



INTERIOR BOARD OF INDIAN APPEALS

Estate of Smoky Jim

63 IBIA 139 (05/31/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ESTATE OF SMOKY JIM)	Order Affirming Order Denying
)	Reopening
)	
)	Docket No. IBIA 15-040
)	
)	May 31, 2016

Cheryl L. Lohman (Appellant) appealed to the Board of Indian Appeals (Board) from the September 30, 2014, Order Denying Reopening issued by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Smoky Jim (Decedent). At Appellant’s urging, the Bureau of Indian Affairs (BIA) had sought to reopen Decedent’s estate to add an omitted child—Appellant’s apparent great-grandmother—as an additional heir of Decedent whose estate was probated in 1912.¹ The ALJ denied the petition on two grounds. First, he held that the petition is barred by the doctrine of *res judicata* because Appellant’s grandmother also had sought unsuccessfully to reopen Decedent’s estate for the same purpose. Second, the ALJ held that, notwithstanding the effect of *res judicata*, “the unsettling of title after more than 100 years weighs heavily against reopening,” and denied the petition on this alternate ground. Order Denying Reopening at 3. We affirm the ALJ’s Order Denying Reopening on the latter ground without addressing his denial on *res judicata* grounds.

Background

Decedent, a Burns Paiute Indian, died intestate in 1908 possessed of an allotment, no. 34, in Oregon.² A hearing was held on April 20, 1912, in Oregon. It appears that none of Decedent’s family attended the hearing and two unrelated persons testified. *See* Affidavit as to Lawful Heirs, Apr. 20, 1912 (Administrative Record (AR) 10). The two witnesses averred that they knew Decedent and that he had two children, Piute Dick and Susie Gill, who survived him. No mention was made of any other children. On

¹ Decedent’s initial probate proceeding was case no. 68620-12. A subsequent petition to reopen was assigned case no. 19159-53. In the probate tracking system, ProTrac, currently used by the Department of the Interior, Decedent’s case number is P000105128IP.

² Decedent was also known as Big Jim, Ma wi’ i, and Tzü pü’ hü.

November 29, 1912, a decision issued in which Decedent's estate was divided equally between Piute Dick and Susie Gill.

At approximately the same time, the estate of Decedent's uncle, Ahtanahquate, was probated. Ahtanahquate died intestate in 1902 and a decision issued in his estate in 1913, finding that his heirs included a niece and several other collateral relatives; no mention was made of Decedent or his lineal descendants. *See* Appellant's Affidavit (Aff.), Oct. 20, 2014, Exhibit 9. In 1921, after supplemental testimony was taken in Ahtanahquate's estate from several persons, including Appellant's grandmother, Nellie Delaney Townsend (Nellie), the initial probate decision was modified to add Decedent as an heir of Ahtanahquate and to remove a purported niece. The testimony revealed that Decedent had had a third child, Mercy Jim Delaney (Mercy),³ who died in or about 1917. According to the record in Ahtanahquate's estate, Mercy was survived by two children, Harry Delaney (Harry) and Nellie, who were then added as heirs to Ahtanahquate's estate through Mercy and Decedent. *See* Modification, *Estate of Ahtanahquate*, No. 70251-21, Oct. 13, 1921 (AR 7). Although reference was made in Ahtanahquate's estate to Decedent's estate, no action was taken to reopen Decedent's estate to add Mercy and her children as heirs.

On or about November 13, 1953, Nellie, through counsel, filed a petition for "rehearing"⁴ in Decedent's estate to be added as an heir. *See* Petition for Re-Hearing of Estate of Smokey Jim (copy added to the record⁵). The petition was denied as untimely. Order Denying Petition for Reopening, Aug. 24, 1954, *aff'd.*, IA-148 (June 20, 1955) (AR 7). As explained in the decision, the regulation in effect at that time, 25 C.F.R. § 81.18(a) (1949), required petitions to reopen closed estates to be filed within 3 years of the date of the probate decision. The deciding official also observed that Decedent's estate

³ Mercy also was known as Kowangie (or Owan-ne-ga), A-tsa-qui-ga, Milcey, and Melsie.

⁴ Nellie's counsel styled the petition as one for "rehearing." Such petitions were to be filed within 60 days of the original probate decision. *See* 25 C.F.R. § 81.17(a) (1949). Petitions filed after the time for seeking rehearing are petitions to reopen. *See id.* § 81.18; 43 C.F.R. §§ 30.238(a), 30.243 (2015). Nellie's petition was filed long after the initial 60 days had passed and, therefore, is referred to herein as a petition to reopen.

Nellie also apparently submitted an earlier petition to reopen Decedent's estate in 1934. It is unclear what, if any, action was taken on this petition. *See* Letter from Examiner of Inheritance to Commissioner of Indian Affairs, Apr. 20, 1944 (AR 6).

⁵ The Board did not receive a complete probate record for Decedent's estate. Additional, relevant documents from file no. 19159-53, which contains records pertaining to Nellie's 1953 petition to reopen, *see* n.1, have been added to this record.

had been closed for more than 42 years and that the original heirs had since died and their estates probated. Therefore, he affirmed the denial of reopening. *Id.*

Nellie died in 1990. Order Approving Will and Decree of Distribution, Aug. 27, 1998, *In the Matter of the Estate of Nellie Townsend*, No. IPSA196N97 (copy added to the record). Nellie's daughter, Beatrice Pollard, who is Appellant's mother, died in 2001. Appellant's Aff., Oct. 20, 2014, at 4. Beatrice's ownership interests in trust real property in Oregon were inherited entirely by her surviving spouse, Bernold Pollard, who was Appellant's father. See Order Reopening Case and Modifying Probate Decision, June 12, 2009, *In the Matter of the Estate of Beatrice Pollard*, No. P000016740IP (copy added to the record). Appellant appealed to the Board from the decision in her mother's estate, claiming that her mother's ownership interest in Decedent's allotment was overlooked. See Appeal, July 9, 2009, *Estate of Beatrice Pollard*, No. IBIA 09-117 (copy added to the record). In this appeal, Appellant set forth her knowledge concerning her family's omission from Decedent's estate. The appeal was dismissed as untimely because it was filed outside of the 30-day period for seeking review from the Board. *Estate of Beatrice Pollard*, 50 IBIA 131, 131-32 (2009).

Bernold died in 2002. Appellant's Aff., Oct. 20, 2014, at ¶ 4. A decision to distribute his Indian trust estate to Appellant and her siblings issued in 2014. Decision, Apr. 17, 2014, *In the Matter of the Estate of Bernold Pollard*, No. P000078162IP (copy added to the record).

In 2012, Appellant renewed her efforts to add Mercy as an heir of Decedent and "urged" BIA to petition to reopen Decedent's estate. Amended Opening Br., June 25, 2015, at 6, n.17; see also letter from Appellant to BIA, Jan. 11, 2012 (AR 7). Shortly thereafter, BIA filed the requested petition. In response, the ALJ issued an Order to Show Cause, requiring BIA to show that manifest injustice outweighed the interest in finality of probate decisions and to approximate the number of subsequent estates that would require reopening if Mercy were added as an heir to Decedent's estate. Order to Show Cause, Feb. 13, 2013 (AR 7). BIA complied, and recounted the events surrounding the modification of Ahtanahquate's probate and the unsuccessful efforts to reopen Decedent's estate through the years. In addition, BIA asserted that reopening Decedent's estate to add a new heir would lead to the reopening of an additional 32 probate cases decided in the past 100 years. Letter from Superintendent, BIA, Warm Springs Agency to Office of Hearings and Appeals, Mar. 13, 2013 (AR 7).

While BIA's petition to reopen was pending before the ALJ, Appellant submitted, through counsel, a letter that begins, "This letter serves as a written request to reopen [Decedent's] estate." Letter from Ryan D. Dreveskracht, Esq., to the Office of Hearings and Appeals (OHA), Aug. 27, 2014 (Dreveskracht Letter) (AR 7). Appellant asserted that

her interests were “adversely affected” by the alleged delay and that she was “prevented . . . from acquiring ownership over the land interests that she is entitled to as a rightful heir to [Decedent’s e]state.” *Id.* She urges OHA to take “action on the merits of *this* written request” within 10 days or she would seek recourse under 25 C.F.R. § 2.8. *Id.* (emphasis added).

On September 30, 2014, the ALJ issued his Order Denying Reopening. He found that Appellant was the real party in interest in the petition, based largely on the letter received from Appellant’s attorney. The ALJ asserted that he would refer to both Appellant and BIA as “petitioner” in his decision. He then held that BIA and Appellant are both bound by the unsuccessful actions taken by Appellant’s grandmother, Nellie, and, thus, barred by the doctrine of *res judicata* from pursuing reopening. The ALJ also held that, even if *res judicata* were not a bar,

[m]any of Decedent’s issue, including Mercy . . . and her issue, including Nellie and her brother Harry have since died. None of the contemporary witnesses have survived. Furthermore, [BIA] . . . estimates that adding Mercy as an heir of Decedent now would result in the necessity of reopening approximately 32 subsequent probate cases. This injects substantial uncertainty and turmoil into the title status of the property, long after the fact. Although there may have been error in the failure to identify Mercy as an heir of Decedent in 1912, the unsettling of title after more than 100 years weighs heavily against reopening

Order Denying Reopening, Sept. 30, 2014, at 3. Shortly after receiving the Order Denying Reopening, Appellant filed a motion for reconsideration. On October 27, 2014, prior to receiving any response to her motion from the ALJ, Appellant appealed the Order Denying Reopening to the Board.⁶

On appeal, Appellant submitted an opening brief and an amended opening brief. No other briefs were received.

Discussion

We affirm the Order Denying Reopening on the grounds that BIA did not show that manifest injustice required reopening when weighed against the passage of time and

⁶ Once the appeal was filed with the Board, the ALJ lost jurisdiction to consider the motion for reconsideration. *See Estate of Edward Teddy Heavyrunner*, 59 IBIA 338, 345 (2015).

disruption to estates long settled. Because we find the latter ground amply supports the ALJ's decision, we need not reach the arguments concerning his application of *res judicata*.

I. Standard of Review

We will review alleged errors of law *de novo* and we will examine the record to determine whether factual findings are supported by substantial evidence. *Estate of Dorothy Glende*, 61 IBIA 183, 189 (2015). When a decision rests on the discretion of the deciding official in weighing the evidence, we will affirm where the decision is reasonable in light of the prevailing law and the record. *See Estate of Thomas Jefferson Boe*, 56 IBIA 15, 27 (2012). At all times, Appellant bears the burden of showing error in the decision. *Estate of Glende*, 61 IBIA at 189; *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012).

II. Standard for Reopening

The ALJ considered BIA's petition on its merits and held that BIA failed to meet the present-day standard for reopening Decedent's estate. The standard for reopening when a petition is filed by BIA more than 3 years after the date of the original probate decision is "[t]o correct an error of fact or law in the original decision which, if not corrected, would result in a manifest injustice." 43 C.F.R. § 30.243(a)(2). As the ALJ observed, whether an error in a probate decision results in manifest injustice is determined by weighing the passage of time, the evidence of diligence in seeking correction, the availability of witnesses and documents, and the consideration of practical concerns:

[I]f [an] ancestor were not diligent [in seeking reopening], the lack of diligence is imputed to his heirs. . . . There is good reason for requiring diligence because there is a need for finality in matters pertaining to the ownership of land so that owners may rely on their title in making improvements and decisions relating thereto. *Estate of Frank Jones*, 1 IBIA 345, 351 (1972). Similarly, there is a need for finality in probate matters to facilitate the distribution of property and to enable heirs and devisees to exercise rights of ownership without fear of a challenge to their title. *Cf. Estate of Newton McNeer*, 33 IBIA 318, 320 (1999). The need for finality increases with the passage of time because evidence and witnesses are lost. *Id.* Even when witnesses are available and evidence is found, the memories of witnesses may be dim with respect to the details of any transaction and documents may be faded or torn and difficult to read.

Order Denying Reopening at 2-3 (quoting *Estate of George Angus*, 46 IBIA 90, 98 (2007)). The ALJ then concluded that the passage of time (during which witnesses have died and title to Decedent's allotment has passed to numerous individuals in the course of 100 years)

and the consequent turmoil that would result from reopening Decedent's estate far outweighed the present-day effects and resulting injustice of any error. *Id.* at 3.

We see no reason to disturb the ALJ's analysis or his conclusion. He balanced the competing facts and did not abuse his discretion. It is regrettable that this error, if error it be, may have caused strained relations between Appellant and her family or caused her any personal distress. However, the events that gave rise to this appeal occurred over 100 years ago and any redistribution of ownership of this allotment now may well result in new or heightened rancor and distress among the current owners of Decedent's allotment, none of whom were alive at the time of the original probate decision.

III. Remaining Arguments

Several final arguments raised by Appellant merit comment. Appellant argues that the ALJ erroneously referred to her as the "petitioner" in his Order Denying Reopening and in so doing has precluded her from petitioning to reopen Decedent's estate under 43 C.F.R. § 30.243(3). Appellant also claims she has not been "dilatatory in pursuing her claim with the BIA." Amended Opening Br. at 10. Appellant's dilatoriness *with BIA* is not at issue here. BIA prepares records to be utilized in the probates of deceased Indians, *see* 25 C.F.R. Part 15, and BIA, in its discretion, may (but is not required to) seek reopening of closed estates, *see* 43 C.F.R. § 30.243. BIA does not conduct probate. That is the province of OHA, which is not part of BIA. *See* 43 C.F.R. Parts 4 and 30. Therefore, any "claim" that Appellant might have to Decedent's estate properly is pursued with OHA and not with BIA.⁷

To the extent that the ALJ characterized Appellant as a "petitioner" before him, it is understandable: Her counsel submitted a letter to OHA that opened by stating, "This letter serves as a written request to reopen [Decedent's] estate." Dreveskracht Letter at 1 (AR 7). At the time the letter was submitted, BIA's petition to reopen was under consideration but had not yet been decided and Appellant's letter goes on to demand action "on the merits of *this* written request," *id.* at 2 (emphasis added), not on the merits of BIA's petition. Thus, we cannot fault the ALJ for construing Appellant's letter as a petition to

⁷ This is not to say that individuals are precluded from requesting BIA to file a petition on their behalfs, as Appellant did. The Board recognizes that some individuals may find it easier or more convenient to seek assistance from BIA and doing so certainly is not prohibited. However, individuals must remain mindful that to preserve their own opportunity to seek reopening, they not only must satisfy the applicable standard, they must also file the petition within 1 year of discovery of the alleged error that they seek to correct. *See* 43 C.F.R. § 30.243(a)(3). This discovery rule does not apply to petitions filed by BIA.

reopen. We note, however, that Appellant now stresses that “[t]he letter sent to OHA on August 27, 2014, was not a petition to reopen; it was a request that OHA take action on the BIA’s petition to reopen, pursuant to 25 C.F.R. § 2.8.” Amended Opening Br. at 4.⁸

Ultimately, it does not matter whether Appellant intended for her letter to be a petition to reopen or a nudge to obtain a decision on BIA’s petition: A petition to reopen from Appellant would be untimely. Where the original decision is more than 3 years old, a petition to reopen by an “interested party,” such as Appellant, must be filed “within 1 year after the petitioner’s discovery of an alleged error.” 43 C.F.R. § 30.343(3)(ii). “Potential heirs” are “interested parties” for purposes of pursuing a petition to reopen. *See* 43 C.F.R. § 30.243(a)(3) and (c) (petitions to reopen may be filed by any “interested party”); *id.* § 30.101 (definition of “interested party” includes potential heirs).

Here, all of Appellant’s direct ancestors to Decedent as well as Appellant’s father (who inherited all of the Oregon trust land interests held by Beatrice) had died by 2002. Thus, Appellant became an interested party in 2002 (as a potential heir of her father⁹) under § 30.343(3)(ii) to seek reopening of Decedent’s estate. Next, Appellant knew of the alleged error by 2009 when she appealed to the Board in Beatrice’s estate, claiming that the inventory of Beatrice’s trust assets should include an interest in Decedent’s allotment. Therefore, because Appellant became an interested party in 2002 when her father died and because she discovered the alleged error in Decedent’s estate no later than 2009, Appellant’s time to seek reopening of Decedent’s estate expired in 2010, if not sooner.

Finally, Appellant argues that her due process rights have been violated because she was not provided a copy of BIA’s petition and was not provided an opportunity to submit a brief while BIA’s petition was before the ALJ. A petition to reopen must set forth fully *all* grounds for reopening, including all relevant evidence. 43 C.F.R. § 30.243(b), (c). Only if a petition appears to show merit will the probate judge cause the petition and all papers submitted therewith to be served on persons whose interest could be affected if the petition is granted. *Id.* § 30.244(b). In contrast, if the judge finds no merit, as occurred here, he need only provide interested parties with a copy of the decision denying reopening and

⁸ Section 2.8 is an action-prompting regulation available only to compel action by BIA officials. As explained *supra*, OHA is not part of BIA and § 2.8 does not apply to alleged inaction by judges within OHA.

⁹ We assume without deciding that if Mercy were found to be an heir of Decedent, that Mercy’s interest in the allotment would then be inherited by Nellie (among others); Nellie’s interest would be inherited by Beatrice (among others); and Beatrice’s interest would be inherited by Bernold. As Bernold’s daughter, Appellant would be a potential heir to his estate, including whatever interest he might inherit in Decedent’s allotment.

provide appeal rights to the Board. *Id.* § 30.244(a). Here, the ALJ found no merit to BIA's petition. Thus, no notice and opportunity to brief was necessary. To the extent that Appellant contends that she should have received a copy of BIA's petition and should have had the opportunity to participate in briefing, we note that she was well aware that a petition to reopen had been filed by BIA and she filed her own pleading with OHA demanding that Decedent's estate be reopened while the matter remained pending before the ALJ. *See* Dreveskracht Letter. We are hard-pressed to understand why she did not request a copy of BIA's petition at that time and request the opportunity to participate in briefing instead of demanding a decision from the ALJ.

To the extent that Appellant argues that the regulation governing the reopening of closed estates does not pass constitutional muster, we have long held that the Board lacks jurisdiction to invalidate duly promulgated regulations. *Estate of John Fredericks, Jr.*, 57 IBIA 204, 210 (2013); *Wilson v. Acting Portland Area Director*, 21 IBIA 188, 194 (1992); *Kays v. Acting Muskogee Area Director*, 18 IBIA 431, 438 (1990).

Conclusion

We find no basis to overturn the ALJ's conclusion that reopening Decedent's estate is unwarranted. The ALJ did not abuse his discretion in determining that correcting an error in heirship after the passage of 100 years is outweighed by the public interest in the finality of decisions and the disruption to settled ownership if the estate were reopened. We decline to reach the issue of *res judicata*, we lack jurisdiction to invalidate regulations, and we reject Appellant's remaining arguments.

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 September 30, 2014, Order Denying Reopening.

I concur:

// original signed
Debora G. Luther
Senior Administrative Judge

//original signed
Robert E. Hall
Administrative Judge