IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fred Begay,

Plaintiff,

v.

Office of Navajo and Hopi Indian Relocation,

Defendant.

No. CV-16-08268-PCT-DJH

ORDER

Pending before this Court are Plaintiff Fred Begay's Motion for Summary Judgment (Doc. 42) and Defendant Office of Navajo and Hopi Indian Relocation's ("ONHIR") Cross-Motion for Summary Judgment (Doc. 58). Both motions have been fully briefed. (Docs. 42-64). The Court finds that the Independent Hearing Officer's decision was not arbitrary, capricious, or an abuse of discretion, was in accordance with law, and was supported by substantial evidence. Accordingly, the Court denies Mr. Begay's Motion for Summary Judgment and grants ONHIR's Cross-Motion for Summary Judgment.

I. BACKGROUND

In 1974 Congress passed the Navajo-Hopi Settlement Act ("Settlement Act"), Pub. L. No. 93-531, codified as amended at 25 U.S.C. §§ 640d et. seq.,[1] to resolve an inter-

[1] The Office of the Law Revision Counsel omitted Section 640d et. seq. of Title 25 from the U.S. Code effective September 1, 2016. This omission is editorial and "has no effect on the validity of a law and is not a statement on its value or importance." *See* OFFICE OF THE LAW REVISION COUNSEL

tribal dispute between the Navajo and Hopi Nations by ordering the partition of land that was then jointly held by the two tribes. *See Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121-22 (9th Cir. 1989). The Settlement Act partitioned the Joint Use Area ("JUA") of the two tribes and created the Defendant's predecessor, the Navajo-Hopi Relocation Commission, to carry out the relocation of members of either tribe who resided on land that was partitioned to the other and to provide services and benefits to households that were required to relocate. *See Begay v. Office of Navajo & Hopi Indian Relocation*, 2018 U.S. Dist. LEXIS 9465, *1 (D. Ariz. Jan. 22, 2018). In order to be eligible for benefits under the Settlement Act, an applicant must prove that (1) as of December 22, 1974, he was a legal resident of an area partitioned under the Settlement Act; (2) he is not be a member of the tribe that received the partitioned land; and (3) he was a "head of household" either as of the date they relocated or as of July 7, 1986, whichever is earlier. *See* 25 C.F.R. §§ 700.147; *Begay*, 2018 U.S. Dist. LEXIS 9465 at *1. Further, the applicant bears the burden of proving their residency and head of household status. *See* 25 C.F.R. §§ 700.147; *See also Begay*, 2018 U.S. Dist. LEXIS 9465 at *1.

Mr. Begay is a member of the Navajo Nation. At the time of the Settlement Act, he and his family lived in Coalmine Mesa, Arizona, which was located on Hopi Partitioned Land ("HPL"). On July 29, 2010, Mr. Begay applied to ONHIR for relocation benefits under 25 C.F.R. § 700.138. (Administrative Record ("AR") 30-34). On May 11, 2012, ONHIR denied the application. (AR 50-51). ONHIR found that Mr. Begay was not a resident of the HPL at the time of the family's relocation and did not qualify as head of household because he was not self-supporting (earning $1,300.00 or more per year) at any time prior to July 7, 1986. (AR 50-51). On July 16, 2012, Mr.

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http://uscode.house.gov/editorialreclassification/t25/index.html (last visited March 28, 2018). Full text of 25 U.S.C. § 640d et. seq. can be found at: https://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE&searchPath=Title+25%2FChapter+14%2FSUBCHAPTER+XXII&oldPath=Title+25%2FCHAPTER+14&isCollapsed=true&selectedYearFrom=2015&ycord=1695 (last visited March 26, 2018).

Begay appealed ONHIR's decision and on October 9, 2015, a hearing was held in front of an Independent Hearing Officer ("IHO"). (AR 55, 136-222). On December 4, 2015, the IHO denied Mr. Begay's appeal, finding that he was a resident of the HPL as of December 22, 1974 "until sometime before or in 1982," but that the family was relocated sometime after 1982 while Mr. Begay "was living in Tuba City with his uncle." (AR 318-319). Additionally, the IHO found that even "if [Mr. Begay] retained his legal residence in Coalmine Chapter after 1982, [Mr. Begay] has not proven that he was a self-supporting head of household at any time before July 7, 1986" and, thus, was "not eligible to receive relocation assistance." (AR 319, 323). On January 12, 2016, ONHIR issued a Final Agency Action Letter. (AR 325). Mr. Begay now seeks review from this Court pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 701-706, and 25 U.S.C. § 640d-14(g).

II. STANDARD OF REVIEW

The Court may grant a motion for summary judgment where no genuine dispute as to a material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, in reviewing an administrative decision under the Administrative Procedures Act ("APA"), the function of the Court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). The agency, not the Court, is the fact-finder. *See id*. Therefore, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental*, 753 F.2d at 770.

The APA requires a reviewing court to uphold an agency decision unless it is found to be "arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with the law," or "unsupported by substantial evidence." 5 U.S.C. § 706 (2)(A), (E). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Info. Providers' Coal. for Defense Against the First Amendment v. FCC*, 928 F.2d 866, 870 (9th Cir. 1991) (quoting *Consol. Edison Co. v.*

NLRB, 305 U.S. 197, 201 (1938)); *see also Orteza v. Shalala*, 50 F. 3d 748, 749 (9th Cir. 1995) ("Substantial evidence is more than a mere scintilla, but less than a preponderance"). Accordingly, the Court will "sustain an agency action if the agency has articulated a rational connection between the facts found and the conclusions made." *Pac. Coast Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). Moreover, the Court must give deference to the agency's decision. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

However, the deference owed to an administrative decision is not unlimited. *Id.* The Court cannot automatically defer to the agency's conclusions. *Id.*; *see also Ocean Advocates v. United States Army Corps of Eng's*, 402 F.3d 846, 859 (9th Cir. 2005) ("Our review must not 'rubberstamp'…administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute") (internal quotations omitted). Indeed, it is the responsibility of the Court to ensure that the agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Pac. Coast Fed'n of Fisherman's Ass'ns*, 426 F.3d 1082 at 1090 (*quoting Motor Vehicle Mfs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In short, review under this standard is "exacting, yet limited." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

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III. DISCUSSION

Mr. Begay contends the IHO's conclusions that he does not meet the standards for residency and head of household are not supported by substantial evidence and the decision to deny him relocation benefits is arbitrary, capricious, and contrary to law. (Doc. 44 at 4-17). ONHIR argues that the IHO's decision was reasonable and supported by substantial evidence, that the IHO articulated specific and cogent reasons for his credibility findings, and that he properly followed applicable law and precedent. (Doc. 58 at 7-17).

A. Residency

To be eligible for benefits under the Settlement Act, a Navajo applicant must first prove that he was a legal resident of the HPL as of December 22, 1974. *Begay*, 2018 U.S. Dist. LEXIS 9465 at *2. "An individual who was, on December 22, 1974, away from the land partitioned to the Tribe of which he/she is not a member may still be able to prove legal residence." Commission Operations and Relocation Procedures; Eligibility, 49 FR 22277-01 (May 29, 1984). The term "residence" refers to the legal standard and "requires an examination of a person's intent to reside combined with manifestations of that intent." *Id; see Akee v. Office of Navajo & Hopi Indian Relocation*, 907 F. Supp. 315, 319 (D. Ariz. 1995); *see also Mike v. Office of Navajo Hopi Indian Relocation*, 2008 U.S. Dist. LEXIS 510, *14-17 (D. Ariz. 2008) (applicant's credible testimony coupled with affirmative evidence sufficiently supported her claim of legal residency).

Here, the IHO found that "[o]n December 22, 1974, [Mr. Begay] was a legal resident of an area of the Coalmine Mesa Chapter that was partitioned for the use of the Hopi Indians. At that time, [Mr. Begay] was 14 years old and a dependent minor." (AR at 318). The IHO concluded that Mr. Begay "retained his legal residence at Coalmine Mesa until some time before or in 1982 as there is no credible or sufficient evidence that he retained his legal residence in Coalmine Chapter after 1982 when he (inconsistently) declared that his family left their residence there and while applicant was living in Tuba City with his uncle." (AR at 318-19).

Mr. Begay argues that he was a resident of the HPL from December 22, 1974 until 1986 and contends that the IHO's contrary finding is not supported by substantial evidence. (Doc. 44 at 14-15). Mr. Begay maintains that the IHO "did not consider the entire record when he determined [Mr. Begay] was not a resident of the HPL in 1986" and relies on witness testimony provided at the hearing to rebut the IHO's conclusion. (Doc. 44 at 15). Mr. Begay contends that (1) the testimony provided by his former employer confirms that he lived in Coalmine the entire time he worked for Ramsey Construction, (2) the testimony provided by his former co-worker confirms that he lived in Coalmine from 1983 to 1987, (3) the testimony provided by his sister confirms that he lived at in Coalmine until 1989, and (4) his own testimony confirms he lived in Coalmine until 1989. (Doc. 44 at 16-17).

Even assuming the veracity of these four witnesses' statements, they are consistent with the IHO's findings that there is insufficient evidence that Plaintiff retained *legal residence* in Coalmine after 1982. Each witness, with the exception of Plaintiff's sister, testified to different time periods of when the Plaintiff was living at Coalmine and none of the witnesses provided testimony that would tend to prove the Plaintiff intended to legally reside in Coalmine despite his physical separation. Additionally, the IHO set forth specific and cogent reasons as to why each witnesses' testimony was not credible – mainly due to a lack of consistency – and these findings are entitled to substantial deference by this Court. *See e.g.*, *De Valle v. I.N.S.*, 901 F.2d 787, 792 (9th Cir. 1990).

Aside from the inconsistent testimony noted above, Mr. Begay has not provided any affirmative evidence to support his contention that he continued to legally reside in the HPL through 1986 despite working and being physically located elsewhere. In *Mike v. ONHIR*, the court found the plaintiff's voter registration, her listing on the JUA roster, her maintaining substantial ties and recurring contact with an identifiable homesite, and her corroborated and credible testimony that she was only temporarily away from the homesite for work and due to a construction freeze was enough affirmative evidence to meet the presumption of legal residency. *Mike*, 2008 U.S. Dist. LEXIS 510, at *14-17.

Here, Mr. Begay has not provided any similar evidence supporting his claim of legal residency, nor has he provided credible testimony that can be relied upon. Thus, the IHO's finding that Mr. Begay was a resident until 1982 was supported by substantial evidence and was not arbitrary or capricious.

B. Head of Household

Mr. Begay must also prove that he "actually maintained and supported himself," to be eligible for relocation benefits. 25 C.F.R. § 700.69(a)(2). An annual income of $1,300 or more is required as proof of an individual's ability to maintain and support themselves. *Benally v. Office of Navajo & Hopi Relocation*, 2014 U.S. Dist. LEXIS 16319, *4 (D. Ariz. Feb. 10, 2014). A court may require evidence or documentation of purported wages used to meet this threshold. *Id.* at *5-8.

Here, the IHO found that "no books of account, written records, written journals, tax documents, or any other writing showing [Mr. Begay's] earnings in any year exist in the record of this appeal." (AR 319). Further, in reviewing the testimony provided in support of the Mr. Begay's appeal, the IHO found very little corroboration between the Mr. Begay's assertions and that of his other three witnesses and even found inconsistencies in the witnesses' own statements. (AR 320-22). In a written declaration prior to the hearing, Mr. Begay's former employer stated that he earned $80-90 per house doing roofing, yet in his testimony at the hearing the employer stated it was $150 per house. (AR 321). Mr. Begay was also unable to recall a specific amount he earned per house while working with Ramsey Construction or his total amount of annual earnings. (AR 322). Indeed, in his application for benefits Mr. Begay instructed his sister to write that he did not earn more than $1300 per year. (AR 322). These types of inconsistencies led the IHO to find that Mr. Begay and his supporting witnesses lacked credibility and he ultimately concluded that Mr. Begay "has not proven that he was a self-supporting head of household at any time before July 7, 1986." (AR 319).

Mr. Begay argues the IHO's credibility findings are not supported by substantial evidence and that he meets the head of household standard. He asserts that the

inconsistencies provided in his and his witnesses' testimonies regarding "pay rate and year of hire do not go to the heart of [his] claim since all testimony was consistent as to the type of work he was engaged in, and that he was employed at the latest by 1982." (Doc. 44 at 7). Further, Mr. Begay contends that "the omission of testimony about [his] specific annual earnings also does not provide a basis for finding the testimony to lack credibility." (*Id*.) Mr. Begay concludes that "there was no reason why [he] or his witnesses would have a clear memory of yearly income," and urges the Court to accept other instances where undocumented wages were accepted as a basis for finding plaintiffs met the head of household standard. (*Id.* at 7, 12-14).

As noted above, however, the IHO set forth specific and cogent reasons why he found Mr. Begay and his three witnesses to be not credible. Further, the Court disagrees with Mr. Begay's contention that a lack of consistency regarding his pay rate and dates worked does not go to the heart of his claim. Mr. Begay bears the burden of proving he was self-supporting in order to receive relocation benefits. The Court may require some form of documentation to prove Mr. Begay's earnings, otherwise Mr. Begay would be able to claim any amount of income to meet the head of household standard no matter how fantastic. *See Benally*, 2014 U.S. Dist. LEXIS 16319 at *7 (Holding the plaintiff did not meet his burden of showing he was head of household because plaintiff's claimed earnings were "totally unsupported by contemporaneous documentation"). Accordingly, Mr. Begay must be able to show how much he earned and that he was indeed supporting himself. Because there are no records of Mr. Begay's purported income and because his testimony and that of his witnesses could not be relied upon, Mr. Begay's claims regarding his income are merely conjecture and the IHO's finding that Mr. Begay did not meet the head of household standard was supported by substantial evidence and was not arbitrary or capricious.

IV. CONCLUSION

For the foregoing reasons, the IHO's decision to deny relocation benefits was not arbitrary, capricious, or an abuse of discretion. It was in accordance with the law and

supported by substantial evidence. Therefore, ONHIR is entitled to summary judgment, and Mr. Begay's motion is denied.

In accordance with the above discussion,

IT IS ORDERED DENYING Plaintiff Fred Begay's Motion for Summary Judgment (Doc. 42) and **GRANTING** ONHIR's Cross-Motion for Summary Judgment (Doc. 58).

IT IS FURTHER ORDERED directing the Clerk of Court to terminate this action.

Dated this 30th day of March, 2018.

Honorable Diane J. Humetewa
United States District Judge