



INTERIOR BOARD OF INDIAN APPEALS

Estate of Floyd Scott Shock

63 IBIA 332 (09/14/2016)



United States Department of the Interior

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

ESTATE OF FLOYD SCOTT SHOCK) Order Affirming Rehearing Order
)
) Docket No. IBIA 15-103
)
) September 14, 2016

The Yakama Nation Credit Enterprise (Appellant or YNCE) seeks review of an Order Granting Petition for Rehearing (Rehearing Order) entered on July 13, 2015, by Indian Probate Judge (IPJ) John R. Payne in the estate of Floyd Scott Shock (Decedent).¹ The IPJ approved Appellant’s claim against Decedent’s estate and ordered that it be paid as described in a July 17, 2014, Notice of Petition for Rehearing and Order to Show Cause (Rehearing Notice and OSC). On appeal to the Board of Indian Appeals (Board), Appellant contends that the IPJ erred by applying regulations not in effect on the date of Decedent’s death. As a result of these misapplied regulations, Appellant contends that the funds available for the payment of claims was erroneously limited, and Appellant’s claim was not given the priority it should have received.

Generally, to preserve the right to raise an argument on appeal, an appellant must raise the argument in proceedings below when given the opportunity to do so. Here, Appellant failed to respond to an initial notice of petition for rehearing issued in 2011, and to the Rehearing Notice and OSC. The Rehearing Notice and OSC clearly described the regulations the Administrative Law Judge (ALJ) proposed to apply and the effect these regulations would have upon the payment of claims. Because Appellant did not challenge the proposed resolution of its claim when provided the opportunity below, we conclude that Appellant’s late-raised merits arguments are outside the Board’s scope of review on appeal, and thus we affirm the IPJ’s Rehearing Order.

Background

Decedent died intestate (without a will) on May 31, 2008. A probate hearing was held by ALJ Thomas F. Gordon on October 28, 2011, and two claims, both submitted to the Bureau of Indian Affairs (BIA) with itemized statements shortly after Decedent’s death,

¹ Decedent was a member of the Yakama Nation. His probate is assigned Probate No. P000069768IP in the Department of the Interior’s probate tracking system, ProTrac.

were considered.² *See* Transcript, Oct. 28, 2011, at 10-17 (AR 1). Following the hearing, the ALJ ordered the distribution of the trust land, and the income in Decedent's Individual Indian Money (IIM) account generated after Decedent's death, to Decedent's four children. Order Determining Heirs, Nov. 2, 2011, at 1-2 (AR 6). The ALJ also approved payment of both claims, on a pro rata basis, from the money in Decedent's IIM account on the date of his death, pursuant to regulations found in 43 C.F.R. Part 30, which became effective December 15, 2008. *Id.* at 2.

Following issuance of the Order Determining Heirs, Yakama Nation Probate, acting as a contractor for BIA, contacted the ALJ to inform him that, "due to an oversight," it had not provided the ALJ with Appellant's claim against the estate. Email from Yakama Nation Probate to ALJ, Nov. 8, 2011 (AR 5). Yakama Nation Probate acknowledged that it received Appellant's claim on May 19, 2011, the date it was submitted by Appellant, by which time the probate package for Decedent's estate had already been submitted to the Office of Hearings and Appeals (OHA). *Id.* The claim form indicated that the claim was for unpaid balances on two loans, that a total of \$122.42 had been repaid, and that the balance remaining unpaid was \$808.91. YNCE Claim Form, May 19, 2011 (AR 5). The claim did not include an itemized statement and did not indicate whether it was to be considered a priority claim.³ *See id.*

The ALJ interpreted the email from Yakama Nation Probate as a petition for rehearing, and issued a Notice of Petition for Rehearing staying the payment of claims and the distribution of the estate. *See* Notice of Petition for Rehearing, Nov. 29, 2011 (AR 5). In the notice, the ALJ cited the claims regulations in effect when the notice was issued. *Id.* Interested parties, including Appellant, were provided 30 calendar days from the date of the notice to submit any responses concerning the petition for rehearing. *Id.* (citing

² One claim, for \$267.25, was received by BIA on June 10, 2008, *see* Claim Form, Les Schwab Tire Center (Administrative Record (AR) 6), and the second claim, for \$23,072.57, was received September 12, 2008, *see* Claim Form, The Center - Orthopedic and Neurosurgical Care and Research (AR 6).

³ The regulations concerning claims against a decedent's estate in effect on the date of Decedent's death required an itemized statement of dates and amounts of charges and payments on account, *see* 43 C.F.R. § 4.250(c) (2007), and recognized certain claims as priority claims, which were to be paid before other claims, referred to as general claims, *see id.* § 4.251. The regulations applied by the ALJ, which became effective December 15, 2008, *see* 73 Fed. Reg. 67256 (Nov. 13, 2008), did not retain the itemized statement requirement and no longer distinguished between priority and other claims. *See* 43 C.F.R. Part 30, Subpart E—Claims. Unless otherwise indicated, citations to claims regulations in the orders of the ALJ and IPJ are to post-2008 editions of the Code of Federal Regulations.

43 C.F.R. §§ 30.238(d) and 30.239). The record does not indicate that an interested party responded during that time period.⁴

After a delay of over two years, the ALJ issued a second Notice of Petition for Rehearing and an Order to Show Cause. *See* Rehearing Notice and OSC, July 17, 2014 (AR 5). Citing to the regulations in effect at that time, the ALJ explained that “claims may only be paid if they are submitted on or before the close of the initial hearing in the matter.” *Id.* at 2 (citing 43 C.F.R. § 30.140(a)).⁵ The ALJ reasoned that Appellant had timely submitted its claim and therefore should not be penalized for Yakama Nation Probate’s failure to promptly forward the claim. *Id.* at 2. He recounted that in the original Order Determining Heirs, he ordered approved claims paid on a pro-rata basis, with the total amount of payment not to exceed the balance of Decedent’s IIM account on the date of death, pursuant to 43 C.F.R. § 30.146. *Id.* at 1; *see also* 43 C.F.R. § 30.147. The ALJ then applied the same regulations to his analysis of Appellant’s claim. *Id.* at 1-2. He concluded that, provided the November 29, 2011, Notice of Petition for Rehearing had stayed the payment of the prior claims, payment could be made on Appellant’s claim, along with the two other claims, on a pro rata basis. *Id.* at 2. Dividing the funds available in Decedent’s IIM account as of his date of death, Appellant would receive a pro rata share of \$13.40. *Id.*

In his Order to Show Cause, the ALJ required that “[a]ny party opposed to the proposed rehearing and modification to consider the claim filed by [Appellant], *as described above*, must show cause by filing . . . a written statement of the reasons for objecting,” within 30 days from the date of mailing of the order. *Id.* at 3 (emphasis added). “Absent a showing of cause within the time specified,” he warned, “an order modifying the approval

⁴ Appellant submitted an amended claim on June 7, 2012, attaching copies of Note and Disclosure forms for two loans. YNCE Amended Claim Form (AR 4). The amended claim indicated that \$139.37 of the amount owed had been repaid, but increased the amount due and owing to \$902.39. *Id.* No explanation was provided for the changes, nor did the amended claim include an itemized statement supporting the amount claimed. The amended claim is not recognized in any subsequent action by OHA, nor does Appellant base its claim in its appeal before the Board on the amount stated in its amended claim.

⁵ In the regulations governing claims payment in effect at the time of Decedent’s death, claims had to be filed within 60 days from the date BIA received verification of the decedent’s death, or “[w]ithin 20 days from the date the creditor is chargeable with notice of the decedent’s death, whichever of these dates is later.” 43 C.F.R. § 4.250(a)(1)-(2). Appellant filed its initial claim for the amounts owing on loans to Decedent almost 3 years after his death.

of claims against Decedent's estate, *as set forth above*, may be issued" *Id.* at 3 (emphasis added).

Appellant did not object, nor did any other party object, to the proposed resolution of Appellant's claim as detailed in the Rehearing Notice and OSC, and on July 13, 2015, the IPJ⁶ issued the Rehearing Order. *See* Rehearing Order (AR 4). The IPJ ordered payment of Appellant's claim, as well as the other two approved claims against Decedent's estate, on a pro rata basis from the funds in Decedent's IIM account on Decedent's date of death, as detailed in the Rehearing Notice and OSC. *Id.* at 1.

On appeal, Appellant contends that the IPJ erred, as a matter of law, in ordering the payment of claims as proposed in the Rehearing Notice and OSC, because the regulations in effect when Decedent died applied to its claim, rather than those in effect when the order issued.

Discussion

As relevant here, in reviewing an appeal, the Board's scope of review is limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing. *See* 43 C.F.R. § 4.318. "As a general rule, the Board does not consider new arguments raised for the first time on appeal." *Estate of Marvin Lee Tissidimit*, 51 IBIA 211, 215 (2010) (citing *Estate of Alice Grace Demontigny*, 50 IBIA 174, 176 (2009)).

We affirm the Rehearing Order because Appellant failed to challenge the ALJ's proposed resolution of its claim when it had the opportunity, on multiple occasions, to do so before the Rehearing Order issued. The IPJ reviewed ALJ Gordon's Rehearing Notice and OSC and explained that "[i]nterested parties were allowed thirty days to submit written reasons as to why [Appellant's] claim should not be considered and possibly approved for payment on a pro rata basis. To date, no parties have objected" Rehearing Order at 1. The IPJ then granted the petition for rehearing and modified the 2011 Order Determining Heirs accordingly. *Id.* at 2. Now, on appeal to the Board, Appellant wishes to raise matters it could, and should, have raised in response to the Rehearing Notice and OSC, had it wished to contest the proposed resolution of its claim. We decline to consider the merits of Appellant's arguments because we conclude that the IPJ did not err in granting the petition for rehearing in the manner he announced, when neither Appellant nor any other interested party had responded to the OSC. *See Estate of Kenneth Mark Booth*,

⁶ ALJ Gordon retired and IPJ Payne was subsequently assigned this case.

53 IBIA 228 (2011) (affirming denial of reopening where neither the petitioner nor other parties responded to OSC).

The only issues raised in the November 8, 2011, petition for rehearing were Yakama Nation Probate's failure to provide the ALJ with Appellant's claim against the estate, and the ALJ's resultant failure to consider Appellant's claim in the Order Determining Heirs. *See* Email from Yakama Nation Probate to ALJ (AR 5). Though Appellant did not file the petition for rehearing, Appellant received notice of the petition and did not respond within the specified time period. *See* Notice of Petition for Rehearing at 2 (distribution list for "particular notice" to parties including Appellant) (AR 5). Appellant subsequently filed an amended claim form that purported to update the claim amount. *See supra* note 4. The updated claim did not contest the ALJ's application of regulations not in effect at the time of Decedent's death in the Order Determining Heirs, or state that its claim should be treated as a priority claim. *See* YNCE Amended Claim Form.

Appellant was also provided the second Notice of Petition for Rehearing and the OSC, *see* Reopening Notice and OSC at 4 (distribution list), which specifically outlined how the regulations the ALJ had earlier applied in the Order Determining Heirs to the payment of the two approved claims, would affect the payment of Appellant's claim, *id.* at 1-2. The OSC allowed Appellant and other interested parties 30 days to object to his proposed resolution. *Id.* at 3. The ALJ warned that he could issue an order modifying the approval of claims, as described, without further hearing. *Id.* at 3. Appellant did not respond and the IPJ issued the Rehearing Order, ordering the payment of Appellant's claim as described in the Rehearing Notice and OSC. *See* Rehearing Order at 1.

Before the Board, Appellant alleges that the IPJ erred in applying regulations that were not in effect on the date of Decedent's death. Opening Brief, Jan. 8, 2016, at 3. It contends that, due to the application of regulations that became effective after Decedent's death, the IPJ erroneously limited the payment of Appellant's claim to the funds in Decedent's IIM account on the date of death, and the IPJ erroneously neglected to treat Appellant's claim as a priority claim. *Id.* at 4-5. Because Appellant neglected to raise these issues below, they are outside of the scope of review on appeal. We see no reason to expand the scope of review to consider arguments not presented below where Appellant had numerous opportunities to define its claim and failed to do so. *See Estate of Booth*, 53 IBIA at 230.

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 IPJ's July 13, 2015, Rehearing Order.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge