INTERIOR BOARD OF INDIAN APPEALS

Estate of Peter Many Hides

60 IBIA 200 (04/29/2015)

United States Department of the Interior

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

ESTATE OF PETER MANY HIDES	)	Order Affirming Denial of Rehearing
	)	
	)	Docket No. IBIA 12-109
	)	
	)	April 29, 2015

Rose Wolf Child (a.k.a. Rose Many Hides Wolf Child) (Appellant), appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered on May 7, 2012, by Administrative Law Judge (ALJ) R. S. Chester in the estate of her brother, Peter Many Hides (Decedent).[1] The Order Denying Rehearing left in place the ALJ's December 23, 2011, Decision approving Decedent's August 23, 2005, will (Will), which devised Decedent's trust property to his niece, Phylistine Running Crane (Phylistine), and great-nephew, Leo Chief Calf (Leo). Appellant argued in her petition for rehearing, and argues again on appeal, that Decedent lacked testamentary capacity and was unduly influenced by Phylistine in executing the Will. Appellant argues that rehearing was warranted based on newly discovered evidence, including a Blackfeet Tribal Court of Appeals order in the separate probate of Decedent's non-trust property, and information regarding Phylistine's whereabouts during the Will's execution.

We conclude that Appellant fails to show error by the ALJ in the Order Denying Rehearing, including the ALJ's conclusions that Appellant was not diligent in discovering and presenting her new evidence prior to the Decision, and that she otherwise failed to meet her burden to show that Decedent's will should be disapproved for lack of testamentary capacity or based on undue influence. Further, Appellant does not convince us that we should consider, for the first time on appeal, new evidence regarding what now amount to several different tribal court orders, nor a new argument regarding Phylistine's last name in the Will. Therefore, we affirm the Order Denying Rehearing.

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[1] Decedent was a Blackfeet Indian. His probate case is assigned Probate No. P000076173IP in the Department of the Interior's probate tracking system, ProTrac.

Background

I. Factual Background

Decedent was born on August 11, 1948, in Browning, Montana. Data for Heirship Finding and Family History, Aug. 18, 2010, at 1 (Supplement to the Administrative Record (AR Supp.) Tab 2); Death Certificate, Apr. 2, 2009 (AR Supp. Tab 3). He was never married and had no children, and his only surviving sibling is Appellant. AR Supp. Tab 2 at 1-2. Decedent died on January 27, 2009. AR Supp. Tab 3. On his date of death, Decedent owned interests in trust or restricted real property on the Blackfeet Indian Reservation, and had funds in his Individual Indian Money (IIM) account. AR Supp. Tab 2 at 3. Decedent's niece, Phylistine, and her son, Leo, are the named beneficiaries in his will. Will, Aug. 23, 2005, at 1 (AR Supp. Tab 4).

During most of his life, Decedent was under the conservatorship of different family members by orders of the Blackfeet Tribal Court (Tribal Court). Most recent to the making of the Will, in 1997, Phylistine and her then-husband, Francis Chief Calf (Francis), were appointed joint conservators, and in 2000, the Tribal Court gave them control of Decedent's IIM account funds. Tribal Court Order Appointing Joint Conservators, Nov. 5, 1997 (AR Supp. Tab 19); Tribal Court Order, June 29, 2000 (AR Supp. Tab 19). At the time Decedent executed the Will in 2005, Phylistine and Francis were his conservators.[2]

Also in 1997, Decedent underwent an assessment for purposes of determining his eligibility for renewed developmental disability services, as more than 10 years had elapsed since he attended the Blackfeet Nation's Dusty Bull Training Center. Psychological Report, Nov. 10, 1997, at 1-2 (AR Supp. Tab 7). The assessment was performed by Dr. Daniel V. Foster, a psychologist with Indian Health Services. Dr. Foster diagnosed Decedent as having "mild mental retardation" since childhood. *Id.* at 4. He opined that Decedent's intellectual disability was compounded by speech and hearing deficits, and by his parents keeping him at home instead of in school to protect him from teasing. *Id.* at 5. Dr. Foster found that Decedent "appear[ed] to reach goal ideas in a logical, sequential manner," and considered him "a reliable historical informant." *Id.* at 3. Dr. Foster described Decedent as "quite trusting in a child like manner" and "quite vulnerable to being manipulated, used or abused by predatory or opportunistic persons." *Id.* He concluded "[i]t is likely that [Decedent] can achieve self care, social and vocational skills adequate for minimum self-support." *Id.* at 5. Decedent signed a release form giving Dr. Foster consent to transmit

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[2] In 2008, Appellant was apparently appointed sole conservator, for reasons that are unclear in the record. *See* Supp. Hearing Transcript (Tr.), July 12, 2011, at 144 (Administrative Record (AR) Tab 4).

the assessment results to a service provider. *Id.* at 2; Information Request or Release Form, Apr. 30, 1997 (AR Supp. Tab 7). Decedent subsequently resumed attendance at the Dusty Bull Training Center.

II. Probate Proceedings

On March 29, 2011, the ALJ held an initial hearing to determine Decedent's heirs and settle his trust estate. Appellant's attorney, Robert E. LaFountain, Esq., objected to the Will based on lack of testamentary capacity and undue influence by Phylistine in its execution. Objection to Validity of Will, Mar. 28, 2011 (AR Supp. Tab 9). The ALJ advised that he would schedule a supplemental hearing, and that the burden would be on the Will challengers to prove its invalidity by a preponderance of the evidence. Initial Hearing Tr., Mar. 29, 2011, at 3, 9-11 (AR Tab 3).

In the time between the hearing and the supplemental hearing, on June 1, 2011, Judge Dawn Running Wolf of the Blackfeet Tribal Court issued a decision in the separate probate of Decedent's non-trust property, approving Decedent's will over Appellant's arguments that Decedent lacked testamentary capacity and was unduly influenced in executing the Will. Tribal Court Order Closing Probate and Distribution of Assets, June 1, 2011 (2011 Tribal Court Decision) (AR Supp. Tab 12). The Tribal Court found, based on the "consensus" of the testimony of witnesses presented by Appellant and Phylistine,[3] that Decedent possessed testamentary capacity when he executed the Will. *Id.* at 3. The Tribal Court specifically found that Decedent was able to execute a number of transactions—such as withdrawing money from his IIM account, cashing his own paychecks, and spending the funds on his own—by a process that was based on his life skills training. *Id.* at 3-4. This process involved "explaining the document to the decedent in simple terms, conferring with the decedent [regarding] his wishes[,] and decedent affirming the transaction by his signature." *Id.* at 4. The Tribal Court concluded that Appellant failed to prove that the Will was invalid by clear and convincing evidence. *Id.*

The ALJ held the supplemental hearing on July 12, 2011. Appellant testified that Decedent could not understand a will, but also testified that she had no contact with him during the time frame in which the Will was made. Supp. Hearing Tr. at 11-12, 29. While the witnesses proffered by Appellant and Phylistine disagreed over whether Decedent was competent to execute a will, the witnesses who had contact with Decedent testified that he freely interacted with friends and family, and attended traditional celebrations and events. *See id.* at 36-37, 102-03, 116, 126-27. As discussed below, the ALJ heard testimony

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[3] The 2011 Tribal Court Decision identifies the names of the witnesses presented by each party, however, the administrative record does not contain a transcript of the hearing.

regarding the Will's execution from Arlene Dusty Bull, a will scrivener and will witness employed by the Bureau of Indian Affairs (BIA);[4] and Gloria Jean Juneau, a BIA notary. Phylistine testified, *inter alia*, that she played no part in the making or execution of the Will.

Ms. Dusty Bull related the process by which the Will was drafted and executed, as follows: Decedent was by himself throughout the process, which took place at her office on August 23, 2005. *Id.* at 41, 45. Ms. Dusty Bull discussed Decedent's testamentary intentions with him, prepared a printout of Decedent's trust property, and read him the property descriptions. *Id.* at 41-42. She specifically asked Decedent if he would like to leave any property to Appellant, and Decedent declined. *Id.* at 47. Ms. Dusty Bull then drafted the Will in accordance with Decedent's instructions, read the Will back to him, and read him the self-proving affidavit attached to the Will and confirmed that Decedent was "doing this on [his] own free will," and that no one was "forcing [him] in any way." *Id.* at 43; *see also* Will, Attach. (affidavit) (AR Supp. Tab 4). The meeting lasted approximately 2 hours. Supp. Hearing Tr. at 50.

In pertinent part, the Will leaves to Phylistine and Leo, after payment of Decedent's last debts, all of his "trust property, surface and minerals, tenants in common including any and all personal, and mixed property I possess at the time of my death, for the reason I have no children of my own and I want my niece Phylistine Ann Many Hides Running Crane and great-nephew Leo Samuel Chief Calf, to have all that I own." Will at 1 (unnumbered) (emphasis omitted). The Will further states that Decedent is "purpose[ful]ly and with full knowledge not making provisions for anyone else who may claim to be my heirs or heirs at law for the reason I have given my property to my niece Phylistine . . . and great-nephew Leo . . . , who I want to have it." *Id.*

The notary, Ms. Juneau, testified that she witnessed the signatures of Decedent and the will witnesses, and notarized the Will. Supp. Hearing Tr. at 75-78. While she did not observe Ms. Dusty Bull's discussion with Decedent about the will, she confirmed that Ms. Dusty Bull's practice was to always read the affidavit accompanying a will to ensure the will was not done under duress or fraud. *Id.* at 76, 80.

Phylistine testified that she did not talk to Decedent about making a will, and did not take him to Ms. Dusty Bull's office. *Id.* at 146. She stated that she did not learn about the Will until the summer of 2006. *Id.* at 151. She explained that she was in Mississippi working for the Federal Emergency Management Agency (FEMA) on Hurricane Katrina clean-up until May 2006. *Id.* at 146. Phylistine expressed uncertainty about her date of departure to Mississippi, stating that she thought it was August 10, 2005. *Id.* at 147.

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[4] The second BIA will witness, Jennifer Reed, was subpoenaed but did not appear.

Appellant's attorney asked Phylistine if she had any proof that she departed on August 10th. *Id.* at 147-48. Phylistine responded that, after Decedent's death, many of her important documents that were stored in Decedent's house were destroyed by Appellant. *Id.* at 148. She offered that she "could call [FEMA] and try to get those document[s]." *Id.*

Later in the hearing, Appellant's attorney again indicated that he would like to receive proof of Phylistine's whereabouts, and the ALJ agreed that it was important evidence. *Id.* at 170. Attorney LaFountain also stated that he had recently filed an appeal on Appellant's behalf of the 2011 Tribal Court Decision approving the Will. *Id.* at 171.

After Appellant's attorney called all of his witnesses, the ALJ recessed the supplemental hearing. *Id.* at 173. On September 22, 2011, the ALJ received medical records regarding Decedent from Appellant's attorney. *See* Letter from Appellant to LaFountain, Aug. 17, 2011, and Attach. (AR Supp. Tab 22). On October 6, 2011, the ALJ issued an Order to Present Evidence. AR Supp. Tab 23. The ALJ explained that, "[b]efore deciding whether an additional Supplemental Hearing is necessary, this Order to Present Evidence is being issued to allow *all* parties an opportunity to present *new* evidence in support of the validity of the [W]ill or in support of their objection(s) to the [W]ill." *Id.* at 1. The ALJ ordered that any new evidence must be presented by October 17, 2011. *Id.* at 2. The ALJ also advised that failure to present new evidence or "reasonable justification" for the lack thereof, would result in a determination that a second supplemental hearing was not warranted and issuance of a decision on the record. *Id.*

On October 13, 2011, Phylistine transmitted two letters to the ALJ. Fax from Phylistine to ALJ, Oct. 13, 2011, and Attach. (AR Supp. Tab 24). One was from Charles Momberg, Jr., Executive Director of Blackfeet Opportunities, Inc., who described Decedent's attendance at the Blackfeet Opportunities Day Program and Supported Living Program.[5] Letter from Momberg to ALJ, Oct. 12, 2011 (AR Supp. Tab 24). Mr. Momberg stated that Decedent earned a monthly wage for his work at a recycling center, and that he would buy his own coffee and newspaper. *Id.* Mr. Momberg further stated that Decedent completed training in basic life skills, including how to prepare simple meals and do household chores. *Id.*

The second letter was from Verda J. Edwards, Legal Advocate, Blackfeet Legal Department.[6] Memorandum from Edwards, Oct. 13, 2011 (AR Supp. Tab 24). Ms. Edwards stated that Decedent came into her office alone on August 23, 2005, the day

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[5] The programs were apparently provided at the Dusty Bull Training Center.

[6] Ms. Edwards appeared on behalf of Phylistine in the Tribal Court proceedings.

the Will was executed, and asked where he could go to make a will. *Id.* She recounted that she directed Decedent to go to the BIA probate office and speak with Ms. Dusty Bull. *Id.*

On October 17, 2011, Phylistine submitted in support of the Will additional letters from family members and friends of Decedent. Fax from Phylistine to ALJ, Oct. 17, 2011, Attach. (AR Supp. Tab 25).

No filings were received from Appellant. On October 18, 2011, the ALJ gave the parties notice that, because he had received no additional evidence in support of objections to the Will, he would not hold an additional supplemental hearing and would instead base his decision on the existing record. Letter from ALJ to All Interested Parties, Oct. 18, 2011 (AR Supp. Tab 26).

III. ALJ's Decision

On December 23, 2011, the ALJ issued the Decision approving Decedent's will. The ALJ stated that he gave "great weight" to the findings in the 2011 Tribal Court Decision because the Tribal Court heard testimony closer in time to the Will and from witnesses who did not appear at the supplemental hearing, and because the Tribal Court's findings were consistent with the ALJ's own findings and the record. Decision at 1. The ALJ also considered Decedent's diagnosis from 1997, and that, according to Dr. Foster, Decedent's disability was exacerbated by his family's efforts to protect him from the outside world. *Id.* at 3. The ALJ noted that in Dr. Foster's opinion it was "likely that [Decedent] can achieve self care, social and vocational skills adequate for minimum self-support." *Id.* (quoting Psychological Report at 5).

The ALJ determined that the Will challengers failed to show that Decedent lacked testamentary capacity. *Id.* at 5. The ALJ summarized the relevant standard for testamentary capacity, specifically that the burden of proof is on the will challenger to show by a preponderance of the evidence that, at the time of execution of the will, the testator did not know the natural object of his bounty, the extent of his property, or the desired distribution at death. *See id.* at 4 (citing *Estate of Jeanette Little Light Adams*, 39 IBIA 32, 33 (2003)). The ALJ found that the record established that, under the conservatorship of Phylistine and Francis, Decedent "developed life skills that allowed him to make decisions and live a life with some independence," and "was able to understand and execute documents that were read to him and the terminology explained to him." *Id.* at 4. The ALJ further found that the scrivener, Ms. Dusty Bull, ensured that Decedent understood the meaning and effect of the Will, and was not acting under duress or coercion. *Id.* at 5.

The ALJ next rejected the Will challengers' allegations of undue influence, explaining that he applied both the standards of presumptive undue influence and actual undue

influence. *Id.* at 5. The ALJ found that only two of the three requirements were met for a finding of presumptive undue influence. *Id.* (citing *Estate of George Fishbird*, 40 IBIA 167, 169 (2004) (holding that the burden will shift to the will proponents to show that the testator was not subject to undue influence if: (1) a confidential relationship existed; (2) the person in the confidential relationship was the principal beneficiary under the will; and (3) the person in confidence actively participated in the preparation of the will)). The ALJ found that Phylistine, as a conservator with control over Decedent's finances, enjoyed a confidential relationship with Decedent, and that she is a principal beneficiary under the Will—thus satisfying the first two elements. *Id.* However, the ALJ found that Phylistine played no role in the making or execution of the Will, as Decedent was alone when he went to the Blackfeet Legal Department and then to Ms. Dusty Bull's office for assistance in executing the Will, and that Phylistine was out of the state at the time. *Id.* Furthermore, the ALJ found that, even if all three elements had been shown, the presumption would be rebutted because Ms. Dusty Bull provided objective, independent advice and information regarding the meaning and effect of the Will to Decedent, and ensured that he understood the Will and it reflected his intent. *Id.* (citing *Estate of Jessee Pawnee*, 15 IBIA 64, 69 (1986) (holding that, to rebut the presumption, "the will proponent must show an objective, independent person thoroughly discussed the effect of the will with the testator")).

The ALJ additionally found that there was no actual undue influence. *Id.* at 6 (citing *Estate of Helen Fisher Parker*, 27 IBIA 271, 273-74 (1995) (holding that the challenger must show that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to the decedent's own desires)). The ALJ found that, even assuming the first element was met, none of the other elements were demonstrated. *See id.* He found "no credible evidence that Phylistine or anyone else was capable of or did exert any influence" over Decedent in his decision to execute a will or that the Will did not represent his desires. *Id.* The ALJ noted that more than 3 years elapsed between the execution of the Will and Decedent's death, and that there was no evidence that Decedent ever complained about being forced to make the Will, despite his ability to freely interact with family and friends. *Id.* The ALJ concluded that the Will was properly executed and that at the time of its execution, Decedent possessed testamentary capacity and acted without undue influence, and the ALJ approved the Will. *Id.*

IV. Petition for Rehearing

Appellant, through attorney LaFountain, petitioned for rehearing based primarily on "newly discovered evidence." Petition for Rehearing, Jan. 19, 2012 (AR Supp. Tab 29). Appellant submitted a November 4, 2011, decision by the Blackfeet Tribal Court of

Appeals vacating and remanding the 2011 Tribal Court Decision on which the ALJ had relied. *Id.* at 1-2 and Attach. (Decision and Order, Nov. 4, 2011 (2011 Tribal Court of Appeals Order)).[7] Appellant also submitted an Internet article as evidence that Phylistine could not have been out of the state working on Hurricane Katrina clean-up by August 10, 2005, because the article stated that the hurricane did not make landfall until several days after the Will was executed on August 23, 2005. Petition for Rehearing at 2 and Attach. (Hurricane Katrina article).

Based on the new evidence, and the record as a whole, Appellant disputed the ALJ's determination that Decedent possessed testamentary capacity and was not unduly influenced in executing the Will. *Id.* at 3-5. Appellant also argued that she was not served copies and given an opportunity to respond to the post-hearing letters that were submitted by Phylistine. *Id.* at 4. And, Appellant requested a copy of the hearing transcripts and an opportunity to submit a supplemental brief. *Id.* at 9.

On February 22, 2012, after Appellant had been provided recordings of the hearings, the ALJ sent Appellant copies of the post-hearing letters and granted Appellant 20 days in which to provide a rebuttal to the letters and to submit a supplemental brief. Letter from ALJ to Robert E. LaFountain, Esq., Feb. 22, 2012 (AR Supp. Tab 30). Appellant did not file a response.

V. Order Denying Rehearing

On May 7, 2012, the ALJ denied Appellant's petition for rehearing. Order Denying Rehearing (AR Supp. Tab 30). In rejecting Appellant's "newly discovered evidence" as grounds for rehearing, the ALJ cited 43 C.F.R. § 30.237(b)(2), which provides that a petition for rehearing based on newly discovered evidence "must . . . [s]tate the reasons for the failure to discover and present that evidence at the hearings held before the issuance of the decision."[8] Order Denying Rehearing at 3; 43 C.F.R. § 30.238(b)(2). The ALJ reasoned that "newly discovered evidence is not a basis for a rehearing when the evidence could have been presented with the exercise of diligent effort," and that Appellant failed to act diligently in discovering and presenting both the 2011 Tribal Court of Appeals Order

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[7] Appellant refers to the 2011 Tribal Court of Appeals Order as having been issued on December 14, 2011—an apparent mistake that the ALJ noted in the Order Denying Rehearing, but which Appellant continues to make on appeal.

[8] In 2011, subsection 30.237 of 43 C.F.R. was redesignated as amended at 43 C.F.R. § 30.238. 76 Fed. Reg. 7500, 7507-7508 (Feb. 10, 2011). The quoted language was not amended and hereafter we cite § 30.238(b)(2).

and the date of Hurricane Katrina's landfall, prior to the Decision. Order Denying Rehearing at 2-4.

Although the ALJ found that Appellant's petition for rehearing did not meet the threshold requirements for rehearing based on newly discovered evidence, the ALJ considered the new evidence, and other evidence in the record, and rejected Appellant's petition for rehearing on the merits. As to both the 2011 Tribal Court Decision and Phylistine's testimony regarding her whereabouts during the Will's execution, the ALJ stated that "neither was decisive" for his Decision. *Id.* at 4. The ALJ explained that the evidence introduced by Appellant in opposition to the Will was insufficient to overcome the presumption that Decedent possessed testamentary capacity and that the Will was not the product of undue influence. *Id.* The ALJ found, instead, that on the whole the record contradicted Appellant's position and supported giving effect to the Will. *Id.* at 3-4. The ALJ therefore denied rehearing.

Appellant appealed to the Board. Notice of Appeal, June 5, 2012. Appellant filed an opening brief and attached a June 27, 2012, decision by Judge Joel Rosette of the Blackfeet Tribal Court, which, following another hearing held on April 27, 2012, declared the Will invalid. Order, June 27, 2012 (2012 Tribal Court Decision) (attachment to Opening Brief (Br.), Aug. 27, 2012). No responsive pleadings were filed in this appeal.

After the conclusion of briefing, the Board determined that the record was incomplete and ordered BIA to submit the complete probate record. Upon receipt of the amended record, the Board issued an order on November 21, 2014, allowing Appellant until December 12, 2014, to file a response to the amended record.[9] No response was received by the Board.

Discussion

I. Arguments on Appeal

On appeal, Appellant repeats, nearly verbatim, the arguments made to the ALJ for rehearing based on "newly discovered evidence." Appellant maintains that her failure to

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[9] The Board's November 21, 2014, order also notified the parties that on October 22, 2014, the Board received from BIA, without comment, another copy of the 2012 Tribal Court Decision; a copy of an April 11, 2013, order by Judge Marshalene Last Star of the Blackfeet Tribal Court (2013 Tribal Court Order); and a copy of an April 12, 2013, order of the Blackfeet Tribal Court of Appeals (2013 Tribal Court of Appeals Order). The Board expressly reserved judgment on the relevance of the orders, if any, to this appeal.

discover and present the new evidence earlier was justified because the 2011 Tribal Court of Appeals Order had not been issued by the time of the supplemental hearing, and because she was not in a position at the supplemental hearing to question Phylistine's testimony regarding her supposed date of departure from Montana. Opening Br. at 3.

Appellant also repeats the arguments made in her petition for rehearing that, based on the new evidence and other evidence in the record, the ALJ erred in finding that Decedent possessed testamentary capacity and that the Will was not the product of undue influence. *Id.* at 5-10. In doing so, she apparently continues to claim that she was denied any opportunity to respond to Phylistine's post-hearing submissions. *Id.* at 6.

Next, Appellant submits, for the first time on appeal, the 2012 Tribal Court Decision invalidating the Will in the probate of Decedent's non-trust estate, and argues that the Board must grant the petition for rehearing and instruct the ALJ to consider that decision on remand. *Id.* at 11-12.

Lastly, Appellant makes a new argument on appeal that, during the April 27, 2012, Tribal Court hearing that preceded the 2012 Tribal Court Decision, evidence was introduced that, although the Will identifies Phylistine as "Phylistine Ann Many Hides Running Crane," Phylistine did not meet her current husband, Gabriel Running Crane, until 2007, and did not marry him until 2008. Opening Br. at 4. Appellant argues that this demonstrates the Will "could not be valid." *Id.*

We uphold the ALJ's denial of rehearing because, with respect to the 2011 Tribal Court of Appeals Order and the date of Hurricane Katrina's landfall, Appellant fails to show error in the ALJ's determination that Appellant did not exercise diligence in discovering and presenting her proffered new evidence prior to the Decision, and thus the new evidence did not meet the standard for rehearing. Moreover, the ALJ nonetheless considered the new evidence, found that it was not decisive for the Decision, and found that Appellant failed to meet her burden to show that Decedent lacked testamentary capacity or that the Will was the product of undue influence. On Appeal, it is Appellant's burden to show error in the Order Denying Rehearing, and she fails to meet that burden. And, contrary to Appellant's claim, the ALJ gave her ample opportunity to respond to Phylistine's post-hearing submissions. She simply did not do so. Finally, we decline to consider for the first time on appeal the 2012 Tribal Court Decision and the allegation regarding Phylistine's last name in the Will, as they do not support a finding of manifest error or injustice. Therefore, we affirm the Order Denying Rehearing.

II. Standard of Review

The Board reviews questions of law and sufficiency of the evidence *de novo*. *Grimes v. Acting Pacific Regional Director*, 59 IBIA 251, 253 (2014); *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). We review factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Josephine J. Palone*, 59 IBIA 49, 52 (2014); *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). Appellant bears the burden of showing error in the Order Denying Rehearing. *See Estate of Palone*, 59 IBIA at 52; *Estate of Margerate Arline Glenn*, 50 IBIA 5, 21 (2009). Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry an appellant's burden of proof. *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 72 (2013); *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 91 (2009).

Unless manifest error or injustice is shown, the Board's scope of review "will be limited to those issues that were before the [ALJ] . . . upon the petition for rehearing." 43 C.F.R. § 4.318 (scope of review). 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).

III. Appellant Failed to Show Diligence in Discovering and Presenting Her New Evidence Prior to the Decision, and Therefore Did Not Meet the Standard for Rehearing Based on Newly Discovered Evidence

Appellant argued in her petition for rehearing, and argues again on appeal, that her delay in discovering and presenting her "newly discovered evidence" was justified because "[a]t the time of the hearing before the ALJ the Tribal Court Order Closing Probate and Distribution of Assets had not yet been issued." Opening Br. at 3; Petition for Rehearing at 2. What Appellant apparently means to say is that the 2011 *Tribal Court of Appeals* Order was issued after the *supplemental* hearing (but before the Decision). And, Appellant reiterates that "no one was in a position to question" Phylistine's statements at the supplemental hearing regarding her whereabouts in August 2005, when Decedent executed the Will. Opening Br. at 3; Petition for Rehearing at 2. According to Appellant's attorney, one of his witnesses later researched and notified him of the date of Hurricane Katrina's landfall. Opening Br. at 3; Petition for Rehearing at 3.

We affirm the ALJ's determination that Appellant failed to show grounds for rehearing based on newly discovered evidence. A petition for rehearing, when based on newly discovered evidence, "must . . . [s]tate the reasons for the failure to discover and present that evidence at the hearings held before the issuance of the decision." 43 C.F.R.

§ 30.238(b)(2). The Board has consistently held that rehearing on the grounds of newly discovered evidence is appropriate only if the appellant shows that the evidence could not, with diligent effort, have been presented at the original hearings held prior to the initial probate decision. *Estate of Dennis Earlwin Sand*, 42 IBIA 83, 86 (2005); *Estate of George Asepermy, Sr.*, 28 IBIA 50, 51 (1995). The aim of the rule is to ensure that a claimant presents all information available to her at the earliest possible stage of the proceeding. *Estate of Warren Lewis Lincoln*, 19 IBIA 118, 121 (1990).

While it appears that the Board has most often applied the rule in the context of a party's failure to discover and present information "at the original hearing," *e.g.*, *Estate of Sand*, 42 IBIA at 86—which is the narrow context in which Appellant seeks to justify her delay—a party's responsibility to exercise diligence in discovering and presenting information to support her case does not automatically cease at the close of the original hearings. We have instructed litigants that "[t]he time for conducting formal discovery is prior to the entrance of the initial probate *decision*, not afterwards." *Estate of Rachel Nahdayaka Poco*, 54 IBIA 248, 252 (2012) (emphasis added) (affirming a denial of rehearing where the petitioner did not seek to locate evidence until after she received an adverse decision, despite the probate judge having held the record open after the probate hearings to receive and consider additional evidence). Thus, as a corollary of the requirement that a party must diligently discover and present her case at the earliest possible stage, when information that was not discoverable with diligent effort prior to the end of the original hearings subsequently becomes discoverable, a party, in appropriate cases, may reasonably be held accountable for her failure to discover and present that information prior to the initial probate decision.

The ALJ did not abuse his discretion in concluding that Appellant failed to show the necessary diligence in discovering and presenting her new evidence. Regarding the 2011 Tribal Court of Appeals Order, the ALJ reasoned that, while Appellant's attorney informed the ALJ at the supplemental hearing that he had appealed the 2011 Tribal Court Decision, the petition for rehearing gave no reason for attorney LaFountain's failure to inform the ALJ prior to the initial probate Decision that the appeal had been granted and the 2011 Tribal Court Decision vacated—despite the approximately 6-week interval between the Tribal Court of Appeals's order and the ALJ's decision. Order Denying Rehearing at 3. The ALJ found this "particularly perplexing" given Mr. LaFountain's knowledge that the 2011 Tribal Court Decision was in evidence, and given that the ALJ's October 6, 2011, Order to Present Evidence held the record open and advised the parties that failure to present additional evidence, or reasonable justification for the lack thereof, would result in the matter being decided without another supplemental hearing. *Id.* The ALJ's October 18, 2011, letter reiterated that, because he had received no additional evidence in support of objections to the will, the decision would be based on the existing record. AR Supp. Tab 26. For these reasons, the ALJ found that the petition for rehearing did not

meet the threshold requirement to show diligence in a petition based on newly discovered evidence. Order Denying Rehearing at 4. On the facts of this case, we find no abuse of discretion by the ALJ.

Turning to the new evidence regarding the date of Hurricane Katrina's landfall, we agree with the ALJ that Appellant's justification for the delay in presenting the evidence prior to the Decision was insufficient. As the ALJ found, Appellant's attorney offered "no explanation" why, in the approximately 5-month period between the supplemental hearing and the Decision, and despite the ALJ holding open the record after the supplemental hearing to receive any new evidence, attorney LaFountain did not research the date of landfall. Order Denying Rehearing at 2. The ALJ also noted that "Mr. LaFountain clearly thought this information was relevant, as he asked Phylistine to provide the [ALJ] proof that she was out of the state," yet he did not follow-up with the ALJ to determine whether Phylistine had provided such evidence. *Id.* We concur with the ALJ's analysis and therefore affirm the determination that Appellant's petition for rehearing did not show the diligent effort necessary to support rehearing based on newly discovered evidence.

IV. Appellant Does Not Show That the ALJ Erred in Denying Rehearing Based on the Merits of Appellant's Challenge to the Decision, and Substantial Evidence in the Record Supports the ALJ's Decision to Give Effect to the Will

Appellant, as the challenger of the Will, had the burden of proving to the ALJ by a preponderance of the evidence that Decedent lacked testamentary capacity or that the Will was the product of undue influence. *Estate of Stevens*, 55 IBIA at 67, 71. On appeal, Appellant bears the burden to show error in the Order Denying Rehearing, *see Estate of Palone*, 59 IBIA at 52, and fails to meet that burden.

Appellant argued in her petition for rehearing, and again argues on appeal, that the ALJ's reliance on the vacated 2011 Tribal Court Decision and Phylistine's incorrect testimony regarding the date of her departure from Montana, "each serve as adequate grounds for rehearing." Opening Br. at 3; Petition for Rehearing at 2. The problem with Appellant's argument on appeal is that the ALJ adequately responded to it in his Order Denying Rehearing. The ALJ clarified that neither the 2011 Tribal Court Decision nor Phylistine's testimony regarding her whereabouts was decisive to his Decision, that the new evidence and Appellant's other evidence did not overcome the presumption that Decedent possessed testamentary capacity and was not unduly influenced, and that the Decision was supported by other evidence in the record. *See* Order Denying Rehearing at 4-5. The other evidence on which the ALJ relied included the testimony of the scrivener, Ms. Dusty Bull; Dr. Foster's 1997 assessment that Decedent could acquire self-care, social, and vocational skills; evidence that since 1997 Decedent had in fact gained some level of independence under Phylistine's conservatorship; and evidence that Decedent freely interacted with

friends and family. *Id.* Appellant does not show that the ALJ erred or that his findings lack substantial support in the record. Instead, as she did in her petition for rehearing, Appellant seeks to shift the burden to Phylistine and/or the ALJ to prove that Decedent had testamentary capacity and that the Will was not the product of undue influence.

Even if Appellant had shown diligence in discovering and presenting her new evidence, it would not warrant rehearing. As the ALJ explained, the copy of the 2011 Tribal Court of Appeals Order that Mr. LaFountain submitted with the petition for rehearing was (and is still) missing a page, leaving the full basis for the reversal of the 2011 Tribal Court Decision uncertain, while the partial copy suggests that the basis was Appellant's lack of legal representation in the lower tribal court proceeding rather than any evaluation of the merits of the 2011 Tribal Court Decision. Order Denying Rehearing at 4. And, the evidence of Hurricane Katrina's landfall showed only that Phylistine could not have been in another state working on Hurricane Katrina cleanup at the time of the Will's execution. No evidence was presented showing Phylistine's actual location at the time. Even if Phylistine had the *opportunity* to influence Decedent, the scrivener testified that Phylistine was not present at the making and execution of the Will. Appellant's new evidence does not indicate that Phylistine actually exerted such influence, as required for a showing of actual undue influence, or actively participated in the Will's execution, as required to establish a presumption of undue influence. *See Estate of Pickard*, 50 IBIA at 94 (rejecting mere "opportunity" to influence as sufficient to demonstrate actual or presumptive undue influence).

As to Appellant's argument that the record as a whole supports her claim that Decedent lacked testamentary capacity and that the Will was the product of undue influence, Appellant tries to make it Phylistine's and/or the ALJ's burden to prove otherwise. For example, Appellant argued to the ALJ and now argues on appeal: "No where [sic] does the testimony demonstrate that [Decedent] demonstrated his ability to understand" the natural objects of his bounty, the extent of his property, and the desired distribution at death of his property. Opening Br. at 8; Petition for Rehearing at 7. Significantly, Appellant does not challenge the testimony of the scrivener, whose testimony the ALJ found "compelling and persuasive," that at the time Decedent executed his Will, he knew the extent of his property, did not wish to leave any property to Appellant, knew what he was doing, and was doing it free of coercion. Order Denying Rehearing at 5.

Appellant also argues that the ALJ should have relied more heavily on Dr. Foster's diagnosis that Decedent was mildly mentally retarded, because there "is no record of further specialized assessment upon which conclusions can be drawn for purposes of analyzing the validity of the will." Opening Br. at 6-7; Petition for Rehearing at 5-6. Here, Appellant appears to make a two-fold argument that: (1) a person who is diagnosed as mildly mentally retarded is incapable of having the testamentary capacity to make a will, or the

ALJ failed to "conduct further medical inquiry into what this [diagnosis] specifically meant as to [Decedent's] ability to understand" the making of a will; and (2) it was error for the ALJ to rely on the testimony and statements of non-physicians that Decedent had, as Dr. Foster opined he could, attained skills adequate for minimum self-support. Opening Br. at 6-7; Petition for Rehearing at 4-5. According to Appellant, "none of [the witnesses] are professionals who are competent to define limits of mental retardation." Opening Br. at 9; Petition for Rehearing at 8.

We have held that "a medical diagnosis alone is not sufficient to show a lack of testamentary capacity, in the absence of a showing that the testator did not otherwise" meet the standards for testamentary capacity. *Estate of Pickard*, 50 IBIA at 93. We have also held that it is not the probate judge's burden to obtain medical evidence or to otherwise demonstrate that a will is invalid for lack of testamentary capacity. *Estate of Frederick Harry Jerred*, 49 IBIA 147, 160-61 (2009). Appellant failed to produce credible evidence, in the form of medical records or testimony, that Decedent did not know the natural objects of his bounty, the extent of his property, or the Will's effect on his desired distribution of his estate.[10] In the absence of such evidence, the Board has held that an Indian testator had testamentary capacity to execute a will despite, for example, illiteracy, guardianship, illness, periods of confusion or forgetfulness, or a long history of alcoholism. *Estate of Jeanette Little Light Adams*, 39 IBIA 32, 33 n.3 (2003) (collecting decisions and explaining that "[e]ach case must be examined on its own merits"); *see also Estate of Jerred*, 49 IBIA at 162 (diagnosis of alcohol dementia); *Estate of Stevens*, 55 IBIA at 71 (diagnosis of dementia). We find no reason why, in Decedent's case, his diagnosis should be treated differently.

Furthermore, while Appellant criticizes the ALJ's reliance on the testimony and statements of non-physicians, she allows that "[t]he testimony as to [Decedent's] competency was based upon personal knowledge of [him] by many people. The testimony went almost equally both ways." Opening Br. at 5; Petition for Rehearing at 3-4.

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[10] The ALJ found that while the "vast majority" of Decedent's medical records submitted by Appellant were from 2006 or later—and thus not particularly relevant to the execution of the Will in 2005—certain entries stated that Decedent was oriented to person, place, and time, with "memory normal, judg[]ment normal," and that Appellant cited no contrary indication in the records that Decedent was unable to make his own medical decisions. Order Denying Rehearing at 5; *see generally* AR Tab Supp. 22 (medical records). Appellant contends that a 2008 medical report raises a question about whether Phylistine held a power of attorney for Decedent. Opening Br. at 8. The report on which Appellant appears to rely does not state that Phylistine held a power of attorney. Consultation Report by Dr. James D. Hinde, Dec. 12, 2008, at 2 (AR Supp. Tab 22). The report does indicate that, according to Decedent, he "does manage to take care of himself at home." *Id.*

Appellant concedes that "the ALJ weighed the testimony and considered the medical evidence available to the ALJ at the time of the hearing." Opening Br. at 5; Petition for Rehearing at 4. We have considered Appellant's allegations that the ALJ improperly weighed the evidence and made erroneous credibility determinations, and reject them. The Board will not disturb an Administrative Law Judge's findings of fact when they are supported by substantial evidence in the record, and it will not normally disturb an Administrative Law Judge's determination of witness credibility when he or she had an opportunity to hear the witnesses and observe their demeanor. *Estate of Philip Malcom Bayou*, 19 IBIA 20, 21 (1990); *Estate of Joseph Kicking Woman*, 15 IBIA 83, at 85 (1987). We find no reason to deviate from these principles or disturb the ALJ's decision in this case.[11]

Finally, we reject Appellant's contention that she was never given an opportunity to respond to the letters that Phylistine submitted in response to the ALJ's Order to Present Evidence. Opening Br. at 6; Petition for Rehearing at 4. As we explained as background, after receipt of Appellant's petition for rehearing, the ALJ provided the letters and afforded Appellant time to respond to them, but she did not do so.

For the foregoing reasons, the Board affirms the ALJ's determination that Decedent possessed testamentary capacity and that the Will was not the product of undue influence.

V. The Board Declines to Consider the 2012 Tribal Court Decision or the Allegation Regarding Phylistine's Last Name in the Will

Appellant submits, for the first time on appeal, the 2012 Tribal Court Decision invalidating the Will in the probate of Decedent's non-trust estate, and argues that the Board should grant rehearing and order the ALJ to consider the decision on remand. Opening Br. at 11-12. As relevant to this appeal, the Board's jurisdiction is limited to review of the Order Denying Rehearing, *see* 43 C.F.R. § 4.320(a) (Who may appeal), and in the absence of a showing of manifest error or injustice, the Board's review will not include consideration of evidence or arguments presented to it for the first time on appeal, *see id.* § 4.318. "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." *Estate of Pickard*, 50 IBIA at 92. Moreover, contrary to Appellant's assertion that the Board "is bound to consider" the Tribal Court's decision, Opening Br. at 11, we have held that the Secretary of

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[11] We note that Mr. LaFountain's claim that Phylistine gave false testimony under oath regarding her date of departure from Montana, and thus all of her testimony is unreliable, Opening Br. at 3, is unwarranted when in fact she expressed uncertainty about the date of a trip that occurred several years before her testimony.

the Interior is not bound by probate decisions reached by state and tribal courts for non-trust property, and that the records of those proceedings "*can* be used for *whatever relevance* they *may* have in the Departmental proceeding." *Estate of Harold Frank Pickernell*, 32 IBIA 1, 4 (1998) (emphases added). While we understand that Appellant did not have an opportunity to present the 2012 Tribal Court Decision to the ALJ, as it was issued after the Order Denying Rehearing, we are unconvinced that the Board should consider it.[12]

According to Appellant, "the Tribal Court reviewed the same evidence and testimony on remand" that the ALJ considered, and decided not to give effect to the Will. Opening Br. at 11. It is not clear, however, on what evidence the Tribal Court based its decision. The decision reveals only that a Tribal Court hearing was held on April 27, 2012, and that "[s]everal witnesses testified on the Decedent's limited ability to comprehend and to make life decisions." 2012 Tribal Court Decision at 1 (unnumbered). The Tribal Court's decision does not discuss the evidence or make specific findings regarding the elements of testamentary capacity or undue influence. The ALJ considered that Decedent's ability to comprehend and make life decisions was "limited." The ALJ found that Appellant did not show that Decedent was limited to the extent of lacking testamentary capacity, or was unduly influenced in executing the Will. The fact that the Tribal Court reached a different conclusion regarding testamentary capacity is not, standing alone, relevant evidence, because the ALJ must reach his own, independent decision. And, as we have explained *supra*, the ALJ clarified in his Order Denying Rehearing that his initial reliance on the vacated 2011 Tribal Court Decision was not decisive to his Decision.

Furthermore, the 2012 Tribal Court Decision is no longer the latest decision or order from a tribal judge in the separate probate of Decedent's non-trust property. Most recently, the 2013 Tribal Court of Appeals Order ordered that all proceedings be ceased "until the federal probate is finalized." 2013 Tribal Court of Appeals Order.

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[12] In contrast, Appellant had ample opportunity to raise her argument regarding Phylistine's last name in the Will to the ALJ prior to the Order Denying Rehearing, and provides no explanation for her failure to do so. One of the letters that Phylistine submitted to the ALJ in response to the Order to Present Evidence—to which Appellant did not respond—contained the same information that Appellant argues she learned for the first time during the Tribal Court hearing held on April 27, 2012—which itself was held 10 days prior to issuance of the Order Denying Rehearing. *See* Fax from Phylistine to ALJ, Oct. 17, 2011 (AR Supp. Tab 25) (enclosing Letter from Gabriel Running Crane, Oct. 16, 2011 (stating that Mr. Running Crane met Phylistine in 2007 and married her in 2008)). Regardless, we have considered Appellant's argument to the extent that we have determined it is not sufficient to demonstrate manifest 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 May 7, 2012, Order Denying Rehearing.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Robert E. Hall
Administrative Judge