



INTERIOR BOARD OF INDIAN APPEALS

Estate of Darrell Leon Thomas

61 IBIA 175 (08/17/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF DARRELL LEON)	Order Affirming Denial of Reopening
THOMAS)	
)	Docket No. IBIA 13-147
)	
)	August 17, 2015

Rosemary D. Murillo (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Reopening entered on August 14, 2012, by Administrative Law Judge (ALJ) Richard D. Hines in the estate of Darrell Leon Thomas (Decedent).¹ Appellant sought reopening of the November 28, 1966, Order Determining Heirs issued in this probate case in order to be added as a daughter of Decedent and an heir. The ALJ denied reopening, concluding that Appellant had not met the standard for reopening a case that has been closed for 3 years or more, i.e., a showing of error which, if not corrected, would result in manifest injustice.

We affirm the Order Denying Reopening because on appeal to the Board, Appellant resubmits the same documents upon which she relied in seeking reopening—a tribal court order and a revised birth certificate apparently based on that tribal court order—without arguing why she contends the ALJ erred in finding them insufficient to meet the standard for reopening. Those documents, standing alone, are not sufficient to demonstrate that the ALJ erred in denying reopening.

Background

Decedent died on December 11, 1965, and his Indian trust estate was probated in 1966. *See* Order Determining Heirs, Nov. 28, 1966. In the Order Determining Heirs, the Hearing Examiner found that Decedent had died intestate (i.e., without a will), and was survived by his spouse and five daughters, who were determined to be his heirs. Appellant was not identified as a child of Decedent (nor was any evidence introduced suggesting that

¹ Decedent, also known as Darrell Leon Nelson and Darrell Leo Thomas, was a Pima Maricopa (Gila River) Indian. When his Indian trust estate was probated, the case was assigned No. G-145-66. It is now assigned Probate No. P000104675IP in the Department of the Interior’s probate tracking system, ProTrac.

Appellant might have had a child in addition to the surviving and pre-deceased children identified at the hearing).

In May of 2012, Appellant filed a petition with the ALJ to reopen Decedent's probate case, contending that her original birth certificate had listed the wrong individual as her father, and that she had petitioned the Gila River tribal court to correct the error. Appellant enclosed a copy of a tribal court order granting her petition to the court to establish paternity and declaring that Decedent was Appellant's biological father. *See* Order on Petition to Establish Paternity, No. CV-2011-0206 (Gila River Community Court, Nov. 7, 2010). Appellant also enclosed with her petition an updated copy of her birth certificate from the State of Arizona, listing Decedent as her father, and a copy of the previous birth certificate listing another individual as her father. Appellant did not address the timeliness of her petition for reopening, nor did she make any arguments for why the standard for reopening the case had been satisfied. *See* 43 C.F.R. §§ 30.243(a)(3) (reopening petition by an interested party must be filed within 1 year after the petitioner's discovery of the alleged error; the standard for reopening after 3 years is "to correct an error" in the original decision "which, if not corrected, would result in a manifest injustice"), 30.243(b) ("All grounds for reopening must be set forth fully in the petition."), and 30.243(c)(1) (petition must include all relevant evidence concerning when the petitioner discovered the alleged error).

On August 14, 2012, the ALJ denied Appellant's petition for reopening. The ALJ noted that the Board has held that in the absence of "strong extenuating circumstances . . . , a mother's testimony by itself is not sufficient to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child." Order Denying Reopening at 2 (quoting *Estate of Emerson Eckiwaudah*, 27 IBIA 245, 252 (1995)). The ALJ also noted that to reopen a probate case more than 3 years after it had been closed requires a finding that failure to correct the error would result in manifest injustice. *Id.* The ALJ concluded that Appellant had offered insufficient evidence to demonstrate error in the original decision, much less demonstrate that the case must be reopened to avoid a manifest injustice.

Discussion

I. Standard of Review

The Board reviews legal determinations and the sufficiency of evidence *de novo*. *Estate of Cyprian Buisson*, 53 IBIA 103, 107 (2011). An appellant has the burden on appeal to demonstrate error in the decision that is being appealed. *Estate of Shirley Lavina Johns Burdeaux*, 39 IBIA 82, 85 (2003).

II. Analysis

In her notice of appeal to the Board, Appellant contends, without further discussion, that she has taken every step required to ensure that her request for reopening be granted. She submitted with her notice of appeal several of the same documents that she submitted to the ALJ, including a copy of the updated birth certificate listing Decedent as her father, and a copy of the tribal court order declaring Decedent as her biological father, based upon an affidavit of her mother. Appellant did not file an opening brief.

We conclude that Appellant has not met her burden to demonstrate that the ALJ erred in denying reopening. Even assuming that her petition was timely—an issue that the ALJ did not address²—the ALJ correctly found that the evidence provided by Appellant was not sufficient to demonstrate error in the Order Determining Heirs. The tribal court order was not binding on the ALJ, *see Estate of Milward Wallace Ward*, 46 IBIA 5, 9 (2007), and thus could not constitute conclusive evidence of an error in the Order Determining Heirs. And the tribal court order itself relies solely on an affidavit submitted by Appellant’s mother, which would not be sufficient, by itself, to determine paternity in this Federal Indian probate proceeding, *see Estate of Eckiwaudah*, 27 IBIA at 252.

² The ALJ found that Appellant had failed to make the minimal offer of proof to establish her “standing,” Order Denying Reopening at 2, but standing is distinct from timeliness, and we do not agree that her offer of proof was insufficient to establish her *standing*. *See Arizona State Legisl. v. Arizona Indep. Redistricting Comm’n*, 2015 U.S. LEXIS 4253, at *21 (June 29, 2015) (“[O]ne must not ‘confus[e] weakness on the merits with absence of Article III standing.’”) (quoting *Davis v. United States*, 131 S. Ct. 2419, 2434 n.10 (2011)).

With respect to timeliness, however, as noted previously, a petition by an interested party must be filed within 1 year of the petitioner’s discovery of the alleged error in the original decision, and the petitioner has the burden to set forth the relevant facts, supported by evidence, to demonstrate timeliness. Appellant did not do so, and we note that the tribal court order was issued more than 1 year before she filed her petition for reopening.

In her notice of appeal, Appellant contends that she did not receive notice informing her “of the outcome of this issue,” but it is apparent that she is referring to the ALJ’s failure to include her on the distribution list for the Order Denying Reopening, an error which was corrected when the Bureau of Indian Affairs provided her with a copy, after which she filed this appeal. Appellant does not state when she first learned of the Order Determining Heirs.

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 August 14, 2012, Order Denying Reopening.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge