

UNITED STATES
v.
GEORGE AVGERIS

IBLA 71-218

Decided December 7, 1972

Appeal from decision (OR 5043) of Administrative Law Judge Dean F. Ratzman holding mining claims null and void and rejecting application for mineral patent.

Affirmed.

Mining Claims: Discovery: Generally

To constitute a discovery upon a mining claim there must be shown to exist, within the limits of the claim, a deposit of minerals in such quantity and quality as would warrant a prudent man to expend his labor and means with a reasonable prospect of success in developing a valuable mine; the facts that gold may have been found on adjacent property and that the claim may have been mined successfully in the past are not sufficient to constitute discovery.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

It is the obligation of a mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners, and an examiner has no duty either to rehabilitate discovery points or to explore beyond the current workings of the mining claimant in an effort to verify a purported discovery.

Mining Claims: Contests -- Rules of Practice: Appeals: Burden of Proof --

Rules of
Practice:
Government
Contests

In a mining contest when the Government has established a prima facie case that there has not been a discovery of a valuable mineral deposit within a mining claim, the claimant then has the burden of proof to show by a preponderance of the evidence that a discovery has been made.

Mining Claims: Contests -- Rules of Practice: Evidence

An assay report which is not supported by evidence as to who took the sample assayed, where it was taken, and what procedures were followed cannot be given substantial evidential weight.

Mining Claims: Patent

A lode mining claim is properly declared null and void, and an application for a patent rejected when the claimant fails to show by a preponderance of the evidence that there is a discovery of a valuable mineral deposit within the limits of the claim.

APPEARANCES: Jeanette Marshall, Esq., of Medford, Oregon, for appellant; Charles Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for appellee.

OPINION BY MR. RITVO

George Avgeris has appealed to the Secretary of the Interior from a decision by Administrative Law Judge Dean F. Ratzman dated February 4, 1971, declaring Junction Claims Nos. 1, 2, and 3 lode mining claims null and void and denying an application for a patent. 1/ The decision stated that locatable minerals were not found within the boundaries of the claims in sufficient quantity, quality, or value to constitute a discovery under the mining laws.

Junction Claims Nos. 1, 2, and 3 are situated in secs. 5 and 8, T. 41 S., R. 1 E., W.M., Oregon. Nos. 1 and 2 are situated entirely and claim No. 3 partially within Klamath National Forest.

Two formal hearings have been conducted to determine Avgeris' rights in Junction Claims Nos. 1, 2, and 3. The first hearing was held on July 26, 1968. It was instituted at the request of the Forest Service to determine the validity of Avgeris' rights in surface resources under his unpatented mining claims, pursuant to section 5 of the act of July 23, 1955, 30 U.S.C. § 613 (1970). The Forest Service asserted that minerals had not been found in sufficient quantities to constitute a valid discovery, and, therefore, the surface resources were subject to use and management by the United States.

1/ The title "Administrative Law Judge" replaced that of "Hearing Examiner" pursuant to an order of the Civil Service Commission. 37 F.R. 16787 (August 19, 1972).

Minter E. Harris, a mining examiner with the Forest Service, testified at the first hearing regarding a survey and assay which he conducted. Samples were taken in the presence of and with the consent of the claimant, Avgeris. The samples were taken to a commercial assayer in Redding, California, who ran a fire assay for gold and silver. The assays showed gold values varying from nil to \$8.75 per ton. One sample containing \$17.50 per ton was taken from that part of the claim originating on Junction No. 2 which extends into private land. Harris concluded that "a prudent man would not be justified in spending his money on these claims." Tr. 53. According to testimony by Avgeris, he and his brother Gust, with whom he had originally located the claims, worked the mines for seven years from the 1940's to the 1950's and then suspended operations. During a five year period of operations, Avgeris allegedly obtained an amount of gold and silver worth \$65,000 to \$75,000. He estimated expenses at \$3,500 to \$4,000 a year. Full scale operations were suspended when Gust Avgeris became ill and were never resumed following his death in 1962. Unfortunately, the mint records, which possibly could have substantiated Avgeris' testimony, were destroyed by Gust's wife upon his death. Therefore, there is little concrete evidence as to the mine's productivity prior to the suspension of operations.

Prior to the rendering of a decision by the Administrative Law Judge, Avgeris filed an application for a mineral patent on Junction Mines Nos. 1, 2, and 3. Thereupon, the Judge suspended his consideration of the surface rights on the claims, since the action on the mineral patent would render determination of the rights to the surface resources moot.

A complaint was then filed in behalf of the Forest Service against the three claims on the grounds that locatable minerals are not disclosed within the claims in sufficient quality, quantity, or value to constitute a discovery under the mining laws. A second hearing before Judge Dean F. Ratzman was then held on September 17, 1970. The Government called two Forest Service mining engineers, Emmett E. Ball and William L. Johnson. Ball testified that he had met Avgeris at the claims on November 20, 1969, and had taken samples at places which Avgeris indicated to him as being favorable locations. On the basis of the assay values, varying from a trace to \$10.12 per ton, Ball concluded that "a prudent man would not be justified in spending any money, time and effort on these claims." Tr. 32. The examination by William Johnson was made on October 30 and 31, 1969, without Avgeris being present. Johnson selected sample sites on the basis of the workings in existence. After receiving the assay reports, showing values of less than \$1.05 in nine

samples, \$5.45 in one and \$8.45 in another, Johnson reached a conclusion which concurred with the prior ones of Harris and Ball that no justification existed for further development of the mines.

At the 1968 hearing Avgeris submitted a composite grab sample, which upon assay showed a value of \$198.00 per ton.

Evidence submitted by Avgeris at the 1970 hearing contained three samples, one from each of the claims. The assay reports disclosed a total value per ton of gold and silver for Junction No. 1 of \$9.85, for Junction No. 2 of \$.35, and Junction No. 3 of \$39.60. At the 1968 hearing Harris had testified that the claims would have to contain minerals bringing a return of at least \$35.00 per ton to be profitable to mine. The only evidence Avgeris offered indicating past production on a full scale basis were three documents: 1) a Bullion Deposit-Memo Report from the United States Mint at San Francisco, California, dated June 19, 1947, recording a shipment of gold worth \$117.20, and 2) two 1947 assays from a Denver Company which indicated \$71.85 and \$87.85 gold per ton of concentrate.

Judge Ratzman concluded that the Government had established a prima facie case, and that it was obligatory upon the mining claimant to establish by a preponderance of evidence that he had made a discovery in each of the claims.

He then found:

As has been indicated, evidence of successful activity in the past on mining properties is of limited value in a proceeding of this type. The account of the history of mining operations on the three Junction claims given by Mr. Avgeris suffers from more than irrelevancy, the weakness ordinarily ascribed to such testimony. It is based almost entirely upon mere allegations, unsupported by records or other appropriate evidence relating to his contentions that (i) during a five-year period operation the "Junction Mine" grossed \$65,000 to \$75,000 (ii) that during seven years of operation as described by the mining claimant he cleared \$5,000 to \$10,000 per year in addition to his wages, and (iii) that there is a large body of ore remaining to be worked, averaging \$35 to \$50 per ton. The proof submitted on behalf of the mining claimant will not support determinations made with certainty or assurance in favor of any of those contentions.

The upper adit on Junction Claim No. 2 commences on that claim but extends into patented lands for most

of its 300 foot length. This fact makes the mining claimant's testimony concerning past operations and samples taken in recent years seriously deficient. There is no way to ascertain how much of the material (i) removed during full scale operations in the 1940's and 1950's, (ii) included in the sample brought to the 1968 hearing by Mr. Avgeris, (\$198 per ton), or (iii) contained in Bag 2 (\$39.60 per ton), came from the patented lands. In each instance there can be little doubt that at least some of the material came from such lands. Because the mining claimant took material from "all over" without recording the observable dimensions of the veins samples, and mixed materials obtained from different claims or from different adits on the same claim, his samples can be accorded little or no weight as evidence.

The mining claimant's brother transferred all of the latter's title and interest in the three Junction claims to the mining claimant prior to the brother's death in 1962. If in fact \$5,000 to \$10,000 per year could have been cleared in addition to the mining claimant's wages, there was an opportunity, once he was full owner of the claim, to add one employee and realize the \$5,000 to \$10,000 only for supervising the mining and milling operation. This was not done. Instead work on the claims has been held to a minimum. The mill has not been used and has fallen into a state of disrepair.

Most of the work of a substantial nature performed on the "Junction Mine" is on Junction Claim No. 2. There the adits either run into patented lands or up to the boundary of the patented lands and terminate. The testimony by Avgeris at the Public Law 167 hearing in 1968 was significant in that he referred to miner's wages four times more than what the gold is worth, and the greatly increased expense of mining in hard rock. Unquestionably there have been great increases in the cost of labor and materials since the mid-1950's. Yet the contestee has provided no details or analysis to show that minerals on the claims can be removed and milled at a profit under current conditions.

The record in this case demonstrates clearly that at the present time development work would not be undertaken by a prudent man on any of the three Junction

claims. Indeed, the samples taken from many points on the three claims have given such low results upon assay that it is questionable whether further exploration work is warranted.

Locatable minerals have not been disclosed within the boundaries of Junction Claim No. 1, Junction Claim No. 2, and Junction Claim No. 3 in sufficient quantity, quality or value to constitute a discovery under the mining laws.

The Judge concluded that the evidence demonstrated that a prudent man would not undertake development of the three Junction Claims. He rejected the patent application for all three claims and declared all three claims null and void.

On appeal Avgeris alleges that the weight of the evidence sustains contestee's position that there is a discovery on each of the claims and that the mineral examiners' samples were improperly taken. He also asserts that the second Administrative Law Judge erred in giving weight to the comments of the first, who showed bias against the contestee, that the proceedings were politically motivated and deprived him of his constitutional rights because the investigating, prosecution, and decision were all accomplished by employees of the same department of the Government. Avgeris also contends that he did not have enough time to prepare his case. Finally the contestee alleges that others have received patents for less deserving claims and that he was discriminated against because of his age, racial origins, naturalization and inability to speak and understand English as well as native born citizens.

The contestee has offered nothing in support of his general allegations of bias and prejudice, allegations which he raises for the first time in his appeal. We have examined the record carefully and find no indication of bias or prejudice. Accordingly, we dismiss these allegations as completely unfounded. United States v. Elsie Cody, 1 IBLA 92 (1970); United States v. Independent Quick Silver Company, 72 I.D. 267 (1965); 2/ aff'd Independent Quick Silver Company v. Udall, 262 F. Supp. 583 (D. Ore. 1966).

2/ This case also points out that appellant did not raise these serious allegations in the time and manner provided for in section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1007 (1964), now 5 U.S.C. § 556 (1970).

The objection to the procedure followed by the Department in the prosecution of mining claims is also without merit. In the first place the investigation and presentation of the Government's case were made by employees of the Department of Agriculture, not the Department of the Interior. Furthermore, this contention has been raised time and again and rejected by the courts and the Department. United States v. Frank and Wanita Melluzzo, et al., 76 I.D. 160, 180, 181 (1969), and cases cited. ^{3/}

Turning now to the appellant's substantive allegations, we note that they are bald statements and conclusions unsupported by any factual or legal analysis of Judge Ratzman's decision. The decision appealed from sets out in careful detail the evidence presented at the hearing and the basis for the Judge's findings. We agree that his conclusions are correct and fully supported by the testimony presented at the hearing.

In order to have a valid mining claim and be entitled to a patent, the appellant must show that there is physically exposed within the limits of each claim a valuable mineral deposit. A valuable deposit of minerals is one which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); United States v. L. B. McGuire, 4 IBLA 307 (1972); Castle v. Womble, 19 I.D. 455, 457 (1894). Where a claim is based on a lode location, there must be exposed within the limits of the claim a lode or vein bearing mineral which would warrant the expenditure of labor and means with the same prospect of success. United States v. Esther R. Smith, A-30888 (March 29, 1968).

When the Government institutes a mining contest it must make a prima facie case of lack of discovery. United States v. Adam J. Flurrey, A-30887 (March 5, 1968). The Government through the testimony of the three mining engineers adequately demonstrated an insufficient discovery. United States v. Lawrence Stevens, 76 I.D. 56 (1969). The burden of proof then rested on Avgeris to show, by a preponderance of evidence that the claim was valid by reason of discovery. United States v. Ray Guthrie et al., 5 IBLA 303 (1972).

Evidence of mineralization which would justify further exploration but not development of a mine does not satisfy the prudent man test. This distinction was recognized by the Court in Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). See United States v. Wayne Winters, 78 I.D. 193 (1971).

^{3/} To the same effect United States v. Herbert H. Mullins, 2 IBLA 133, 139 (1971).

On the basis of the evidence submitted, we conclude that Avgeris failed to demonstrate by a preponderance of the evidence that a discovery has been made. The samples produced by Avgeris were insufficient to establish a valuable discovery in light of the testimony given by the three mineral examiners. The examinations by Harris and Ball were procedurally proper, since a Government mineral examiner investigating a mining claim prior to a proceeding under the Act of July 23, 1955, has no duty to test a claim for a discovery beyond examining the discovery point made available by the mining claimant. United States v. Ford M. Converse, 72 I.D. 141 (1965), aff'd, Converse v. Udall, supra. Evidence of past successful activity is of limited value, and the Judge acted properly in requiring a showing of discovery at the present time. United States v. Evelyn M. Kiggins, A-30827 (July 12, 1968); United States v. Taylor E. Hicks, A-30780 (October 24, 1967). As the Judge pointed out, Agveris' two samples showing mineral values in excess of the many samples showing no or low values are not entitled to substantial weight. United States v. Ray Guthrie, 5 IBLA 303, 308 (1972). Since the necessary showing was not made, the lode mining claims were properly declared null and void and the patent application rejected. United States v. William J. Bartels, Sr., 6 IBLA 124 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Newton Frishberg, Chairman

Frederick Fishman, Member.

