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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Annabelle Begay Plaintiff, Office of Navajo and Hopi Indian Relocation, *an Administrative Agency of the United States,* Defendant.	No. CV-20-08057-PCT-DJH **PLAINTIFF'S REPLY IN SUPPORTOF HER MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO ONHIR'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Annabelle Begay files this Reply in Support of her Motion for Summary Judgment, and this Response in Opposition to Defendant's Cross-Motion for Summary Judgment.

I. PRELIMINARY STATEMENT

Plaintiff Annabelle Begay, in her Motion for Summary Judgment, demonstrated that the Defendant, ONHIR, committed prejudicial error when it affirmed the Hearing

Officer's ("HO") decision to deny Annabelle's appeal for relocation assistance benefits based on ONHIR's untimely introduced evidence disclosed only to the HO. Had ONHIR disclosed the disputed documents prior to Plaintiff's hearing, as provided by ONHIR's own regulation, Plaintiff could have responded to explain the discrepancies.

In its Response and Cross-MSJ, ONHIR conflates its distinct regulations governing evidence and procedure with the submission of a post-hearing brief in its attempt to excuse its improper disclosure of documents after the close of Plaintiff's hearing. The HO misapplied the evidentiary concept of "judicial notice" to a disputed fact, and his factual and credibility determinations were not based on substantial evidence as these determinations relied almost entirely on documents not properly included in the Administrative Record.

Finally, Plaintiff demonstrated ONHIR acted in an arbitrary and capricious manner in failing to adhere to its own precedent set in 1994 when ONHIR certified as eligible for relocation benefits Annabelle's younger sister Annette Begay and thereby recognized the continued existence and use of the Howell Mesa homesite by the Begay family through 1988, and that ONHIR is precluded from re-litigating this issue.

II. ANNABELLE BEGAY REMAINED A LEGAL RESIDENT OF HER FAMILY'S HOWELL MESA HOMESITE THROUGH THE TIME SHE BECAME A SELF-SUPPORTING HEAD-OF-HOUSEHOLD IN 1982.

A. Substantial record evidence supports a determination that Plaintiff retained her legal residency at Howell Mesa through 1982.

An administrative law judge ("ALJ") "must take into account all the evidence submitted, including independent documentary support" and "cannot selectively examine

evidence . . .” *Ilunga v. Holder*, 777 F.3d 199, 207 (4th Cir. 2015) (citing to and quoting from *Shah v. Att’y Gen. of U.S.* , 446 F.d3d 429, 437 (3rd Circ. 2006)). A court’s review of an administrative decision “is more than an examination of the record for the existence of substantial evidence in support of the Secretary’s decision, we also take into account whatever in the record fairly detracts from its weight.” *Cline v. Sullivan*, 939 F. 2d 560, 564 (8th Cir. 1991) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 464 (1951). While a court does not require an ALJ to provide a “written evaluation of every piece of evidence, an ALJ must ‘sufficiently articulate his assessment of the evidence to assure us that the ALJ considered the important evidence.’” *Rohan v. Chater*, 98 F.3d 966, 971 (7th Cir. 1996) (citing to *Carlson v. Shalala*, 999 F.2d 180, 181 (7th Cir.1993) (per curiam), quoting *Stephens v. Heckler*, 766 F.2d 284, 287 (7th Cir.1985)).

The evidence Plaintiff disclosed to ONHIR prior to her hearing and then introduced at hearing was substantial proof of her continued legal residence at her family’s Howell Mesa homesite through 1982 and beyond, and supported her eligibility for relocation benefits. That evidence included the following:

- ONHIR’s May 27, 1994 Notice of Certification of Eligibility for Relocation Assistance Benefits for Annette Begay, ONHIR CF # 4576. AR 136.
- NHLSP’s April 13, 1994 Notice of Intent to Appeal Letter to ONHIR disputing the HO’s findings for Annette Begay and evidence supporting her eligibility for relocation assistance benefits. AR 137-139.
- The first twenty (20) pages of the hearing transcript testimony of sister Annette Begay and father Roger Begay given at Annette’s appeal hearing on April 20, 1988. AR 140-160.
- Internal ONHIR memoranda and forms from Roger Begay’s file in 1988 regarding the family’s shack in Tuba City, including ONHIR’s recognition of that shack as a

temporary shelter, and the overcrowded and hazardous conditions of that shack. AR 161-163, 168-170.

- A notarized, sworn statement by Bernard Phillips, a Hopi neighbor of Roger Begay's, who attested that Roger continued to have livestock at Howell Mesa as late as 1985. AR 164-165.
- A notarized Certification of Occupancy of Replacement Home and Vacancy of Former Joint Use Area dated January 25, 1990 and signed by Roger Begay. AR 166.
- The Quitclaim Deed for Roger Begay's HPL improvements at Howell Mesa signed and dated on October 24, 1989, AR 167, which was specifically referred to in Roger's 2013 hearing testimony for Plaintiff. AR 219-220.

The evidence Annabelle disclosed prior to and at her 2013 hearing, which corroborated her testimony and that of Roger Begay, was entirely disregarded by the HO, who decided that the documents from Roger Begay's file disclosed post-hearing by ONHIR "trumped" the properly and timely-disclosed documents introduced by Plaintiff. AR 361.

B. ONHIR conflates its regulations to justify its post-hearing citations to documents not previously disclosed and properly admitted into the Administrative Record.

An agency is bound by its own regulations. *Terry v. Astrue*, 580 F.3d 471, 476 (7th Cir. 2009). ONHIR has published two regulations in the CFR pertaining to evidence and procedure and the submission of post-hearing briefs by the "applicant." 25 CFR §700.313 regarding evidence and procedure, provides in pertinent part:

> (a) At the hearing and taking of evidence the Applicant shall have an opportunity to:
>
> > (3) Have produced Commission evidence relative to the determination, *Provided*, that the scope of pre-hearing discovery of evidence shall be limited to relevant matters as determined by the Presiding Officer;
>
> (b) The Presiding Officer is empowered to:
>
> > Hold the record open for submission of evidence no longer than fourteen days after completion of the hearings;

> (13) Extend any time period of this subpart upon his/her own motion or upon motion of the applicant, for good cause shown.

ONHIR's regulation regarding the submission of post-hearing briefs provides:

> 25 CFR §700.315
> Applicants may submit post-hearing briefs or written comments to the Presiding Officer within fourteen days after conclusion of the hearings. In the event of multiple applicants or parties to a hearing, such briefs shall be served on all such applicants by the applicant submitting the brief.

Although the regulations only provide for the submission of a post-hearing brief by the applicant, the HO has permitted ONHIR to submit one as well. At the close of Plaintiff's hearing the HO stated as he does at the conclusion of every hearing:

> Okay. Then that will conclude the testimony portion of this Hearing and I will hold this Matter open for a period of two weeks, after receipt of the transcript to permit either, or both of you, to file a written Post Hearing Memoranda, after which a decision will be made within 60 days of that date. So that will conclude this Hearing and I thank you all.

AR 227.

Subsections (b)(9) and (b)(13) of 25 CFR §313 provide that the HO may hold the record open for the submission of evidence no longer than 14 days after the hearing, and to extend any time period either on his own motion or by motion of the applicant (but not ONHIR). However, at no time during Plaintiff's hearing did the HO state he was holding the record open for the submission of evidence, nor did either party request that he do so. AR 182-228. Also, there is nothing in the Administrative Record to support ONHIR's claim that the HO granted the parties an extension to submit post-hearing briefs. AR 2-3, 245.1

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1 ONHIR claims in its Response and Cross-MSJ that the HO granted an extension for the parties

ONHIR's regulations address "Evidence and Procedure" and "Post-Hearing Briefs" as separate and distinct regulations and do not treat "evidence and procedure" as the same or as interchangeable with "post-hearing briefs". Post-hearing briefs are the parties' closing arguments, supported by evidence already admitted into the record. 25 CFR §700.315 regarding applicants' submission of post-hearing briefs is not an opportunity for either party to submit new evidence not already presented to the HO.

C. The Response of ONHIR Fails to Demonstrate that the HO Provided Specific and Cogent Reasons for his Adverse Credibility Determinations as Required by Relevant Case Law

Defendant cites *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990) in recognizing that an ALJ "who rejects testimony for lack of credibility must offer a specific, cogent reason for the rejection." Response and Cross Motion, at 15. However, here the HO offered no specific and cogent reasons for his adverse credibility determinations, basing them entirely on the prior testimony of Roger Begay, provided by ONHIR post-hearing to the HO without affording Roger or Plaintiff the opportunity to address the prior testimony at Plaintiff's hearing. AR 182-228, 299-345. An ALJ is not permitted to "'cherry pick' facts or inconsistencies to support an adverse credibility finding that is unsupported by the record as a whole." *Ilunga v. Holder*, 777 F.3d 199, 207 (4th Cir.

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to submit their post-hearing briefs at AR 245, but AR 245 is page 4 of ONHIR's post-hearing brief, not correspondence from the HO granting such an extension. See ONHIR Response at 13 and CSOF ¶30. Plaintiff's counsel could not locate in the Administrative Record any correspondence from the HO granting such request, and no correspondence regarding the submission of post-hearing briefs is listed in ONHIR's index to the Administrative Record. AR 2-3.

2015).

The HO stated that the testimony of Annabelle and her father had "no evidentiary value" because their testimony was contradicted by statements made by Roger Begay in his 1986 Affidavit and hearing testimony quoted by ONHIR in its post-hearing brief. AR 289. The HO gave no weight to Plaintiff's timely disclosed-evidence, properly admitted into the Administrative Record, which corroborated her and her father's testimony. AR 136-170, 361. The HO stated in his decision denying Plaintiff's Motion for Reconsideration that Roger's 1986 testimony "trumps" the corroborating evidence "in terms of credibility and authenticity". AR 361. By "cherry picking" those inconsistencies and disregarding evidence helpful to Plaintiff, the HO's adverse credibility findings are unsupported by the record as a whole and not entitled to deference. See *Ilunga*, 777 F.3d at 207.

ONHIR quotes *Sarvia-Quintanilla v. Immigration & Naturalization Service*, 767 F.2d 1387, 1395 (9th Cir. 1985), to demonstrate the process of evaluation an ALJ conducts to properly analyze testimony in determining credibility of a witness. Response and Cross Motion, *Id*. But clearly the HO here did not conduct such an objective appraisal of the testimony of Annabelle and Roger. The Immigration Judge in *Sarvia-Quintanilla* offered far more than the HO here to find the testimony of the petitioner for political asylum lacking in credibility. The petitioner admitted he lied in order to get a Mexican passport; had lied under oath to U.S. immigration officials; and conceded that he had been convicted of illegally bringing aliens into

the United States. Further, the Immigration Judge found the petitioner's credibility undermined by his inability to offer direct evidence of specific threats against his life or freedom. *Id*, at 1393. In contrast, the HO here points to nothing in the record that undermines the veracity of Annabelle and Roger. He simply dismisses their entire testimony in reliance on the post-hearing documents to which they were denied the opportunity to address at hearing.

This does not constitute the analysis of testimony in reaching an adverse credibility determination as required by precedential authority. Nothing is offered by the HO as a reason, cogent or otherwise, for declaring the testimony here to be untruthful. The HO is required to address the credibility of each witness individually, and if he declares a witness to not be credible, support that determination with specific and cogent reasons. This is totally lacking in the decision of the HO at issue here.

D. ONHIR's post-hearing introduction of the disputed documents does not constitute "impeachment"

Impeachment evidence is that evidence offered to "discredit a witness . . . to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] testimony." *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993). The Federal Rules of Evidence Rule 613(b) pertaining to extrinsic evidence of a prior inconsistent statement provides as follows:

> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

The Federal Rules of Evidence do not apply to adjudicatory hearings held pursuant to the APA. *R&B Trans., LLC v. U.S. Dept. of Labor*, 618 F.3d 37, 45 (1st Cir. 2010). However, ONHIR Counsel Ruzow argued in ONHIR's response to Plaintiff's Motion for Reconsideration that the 1986 affidavits and hearing testimony were exempt from disclosure under the Federal Rules of Civil Procedure because the documents were being introduced post-hearing for the purpose of impeachment.2 AR 357. Mr. Ruzow's claim is disingenuous because evidence disclosed *after* the close of the hearing by definition cannot be used to "impeach" a witness because the witness had no opportunity to explain the prior inconsistent statements.

At no time during Plaintiff's hearing did Counsel Ruzow attempt to introduce the 1986 Roger Begay documents into evidence. AR 182-228. Mr. Ruzow cross-examined Plaintiff and Roger Begay, and asked no questions of either witness about the 1986 Roger Begay documents, and so failed to use these documents for purposes of impeachment. AR 207, 226. Defendant thus waived its opportunity to use these documents to impeach

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2 As Plaintiff argued in her Motion for Summary Judgment, the Federal Rules of Civil Procedure also do not apply to APA hearings. See Plaintiff's MSJ at 7,9; FRCP Rule 81; *Kelly v. U.S. EPA*, 203 F.3d 519, 523 (7th Cir. 2000).

Annabelle and Roger's testimony. *Id.* ONHIR'S improper introduction of the documents post-hearing denied Annabelle and Roger the opportunity to explain any discrepancies in Roger's 1986 and 2013 testimony and denied Annabelle a fair hearing. AR 282-289; 360-361.

E. ONHIR's post-hearing introduction of the 1986 Roger Begay documents materially prejudiced Plaintiff as the Hearing Officer relied entirely on these documents to deny Annabelle's appeal.

While admitting that it first disclosed the Disputed Documents post-hearing, ONHIR argues that Plaintiff was not materially prejudiced. Response and Cross-MSJ at 13. ONHIR asserts that because Plaintiff's counsel examined Roger Begay's file pursuant to a FOIA request, and because a previous NHLSP attorney represented Roger Begay in his 1986 appeal before ONHIR, that Plaintiff's counsel was aware of and should not have been "surprised" by ONHIR's reliance on these documents post-hearing. Response and Cross-MSJ at 14.

It is a specious argument that the Plaintiff was not prejudiced by ONHIR's improperly-introduced documents because Plaintiff's counsel was aware of and had access to those documents. It is not relevant that Plaintiff's attorney was aware of the existence of the Disputed Documents and not "surprised" by them. ONHIR's post-hearing disclosure of the Disputed Documents denied Plaintiff the opportunity for her and her witness to explain any discrepancies *at* her hearing when the witnesses were present and available for cross-examination by ONHIR.

ONHIR's "Evidence and Procedure" regulation gives applicants the opportunity for ONHIR to "produce evidence relative to the determination" to the applicant regarding the applicant's eligibility for relocation benefits. *See* 25 CFR §700.313(a)(3). Any documents ONHIR intended to use to support its denial determination must be disclosed pre-hearing so that Plaintiff and her counsel can prepare her case for hearing. The only reason for "surprise" is for the introduction of evidence during the hearing for impeachment which did not occur here because the conflicting testimony was not introduced at the hearing. AR 206, 227.

ONHIR's improper post-hearing introduction of this evidence led to the HO's reliance on the Disputed Documents to make adverse credibility findings and ultimately, to deny Annabelle's appeal. AR 182-228; 242-247; 282-289; 360-361. "Any error having such a fundamental effect on the outcome of the litigation cannot be considered harmless." *Chiasson*, 988 F.2d at 518.

F. The HO improperly applied the "judicial notice" and "official notice" doctrines.

Federal Rule of Evidence 201 regarding "judicial notice" does not apply to APA adjudicatory proceedings. *R&B Trans., LLC v. U.S. Dept. of Labor*, 618 F.3d 37, 45 (1st Cir. 2010). Even if FRE 201 were to apply, it is limited in its application to "a fact that is not subject to reasonable dispute." F.R.E. 201(b); see also *U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). The APA provides that when "an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. §556(e).

The first time the HO claimed he was taking "judicial notice" of anything was in his decision *in response to* Annabelle's Motion for Reconsideration. AR 360-361. The HO asserted in this decision that "the undersigned can certainly take judicial notice of testimony given at a hearing before the undersigned involving applicant's father's application for relocation benefits." AR 360. Plaintiff in her Motion for Reconsideration did argue that Counsel Ruzow did not request the HO take judicial notice of any part of Roger Begay's file, and the HO did not during Annabelle's hearing state he was taking judicial notice of anything that was outside of the hearing record. AR 182-228, 294. "Due process requires the Hearing Officer, as the decision maker, to base his decisions on evidence in the record; for the hearing to be a meaningful one, evidence outside the record cannot be relied upon, unless judicial notice is taken." *Hammerton v. City of Chicago*, 776 F.2d 636, 645 (7th Cir. 1985). AR 294.

The HO's purported reliance on "judicial notice" of the Disputed Documents that were outside of the hearing record fails because Annabelle was not afforded the opportunity to show the contrary. The "Disputed Documents" contained statements of when Roger moved from his Howell Mesa homesite, which is a disputed fact in Annabelle's appeal. A court may not take judicial notice of any matter that is in dispute. See *Walker v. Woodford*, 454 F.Supp. 2d, 1007, 1022 (Dist. Ct. SD Cal. 2006). A court may also not take judicial notice after the hearing record is closed. See *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 259 F.2d 662, 664 (5th Cir. 1958). When the HO asserted he was taking "judicial notice" of the Disputed Documents, he did not provide Plaintiff with an opportunity to be heard or

to show the contrary of the disputed fact contained in the 1986 Roger Begay documents, i.e. the date her family moved from Howell Mesa. AR 360-361.

G. ONHIR is precluded from re-litigating the issue of when the Begay family used and occupied their Howell Mesa homesite.

In its Cross-Motion at 16, ONHIR argues that "nonmutual offensive collateral estoppel … is limited to private litigants and does not apply against the government," citing *United States v. Mendoza*, 464 U.S. 154 (1984). However, if the party asserting offensive collateral estoppel is in privity with the party to the prior suit in which issue preclusion is sought then it is not "non-mutual." The Supreme Court made clear in a "companion case," issued the same day as *Mendoza*, that *mutual* collateral estoppel still applies when used against the government. *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984).

Here, the party to the prior adjudication at issue, Annette Begay, is the sister of, and in privity with, Annabelle Begay. "Although a familial relationship need not, in and of itself, confer privity status, it does constitute an important factor when assessing the preclusive effects of a prior adjudication." *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1997). The sisters presented evidence in their individual hearings regarding the nature and duration of their family's occupation of the homesite at which each was born and raised. AR 140-160, 182-228. Their father was a witness at both hearings. *Id.*

ONHIR maintains that Plaintiff insists that the doctrine of collateral estoppel requires the HO, "to give preclusive effect to a prior determination regarding her sister's eligibility for Relocation Benefits." Response/Cross-Motion, at 16. On the contrary,

Plaintiff recognizes that she must prove her own eligibility for relocation benefits independently of her sister. Nor, does Plaintiff argue, "that the IHO had to treat Plaintiff's case, evidence, and issues, the exact same way that he treated those in Annette Begay's case…" *Id.*, at 17. All Plaintiff asserts, as presented in her opening memorandum, is that preclusive effect must be given to the issue of the dates through which the Howell Mesa homesite remained occupied by the Begay family. This was a necessary factual determination made by ONHIR in certifying Annette for relocation benefits.

ONHIR cites *Littlejohn v. U.S.*, 321 F.3d 915, (9th Cir. 2003) for the elements that must be met for collateral estoppel to be invoked to bar the relitigating of a fact determined in a prior adjudication. Response/Cross-Motion, at 16, citing *Littlejohn*, 321 F. 3d, at 923. Each of these elements is satisfied here. (1) The issue at stake in Annabelle's case, the date through which the Begay family homesite remained occupied, is identical to that in Annette's case. (2) That issue was actually litigated in the prior hearing as Annette and her father testified to the history of the homesite's occupation and ONHIR's counsel had the opportunity to cross-examine each witness regarding that issue. (3) The determination of the issue in the prior litigation was a critical and necessary part of the prior action, as Annette would not have been certified for benefits had she not proved to ONHIR's satisfaction that the Begay family homesite remained occupied through the date of Annette's hearing in 1988. ONHIR is precluded from now denying the dates it

previously recognized for the Begay family's occupancy of the Howell Mesa homesite.

III. CONCLUSION

ONHIR failed to disclose three pivotal documents to Plaintiff before her appeal hearing, despite ONHIR's regulation (25 CFR §700.313) requiring that it do so. Had those documents been disclosed in a timely manner, Plaintiff could have responded to any discrepancies with prior testimony. Denying the Plaintiff of that opportunity materially prejudiced her case.

The Hearing Officer relied for his adverse credibility findings for the Plaintiff and her witness entirely on the improperly introduced documents and did not conduct the individual analysis of each witnesses' testimony in order to provide the specific and cogent reasons for rejecting testimony as legally required,

ONHIR is precluded from relitigating the dates of occupancy for the family's homesite, which it previously determined in finding Plaintiff's sister eligible for relocation benefits. Defendant's decision to deny relocation assistance benefits to Plaintiff was not based on substantial evidence and was arbitrary, capricious and contrary to law. The Court should set aside Defendant's decision and grant summary judgment to Plaintiff.

Respectfully submitted this 7th day of December, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, I electronically transmitted the attached document, Plaintiff's Reply in Support of her Motion for Summary Judgment and Response to ONHIR's Cross-Motion for Summary Judgment, to the Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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