



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edward Teddy Heavyrunner

59 IBIA 338 (01/30/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF EDWARD TEDDY ) Order Affirming Denial of Rehearing  
HEAVYRUNNER )  
)  
) Docket No. IBIA 12-038  
)  
)  
) January 30, 2015

Edward J.F. Heavyrunner (Edward) and his son, Julian Heavyrunner (Julian) (collectively, Appellants), appealed to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing (Order Denying Rehearing) entered on October 26, 2011, by Administrative Law Judge (ALJ) R. S. Chester in the estate of Edward Teddy Heavyrunner (Decedent).<sup>1</sup> The Order Denying Rehearing left in place the ALJ's July 27, 2011, Decision, which approved Decedent's latest will over the objections of several will contestants that Decedent lacked testamentary capacity to execute the will or was subject to undue influence when he did so. The will left Decedent's trust estate to Darrell Flores (Darrell) and his wife, Angela Flores (Angela) (collectively, the Floreses).<sup>2</sup>

On appeal, Appellants argue that: (1) The ALJ erroneously denied the petition for rehearing filed by Edward for failure to state specifically and concisely the grounds for rehearing, when Edward had asserted that a fraud may have been perpetrated by the Floreses and that he needed to cross-examine witnesses to prove his suspicions; (2) the Board should order rehearing to allow such cross-examination and thereby correct manifest error or injustice that resulted from the ALJ's decision not to call witnesses back after Appellants missed a supplemental hearing held to consider their challenges to the will; and (3) Appellants have met their burden to invoke a presumption that the will is the product of undue influence by the Floreses, and the presumption has not been rebutted.

We conclude that Appellants have failed to meet their burden on appeal and affirm the Order Denying Rehearing. After receiving adequate notice, Appellants missed the

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<sup>1</sup> Decedent was a Blackfeet Indian. His probate case is assigned Probate No. P000076648IP in the Department of the Interior's probate tracking system, ProTrac.

<sup>2</sup> The ALJ determined that because Angela is a non-Indian, she is only entitled to receive a life estate in Decedent's trust real property interests on the Blackfeet Indian Reservation. Decision at 7 (Probate Record (PR) Tab 7).

supplemental hearing held to consider their challenges to the will and the ALJ was not required to schedule another hearing. In his petition for rehearing, Edward complained that he was unable to conduct cross-examination and made assertions regarding the Floreses' relationship with Decedent and Decedent's estate plan. The ALJ considered Edward's arguments and found that they were not supported with evidence in the record or new evidence, and thus did not support rehearing. On appeal, Appellants do not show that the ALJ abused his discretion or made any error warranting rehearing, much less manifest error or injustice. As we have held, "[a] petition for rehearing is *not* an opportunity for a contestant to start an investigation to support [his] position." *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 92 (2009). Appellants also seek the Board's review of new evidence submitted for the first time on appeal. We decline to do so. Accordingly, we affirm the ALJ's Order Denying Rehearing.

## Background

Decedent died on March 3, 2009. Certificate of Death (PR Tab 1). At the time of his death, Decedent resided in the Spokane Veteran's Home. *Id.* He died owning interests in 123 allotments located on the Blackfeet Indian Reservation. Data for Heirship Finding and Family History, June 10, 2010, at 3 (PR Tab 1). The Bureau of Indian Affairs (BIA) reported that as of Decedent's date of death, there was \$2.99 in his Individual Indian Money account. Decision at 2.

### I. Probate Hearings

The ALJ held a hearing in Spokane, Washington, on September 14, 2010, to consider the validity of a will executed by Decedent on May 12, 2008. Initial Hearing Transcript (Tr.), Sept. 14, 2010 (PR Tab 2); Will, May 12, 2008, at 4 (PR Tab 4). Through a residuary provision, the will devises Decedent's entire trust estate to the Floreses, and specifically disinherits Edward as Decedent's son. Will art. V. The will identifies no familial relationship among Decedent and the Floreses, however, Darrell claims that Decedent referred to him as his nephew from the time Darrell was growing up until Decedent's death. Darrell Affidavit (Aff.), Oct. 4, 2011 (Order Denying Rehearing, Oct. 26, 2011, Attach. (PR Tab 5)). At the hearing, Edward contested the will, stating that Decedent was "[n]ot in his own self . . . [n]ot . . . knowing he's doing it," and the will is "not really what my dad would want" and "[d]oesn't express his intent." Initial Hearing Tr. at 5. Julian, Decedent's grandson, was also present at the hearing, but apparently did not testify. *See id.* at 20.<sup>3</sup>

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<sup>3</sup> Julian did tell the ALJ that he had an attorney, and the ALJ stated that on the present record Julian did not appear to be an interested party with standing. Initial Hearing Tr. (continued...)

The will scrivener, attorney Robert Redmond (Redmond), testified that Decedent was “very clear as to who his family was[,] . . . very clear about what he had, and very clear about what he wanted.” *Id.* at 7. The Floreses were not present in Redmond’s two meetings with Decedent regarding the will. *Id.* Redmond testified that because the Floreses were in frequent contact with Decedent following a stroke he had in March 2008, and because Decedent also asked Redmond to prepare powers of attorney in favor of Darrell, Redmond “wanted to be especially sure . . . that it was [Decedent’s] wishes and not theirs” that his property be left to the Floreses. *Id.* at 7, 16.

Decedent’s execution of the will was witnessed by Redmond and Tamara (Brown) Roberts approximately a week after Redmond’s first meeting with Decedent. *Id.* at 10; Decision at 3. The ALJ asked Redmond whether Decedent specifically discussed his trust property, and Redmond responded that Decedent “wanted to be very clear that he wanted his tribal lands, not just everything else he had . . . to go to Darrell and Angela.” Initial Hearing Tr. at 14. Redmond further testified that he took steps to reassure himself that this was Decedent’s estate plan, and not the Floreses, “because [Decedent] was giving it to his . . . nephew and not to his son.” *Id.* at 17. The ALJ also elicited testimony from Redmond as to whether Decedent discussed his reasons for giving his property to the Floreses, and Redmond recounted in sum that “[t]he Floreses had been present and were present in his life and . . . the rest of his family w[asn’t].” *Id.* at 10.

At the conclusion of the initial hearing, the ALJ informed the parties that a supplemental hearing would be held regarding whether Decedent lacked testamentary capacity to execute the will or was subject to undue influence when he did so. *Id.* at 18-21. The ALJ advised Edward to “come prepared to make that showing,” because “generally I’m going to give you one shot to do that . . . [and] it’s very unlikely I’ll give you additional time to prepare and set it for a third hearing.” *Id.* at 22. The ALJ stated that he would subpoena the will witnesses and that if Edward or the Floreses knew of other persons who may have relevant evidence, they needed to let the ALJ know for purposes of issuing subpoenas to them as well. *Id.* at 19, 22-23.

The ALJ held the supplemental hearing on April 1, 2011, in Spokane. Supplemental (Supp.) Hearing Tr., Apr. 1, 2011 (PR Tab 2). Unlike the notice of the initial hearing, which scheduled the hearing according to Pacific Daylight Time, the notice of the supplemental hearing specified that this hearing would be held at 10:00 a.m. Mountain Daylight Time. *Compare* Notice of Initial Hearing, Aug. 23, 2010 (PR Tab 1), *with* Notice

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(...continued)

at 20. Appellants made no mention of any prior will executed by Decedent in favor of Julian (or Edward).

of Supp. Hearing, Feb. 18, 2011 (PR Tab 1). The ALJ subpoenaed both of the will witnesses and, at the request of the Floreses, also subpoenaed one Lester Peters (Peters) to appear at the supplemental hearing, all at 10:00 a.m. Mountain Time. Subpoenas (PR Tab 14); Report of Contact, Oct. 15, 2010 (PR Tab 16).

Redmond, Peters, and the Floreses appeared on time. Decision at 1. Counsel for Appellants, Gregory P. Johnson (Johnson), did not appear until approximately 10:50 a.m. Mountain Time (i.e., 9:50 a.m. local time), by which time the hearing had already concluded. *Id.* According to the ALJ, Johnson indicated that he had misunderstood the designated start time for the hearing, and requested that he be allowed to present testimony and evidence in support of his client's position. *Id.* The ALJ denied his request to do so at the time because the other parties had left and would not have an opportunity to hear any testimony, but allowed Johnson the opportunity to submit a post-hearing brief. *Id.*

## II. Post-Hearing Submissions

Johnson filed a post-hearing brief on behalf of Edward, in which he did not request a supplemental hearing or discovery, or otherwise argue that he was prevented from cross-examining witnesses or obtaining documentary evidence. Post-Hearing Brief (Br.), Apr. 22, 2011 (PR Tab 11)<sup>4</sup>; Order Denying Rehearing at 5. In his brief, Edward challenged the will on the grounds that: (1) it was not attested to by two disinterested adult witnesses, because Redmond was allegedly the Floreses' attorney and because the second will witness did not testify at the supplemental hearing; (2) Decedent lacked testamentary capacity at the time the will was executed; and (3) Decedent was subject to the undue influence of the Floreses, whom Edward did not know prior to Decedent's death and did not believe were related to Decedent. *Id.* at 4-9. The brief attached records of Decedent's hospitalization from March 31, 2008, to April 11, 2008, for the stroke, and other records regarding Decedent during his subsequent residence in a nursing home until his transfer on May 5, 2008, to the veteran's home, where he died 10 months later. *See* Post-Hearing Br., Exs. A-D. Edward's brief also included an April 23, 2011, letter to his attorney in which he stated, "I am writing this letter to . . . let you know of my dad's last conversation we had. After his first heart attac[k] he told me that he was going to leave my son and me all he owned if anything should happen to him." *Id.*, Ex. F.

Additionally, on May 2, 2011, the ALJ received a statement from Kenneth Old Person, Jr. (Kenneth Jr.), a nephew of Decedent through Decedent's brother, Kenneth Old Person, Sr. (Kenneth Sr.). Kenneth Jr. Statement, Apr. 11, 2011, at 1 (PR Tab 12). After Decedent's heart attack in early 2001, Kenneth Jr. was given power of attorney for

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<sup>4</sup> The Table of Contents mistakenly states that this document is found at PR Tab 12.

Decedent and Decedent executed a will. *Id.* at 1-2. Kenneth Jr. enclosed the power of attorney and the April 2, 2001, will (2001 Will), which, in contrast to Edward's letter, devised Decedent's trust property to Edward, Julian, Kenneth Sr., Kenneth Jr., and Kenneth Jr.'s girlfriend, Lorraine Sue Mancha, "to share and share alike." 2001 Will at 1 (PR Tab 12). Kenneth Jr. challenged the subsequent 2008 will on the grounds that it did not represent Decedent's intent and was the product of undue influence by the Floreses. Kenneth Jr. Statement at 3-4.

### III. Initial Probate Decision

The ALJ was not persuaded by Edward's or Kenneth Jr.'s arguments or evidence. First, the ALJ found that the record showed that Redmond was Decedent's attorney at the time the will was executed and was not a *de facto* interested party based on any subsequent attorney-client relationship with the Floreses. Decision at 3-4; *see also* Supp. Hearing Tr. at 7. The ALJ also noted that the second witness to the will's execution apparently telephoned in for the hearing at the proper time but was not connected, and later provided a sworn affidavit. Decision at 3; *see also* Roberts Aff., June 21, 2011 (PR Tab 8).

Next, as to the issue of testamentary capacity, the ALJ found that at the time of executing his will, Decedent "was alert, aware of his actions, the natural object of his bounty, the extent of his property, and the effect of the will." Decision at 3. He found that Decedent "was not confused or passive, but actively directing his legal affairs in executing a will and two powers of attorney." *Id.* The ALJ gave significant weight to the testimony of Redmond, Peters, and the second will witness, and gave little weight to the hospital and nursing home records included with Edward's post-hearing brief. *Id.* at 1, 3, 5-7. The ALJ determined that it was Edward's burden, as the will challenger, to show that Decedent lacked testamentary capacity on the date the will was executed. *Id.* at 6 (citations omitted). The ALJ found the hospital records insufficient to meet Edward's burden as they contained no doctor's notes or opinions and ended 1 month prior to the execution of Decedent's will, and noted that all of the records were offered without the benefit of testimony explaining them. *Id.* at 1, 6. The Floreses, in contrast, offered the testimony of Peters, who as a nurse practitioner had treated Decedent for years, saw him in early 2008 before the stroke and again in late 2008, and opined that Decedent was mentally unimpaired by the stroke. *Id.* at 6; *see also* Supp. Hearing Tr. at 9-11. The ALJ found Peters's testimony consistent with a resident transfer form submitted by Edward, which indicated that when Decedent was moved to the veteran's home on May 5, 2008, he was alert and cooperative, and his speech and hearing were good. Decision at 6-7; *see also* Post-Hearing Br., Ex. C. The ALJ found, "[a]t best," some indication of short-term memory issues, the degree of which he found unclear and insufficient to demonstrate a lack of testamentary capacity. Decision at 7 (citations omitted); *see also* Post-Hearing Br., Ex. B at 4.

With respect to undue influence,<sup>5</sup> the ALJ found no evidence of a confidential relationship between Decedent and the Floreses at the time the will was executed, as Darrell's powers of attorney were created by Redmond after the will, and that the Floreses were not involved in the preparation or execution of the will, and thus there could be no presumption of undue influence. Decision at 5-6. The ALJ did not specifically address Edward's contention in his post-hearing brief that the hospital records include a Physician Orders for Life-Sustaining Treatment form that was signed by Darrell as Decedent's "Legal Surrogate for Health Care" on April 11, 2008. Post-Hearing Br. at 7, 9, and Ex. B at 6. But the ALJ did find that even assuming there was presumptive undue influence arising from a purported confidential relationship, the independent legal advice that Redmond gave to Decedent was sufficient to overcome the presumption. Decision at 5 (citations omitted). Redmond had testified that "[w]e went through all the provisions of the will and wanted to make double sure that it was, indeed, what his wishes were when he signed the will." Initial Hearing Tr. at 9; *see also* Supp. Hearing Tr. at 6 ("[W]e went through the will paragraph by paragraph before we did any signing."). Finding that Appellants, and Kenneth Jr., offered no evidence to show that the will was contrary to Decedent's desires or that he was being controlled by anyone, the ALJ determined that Decedent was not subject to undue influence and that the will reflected Decedent's actual intent regarding the disposition of his estate. Decision at 3-4. The ALJ approved the will and ordered that Decedent's trust estate be distributed to the Floreses. *Id.* at 7.

#### IV. Petitions for Rehearing

Through newly retained counsel, Edward filed a petition for rehearing on August 25, 2011.<sup>6</sup> Edward asserted that "[d]ue to a mix-up," he was instructed by his former attorney to appear for the supplemental hearing at 10:00 a.m. Pacific Time instead

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<sup>5</sup> Undue influence can be actual or presumptive. In order for a presumption of undue influence to arise from the existence of a confidential relationship, the will challenger must show that (1) a confidential relationship existed, (2) the person in the confidential relationship actively participated in the preparation of the will, and (3) the person in the confidential relationship was the principal beneficiary under the will. If all three elements are shown, then the burden shifts to the will proponents to show that the testator was not subjected to undue influence. *Estate of Orville Lee Kaulay*, 30 IBIA 116, 122 (1996) (citations omitted).

<sup>6</sup> In addition, Kenneth Sr. and Kenneth Jr. each submitted a petition for rehearing, asserting in relevant part that the Floreses are unrelated to Decedent and the 2001 will should be honored because Decedent was incompetent at the time the 2008 will was executed. *See* Kenneth Sr.'s Petition for Rehearing, Aug. 25, 2011 (PR Tab 6); Kenneth Jr.'s Petition for Rehearing, Aug. 25, 2011 (PR Tab 6).

of Mountain Time as specified in the hearing notice. Petition for Rehearing, Aug. 25, 2011, at 1 (PR Tab 6). Edward objected that, due to this mistake, he was “unable to cross examine any witnesses presented by Mr. Flores.” *Id.* He also asserted that “[m]y lawyer advised me that the court had declined to issue subpoenas,” and complained that he did not know how he could be expected to prove undue influence “without access to the medical records . . . and without the ability to question those in possession and custody of my father.” *Id.* at 3. Edward requested “both a rehearing, and subpoenas to allow my lawyer to take the depositions of those who testified in support of the will.” *Id.*

In substance, Edward asserted that “a fraud may be being perpetrated” on the ALJ’s proceedings. *Id.* at 1. He submitted his own declaration in which he claimed that Decedent’s expressed intent, for over 20 years prior to his death, “w[as] always, uniformly and unchangingly, that his property interests would stay within his direct line of descent, and pass to . . . Julian.” Edward Declaration (Decl.), Aug. 25, 2011, at 2 (Petition for Rehearing, Attach.); *see also id.* at 4 (“My father had a long time and continuous estate plan, in favor of my son Julian.”).

Edward also asserted that he went to see Decedent at the nursing home, that Decedent did not at first recognize him, and that after Decedent was moved from there he attempted to, but could not, locate Decedent. *Id.* at 2-3. Edward contended that the Floreses had a confidential relationship with Decedent, on the grounds that whoever checked Decedent out of the nursing home and into the veteran’s home must have had a power of attorney at that time, and the Floreses were paid caregivers to Decedent at the time of the will’s execution. *Id.* at 4-6.

On October 6, 2011, the ALJ received affidavits from Darrell and Angela opposing rehearing and responding to allegations made by Edward, which affidavits the ALJ attached to his Order Denying Rehearing. Darrell Aff., Oct. 4, 2011 (PR Tab 5); Angela Aff., Oct. 4, 2011 (PR Tab 5).

## V. Order Denying Rehearing

The ALJ denied the petitions for rehearing on October 26, 2011, concluding that none of the petitions contained a “specific, concise statement of the grounds for which it [was] submitted as required by 43 C.F.R. § 30.238,” and left it instead to the ALJ to attempt to determine the basis for rehearing. Order Denying Rehearing at 4. After reviewing the allegations made by the petitioners, the ALJ found no error of law or fact in the Decision to warrant rehearing. *Id.* at 6. The ALJ also found that none of the petitioners had requested assistance from the ALJ to obtain documents or witnesses, and that “nothing in the petitions for rehearing have presented anything new that would justify rehearing the case.” *Id.* at 5.

As to the petitioners' shared allegation that Darrell was unrelated to Decedent, the ALJ noted that none of the petitioners explained how this factual issue was material to the Decision approving the will, and he found that it was immaterial. *Id.* at 4. The ALJ reasoned that within certain limits a testator is free to devise his property to non-relatives; there is no requirement that the testator accurately identify his relationship with the devisee and in this case Decedent's will simply names the Floreses individually as the recipients of the residue of his estate, without attempting to characterize his relationship with them; and any mischaracterization of the relationship in the Decision is irrelevant. *Id.* (citations omitted).

Next, the ALJ addressed Edward's claim that he was denied the opportunity to cross-examine witnesses and obtain evidence from medical personnel, finding that the "failure of the attorney or the petitioners to accurately read the hearing notice is the responsibility of the petitioners and not a justification to rehear this case." *Id.* at 5. The ALJ also specifically found that at no time did Edward or his then-attorney request subpoenas, and stated that Edward's post-hearing brief and supporting documents were considered and addressed in the Decision. *Id.*

With respect to Edward's contention that Decedent had a long-time estate plan in favor of his lineal descendants, and Julian in particular, the ALJ found that the 2001 will, which as noted was produced by Kenneth Jr. and devised Decedent's estate to Julian as one of five devisees, undermined Edward's credibility in general and absolutely refuted the contention. *Id.* Finally, the ALJ dismissed Appellants' claim that the Floreses were paid caregivers as unsupported by the record and specifically denied in an affidavit submitted by Angela, which, along with Darrell's affidavit, the ALJ found consistent with the "credible" testimony they provided at the hearings and consistent with other evidence in the record. *Id.* at 3, 5-6; Angela Aff. at 2 (unnumbered). Further, the ALJ reiterated his finding in the Decision that, even if the Floreses had a confidential relationship with Decedent (i.e., whether through paid caregiving or a power of attorney), because they did not participate in the drafting or execution of the will, and Decedent received independent legal advice from Redmond, any presumption of undue influence had been rebutted by the will proponents. Order Denying Rehearing at 6; Decision at 5.

Appellants appealed to the Board. Notice of Appeal, Nov. 25, 2011. Appellants also filed, with the ALJ, a "Motion for Reconsideration," which the ALJ's office transmitted to the Board because Appellants' appeal had divested the ALJ of jurisdiction over the case.<sup>7</sup>

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<sup>7</sup> See also 43 C.F.R. § 30.241 (probate judge's jurisdiction terminates upon issuance of a decision finally disposing of a petition for rehearing; successive petitions for rehearing are not permitted).

The motion included a declaration by Julian attaching exhibits, and a declaration by his current attorney attaching a statement by Julian's mother, Patricia (Heavyrunner) Stearns (Patricia).<sup>8</sup> The Board added the motion and accompanying declarations to the appeal record, and explained to the parties that in doing so the Board expressed no opinion on whether or to what extent their consideration would be appropriate in the context of this appeal. In support of their appeal, Appellants filed an opening brief, the Floreses filed an answer brief, and Appellants replied.

## Discussion

### I. Standard of Review

Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the ALJ on rehearing. 43 C.F.R. § 4.318 (scope of review); see *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 72 (2013). Therefore, we ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge. *Estate of Sings Good*, 57 IBIA at 72; *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012).

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Sings Good*, 57 IBIA at 71-72; *Estate of Stevens*, 55 IBIA at 62. We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Sings Good*, 57 IBIA at 72. The burden lies with Appellants to show error in the Order Denying Rehearing. See *id.* Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry an appellant's burden of proof. *Id.*; *Estate of Pickard*, 50 IBIA at 91.

### II. Arguments on Appeal

On appeal, Appellants object to the ALJ's finding that they failed to articulate, specifically and concisely, grounds for rehearing the case. They argue that they had asserted that "a fraud may be being perpetrated" upon the ALJ's proceedings and had explained why. Opening Br., Mar. 29, 2012, at 12 (quoting Edward Decl. at 2). Appellants argue they showed the ALJ that the Floreses "may well have had a confidential relationship" with Decedent through paid caregiving or a power of attorney, *id.*, and had explained that Appellants lacked "absolute proof of the confidential relationship and overreaching" due to their inability to cross-examine witnesses, *id.* at 13. In essence, Appellants argue that they

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<sup>8</sup> The motion did not include a certification that it was served by Appellants on all interested parties.

should have been granted another hearing for the purpose of discovering evidence that would in turn have enabled them to support their petition for rehearing based on undue influence, and that the ALJ “conflated” the two issues and thereby applied the wrong standard in denying the rehearing petition. Notice of Appeal at 1-2; Opening Br. at 19-20 (“[T]he main point of the Petition for Rehearing [is that] absent the opportunity to cross examine, it is impossible to meet a burden of proof on undue influence. All Appellants could do, and did, was to show what suspicious circumstances exist . . . .”); Reply Br., May 15, 2012, at 4 (same).

Appellants also argue that the Board should order rehearing, asserting that the scope of the Board’s review “is essentially *de novo*, to correct a manifest injustice.” Opening Br. at 15 (citing 43 C.F.R. § 4.318); Reply Br. at 5. They contend that “substantial justice” was not done because the ALJ issued the Decision without giving Appellants another opportunity to cross-examine witnesses. Opening Br. at 15-20; Reply Br. at 6-8.

And while, as noted, Appellants argue that without cross-examination they cannot meet their burden of proof on undue influence, Opening Br. at 19; Reply Br. at 3, they also assert that they “easily met” the elements of presumptive undue influence and that the will proponents did not meet their burden to overcome the presumption, Reply Br. at 9-11.

Further, Appellants request that the Board consider Julian’s declaration and exhibits, and his mother Patricia’s statement—which were appended to Appellants’ motion for reconsideration—as “part of the record” or “supplemental to the principal record on appeal.” Opening Br. at 21. Appellants contend that these documents show that Decedent and Julian had a close and longstanding relationship, and that Decedent intended for Julian to inherit from him. *Id.* at 15, 21.

### III. Analysis

We reject Appellants’ arguments and decline to consider Julian’s declaration and Patricia’s statement, which were proffered for the first time on appeal and without explanation as to why they could not have been provided to the ALJ during the probate proceedings.

- A. The ALJ properly denied Appellants rehearing for the purpose of cross-examining witnesses.

At the outset, the Board notes that Appellants did not allege to the ALJ, and do not allege on appeal, that they were denied due process by the ALJ’s notice of the supplemental hearing. Nor would we find such an argument persuasive. The notice clearly identified the place and time of the supplemental hearing, which are matters within the probate judge’s

authority to decide. *See* 43 C.F.R. § 30.120(a) (a probate judge has the authority to “[d]etermine the manner, location, and time of any hearing . . . and otherwise to administer the cases”). And Appellants concede that their point “is not that it was wrongful [for the ALJ] to schedule a hearing according to the time of a different time zone than used at the location of the hearing; it is just that *the error by Appellants’ then-attorney* was understandable.” Opening Br. at 11, n.4 (emphasis added). We conclude that Appellants received adequate notice of the supplemental hearing and the ALJ is not accountable for the error of Appellants’ attorney.

The question of whether or not to give Appellants another opportunity to cross-examine witnesses was also a matter within the ALJ’s authority to decide. *See* 43 C.F.R. § 30.120(s) (a probate judge has authority to “[p]ermit the cross-examination of witnesses”). In this case, the ALJ declined to schedule another hearing after he specifically advised Edward at the initial hearing that he was unlikely to hold a third hearing. Initial Hearing Tr. at 21-22. He instead afforded Edward the opportunity to file a post-hearing brief, which Edward did and the ALJ considered and addressed in his Decision. In his post-hearing brief, Edward made no complaint regarding his inability to cross-examine witnesses.<sup>9</sup>

Apparently only after the Decision giving effect to Decedent’s will did Appellants, through their new attorney, Milton G. Rowland, protest the lack of cross-examination and advance the argument that the ALJ also denied them subpoenas or other discovery. *See, e.g.,* Opening Br. at 13 (quoting Edward Decl. at 3). But the record is clear that at the initial hearing the ALJ expressly invited the parties to make requests for subpoenas. Initial Hearing Tr. at 19, 22. Angela Flores did so, and Appellants simply did not. Order Denying Rehearing at 2, 5.

In arguing that the ALJ failed to apply the correct standard to their rehearing petition, and in asserting that the Board should correct a manifest injustice, Appellants appear to miss the point that, having received due process, they were not entitled to a rehearing to conduct an investigation to find the evidence necessary to support their suspicions. *See Estate of Pickard*, 50 IBIA at 92. To hold otherwise would turn on its head the rule governing petitions for rehearing, which, as it relates to the discovery of new

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<sup>9</sup> Nor did Appellants supply their own testimony at that time—Edward waited to do so until after the Decision, and Julian waited to do so until after the Order Denying Rehearing. While we do not suggest that this case would have had a different outcome had they provided their declarations and evidence sooner, their failures to do so reinforce our view that Appellants failed to avail themselves of opportunities the ALJ afforded them to present their case.

evidence, provides that the petition must be accompanied by affidavit(s) “stating fully the content of the new evidence” and state the reasons for the failure to discover and present that evidence before the probate decision was issued. 43 C.F.R. § 30.238(b)(1)-(2); *see Estate of Pickard*, 50 IBIA at 92; *see also Estate of Rachel Nahdayaka Poco*, 54 IBIA 248, 251 (2012) (“proper grounds” for rehearing, i.e., grounds that appear to “show merit,” 43 C.F.R. § 30.240, do not include requests for additional time to seek evidence). As the Board has previously held, “[i]t is not the function of this Board to provide the parties further opportunity to obtain documents and evidence for use in a probate proceeding that has already occurred.” *Estate of Alfred Chalepah, Sr.*, 51 IBIA 148, 148 (2010).

For the foregoing reasons, we find no abuse of discretion or error, much less manifest error or injustice, in the ALJ’s decision not to grant Appellants another hearing to cross-examine witnesses.

B. Appellants do not show substantive error in the Order Denying Rehearing.

Turning now to the merits of Appellants’ substantive objections, we find that Appellants fail to meet their burden on appeal to show error in the Order Denying Rehearing. *See Estate of Sings Good*, 57 IBIA at 72. When Edward sought rehearing from the ALJ, it was his burden to either (1) identify newly discovered evidence or (2) allege specific and concise grounds for rehearing, such as a material error of fact or law in the underlying Decision. *See* 43 C.F.R. § 30.238(b) (petition based on newly discovered evidence), (c) (petition alleging specific and concise grounds for rehearing). Edward did not identify any newly discovered evidence. He alleged that the Floreses were paid caregivers to Decedent, but the allegation was unsupported. *See* Edward Decl. at 6. Thus, the petition was substantively based, if anything, on a perceived flaw in the Decision. The problem, as the ALJ found, is that Edward “[left] it to the [ALJ] to attempt to determine the basis for [the] petition,” contrary to the requirements of § 30.238. Order Denying Rehearing at 4. On appeal, Appellants concede that they were unable to meet their burden regarding undue influence (i.e., for lack of cross-examination) and alternatively argue that they have shown presumptive undue influence and the will proponents have not rebutted the presumption. Reply Br. at 3, 9-11. We have already rejected the former argument as grounds for rehearing, *supra*, and now reject the latter.<sup>10</sup>

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<sup>10</sup> We note that Appellants do not appear to discuss their claim made to the ALJ that Decedent lacked testamentary capacity, except to the extent the issue is intertwined with Appellants’ contention that they were denied access to medical records and an opportunity to cross-examine witnesses, which we addressed *supra*. We also note that Julian’s declaration submitted with Appellants’ motion for reconsideration contains approximately 100 pages of medical records, the majority of which are submitted for the first time on

(continued...)

Appellants assert that they presented sufficient arguments and evidence to the ALJ to warrant rehearing, but we disagree. In his petition for rehearing, Edward described his theory of the case that the Floreses are unrelated to Decedent, they were in a confidential relationship with Decedent, and they unduly influenced Decedent to change his purported long-time plan to give his property to Julian. The ALJ evidently accepted Edward's position that the record did not support the finding in the Decision that Darrell is a nephew of Decedent, however, the ALJ found that Edward failed to explain why this should change the outcome and the ALJ determined that it should not. *See* Order Denying Rehearing at 4. The ALJ also found that Edward did not show that undue influence should be presumed based on a purported confidential relationship, and that even if undue influence were presumed, the presumption would be overcome by the independent legal advice that Decedent received from Redmond. *See id.* at 6; *see also* Decision at 5.

In their briefs on appeal, Appellants do not persuade us that the ALJ erred. For example, in support of their assertion that Decedent did not receive independent legal advice, Appellants argue that Redmond was hired by the Floreses and that he did not know of Decedent's purported long-time estate plan. Reply Br. at 11. But the 2001 will—which Appellants did not produce to the ALJ, did not otherwise discuss in their submissions to the ALJ, and do not address on appeal—contradicts Appellants' contention that Decedent planned to give his property, in major part or in whole, to Julian. Moreover, as the ALJ found and the record supports, Redmond was Decedent's attorney at the time the will was executed. *See* Decision at 3-4; Supp. Hearing Tr. at 7. And Appellants fail to explain how Redmond's knowledge, or lack thereof, of Decedent's prior will, much less any unwritten estate plan, has any relevance to the validity of the will prepared 7 years later.

Ultimately, Appellants relied on their own uncorroborated version of the facts as the "evidence" in the record that supported rehearing, and in doing so failed in their petition for rehearing to show that a factual or legal error existed in the Decision that would warrant rehearing. As such, Appellants' objections to the Decision amounted to simple disagreement with it and bare assertions are insufficient to meet Appellants' burden to show error justifying rehearing. *See Estate of Pickard*, 50 IBIA at 91.

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(...continued)

appeal, without any explanation as to why they were not submitted to the ALJ and without any testimony explaining their meaning. We decline to consider these and other newly submitted documents for reasons we discuss further *infra*.

- C. The Board declines to consider Julian’s declaration and exhibits, and Patricia’s statement.

Appellants do not persuade us that we should consider Julian’s declaration and exhibits, and Patricia’s statement, attached to Appellants’ “Motion for Reconsideration.” Appellants offer the documents “to rebut any inference in the record” that Decedent did not have a close and longstanding relationship with Appellants and to show that Decedent’s intent was for Julian to receive his property. Opening Br. at 15, 21.

The Board ordinarily does not consider arguments or evidence presented to it for the first time on appeal. *See* 43 C.F.R. § 4.318; *Estate of Florence Wilson Rowland*, 47 IBIA 159, 165 (2008). It was Appellants’ burden to show, to the ALJ, why Decedent’s will should not be approved. *See Estate of Pickard*, 50 IBIA at 92 (“An appeal is not ordinarily an opportunity for presenting a new case, with information never provided in the hearing or in a petition for rehearing.”).

Appellants have not proffered any explanation as to why they could not have submitted these documents to the ALJ with their post-hearing brief or petition for rehearing. Moreover, the ALJ’s decision did not rest on any inference that Appellants lacked a relationship with Decedent. It rested on affirmative evidence that Decedent executed a valid will in 2008. And the ALJ considered Appellants’ allegations that Decedent intended Julian to receive his property. Appellants were afforded several opportunities to present evidence and argument to make their case. We are not persuaded that considering this additional evidence on appeal is either warranted or would demonstrate error in the ALJ’s decision.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board Affirms the ALJ’s October 26, 2011, Order Denying Rehearing.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge