



INTERIOR BOARD OF INDIAN APPEALS

Estate of Esther Tainewasher Bill

60 IBIA 237 (04/30/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ESTHER TAINEWASHER)	Order Vacating Order Denying
BILL)	Rehearing
)	
)	Docket No. IBIA 12-158
)	
)	April 30, 2015

Yakama Nation Credit Enterprise (Appellant or YNCE) appealed to the Board of Indian Appeals (Board) from an Order Granting Rehearing in Part; Denying in Part (Rehearing Order) entered on August 16, 2012, by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Esther Tainewasher Bill (Decedent).¹ The ALJ granted rehearing in part to give priority status to Appellant’s claim, finding that the probate claims regulations in effect when Decedent died must be applied. But with respect to the pool of funds in Decedent’s estate that are available to pay the claim, the ALJ denied rehearing, concluding that (1) the claims provisions in effect when Decedent died could *not* be applied because an intervening change in the regulations had divested probate judges of jurisdiction to allow post-death income to be used to pay creditor claims; and (2) even if that were not the case, the BIA-approved assignment upon which Appellant’s claim is based barred payment from post-death income by the terms of the assignment.

We reverse the ALJ’s denial² of Appellant’s petition for rehearing and hold that the payment of Appellant’s claim is governed, in full, by the regulations that were in effect when Decedent died (and when Appellant filed its claim). Nothing in the intervening regulations reveals an intent by the Department of the Interior (Department) that the claims provisions be applied retroactively to claims filed in the estates of decedents who died before the new regulations became effective. In granting rehearing in part, the ALJ correctly recognized that substantive provisions in the probate regulations could not be applied retroactively. But he erred in determining that the intervening change in the regulations that limits the pool of estate funds available to pay claims was a “jurisdictional”

¹ Decedent was a Yakama Indian. Her probate case is assigned Probate No. P000066736IP in the Department of the Interior’s probate tracking system, ProTrac.

² The portion of the ALJ’s order granting Appellant’s petition for rehearing, i.e., to grant Appellant’s claim priority status, is not at issue in this appeal.

change that was controlling and did not affect Appellant’s substantive rights and expectations as a creditor. After deciding that the regulations in effect when Decedent died govern Appellant’s claim, we also hold, contrary to the ALJ’s interpretation of the assignment, that it does not bar the payment of Appellant’s claim from post-death income.

Background

This appeal stems from Appellant’s attempt to collect on two defaulted loans through the probate claims process. On July 24, 2000, Decedent borrowed \$60,027.40 from the Yakama Nation Credit Enterprise (YNCE). Rehearing Order at 5; Hearing Transcript (Tr.), Oct. 27, 2011, at 22-23 (Administrative Record (AR) Tab 11); Claim Form, Jan. 18, 2008 (AR Tab 8). In consideration of the loan, Decedent executed an “Assignment of Trust Property and Power to Lease,” and the assignment was approved by the Superintendent of the Yakama Agency, Bureau of Indian Affairs (BIA), on the same day. Assignment, July 24, 2000 (2000 Assignment) (AR Tab 8). On January 19, 2001, Decedent signed a “Note and Disclosure” for a consumer credit loan in the amount of \$4,000.00, and executed an identical “Assignment of Trust Property and Power to Lease” as security for that loan. Assignment, Jan. 19, 2001 (2001 Assignment) (AR Tab 8); Claim Form, Jan. 18, 2008 (AR Tab 8). The second assignment was also approved by BIA. 2001 Assignment (AR Tab 8).

The assignments were executed on BIA Form 5-4720 (September 1959). 2000 Assignment (AR Tab 8); 2001 Assignment (AR Tab 8). Both assignments contain the following form language:

3. In consideration of a loan from the lender, I hereby assign to the lender as security for repayment of such loan, the following: (a) All property, except land, which is now or may in the future be held in trust for me by the United States; (b) all income from trust land in which I now have or may in the future acquire an interest; (c) any income from any source and any funds [sic] any source accruing to my individual Indian account.

4. I hereby grant to the authorized Bureau officer . . . having jurisdiction over the area in which the lender is operating, full right, power, and authority to demand, collect, sue, or receipt [sic] for my property any income, and to apply such income or any income belonging to me in the hands of the said officer, on my indebtedness to the lender. . . .

.....

6. It is understood that in the case of my death, this assignment and power to lease shall constitute a claim against trust funds, income, or trust property superior to that of my heirs.

See e.g. 2000 Assignment (AR Tab 8).

Decedent made sporadic payments but ultimately defaulted on the loans, and at her death on January 10, 2008, owed an outstanding balance of \$60,259.55. Claim Form, Jan. 18, 2008 (AR Tab 8). On January 18, 2008, Appellant submitted a claim at probate for the remaining balance. *Id.* A second creditor, Kraff's Clothing of Toppenish, Washington (Kraff's), filed a separate claim for \$5,259.54. Claim Form, Mar. 17, 2008 (AR Tab 8). No other claims were filed against the estate and no objections were made to either claim by Decedent's heirs.

On December 20, 2011, the ALJ issued an Order Determining Heirs for Decedent's estate, in which he approved partial payment of Appellant's and Kraff's claims from the funds available in Decedent's IIM account as of her date of death. Order Determining Heirs, Dec. 20, 2011, at 3 (Decision) (AR Tab 5). Relying on regulations that became effective after Decedent's death (and after the claims had been filed), the ALJ found that "money generated after the decedent's date of death belong[ed] to the heirs or devisees," and was not available to pay claims against the estate. *Id.* (quoting the preamble to the revised regulations, 73 Fed. Reg. 67256, 67263 (Nov. 13, 2008)). Based on a new limitation in the regulation regarding the funds in a decedent's estate that are subject to payment of claims, *see* 43 C.F.R. § 30.146 (2009),³ the ALJ concluded that the revised regulation constituted "a jurisdictional bar to the use of post-death income to pay the claim." *Id.* Applying § 30.146, the ALJ ordered that payment of the claim could not exceed the amount of \$8,391.52, the balance of Decedent's IIM account as of her date of death, and he also ordered that the claims be paid on a pro rata basis. *Id.* The remaining balance on each claim was denied. *Id.*

Appellant filed a timely petition for rehearing, arguing that 43 C.F.R. § 30.146 did not apply to claims against Decedent's estate because the regulation did not go into effect until after Decedent's death. *See* Petition for Rehearing, Jan. 19, 2012, at 2 (AR Tab 4).

³ The 50 titles of the Code of Federal Regulations are revised at least once a year and issued on a quarterly basis. The revised probate regulations that became effective on December 15, 2008, were first published in the October 2009 edition of the Code. Unless otherwise noted, citations to the regulations effective on December 15, 2008, will be to the 2009 edition.

Instead, Appellant asserted that the applicable regulations were those in effect on the date of Decedent's death, and that those regulations did not preclude the use of post-death income to satisfy claims at probate. *Id.*⁴

On August 16, 2012, the ALJ issued the Rehearing Order that is the subject of this appeal. The ALJ rejected Appellant's contention on rehearing that post-death income was available to pay claims against the estate. First, the ALJ concluded that the specific language of the assignments showed that they terminated upon the death of Decedent, and thus the "plain language of the assignment, standing alone" barred the use of post-death income to pay Appellant's claim. Rehearing Order at 6. Relying on Decedent's authorization of BIA in clause 4 of the assignment, *see supra* at 238, "to apply . . . any income *belonging* to [Decedent] in the hands of [BIA], on [Decedent's] indebtedness to the lender," the ALJ concluded that because title to assets in Decedent's estate vested in her heirs upon her death, no post-death income existed that "belonged" to Decedent, and thus the assignment of Decedent's income from trust property could not survive her death. *Id.* at 5-6 (emphasis added). According to the ALJ, "the plain language of the assignment *by its own terms* limits the availability of trust funds to pay the claim to those funds belonging to her, and not those funds belonging to her heirs." *Id.* at 6.

Second, the ALJ concluded that even if the assignment by its own terms did not bar payment from post-death income, § 30.146 did bar such payment, and was applicable to Appellant's claim. *Id.* at 7-8. The ALJ construed the language of § 30.146, which limits the pool of funds for paying claims to the balance in a decedent's IIM account (or having accrued) on the date of death, as a jurisdictional limitation on his authority. *Id.* at 9. The ALJ recognized that in *Estate of Roy Phillip Watlamatt*, 46 IBIA 60 (2007), the Board concluded that the regulations in effect on the date of death governed claims in probate, and not subsequently promulgated regulations. Rehearing Order at 2. Nevertheless, after engaging in an extensive analysis of the law of retroactivity, the ALJ concluded that § 30.146 was a jurisdictional provision that necessarily applied and divested him of authority to consider payment of the claim from post-death income. *Id.* at 9. On the other

⁴ Appellant argued, in the alternative, that contrary to the proposed language of the regulation, which expressly prohibited the use of trust personalty accruing after death, *see* 71 Fed. Reg. 45174, 45234 (Aug. 8, 2006), § 30.146 as adopted did not specifically preclude the use of such income to pay claims against the estate. Petition for Rehearing at 6. Instead, according to Appellant, the regulation simply provided a non-exhaustive list of property that may be used to satisfy claims. *Id.* Appellant raises the same argument on appeal, but because we agree that the regulations in effect when Decedent died govern, we need not address this issue.

hand, the ALJ also concluded that application of the revised probate regulations, which no longer required payment of priority claims before general claims, would change Appellant's status from that of a priority claimant to that of a general claimant. *Id.* at 10. This change in legal status would constitute error if applied retroactively, he determined, and he therefore granted rehearing in part to give Appellant's claim priority status under the regulations in effect on the date of Decedent's death.

Appellant appealed to the Board from that part of the Rehearing Order applying § 30.146 to limit the payment of Appellant's claim to the date-of-death balance and submitted an opening brief. No other pleadings have been received in this appeal.

Discussion

I. Standard of Review

On appeal to the Board, the Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Sarah Stewart Sings Good*, 57 IBIA 65, 71-72 (2013); *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Sings Good*, 57 IBIA at 72. The burden lies with Appellant to show legal or factual error in the ALJ's order. *Estate of Josephine J. Palone*, 59 IBIA 49, 52 (2014).

The regulations at issue in this appeal govern the availability of post-death income to pay claims against the estate. On the date of Decedent's death in January 2008, 43 C.F.R. §§ 4.250-252 applied to the submission and consideration of claims at probate. In particular, 43 C.F.R. § 4.251 authorized the probate judge to base payment of priority and general claims on the amount of funds available in a decedent's IIM account "as of the date of the initial informal or formal hearing." See 43 C.F.R. § 4.251(e)-(f) (2008).⁵ The use of such funds is further clarified in § 4.252 by the description of the sources of income that may be used to satisfy claims:

Claims are payable from income from the lands remaining in trust. Further, except as prohibited by law, all trust moneys of the deceased on hand or accrued at time of death, including bonds, unpaid judgments, and accounts

⁵ Citation to the regulations in effect at the time of Decedent's death will henceforth be to the regulations published in the 2008 edition of the Code of Federal Regulations unless otherwise noted.

receivable, may be used for the payment of claims, whether the right, title, or interest that is taken by an heir or beneficiary remains in or passes out of trust.

43 C.F.R. § 4.252.

In *Estate of Watlamatt*, the Board interpreted this regulation to allow the payment of claims from post-death income generated from trust real property, finding that “[t]he second sentence . . . indicates that the drafters . . . knew how to limit the payment of claims to those funds on deposit ‘at time of death,’ but chose not to similarly limit the payment of claims from income from lands ‘remaining in trust.’” 46 IBIA at 71-72. The Board concluded that “income that accrues after death from real property that remains in trust is subject to [a creditor’s] claims.” *Id.* at 72. In *Estate of Watlamatt*, the Board also concluded that the regulations in effect on the date of Watlamatt’s death governed the payment of claims, not those promulgated after his death. *Id.* at 74-75.

On December 15, 2008, during the probate of Decedent’s estate, substantially revised probate regulations went into effect, which included § 30.146. Section 30.146 describes the property available to satisfy claims as follows:

Except as prohibited by law, all intangible trust personalty of a decedent on hand or accrued at the date of death may be used for the payment of claims, including:

- (a) IIM account balances;
- (b) Bonds;
- (c) Unpaid judgments; and
- (d) Accounts receivable.

43 C.F.R. § 30.146. If, “as of the date of death,” there are insufficient trust funds to pay all claims, § 30.147 provides that “the judge may order them paid on a pro rata basis,” and the “unpaid balance of any claims will not be enforceable against the estate after the estate is closed.” *Id.* § 30.147. The revised regulations do not distinguish between priority claims and general claims or otherwise establish an order for paying claims, as had been the case in previous versions of the regulations, including those in effect at the time of Decedent’s death. *See* 43 C.F.R. § 4.251(b) (establishing a “priority in payment” of claims).

The 2008 regulations were made “effective on December 15, 2008,” 73 Fed. Reg. 67256 (Nov. 13, 2008), and thus § 30.146 became effective on that date. The 2008 regulations do not expressly address whether changes to the regulations are intended to, or could permissibly be applied to, pending probate cases. But as noted above, when the 2008

regulations were promulgated, the Board's precedent in *Estate of Watlamatt* indicated that the probate claims provisions applied only prospectively, i.e., to the estates of decedents who died after the provision became effective. In addition, in an earlier probate rulemaking, in 2001, the Department specifically addressed the issue of retroactivity. In response to a commenter's concern that the application on pending cases of the interim rule, which was effective on publication on June 18, 2001, could alter the substantive rights of affected parties, the Department replied: "To avoid such concerns, *OHA will apply any new substantive provisions of either the interim or final rule only to cases arising after their respective effective dates, i.e., to cases in which the decedent died after the effective date of the rule.*" 66 Fed. Reg. 67652, 67652 (Dec. 31, 2001) (emphasis added).

II. Analysis

A. The Claims Regulations in Effect on the Date of Decedent's Death Apply to Appellant's Claim

In our view, the present appeal can be resolved largely by reaffirming the conclusion reached in *Estate of Watlamatt*—that the claims provisions in the regulations that are in effect on the date of a decedent's death provide the substantive rules governing the allowance of claims, including the pool of funds in a decedent's estate that are available for the payment of claims. In *Estate of Watlamatt*, we did not expressly ground our holding in the general presumption against the retroactive application of regulations to matters pending at the time revised regulations take effect, or judicial pronouncements to this same effect in cases like *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."), and *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 280 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). We are not persuaded by the ALJ's analysis that there is any reason to revisit *Watlamatt*, or to apply the general rule against retroactivity any differently in the present appeal.

First, the ALJ erred in concluding that § 30.146 divested him of "jurisdiction" over Appellant's claim to the extent it exceeded Decedent's date-of-death balance. The ALJ's jurisdiction to hear and resolve claims was not diminished by § 30.146, which merely specifies the property available to pay valid claims. As relevant here, a probate judge has the authority to allow or disallow claims by creditors and to order the distribution of trust property to heirs and devisees. 43 C.F.R. § 30.120(h)-(i). In doing so, the ALJ is bound to follow the applicable regulations. But not every substantive rule in the probate regulations that a probate judge is bound to apply is a jurisdictional limitation. The change

in the rule governing the property that is subject to the payment of allowed claims, 43 C.F.R. § 30.146, which took effect on December 15, 2008, did not affect OHA's, or the ALJ's, power to hold hearings and consider claims against individual Indian trust estates. Nor was the probate judge's jurisdiction reduced in 2008 from what it was under the 2005 regulations by virtue of the reduction in the pool of funds available to satisfy claims pursuant to 43 C.F.R. § 30.147. Instead, the substantive law was changed.

Second, the ALJ erred in finding that the revisions in the regulations limiting the pool of funds from which a claim may be paid had no substantive effect on the rights or expectations of creditors, and thus did not raise retroactivity concerns about applying § 30.146 to Appellant's claim. When Decedent died, there were probate regulations in place that clearly governed the rights and expectations of creditors—and heirs—and those regulations allowed the payment of claims from post-death income that accrued in a decedent's estate account to the date of the hearing. Changing that rule to limit the payment of claims only to funds available on the date of death was a substantial change. In the present case, the difference is between paying Appellant's claim in its entirety (because sufficient funds had accrued by the date of the hearing), or paying only a fraction (if subsequently limited to the date-of-death balance). And the Department's *rationale* for changing the regulations in 2008 to limit the pool of funds from a decedent's estate that may be used to pay claims, reflecting a policy choice to limit payment from a decedent's trust personalty, falls far short of a clear expression that the Department intended to have § 30.146 apply retroactively after a decedent had died and to cases in which claims had already been filed.

As illustrated by the ALJ's decision to grant rehearing in part, the ALJ recognized that applying § 30.147 (pro rata payment of claims without distinguishing priority of claims) to Decedent's probate case would have an impermissible retroactive effect, and thus he recognized the general rule against retroactivity. But by characterizing the also-limiting provisions of § 30.146 as purely "procedural" or even as "jurisdictional," the ALJ failed to appreciate the Supreme Court's admonition to look at the substantive effect of a provision, rather than rely on a characterization.⁶ In the present case, the substantive effect of § 30.146 is neither purely "procedural" nor is it "jurisdictional."

⁶ Because he characterized the substantive rules governing probate claims as "jurisdictional," the ALJ apparently perceived there to be tension between the Board's conclusion in *Estate of Watlamatt* that the regulations in effect as of the date of death applied, and the Board's conclusion in three other probate cases, in which we found that post-death-promulgated regulatory provisions applied. See *Estate of Benson Potter*, 49 IBIA 37 (2009), *Estate of Frances Marie Ortega*, 50 IBIA 322 (2009) and *Estate of Harrison H. Yazzie*, 51 IBIA 307 (continued...)

As Appellant correctly observes, the ALJ failed to appreciate the “critical” issue that we sought to emphasize in *Watmalatt*. The “critical issue” is *not* whether the property in a decedent’s estate is deemed to “vest” in heirs at the time of death, but whether title to that property passes subject to limitations, in this case the probate regulations governing payment of claims. 46 IBIA at 72-74. Indeed, the ALJ’s emphasis on the proposition that title is deemed to vest in heirs upon death, if taken to its logical conclusion, would require the denial of *all* claims because, by definition, there would be no “estate” from which to pay claims, all property, including trust personalty, having already “passed” to heirs.

B. The Assignment Does Not Limit Appellant’s Claim to Pre-Death Income and Appellant’s Claim was Not Fatally Deficient

The ALJ concluded that even if the claims regulations in effect at the time of Decedent’s death applied, the assignment itself prevented payment of Appellant’s claim with post-death income. We disagree. Section 3 of the assignment expressly assigns, as security for the loan, “all income from trust land” owned by Decedent at the time, or acquired in the future. That language is undoubtedly broad enough to include post-death income from property owned by Decedent. Even assuming that the language in section 4, pertaining to BIA’s authority and referring to “income belonging to me” is relevant here, we are not convinced that it does not include income belonging to Decedent’s estate, whether trust personalty or funds in the estate account derived from post-death income.⁷

(...continued)

(2010). The ALJ’s concern was misplaced. In each of the latter three cases, the effect of a change in the regulation truly was jurisdictional in nature, and did not affect underlying substantive rights. Adopting the Court’s observation in *Landgraf*, as tailored to this case, “there is no special reason to think that all the diverse provisions of the [probate regulations] must be treated uniformly.” *Landgraf*, 511 U.S. at 280.

⁷ The ALJ also concluded, in his order denying rehearing, that Appellant’s claim was “fatal” even under the prior regulations because, according to the ALJ, Appellant is a “general creditor” and had not submitted an affidavit stating whether it had filed a claim against Decedent’s non-trust assets. Rehearing Order at 9-10; *see* 25 C.F.R. § 15.202(b) (2008). Again, we disagree with the ALJ. Appellant’s claim is undoubtedly a secured claim, as clearly evidenced by the substance of the assignment, and Appellant’s failure to submit an affidavit stating whether it was seeking to recover against non-trust, non-collateral assets was not fatal. *See also* Hearing Tr. at 29 (AR Tab 11) (ALJ: “The claims and the backup documents appear to be in order. I don’t see anything fatal as far as meeting the requirements of the regulations.”).

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 ALJs denial of rehearing and orders payment of Appellant's claim.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge