

INTERIOR BOARD OF LAND APPEALS

Alice Rock, et al.

168 IBLA 54 (March 14, 2006)

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ALICE ROCK, ET AL.

IBLA 2005-264, et al.

Decided March 14, 2006

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native Veteran Allotment applications. AA 83406, et al.

Affirmed.

1. Alaska: Alaska Native Veteran Allotment: Generally--Alaska: Alaska Native Veteran Allotment: Deceased Veteran

When it passed section 306 of the Alaska Land Transfer Acceleration Act of 2004, amending 43 U.S.C. § 1629g(b) (2000), Congress acted with the manifest intent to remove from the Department of Veterans Affairs the sole authority to determine whether a decedent, on whose behalf an application for an allotment under the Alaska Native Veterans Allotment Act had been filed, died as a direct consequence of a wound received in action in South East Asia during the specified time period and vested in the Secretary of the Interior the same authority to make such a determination “based on other evidence acceptable to the Secretary.” 43 CFR 2568.60(b) (2004), which has not been amended to reflect the statutory change, does not prevent BLM, acting for the Secretary, from considering other evidence to make such a determination without referring the matter to the Department of Veterans Affairs.

2. Alaska: Alaska Native Veteran Allotment: Generally--Alaska: Alaska Native Veteran Allotment: Deceased Veteran

When BLM rejects an Alaska Native Veterans Allotment Act application filed by a Special Administrator or Personal Representative of a deceased Native veteran because the application and information filed in support thereof show that the deceased veteran is not eligible for an allotment under

43 U.S.C. § 1629g(b)(2)(A), amended by section 306 of the Alaska Lands Transfer Acceleration Act of 2004, the due process rights of the applicant are protected by the right to appeal that determination to the Board of Land Appeals.

APPEARANCES: Linda Mueller, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the appellants; Lisa D. Doehl, Esq., Office of the Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Alice Rock and 13 others, acting individually as Special Administrators or Personal Representatives of 14 deceased Alaska Native veterans, timely filed Alaska Native Veteran Allotment applications with the Alaska State Office, Bureau of Land Management (BLM), pursuant to the Alaska Native Veterans Allotment Act (ANVAA), as amended, 43 U.S.C. § 1629g (2000). In separate decisions dated July 21, July 22, or July 25, 2005, BLM rejected each ANVAA allotment application due to lack of evidence that the veteran on whose behalf the application had been filed was an “eligible deceased veteran” that would entitle his Special Administrator or Personal Representative to select an allotment. (Decision at 1.)<sup>1/</sup> In each case, a timely appeal was filed.<sup>2/</sup> BLM moved to consolidate the appeals and requested expedited consideration. In light of the identity of the arguments made in the appeals and the comparable facts in each case, we grant the motion to consolidate. We also grant the request for expedited consideration in light of the fact that these cases present issues of first impression.

ANVAA allows certain Alaska Natives who were on active military duty during a specific period of time to apply for an allotment of not more than two parcels of Federal land totaling 160 acres or less under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), as that Act was in effect before December 18, 1971 (Alaska Native Allotment Act).<sup>3/</sup> 43 U.S.C. § 1629g(a)(1) and (b)(1) (2000). ANVAA includes a special provision for deceased individuals who

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<sup>1/</sup> For the purposes of clarity, unless otherwise noted, we will refer to the documents in Rock’s case file, as the documentation in her case is representative of the documentation in the rest of the cases.

<sup>2/</sup> The IBLA docket numbers, the names of appellants and veterans, and the application numbers are included in Appendix A.

<sup>3/</sup> The Alaska Native Allotment Act was repealed, effective Dec. 18, 1971, by sec. 18(a) of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971), codified in relevant part at 43 U.S.C. § 1617(a) (2000).

served in South East Asia at any time during the period beginning August 5, 1964, and ending December 31, 1971. 43 U.S.C. § 1629g(b)(2) (2000), amended by § 306 of the Alaska Land Transfer Acceleration Act of 2004 (ALTAA), Pub. L. No. 108-452, 118 Stat. 3590 (2004). If a deceased veteran were otherwise eligible for an allotment under 43 U.S.C. § 1629g(b)(1)(A), a Special Administrator or Personal Representative of that decedent's estate could select an allotment on behalf of the heirs, under the following qualifying circumstances:

- [I]f the decedent was a veteran who served in South East Asia at any time during the period beginning August 5, 1964, and ending December 31, 1971, and during that period the decedent—
- (i) was killed in action;
  - (ii) was wounded in action and subsequently died as a direct consequence of that wound, as determined by the Department of Veterans Affairs or based on other evidence acceptable to the Secretary; or
  - (iii) died while a prisoner of war.

43 U.S.C. § 1629g(b)(2)(A).

A representative of a deceased veteran applying for an allotment must show that the decedent would have been eligible under the Alaska Native Allotment Act, served in South East Asia during the required time period, and died in one of the circumstances described in 43 U.S.C. § 1629g(b)(2)(A). If one of these elements is not established, the decedent is not eligible, and the application must be rejected.

BLM stated in its decisions that it was relying on information contained in military discharge papers (DD Form 214 “Certificate of Release or Discharge from Active Duty”), death certificates, and the personal appointment papers for Special Administrators or Personal Representatives, when it concluded in each case that the decedent was not eligible for an allotment because there was “no evidence that [the decedent] was killed in action, wounded in action and later died as a direct consequence of that wound, or died while a prisoner of war.”<sup>4/</sup> (Decision at 3.)

Appellants make three main arguments, each challenging the process by which BLM reached its conclusions. First, they allege BLM failed to give a specific reason for rejecting the applications, thereby failing to provide the due process notice guaranteed by Pence v. Kleppe, 529 F.2d 135, 141 (9<sup>th</sup> Cir. 1976) (Pence I). Next, they claim that, once BLM provides the reasons for rejection, they should be afforded,

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<sup>4/</sup> We note that the case file for deceased veteran Clyde D. Huntington does not contain a DD Form 214. However, the file does contain other documentation evidencing his discharge from military service.

in accordance with Pence I, the opportunity for a hearing at which to present evidence. Last, they assert that the Department of Veterans Affairs, rather than the Secretary acting through BLM, should make the eligibility determination under 43 U.S.C. § 1629g(b)(2)(A)(ii). Appellants' appeals do not reach the substantive question of the validity of BLM's conclusions that the decedents were not qualified to receive an allotment.

[1] Because BLM's decision to make judgments regarding eligibility without a determination from the Department of Veterans Affairs served as the basis for proceeding with rejection of the applications, we address that issue first. On December 10, 2004, Congress passed ALTAA, section 306 of which made two relevant changes to 43 U.S.C. § 1629g(b). ANVAA originally provided that, under certain circumstances, a deceased veteran could qualify for an allotment, if the decedent had been "wounded in action and subsequently died as a direct consequence of that wound, as determined by the Department of Veterans Affairs." 43 U.S.C. § 1629g(b)(2)(B) (2000); see 43 CFR 2568.60(b) (2004). In the first change, Congress amended that language to grant eligibility, if the decedent "was wounded in action and subsequently died as a direct consequence of that wound, as determined by the Department of Veterans Affairs or based on other evidence acceptable to the Secretary." (Emphasis added.) 43 U.S.C. § 1629g(b)(2)(A)(ii). Section 306 also inserted a new section into the statute, 43 U.S.C. § 1629g(b)(2)(B)(i), imposing processing time limits on the Department of Veterans Affairs, "[i]f the Secretary requests that the Secretary of Veterans Affairs make a determination whether a veteran died as a direct consequence of a wound received in action \* \* \*." Those time limits give the Department of Veterans Affairs 60 days to either provide such a determination or notify the Secretary that further investigation will be necessary. 43 U.S.C. § 1629g(b)(2)(B)(i)(I) and (II). "Not later than 1 year after notification to the Secretary that further investigation is necessary, the Department of Veterans Affairs shall complete the investigation and provide a determination to the Secretary." 43 U.S.C. § 1629g(b)(2)(B)(ii).

This is the first opportunity this Board has had to consider the changes made to ANVAA by section 306 of ALTAA. When interpreting the statute, we are mindful of the Supreme Court's admonition that "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). Thus, we must begin our interpretation of Congress' intent by looking at the changes ALTAA effected on the existing statutory scheme. These changes show that Congress wanted to speed the processing of deceased veterans' allotment applications that required input from the Department of Veterans Affairs. The substance of the changes shows that Congress considered the Department of Veterans Affairs to be a time-limiting step in the application

evaluation process. Congress amended the statute specifically to give the Secretary of the Interior the authority to bypass the Department of Veterans Affairs, when she was able to make a determination of eligibility under 43 U.S.C. § 1629g(b)(2)(A)(ii) based on “other evidence acceptable to the Secretary.”

In the cases before us, BLM relied on the information in the case records showing that all decedents served in the military during the required time period and were discharged and that none of the decedents died before January 1, 1972. Thus, BLM determined that none of the deceased veterans was eligible for an allotment under subsections (A)(i) and (iii) of § 1629g(B)(2) because none died between August 5, 1964, and December 31, 1971. BLM relied on the same records, without resort to the Department of Veterans Affairs, to conclude that none qualified under 43 U.S.C. § 1629g(b)(2)(A)(ii).<sup>5/</sup>

While appellants recognize the statutory change allowing consideration of “other evidence acceptable to the Secretary,” they argue that, because BLM has not yet amended its implementing regulations to reflect the changes to the statutory scheme created by ALTAA, BLM is bound, not by statute, but by its own regulations to seek a determination from the Department of Veterans Affairs in each of these cases.<sup>6/</sup> Appellants are correct, as this Board has stated many times, that duly promulgated regulations have the force and effect of law and are binding on the Department and this Board. Pacific Offshore Operators, Inc., 165 IBLA 62, 76 (2005), and cases cited therein. Nevertheless, BLM argues that it is not obligated to follow its current regulations because they have become “plainly inconsistent” with ANVAA since ANVAA was amended by the ALTAA. (Answer at 20.) The language of 43 CFR 2568.60(b) (2004) is clearly inconsistent with 43 U.S.C. § 1629g(b)(2)(A)(ii) because it has not been updated to reflect the statutory change. However, “[w]here regulations and statutes are in conflict, regulations must necessarily yield.” Kievenaar v. Office of Personnel Management, 421 F.3d 1359, 1364 (Fed. Cir. 2005) (citing K Mart Corp. v. Cartier, Inc., 486 U.S. at 294 and Brush v. Office of Personnel Management, 982 F.2d 1554, 1560 (Fed. Cir. 1992)). In

<sup>5/</sup> The case records for deceased veterans Arthur Monroe, Clyde D. Huntington, Anthony Schaeffer, Clarence Allen, Jr., and Walter Stevens do not show affirmative evidence of military service in South East Asia. BLM did not rely on this fact in rejecting the applications filed on behalf of the heirs of these deceased veterans. See n.7, infra.

<sup>6/</sup> 43 CFR 2568.60 (2004) provides that the Personal Representative or Special Administrator may apply for an allotment for the benefit of the deceased veteran’s heirs, if the deceased veteran, inter alia, “(b) Was wounded in action and later died as a direct consequence of that wound, as determined and certified by the Department of Veterans Affairs.”

the cases at hand, BLM was not bound by the limiting language of 43 CFR 2568.60(b) (2004).

Appellants also assert that the failure of Congress to define “other evidence” limits the Secretary’s authority under 43 U.S.C. § 1629g(b)(2)(A)(ii). The plain meaning of the statute contradicts this interpretation. Section (A)(ii) reads, “was wounded in action and subsequently died as a direct consequence of that wound, as determined by the Department of Veterans Affairs or based on other evidence acceptable to the Secretary.” (Emphasis added.) The section (A)(ii) determination can be made through the Department of Veterans Affairs or based on “other evidence acceptable to the Secretary.” This is a clear grant of authority to the Secretary. The fact that “other evidence” is not defined simply leaves it to the Secretary’s discretion to determine what evidence will be acceptable. When addressing a category of claims likely to be factually varied, such as this one, Congress could reasonably decide that it was best to give the Secretary the authority to evaluate the reliability of the evidence on a case-by-case basis, rather than create statutory definitions for “other evidence.” Far from denying authority to the Secretary, the lack of a statutory definition for “other evidence” actually expands her authority.

Enforcing 43 CFR 2568.60, in the face of Congress’ clear intent to speed the process by allowing the Secretary to also make the § 1629g(b)(2)(A)(ii) determination, would frustrate Congress’ purpose. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The expressed intent of Congress to authorize the Secretary to make the 43 U.S.C. § 1629g(b)(2)(A)(ii) determination is unambiguous. 43 CFR 2568.60 is in conflict with the current form of its authorizing statute. We reject appellants’ argument that recourse to the Department of Veterans Affairs is required in these cases.

[2] Having established that BLM had the authority to make determinations under 43 U.S.C. § 1629g(b)(2)(A)(ii), we now proceed to appellants’ argument that they were not accorded due process, in the form of notice and a hearing, required by Pence I. In Pence I, the court held that Native allotment applicants were entitled to notice and an opportunity for a hearing where there was an issue of fact with respect to an applicant’s qualifications. The Board implemented the Pence I court’s mandate by providing in Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 310 (1976), sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976), that the Department contest regulations at 43 CFR 4.451 et seq. would be applied in such cases. The Board noted, however, that, “[p]ursuant to the procedures and departmental decisions, where BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it

may reject the claim or application without a hearing,” and the due process rights of the Native applicant would be protected by a right to appeal to the Board. Id. at 241, n.1, 83 I.D. at 211, n.1.

In finding that the contest procedures facially complied with Pence I, the Ninth Circuit court in Pence v. Andrus, 586 F.2d 733, 743 (9<sup>th</sup> Cir. 1978) (Pence II), clarified that the due process required by Pence I is not absolute and endorsed the procedure pointed out in the Peters footnote:

[T]he IBLA must have been referring to cases in which the applicant fails to state facts which establish eligibility for an allotment.

If, for example, an applicant files a claim but does not allege that he or she is an Alaska Native, we cannot say that rejection of the claim without hearing violates the *Pence I* requirements. The aggrieved applicant may always appeal the decision to the IBLA, 43 C.F.R. § 4.400 *et seq.* (1976), which can correct error by the BLM.

Consistent with Pence II, we held in Franklin Silas, 117 IBLA 358, 364 (1991), that “[n]o Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act.”<sup>7/</sup>

Appellants acknowledge Silas’s holding, but argue that nothing on the face of their applications shows facial ineligibility that would trigger the exception. BLM is not limited, however, to examining only the face of the ANVAA application itself in making an initial determination of eligibility because the regulations governing the filing of ANVAA applications direct that specific information accompany the application or be filed prior to adjudication by BLM. The regulations direct that a DD Form 214 “Certificate of Release or Discharge from Active Duty” or other documentation from the Department of Defense must be filed to verify military service. 43 CFR 2568.74(b). In addition, a Special Administrator or Personal Representative filing on behalf of the estate of a deceased veteran is expressly directed to “file the Department of Veterans Affairs verification of cause of death” (43 CFR 2568.75(b); see 43 CFR 2568.74(b)), as well as “proof of a current appointment” or “proof that this appointment process has begun.” 43 CFR 2568.61. None of the case files contains a “Department of Veterans Affairs verification of cause of death,” despite requests by BLM in a number of cases to file such information. Moreover, in some cases, following passage of ALTAA, BLM requested that the

<sup>7/</sup> Clarified on judicial remand, Franklin Silas, 129 IBLA 15 (1994), aff’d Silas v. Babbitt, 96 F.3d 355 (9<sup>th</sup> Cir. 1996).

Special Administrator or Personal Representative provide a certificate of death or other official documentation indicating cause of death, noting that “[a] certificate of death is required so that BLM may make cause of death determinations where appropriate.” E.g., Mar. 17, 2005, “Demand That Applicant Show Cause Why Application Should Not Be Rejected,” Paul R. Huff, Sr., FF-93535, IBLA 2005-266. In other cases, BLM secured certificates of death directly from the Alaska Bureau of Vital Statistics. E.g. Alice Rock, AA-83406, IBLA 2005-264. All fourteen case files contain certificates of death.

Although appellants allege that BLM failed to give a specific reason why the deceased veterans were not eligible for an allotment, thereby allegedly constituting a lack of notice required for due process under Pence I, due process cannot be used as a shield to protect them from legal deficiencies in the applications of which appellants are well aware. At the time BLM issued its decisions, each case file contained evidence showing that none of the deceased veterans died during the period beginning August 5, 1964, and ending December 31, 1971. Each applicant knew this fact, which disqualified the deceased veteran from eligibility under the first or third prongs of 43 U.S.C. §1629g(b)(2)(A). Thus, in every case, the deceased veteran could be eligible for an allotment, if at all, only if, under the second prong of § 1629g(b)(2)(A), he was wounded in action during the requisite time period and subsequently died as a direct consequence of the wounds.

The case records do not show any evidence of any of the decedents having been wounded in action. A notation on a DD Form 214 that a deceased veteran had been awarded a Purple Heart would constitute evidence in support of such a claim because a Purple Heart is awarded to a member of the armed forces “who is killed or wounded in action as the result of an act of an enemy of the United States.” 10 U.S.C. § 1129 (2000); see Army Regulation 600-8-22, Military Awards (1995), provided by BLM as Attachment B to its Answers. That regulation provides at Chapter 2, § 2-8(g) that “[a]ny member of the U.S. Army who believes that he or she is eligible for the Purple Heart, but through unusual circumstances no award was made,” may apply for one. Therefore, the failure of military records to show receipt of a Purple Heart does not itself establish that a veteran was not “wounded in action,” within the meaning of § 1629g(b)(2)(A). A Special Administrator or Personal Representative may provide other evidence of being wounded in action. No such evidence was offered to BLM prior to the issuance of its decisions and none has been offered on appeal.

The causes of death listed on the death certificates directly support the conclusion that none of the applicants died as a direct consequence of being wounded in action during the period of August 5, 1964, through December 31,

1971. <sup>8/</sup> Nothing that would indicate a wound received in action during the time period is listed as a direct or even precipitating cause of death for any of the veterans. <sup>9/</sup> The applicants did not offer any evidence prior to BLM's decisions, nor have appellants offered any on appeal, that any of the deceased veterans died as a direct consequence of being wounded in action during the critical time period. <sup>10/</sup> For the reasons set forth in Pence II, the procedures used by BLM when rejecting the applications were sufficient to provide appellants with notice of the reasons for rejection of their applications, and appellants' due process rights were protected by their right to appeal BLM's decisions to this Board.

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

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge

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<sup>8/</sup> The fact that certain applications may have had multiple deficiencies, which were not disclosed in the decision, is not a failure of notice, as alleged by appellants, because the basis for rejection in each case (ineligibility under 43 U.S.C. § 1629g(b)(2)(A)) is dispositive.

<sup>9/</sup> At the request of appellants the specific causes of death are omitted from this opinion.

<sup>10/</sup> We note that the case record for deceased veteran Noel J. Dayton contains a copy of a Sept. 1, 2004, e-mail from the Allotment Specialist, Real Estate Services, Tanana Chiefs Conference, to a BLM employee stating that "[t]he Personal Representative has been unable to provide proof that the applicant died of causes due to the war \* \* \*."

## Appendix A

IBLA Number	Appellant <sup>11/</sup>	Deceased Veteran	Application Number
2005-264	Rock, Alice	Rock, Peter A.	AA-83406
2005-265	Sweetsir, Sheila	Andrews, Benny A.	AA-83551 Parcels A&B
2005-266	Huff, Sr., Paul	Gooden, Richard C. Clyde	FF-93535
2005-267	Henry, Diane	Green, Edward P.	AA-83981 Parcels A&B
2005-268	Okitkun, Agnes	Odinzoff, David J.	AA-83845 Parcel A
2005-277	Dayton, Alvin	Dayton, Noel J.	FF-93243 Parcels A&B
2005-278	Schaeffer, Ruth	Schaeffer, Anthony E.	FF-93599 Parcels A&B
2005-279	Savetilik, Minnie	Allen, Jr., Clarence	AA-83987
2005-280	Pfleegor, Frances	Pfleegor, Harry H.	AA-83626
2005-281	Robertson, Mary	Monroe, Arthur J.	FF-93457
2005-282	Cleaver, Erica	Cleaver, I, Joseph E.	FF-93570
2005-283	Huntington, Wayne	Huntington, Clyde D.	FF-93242
2005-284	Stevens, Kyle	Stevens, Walter A.	FF-93583
2005-285	Deaton, Ada	Pitka, Frank R.	FF-93240 Parcels A&B

<sup>11/</sup> In all cases, except IBLA 2005-265 and IBLA 2005-284, the Special Administrator or Personal Representative appointed in Alaska state court is the appellant. In those two cases, an heir is the appellant.