INTERIOR BOARD OF INDIAN APPEALS

Marilyn Boucher v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

63 IBIA 338 (09/15/2016)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

MARILYN BOUCHER, Appellant,	)	Order Vacating Decision and Setting Aside Restriction
v.	)	
	)	Docket No. IBIA 15-107
ACTING EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 15, 2016

The Bureau of Indian Affairs (BIA) may restrict an Individual Indian Money (IIM) account through supervision if BIA determines through an administrative process that an individual Indian is "an adult in need of assistance based on a finding by a licensed medical or mental health professional that [the individual is] 'incapable of managing or administering property, including [her] financial affairs.'" 25 C.F.R. § 115.601(a)(3).[1]

BIA's Osage Agency Superintendent (Superintendent) placed a restriction on Appellant Marilyn Boucher's IIM account after receiving a report from Osage Nation Adult Social Services (Osage Social Services). Appellant sought a hearing, and at the hearing a case manager from Osage Social Services testified that she did not see "anything wrong with [Appellant's] mental capacity."[2] She expressed concern, however, that Appellant was being influenced and manipulated by her family to spend her money on them rather than for her own needs, and that without supervision, Appellant would not be eligible for Medicaid. BIA's Acting Eastern Oklahoma Regional Director (Regional Director) affirmed the Superintendent's restriction, concluding that Appellant, at the hearing, had been

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[1] BIA may also restrict an account based on its receipt of a court order declaring an individual non-compos mentis or determining that the individual is incapable of managing or administering property, including the individual's financial affairs. *Id.* § 115.601(a)(1)&(2). In the present case, BIA did not rely on such orders.

[2] Hearing Transcript (Tr.), Feb. 6, 2015, at 12 (2015 Hearing Tr.) (Administrative Record (AR) 23).

"unable to provide sufficient documentation or testimony to demonstrate you possess the ability to manage your financial affairs."[3]

We vacate the Regional Director's decision, and set aside the restriction on Appellant's IIM account. The record does not contain the necessary finding by a licensed medical or mental health professional that Appellant is "incapable of managing or administering property, including [her] financial affairs," *see* 25 C.F.R. § 115.601(a)(3), and the Regional Director improperly imposed the burden of proof on Appellant to have demonstrated, at the hearing, her ability to manage her financial affairs. Moreover, it was impermissible for BIA, in imposing the restriction, to consider how the decision could affect Appellant's eligibility for Medicaid. That issue is not relevant to the criteria that govern BIA's authority to restrict an IIM account for an adult in need of assistance.

Background

In May 2012, Appellant suffered a stroke that caused certain mental and physical impairments that made it difficult for Appellant to care for herself and her financial affairs at that time. *See* Hearing Tr., Apr. 23, 2013, at 4, 14 (2013 Hearing Tr.) (AR 11). As a result, Appellant consented to BIA supervision of her IIM account and the preparation of a disbursement plan for her funds through Osage Social Services. Letter from Superintendent to Appellant, June 4, 2012 (AR 1); Letter from Appellant to Superintendent, June 11, 2012 (AR 2). Appellant was also placed under the co-guardianship of her daughters, Crystal Hadlock and Cindee Edwards, by order of the District Court of Osage County. Guardianship Order, Case No. PG-2012-47 (D.C. Osage County, Oct. 22, 2012) (AR 4).

On February 12, 2013, Appellant requested a hearing to review the need for continued supervision of her IIM account. Letter from Field Solicitor to Appellant, Mar. 28, 2013 (AR 10). At the hearing, Appellant explained that her mental condition had improved sufficiently to restore her competency to manage her own financial affairs, and she submitted letters from two of her treating physicians in support of that assertion. *See* 2013 Hearing Tr. at 19-20; Letter from Gregory S. Connor, M.D. to William Baker, Dec. 5, 2012 (AR 12); Letter from J.I. Graham, D.O. to Willie Baker, Nov. 21, 2012 (AR 13). At the recommendation of the hearing officer, the restriction on Appellant's account was lifted in May 2013. Memorandum from Field Solicitor to Superintendent, May 3, 2013 (AR 17).

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[3] Letter from Regional Director to Appellant, July 13, 2015, at 1 (unnumbered) (Decision) (AR 32).

One year later, after becoming concerned that Appellant "may not be aware of what is going on at all times," and following an "inquiry about selling property," a specialist from Osage Social Services, accompanied by an Oklahoma state specialist in adult protective services, visited Appellant's home to assess whether to re-impose supervision of her IIM account. Osage Nation Social Services Assessment, May 15, 2014, at 3 (unnumbered) (AR 18). At the time, Appellant was living with her daughter, Crystal. *Id.* The assessment included a review of Appellant's income and expenses, a capacity assessment, and an executive function assessment to determine Appellant's competency to handle her financial affairs. *Id.* During the visit, Appellant made accusations of mistreatment and theft against Crystal, and it was determined that Appellant should be relocated to Pawhuska Nursing Home until the social services investigation was complete. *Id.*

With Appellant's permission, the Osage Social Services specialist reviewed Appellant's bank statements, which documented certain transfers of money from Appellant's account to her family that prompted concerns, and other expenditures that the specialist considered questionable. *Id.* The statements also showed significant overdraft charges during the time since the restriction on her account was lifted in May 2013. *See id.* The specialist concluded that reestablishment of supervision of Appellant's IIM account was necessary "based on the past year's bank statements that show that [Appellant's] funds are being used for other people before her needs are being met and the fact that [Appellant] had been deemed incompetent through guardianship proceedings in a District Court." *Id.* The Superintendent accepted the specialist's recommendation, and notified Appellant that "through an administrative process" it had been determined that she was an "adult in need of assistance," and that her account would therefore be restricted "five . . . days after the date of this letter" pursuant to 25 C.F.R. § 115.604. Letter from Superintendent to Appellant, May 20, 2014 (AR 19). The notice also informed Appellant of her right to a hearing under 25 C.F.R. § 115.607. *Id.*

Appellant requested a hearing, and the Superintendent granted the request and scheduled a hearing for February 6, 2015.[4] Handwritten Letter from Appellant, Jan. 6,

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[4] The Superintendent stated that the hearing would be recorded "pursuant to 25 C.F.R. § 117.5(c)." AR 22. Part 117 regulates deposits and expenditures of Osage Indians who "do not have certificates of competency," and provides for supervision of an IIM account where an investigation "indicates that the Indian is wasting or squandering his allowance funds." 25 C.F.R. § 117.5(a). Part 115 does not apply to funds subject to Part 117. 25 C.F.R. § 115.100. The record indicates that BIA relied on Part 115, specifically § 115.601(a)(3), to impose the restriction, notwithstanding scattered references to Part 117 in the record, *see* AR 19 (citing Part 115 procedural regulations), and we have no basis on this record to conclude that Part 115 does not apply. Even if BIA's decision were to be

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2015 (AR 20); Letter from Appellant to Superintendent, Jan. 15, 2015 (AR 21); Letter from Superintendent to Appellant, Jan. 26, 2015 (AR 22). In the meantime, Appellant successfully obtained an order from the District Court restoring her competency. Order Restoring Competency and Ordering Accounting, No. PG-2012-47 (D.C. Osage County, Jan. 12, 2015) (AR 25).

At the hearing, testimony began with Maggie Bolt, a case manager from Osage Social Services, who expressed concern that "[o]nce [Appellant's] IIM account goes out from under supervision, she will not qualify for Medicaid, and . . . she'll have to private pay for her nursing home care." 2015 Hearing Tr. at 4 (AR 23). She also testified that there had been "allegations of exploitation and maybe some undue influence that [Appellant] is giving this money to her daughters and her grandchildren . . . and [that Appellant] is not receiving the care that she needs because of that." *Id.* at 6. On cross-examination, Bolt admitted that transfers from Appellant's IIM account to her family were made at Appellant's request, and that she did not see "anything wrong with [Appellant's] mental capacity." *Id.* at 12. But Bolt reiterated her concern that Appellant's "family does kind of influence her . . . whenever she calls me with requests," and suggested that the family may have been manipulating Appellant into overspending on their behalf. *See id.* at 12-15.

At the recommendation of the hearing officer, the Superintendent denied Appellant's request to remove the restriction on her IIM account. Letter from Superintendent to Appellant, Mar. 6, 2015, at 2 (unnumbered) (AR 28). In support of his conclusion, the Superintendent recounted Bolt's testimony that lifting the restriction would endanger Appellant's eligibility for Medicaid, and leave her vulnerable to her family's influence. *Id.* at 1-2 (unnumbered). The Superintendent also noted Bolt's testimony that she "did not believe that there was anything wrong with [Appellant's] mental capacity," and that Appellant "believed that [she] could take care of [her] own money as well as understood the issues raised by [Osage Social Services]." *Id.* at 2 (unnumbered).

The Superintendent concluded that based on "[t]he testimony presented . . . [it] is evident that you need assistance in the management of your trust funds." *Id.* He explained that when Appellant's account was unsupervised, "there were payments made to children and grandchildren and allegations of misuse of funds by family members," and that if the restriction on her account were lifted, there would be "no safeguards in place to prevent the misuse of your trust funds." *Id.* The Superintendent further stated that "[t]he fact that [Appellant was] unaware of many of the expenditures from [her] accounts emphasizes the

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evaluated under Part 117, we would vacate the decision because Part 117 requires that BIA comply with specific reporting and notice requirements, which BIA did not do.

need for continued supervision." *Id.* Thus relying on the testimony presented at the hearing, the Superintendent concluded that it was not "appropriate to remove the supervision from [Appellant's] account at this time." *Id.*

Appellant appealed to the Regional Director, arguing that it was unreasonable for BIA to override the determinations of her treating physicians and the Osage County District Court that she was competent to manage her affairs. Notice of Appeal to Regional Director, Apr. 6, 2015, at 1 (unnumbered) (AR 29). In what was effectively a summary affirmance of the Superintendent's decision, the Regional Director upheld the restriction because Appellant was "unable to provide sufficient documentation or testimony to demonstrate you possess the ability to manage your financial affairs." Letter from Regional Director to Appellant, July 13, 2015, at 1 (unnumbered) (AR 32). The Regional Director provided no further reasoning in support of the Decision.

Appellant appealed to the Board, reiterating the arguments made to the Regional Director. Notice of Appeal to the Board, Aug. 19, 2015 (AR 33). In lieu of an opening brief, Appellant relies on the documentation submitted with her notice of appeal, and the Regional Director relies on the record, without filing a brief.

Standard of Review

BIA's decision to restrict an individual's IIM account is discretionary. *Peters v. Acting Midwest Regional Director*, 55 IBIA 266, 269 (2012). The Board reviews a discretionary decision of BIA to determine whether it comports with the law and applicable regulations, is supported by the record, and is not arbitrary or capricious. *Id.*; *Maldonado v. Northwest Regional Director*, 60 IBIA 122, 126 (2015). The Board reviews legal questions, including whether BIA correctly considered legal prerequisites contained in the regulations, or made other errors of law, *de novo*. *See Maldonado*, 60 IBIA at 126.

Discussion

BIA maintains IIM accounts for trust funds held for the benefit of individual Indians. *See generally*, 25 C.F.R. Part 115, Subpart F. When the Secretary determines an adult Indian "to be in need of assistance in managing [her] affairs," the Secretary may exercise her discretion to restrict an account, and funds "may be disbursed to the adult, within [her] best interest, under approved plans." 25 C.F.R. § 115.104; *see also Begay v. Navajo Regional Director*, 62 IBIA 346, 347 (2016). As relevant to this appeal, BIA may supervise an account if it "[d]etermines through an administrative process that [the individual is] an adult in need of assistance based on a finding by a licensed medical or mental health professional that [the individual is] 'incapable of managing or administering property, including [her] financial affairs.'" 25 C.F.R. § 115.601(a)(3). If BIA decides to

impose a restriction, it must provide the account holder with written notice, *id.* § 115.605, and an opportunity to challenge the decision at an administrative hearing on the record, *id.* §§ 115.607, 115.614.

After review of the record, the Board concludes that the Regional Director erred in affirming the restriction on Appellant's IIM account. First, the restriction was imposed without the necessary finding by a licensed professional that Appellant was unable to manage her financial affairs. *See* § 115.601(a)(3). Second, in the absence of such a finding, the Regional Director improperly placed the burden of proof on Appellant to refute the Superintendent's decision and affirmatively demonstrate her competency. And third, BIA considered impermissible factors outside of the regulations in justifying imposition of supervision. These errors compel us to vacate the Decision and set aside the restriction on Appellant's IIM account.

I. BIA Erred in Imposing a Restriction Pursuant to § 115.601(a)(3) Without the Necessary Finding By a Licensed Medical or Mental Health Professional

Of four listed circumstances under which BIA may restrict an IIM account through supervision, three require either a court order or judgment, *see* 25 C.F.R. §§ 115.601(a)(1)-(2), or information from another Federal agency showing legal disability, *id.* § 115.601(a)(4). BIA did not purport to rely on any of those three, instead making a determination that Appellant is an adult in need of assistance.[5] But the regulation requires that any such determination be "based on a finding by a licensed medical or mental health professional" that the restricted individual is incapable of managing her financial affairs. *Id.* § 115.601(a)(3). In Appellant's case, the Superintendent restricted her account in the absence of the necessary professional finding, and as such the restriction must be set aside.

To the extent the Superintendent relied on the May 15, 2014, Osage Social Services assessment in restricting Appellant's account, there is no indication in the record that any of the social services specialists or supervisors who made that recommendation met the professional licensing requirements of § 115.601(a)(3).[6] In fact, the only apparent

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[5] We recognize that when the Superintendent initially re-imposed the restriction in 2014, there was an Osage County court order that might have been sufficient to impose a restriction under § 115.601(a)(1) or (2). But by the time BIA held a hearing to consider Appellant's challenge, that order had been lifted, and the Superintendent did not attempt to rely on the former order as grounds to reject Appellant's challenge to the restriction.

[6] The record relied on by the Regional Director also contains an Osage Social Services assessment that was conducted during Appellant's appeal to the Regional Director, *see* Osage Social Services Assessment, July 9, 2015 (AR 31), but for which Appellant was not

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statements in the record from licensed medical professionals are the letters submitted by Appellant from her treating physicians claiming that Appellant is fully competent to manage her financial affairs. Thus we cannot conclude that reliance on the Osage Social Services assessment and recommendation was sufficient to satisfy the professional finding of need required by § 115.601(a)(3), and as such supervision of Appellant's account is not authorized by the regulations, and the Regional Director erred in upholding the restriction.

II. The Regional Director Erred in Shifting the Burden of Proof to Appellant to Show Competency to Manage Her Financial Affairs

In the absence of a licensed professional finding on which to base the restriction of Appellant's IIM account, it was also legal error for the Regional Director to place the burden on Appellant to demonstrate her competency at the hearing challenging the restriction. The Regional Director affirmed supervision of Appellant's account because Appellant was "unable to provide sufficient documentation or testimony to demonstrate [she] possess[ed] the ability to manage [her] financial affairs." Decision at 1 (unnumbered). It may be that once the necessary finding under § 115.601(a)(3) has been made, the burden would shift to the IIM account holder to rebut the finding, but that is not an issue we need to decide in this appeal. Here, there was no finding that complied with the regulation, and without the necessary finding, the restriction on Appellant's IIM account was unauthorized. It was therefore improper to uphold the restriction on the ground that Appellant had not proven her competency.

III. BIA Erred By Relying on Impermissible Factors Outside of the Regulations

BIA also erred by considering the effect of lifting the restriction on Appellant's IIM account on her eligibility for Medicaid. The Osage Social Services case manager testified at length about the possibility that Appellant would lose her Medicaid benefits if her account were released from restriction, and that she would then have to pay for her nursing home fees out-of-pocket. The Superintendent relied on this testimony in his decision to maintain supervision of Appellant's account. But whether or not a restriction affects an individual's

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provided an opportunity to respond—the assessment was approved by the Superintendent on the same day that the Regional Director issued the Decision. When a BIA deciding official considers "documents . . . not contained in the record on appeal," all interested parties must be notified and given 10 days to comment on the information before a decision is rendered. 25 C.F.R. § 2.21(b). In addition to this procedural violation, the assessment still does not contain the necessary professional finding of Appellant's inability to manage her affairs.

eligibility for benefits, to avoid having to use personal funds to pay for medical care, has no relevance to the regulatory criteria for finding that a person is an "adult in need of assistance" because they are "incapable of managing or administering . . . [their] financial affairs," under Part 115. *See* 25 C.F.R. § 115.601. As such, BIA's consideration of this factor in deciding to restrict Appellant's account was improper.

Likewise, BIA's reliance on evidence of pressure, manipulation, and theft by Appellant's family members as sufficient to restrict her account was in error. Although family influence and manipulation might provide supporting evidence, in conjunction with the necessary finding by a licensed professional that an individual is incapable of managing property or financial affairs, it could not serve as an independent basis to support BIA's determination in this case that Appellant was an adult in need of assistance as contemplated by § 115.601(a)(3).[7]

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 vacates the July 13, 2015, decision of the Regional Director and sets aside the restriction on Appellant's IIM account.

I concur:

// original signed	//original signed
Steven K. Linscheid	Robert E. Hall
Chief Administrative Judge	Administrative Judge

[7] Here, again, the scattered references to Part 117 in the record suggest that BIA may have contemplated applying § 117.5 to protect Appellant from "wasting or squandering [her] allowance," but ultimately BIA's decision could not have been sustained under Part 117 because, as previously noted, BIA did not comply with the necessary reporting and notice requirements.