U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0315

CECIL W. LUI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN UNIVERSITY OF AFGHANISTAN	)	
	)	
	)	DATE ISSUED: 06/30/2020
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Andrew D. Lanphere and Rebecca S. Stewart (Pillsbury Winthrop Shaw Pittman LLP), San Francisco, California, for employer.

Cynthia Liao and Stephanie Macinnes (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denying Benefits (2017-LDA-00775) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the DBA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer, the American University of Afghanistan (University), was founded in 2006 to provide higher education for Afghans and others in the region. ALJX 2 at 1. It entered into a cooperative agreement with the United States Agency for International Development (USAID) whereby USAID agreed to pay employer 40 million dollars from August 1, 2013, through July 31, 2018. CX 19 at 1. This funding represented approximately 36 percent of employer's total program budget. ALJX 2 at 1. One of the purposes of the cooperative agreement was to fund the hiring of employer's faculty and staff. CX 19 at 8, 28.

In May 2013, employer entered into an employment contract with claimant to serve as an Associate Professor of Finance from July 1, 2014, to June 30, 2017; USAID did not sign the contract. CX 23.

On August 24, 2016, claimant was lecturing in a classroom when an insurgent group attacked the campus, killing and wounding a number of people. ALJX 2 at 1. Claimant was hit by shrapnel, injured his left wrist and elbow jumping from a second-floor window, and claimed he suffered psychological injuries. CXs 1, 5 at 22-24. He filed a claim under the DBA; employer controverted, asserting the DBA is inapplicable.[1] CXs 1, 2.

[1] The administrative law judge initially denied the parties' motion for summary decision. He found there was a genuine issue of material fact with regard to whether the United States approved the contract between employer and claimant. ALJX 2 at 4 (Order Denying Employer's Motion for Summary Decision, Granting In Part Claimant's Motion for Partial Summary Decision and Rescheduling Hearing Date (Order)). The administrative law judge granted claimant partial summary decision; he agreed the failure to include a DBA coverage requirement in the cooperative agreement between USAID and employer did not preclude coverage under the Act but denied claimant's contention that coverage was established as a matter of law. *Id*. He held a formal hearing in the case on February 26, 2018.

The administrative law judge found the claim does not fall within Section 1(a)(4) of the DBA, 42 U.S.C. §1651(a)(4), because, inter alia, the cooperative agreement between employer and USAID is not a "contract" as that term is used under the DBA. Decision and Order at 14. The administrative law judge also determined the claim does not fall under Section 1(a)(5), 42 U.S.C. §1651(a)(5), because the United States or an agency thereof did not approve claimant's employment contract. *Id*. at 11, 13.

On appeal, claimant contends his claim is covered by Sections 1(a)(4) and 1(a)(5) of the DBA and asserts error in the administrative law judge's decision to the contrary. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director) responds, asserting the administrative law judge properly denied coverage under Section 1(a)(4), but contends the Board should reverse the denial of coverage under Section 1(a)(5). Claimant filed a reply brief.

Section 1(a)(4)

Claimant avers the administrative law judge erred in finding the employer-USAID cooperative agreement is not a "contract" under Section 1(a)(4). This section provides in pertinent part that the DBA applies to an employee engaged in any employment:

> *under a contract entered into with the United States or any executive department, independent establishment, or agency thereof* . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this chapter, and (2) shall maintain in full force and effect during the term of such contract . . . .

42 U.S.C. §1651(a)(4) (emphasis added).

In *University of Rochester v. Hartman*, 618 F.2d 170, 172 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, considered whether the deceased claimant was covered under Section 1(a)(4). The court determined the research grants between the claimant's employer, NASA, and the National Science Foundation did not constitute "contracts." This ended the coverage inquiry because Section 1(a)(4) expressly requires the employee be engaged in employment "under

a *contract entered into* with the United States" as a condition of coverage.[2] *University of Rochester*, 618 F.2d at 174-176. The court relied on the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §6301 *et seq.* (formerly codified at 41 U.S.C. §501 *et seq.*), which differentiates procurement contracts, grants, and cooperative agreements.[3] *Id*. at 175.

Finding "contract" as used in Section 1(a)(4) to be a term of art in view of the Federal Grant and Cooperative Agreement Act, the court concluded the employee's death was not covered under the DBA because the employment was governed by a "grant" and not a "contract." Pursuant to *University of Rochester*, the administrative law judge in this case properly found the cooperative agreement between employer and USAID is not a "contract" under the DBA, thereby precluding coverage under Section 1(a)(4). *See id*. Consequently, we affirm the denial of coverage under Section 1(a)(4).

Section 1(a)(5)

Claimant and the Director contend the administrative law judge erred by denying coverage under Section 1(a)(5). They assert he too narrowly construed the statute to find claimant's employment contract with employer was not "approved" by USAID. Section 1(a)(5) provides in pertinent part that the DBA applies to an "employee engaged in any employment:"

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[2] The court further held the employee was not engaged in a "public work" under Section 1(a)(4). *University of Rochester*, 618 F.2d at 173, 175.

[3] Section 6303 of this statute states when an executive agency should enter into a procurement contract, and Section 6304 states when an agency should use a grant. 31 U.S.C. §§6303-6304; *see Henke v. U.S. Dep't of Commerce*, 83 F.3d 1445, 1451 n.7 (D.C. Cir. 1996). Section 6305, 31 U.S.C. §6305, states, in pertinent part, "[a]n executive agency shall use a cooperative agreement . . . when-

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

> under a contract *approved and financed by* the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954, as amended. . ., and not otherwise within the coverage of this section, and every such contract shall contain provisions requiring that the contractor... (A) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in work under such contract the payment of compensation and other benefits under the provisions of this chapter, and (B) shall maintain in full force and effect during the term of such contract..., or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, . . .

42 U.S.C. §1651(a)(5) (emphasis added).[4]

The administrative law judge framed the sole contested issue as whether the contract between employer and claimant was "approved" by the United States.[5] Decision and Order at 9; *see* Order at 4. He interpreted the term "approved" in Section 1(a)(5) as requiring actual government approval of claimant's specific hiring contract. First, he found the yearly audits the Special Inspector General for Afghanistan Reconstruction (SIGAR) conducted of employer's past expenditures "does not in any way" suggest the United States approved employer's decision to hire claimant in 2014 or to retain him until 2017. Decision and Order at 11. He also credited the testimony of David Sedney, a member and former acting president of employer's Board of Trustees, that employer's president made all hiring decisions without the involvement of the United States government and no government employees served on the Board. Tr. at 56-57, 59-60, 81-82. The administrative law judge further determined USAID did not explicitly approve claimant's employment contract in the cooperative agreement because that document required USAID approval only of the

[4] Reference to the Mutual Security Act of 1954 in Section 1(a)(5) is treated as a reference to its successor, the Foreign Assistance Act of 1961, 22 U.S.C. §2151 *et seq.* In this case, the USAID cooperative agreement states it was entered into "[p]ursuant to the authority contained in the Foreign Assistance Act of 1961." CX 19 at 1.

[5] The administrative law judge found claimant established the other two prongs of Section 1(a)(5), as his employment was "to be performed outside the continental United States" and there is sufficient evidence the United States "financed" the contract. He found the "financed by" prong was met because USAID provided funding for faculty, CX 19 at 7, and the Special Inspector General for Afghanistan Reconstruction conducted yearly audits which involved evaluating staff salaries, including claimant's. Decision and Order at 9; CX 27 at 3.

hiring for key positions (President, Chief of Staff, and Chief Financial Officer). Decision and Order at 11, 13; Tr. at 58, CX 19 at 12, 39. Consequently, he concluded claimant did not show the United States, or an agency thereof, approved his employment contract, and therefore denied coverage under Section 1(a)(5) of the DBA.

The administrative law judge took too narrow a view of this issue. The Board addressed the scope of Section 1(a)(5) in *Delgado v. Air Serv. Int'l, Inc*., 47 BRBS 39 (2013), where the claimant was an airplane mechanic/engineer in Chad. His employer provided humanitarian air transport funded by a cooperative agreement with the United States Department of State (DOS) and a grant from USAID. Rejecting the administrative law judge's finding to the contrary, the Board concurred with the Director's position "that Section 1(a)(5) does not require the employee to have been working under a contract to which the United States is a party." *Delgado*, 47 BRBS at 42.

The Board then considered the "remaining inquiry," that the administrative law judge did not address, as "whether the "approved . . . by the United States" prong of Section 1(a)(5) [was] met." The Board stated the USAID-DOS agreement contained evidence which "could support a finding that claimant's aircraft maintenance work was performed under an employment contract with employer that was approved by the USAID, through its grant to employer." *Id.* at 43. This evidence indicated "aircraft maintenance was part of the USAID grant and that the cost of contracts to perform such maintenance, including labor charges, was included in the budgets and financial reports that employer was required to submit to the USAID." *Id.* at 44 n. 8 The Board therefore vacated the administrative law judge's grant of summary decision to the employer and remanded the case for consideration of whether the claimant's employment was covered under Section 1(a)(5) of the DBA.[6] *Id.* at 44.

Section 1(a)(5) does not specify how a contract must be "approved." But we agree with the Director that *Delgado* does not suggest the government must explicitly approve the employment contract in order for claimant to be covered.[7] Rather, *Delgado* provides

[6] In *Delgado*, the Board additionally held the contracts'/agreements' omission of the requirement for securing compensation under the DBA did not preclude coverage under Section 1(a)(5). *Delgado*, 47 BRBS at 43-44. Thus, the administrative law judge in this case properly held the absence of any reference to DBA coverage in the cooperative agreement is not dispositive of the coverage issue. *See* n.1, *supra.*

[7] We note the Director's reliance on the legislative history. Specifically, Section 1(a)(5) was added to the DBA in 1958 in order to extend coverage to more workers. *See Ross v. DynCorp*, 362 F. Supp. 344, 355 (D.D.C. 2005) (history of congressional modification of DBA is one of continuous expansion of coverage and militates against an

there may be evidence showing the agency implicitly "approved" an individual employment contract by virtue of the terms of its agreement with the claimant's employer. *Delgado*, 47 BRBS at 43. In this case, the evidence confirms that, for purposes of Section 1(a)(5), USAID "approved" claimant's contract.[8]

The general purposes of the cooperative agreement were to: (1) strengthen academic and professional development programs; (2) enhance the quality of programs; (3) expand programs for women; and (4) increase financial self-sufficiency. CX 19 at 29.[9] With regard to "enhancing quality," the agreement states the University "will continue seeking talented faculty who will strengthen existing and new academic programs," *id.* at 31, and ensure "appropriately credentialed faculty" are teaching undergraduate courses," *id.* at 30. The goal was to have 40 percent of the University's faculty holding doctoral degrees. *Id.* at 31.

Claimant was hired as an Associate Professor of Finance in the Department of Business and Economics. CX 23 at 1. The preface to his employment contract states the mission of the University was to "provide advanced academic program at international

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artificially restrictive reading of DBA coverage); S. Rep. No. 85-1627 at 29 (1958), reprinted in 1958 U.S.C.C.A.N. 2755, 2782-83.

[8] The "substantial involvement" necessary for a cooperative agreement, as detailed at 31 U.S.C. §6305, entails government oversight in the execution of the agreement more extensively than mere financing. *See, e.g., Hymas v. United States*, 810 F.3d 1312, 1328 (Fed. Cir. 2016), *cert. denied*, 137 S.Ct. 2196 (2017) (cooperative farming agreements authorized Fish and Wildlife Service to advise on decisions related to crop selection, farming methods, pesticide and fertilizer use, and crop harvest); *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389, 404-405 (S.D.N.Y. 1999), *aff'd sub nom. Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000) (National Science Foundation retained responsibility for supporting registration services and planning, providing oversight, monitoring and evaluating, approving actions as required, and contacting and negotiating with federal agencies, etc., under internet services/domain cooperative agreement). This is inconsistent with the administrative law judge's finding USAID's oversight is part of the "financed" prong in Section 1(a)(5) rather than the "approved" element. *See* n.5, *supra*.

[9] At the time of the agreement, the University had five undergraduate programs. The agreement states the university "will continue the expansion of its highly successful MBA program" and "will develop at least one other master's level program to meet specific needs." CX 19 at 27-28.

standards of quality" and, to advance that mission, the University sought "to hire highly qualified international faculty." *Id.* at 2. Claimant is a citizen of Canada and Hong Kong, and received a Ph.D. from the Department of Economics and Finance from the City University of Hong Kong. CX 5 at 28 (Dep. at p. 108); EX 11 at 239. Under *Delgado*, this evidence establishes that, through its agreement with employer, USAID "approved" claimant's employment contract.[10] *Delgado*, 47 BRBS at 43.

Other evidence further compels this conclusion. Section A.13 of the cooperative agreement, entitled "Substantial Involvement," required employer to obtain from USAID its "[a]pproval" of its quarterly performance reports, annual work plans, and budgets, with accompanying justification and performance monitoring plans.[11] It also subjected employer's expenditures to audit by various entities, including the USAID Inspector General and SIGAR.[12] CX 19 at 8, 11-12, 38; CX 27. This provision involving oversight of financial matters does not only satisfy Section 1(a)(5)'s "financed by" requirement. It demonstrates USAID's authority to approve actions employer took with respect to its finances. Additionally, under the agreement, employer had to obtain USAID's assistance for resolving any employee improper-conduct situations. *Id.* at 49. Therefore, the cooperative agreement required USAID to oversee employer's operations not only by giving financial support, but also by reviewing and approving the plans and budgets, approving any changes of key personnel, and providing for audits by the USAID Inspector General and SIGAR. *Id.* at 7, 11-12, 38-39; CX 27. The cooperative agreement thus indisputably provided USAID significant approval authority over employer's operations.[13]

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[10] Requiring employer to obtain an extra layer of approval from USAID to replace its top administrators does not diminish this fact. Nor does it undermine the fact that USAID could have used a variety of control mechanisms to disapprove of claimant's hiring, such as cutting off funding for his position or even terminating his employment, although that did not occur in this case.

[11] The budget included international staff salaries and fringe benefits. CX 19 at 8.

[12] In March 2016, SIGAR performed an audit of all of employer's costs under the cooperative agreement from August 1, 2013 to July 31, 2015. CX 27 at 17. This included staff salaries and fringe benefits; there is no indication SIGAR questioned the use of USAID funds to pay claimant's salary or benefits. *Id.*

[13] The agreement also provided for USAID to monitor the achievement of the program's objectives and employer's branding strategy and marketing plan, and it imposed gender requirements and implemented specific security protocols. *Id.* at 8, 11-15.

Mr. Sedney's testimony confirms this conclusion. He explained the agreement required employer to report its international staff salaries on forms sent to USAID, which would typically approve them, but sometimes would not. He also acknowledged USAID required employer to resolve any questions USAID had about the dollar amounts or substantive issues with the salaries before it would approve any reimbursements. Tr. at 70-71. Finally, he confirmed employer's expenditures were subject to the aforementioned audits. *Id*.; *see also* CX 19 at 38; CX 27.

The sole question for coverage under DBA Section 1(a)(5) in this case is whether claimant worked under a contract the United States government approved. As discussed, the cooperative agreement easily meets this standard through USAID's administration of it as a matter of law. *See Malta v. Wood Group Prod. Services*, 49 BRBS 31 (2015), *aff'd sub nom. Wood Group Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019); *see also Jarrett v. CP & O, LLC*, 52 BRBS 27 (2018). The administrative law judge's narrow interpretation of "approved by" and his limitation of DBA coverage to those "key" employees specifically enumerated in the cooperative agreement as subject to USAID's approval would exclude from coverage all lower level employees carrying out the government-financed mission. As stated previously, the DBA's history reflects a strong intent to broaden coverage, not reduce it. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 130 (1962) (quoting *De Bardeleben Coal Corp. v. Henderson*, 142 F.2d 481, 483-484 (5th Cir. 1944) ("[i]n the application of the Act . . . , the broadest ground it permits of should be taken.")); *Ross v. DynCorp*, 362 F. Supp. 344, 355 (D.D.C. 2005).

The indisputable evidence demonstrates USAID had approval authority over many aspects of the business relationship with employer, including staff salaries, despite its not having approved claimant's specific employment contract. As claimant's employment contract fell within the broad spectrum of overseeing and approving employer's budget and its international staff's salaries, we reverse the administrative law judge's finding that claimant is not covered under Section 1(a)(5).

For the reasons stated, we hold USAID's oversight and approval of employer's budget, including its international staff salaries, constitutes "approval" by the United States of claimant's employment contract under Section 1(a)(5). As claimant has established all necessary elements for DBA coverage, we reverse the administrative law judge's denial of coverage under Section 1(a)(5).

Accordingly, we affirm the administrative law judge's Decision and Order - Denying Benefits with respect to his Section 1(a)(4) findings. We reverse his finding that claimant is not covered under Section 1(a)(5), and we remand the case for the administrative law judge to address the remaining contested issues.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues that claimant is not covered under the DBA pursuant to 42 U.S.C. §1651(a)(4). I also concur with my colleagues that DBA coverage under 42 U.S.C. §1651(a)(5) does not require explicit government approval of claimant's employment contract and that the terms of the cooperative agreement between the government and the employer may show the requisite approval of a claimant's employment contract, pursuant to *Delgado v. Air Serv. Int'l, Inc*., 47 BRBS 39 (2013). However, I respectfully dissent from my colleagues' decision to reverse outright the administrative law judge's conclusion that claimant's injury is not covered by the DBA under Section 1(a)(5). Because the Board is not permitted to engage in fact-finding, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), I would vacate the administrative law judge's denial of coverage under this section and remand the case for him to address whether the evidence of record establishes claimant's injury comes within the coverage of Section 1(a)(5), in accordance with applicable law. *Id.*

JUDITH S. BOGGS, Chief
Administrative Appeals Judge