BRB No. 12-0283

TED S. DELGADO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AIR SERV INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 09/24/2013
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Respondent's Motion for Summary Decision of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Roncevert D. Almond (The Wicks Group, PLLC), Washington, D.C., for employer.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Respondent's Motion for Summary Decision (2011-LDA-00497) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, 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 supported by substantial evidence, rational, 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).

Claimant worked for employer under an employment agreement as an airplane mechanic/engineer in Abeche, Chad. He filed a claim under the Act for work-related injuries to his hip, lower back and legs allegedly sustained on or about August 26, 2010. Employer filed with the administrative law judge a motion for summary decision, contending that the claim is not covered by the DBA because there was no genuine issue of material fact that claimant was not working pursuant to a contract with the United States. In support of its motion, employer submitted several documents demonstrating that employer's humanitarian air transport services in Chad are funded through a cooperative agreement with the United States Department of State (DOS) and a grant from the United States Agency for International Development (USAID), and that claimant's employment with employer was pursuant to those two sources of funding. Employer thus asserted that as claimant worked for employer pursuant to a cooperative agreement and a grant, and not a contract, his claim is not covered by the DBA. Claimant opposed employer's motion for summary decision on the ground that issues of fact remain regarding whether the agreements between employer and DOS and USAID could be construed as contracts for the purpose of DBA coverage. The Director, Office of Workers' Compensation Programs (the Director), did not participate in the proceedings before the administrative law judge.

The administrative law judge found that claimant did not demonstrate that there is a genuine issue of material fact with respect to DBA coverage; he, therefore, granted employer's motion for summary decision and dismissed the claim. Specifically, the administrative law judge found that claimant's work for employer was performed pursuant to the DOS cooperative agreement and the USAID grant, and that neither of these legal instruments constitutes a "contract" within the meaning of Section 1(a)(5) of the DBA, 42 U.S.C. §1651(a)(5). The administrative law judge concluded that as claimant worked for employer pursuant to assistance awards, *i.e.*, the DOS cooperative agreement and the USAID grant, rather than a contract, his claim is not covered under Section 1(a)(5) of the DBA. In addition to finding that claimant's work for employer is not covered under Section 1(a)(5), the administrative law judge determined that claimant is not covered by any of the other bases for DBA coverage. *See* 42 U.S.C. §1651(a)(1)-(4), (6). Accordingly, the administrative law judge dismissed the claim for lack of coverage under the DBA.

Claimant appeals the administrative law judge's grant of summary decision, contending the administrative law judge erred in finding that there is no genuine issue of material fact as to whether claimant was performing work under a "contract" within the meaning of Section 1(a)(5) of the DBA. Employer has filed a response brief, urging affirmance of the administrative law judge's order granting summary decision. By Order dated February 15, 2013, the Board requested that the Director file a response brief addressing the issue of DBA coverage under Section 1(a)(5). The Director contends that the administrative law judge incorrectly interpreted Section 1(a)(5) as requiring employer to have *entered into* a contract with the United States or an agency thereof as a prerequisite to DBA coverage. The Director avers that, pursuant to the specific language of Section 1(a)(5), the administrative law judge should have addressed whether claimant's employment was performed under a contract that was "approved and financed" by the United States, even if the approval and financing for that contract came through a grant or cooperative agreement. The Director, therefore, urges the Board to vacate the administrative law judge's order granting summary decision and remand the case for further consideration of whether claimant's employment is covered under Section 1(a)(5). In a brief dated April 17, 2013, employer responded to the Director's arguments and, in addition, presented an argument regarding the clause in Section 1(a)(5) requiring the securing of compensation under the DBA (the DBA security/insurance clause). The Director filed an additional brief on May 14, 2013, responding to employer's argument regarding the DBA security/insurance clause, to which employer replied on July 29, 2013.[1]

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); 29 C.F.R. §§18.40(c), 18.41(a). For the reasons that follow, we conclude that the administrative law judge erred in granting employer's motion for summary decision in this case and that the case must be remanded. *Irby v. Blackwater Security Consulting,* 44 BRBS 17 (2010).

[1]By Order dated July 17, 2013, the Board accepted the Director's May 14, 2013 brief and allowed employer to file a reply to the Director's brief; employer thereafter filed a brief on July 29, 2013, which we accept as part of the record.

The DBA contains six bases for coverage. 42 U.S.C. §1651(a)(1)-(6). Only Section 1(a)(5) is at issue in this appeal.[2] Section 1(a)(5) provides in pertinent part that the DBA applies to an employee engaged in any employment –

> 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). The 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 (FAA), 22 U.S.C. §2151 *et seq.*[3] *See* Decision and Order at 6; Dir. March 27, 2013 Brief at 4 n.3. In this case, the parties acknowledge that USAID expressly issued the grant to employer "pursuant to the authority contained in the Foreign Assistance Act of 1961."[4] EX-D at 1; *see also* Decision and Order at 6.

The administrative law judge determined that the issue of whether claimant's employment is covered under Section 1(a)(5) rests on whether claimant "was doing work

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[2]As claimant challenges only the administrative law judge's finding that his work for employer is not covered under Section 1(a)(5), we need not address the administrative law judge's further findings that claimant is not covered under subsections (a)(1)-(4) and (6). *See* Decision and Order at 8.

[3]*See Overseas African Constr. Corp. v. McMullen,* 500 F.2d 1291, 1295 n.10 (2d Cir. 1974); *Ross v. Dyncorp.,* 362 F.Supp. 2d 344, 353 (D.D.C. 2005); *see also* 48 U.S.C. §28.305(b)(2).

[4]Employer notes that the DOS cooperative agreement with employer indicates that the agreement was authorized and funded pursuant to the Migration and Refugee Assistance Act of 1962, 22 U.S.C. §2501 *et seq.* EX-B at 1. As noted by employer, although the Director does not expressly concede that the DBA does not apply to the DOS cooperative agreement, he confines his analysis of whether the United States approved and financed claimant's employment agreement to the USAID grant to employer, which was issued pursuant to the FAA.

under a 'contract' within the meaning of the DBA." Decision and Order at 6. In considering this issue, the administrative law judge, in essence, found the relevant inquiry to be whether the legal instruments between employer and DOS and USAID constituted "contracts" within the meaning of the DBA. *Id.* at 6-8. As recognized by the administrative law judge, the term "contract" is not defined in the DBA. *Id.* at 6; *see University of Rochester v. Hartman,* 618 F.2d 170, 172 (2d Cir. 1980). The administrative law judge therefore sought guidance from the decision of the United States Court of Appeals for the Second Circuit in *University of Rochester,* in which the court considered whether the deceased employee's employment was covered under Section 1(a)(4) of the DBA. *Id.* at 172. The administrative law judge in this case, relying on the analysis employed by the court in *University of Rochester*, looked to the definitions of "contract," "grant" and "cooperative agreement" provided in the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §6301 *et seq.* (the Grant Act).[5] Decision and Order at 2-8. The administrative law judge found that neither the DOS cooperative agreement nor the USAID grant is a "contract" within the meaning of the DBA, and he therefore concluded that claimant is not covered under Section 1(a)(5). *Id.* at 5-8.

We agree with the Director that the administrative law judge erred in finding the *University of Rochester* court's analysis under Section 1(a)(4) to be applicable to the issue of coverage under Section 1(a)(5) in this case. Significantly, the administrative law judge did not discuss the differences in the language used in subsections (a)(4) and (a)(5), which give those subsections different meanings. Consistent with the language of Section 1(a)(4), the Second Circuit in *University of Rochester* found that the issue determinative of coverage under that subsection was whether the research grants issued to the employer by the two federal agencies, NASA and NSF, constituted "contracts" within the meaning of the DBA. 618 F.2d at 174-176. The court's determination that these research grants did not constitute contracts ended the coverage inquiry under Section 1(a)(4), which expressly requires that the employee be engaged in employment "under a contract *entered into* with the United States," as a condition of coverage.[6] 42 U.S.C.

[5]In *University of Rochester,* the Second Circuit applied the Grant Act criteria, as well as criteria developed by NASA and the National Science Foundation (NSF), the federal agencies involved in that case, to determine whether a grant or a contract was used for any particular project, and concluded that grants were appropriately used for the funding of the research project on which the deceased employee worked. 618 F.2d at 175-76. The court held that as there was no "contract" within the meaning of Section 1(a)(4), the claim was not compensable under the DBA. *Id.* at 176.

[6]Section 1(a)(4) 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

§1651(a)(4) (emphasis added); *see also Tisdale v. American Logistics Services*, 44 BRBS 29, 32 (2010) ("Section [1651(a)(4)] requires the United States or an agency thereof to be a party to the contract."). In *University of Rochester*, coverage under Section 1(a)(4) would have required the deceased employee's employer to have entered into a contract with the United States, or an agency thereof. Thus, the inquiry that was determinative of the coverage issue in that case was whether the legal instruments, or relationships, among the employer and NASA and NSF could be considered to be contracts within the meaning of Section 1(a)(4).

In contrast to Section 1(a)(4), however, Section 1(a)(5) requires only that the employee's employment be "under a contract *approved and financed* by the United States," or any agency thereof. 42 U.S.C. §1651(a)(5) (emphasis added); *see Tisdale*, 44 BRBS at 32. In the Director's view, the phrase "approved and financed" contained in Section 1(a)(5) reflects coverage of employees engaged in employment under contracts that are approved and funded by the United States, even if the United States is not a party to those contracts. The Director argues in this regard that if Congress had intended to limit coverage under Section 1(a)(5) to employment under a contract to which the United States is a party, it would have used the same language used in Section 1(a)(4). In support of this argument, the Director cites *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *amending* 912 F.2d 1084, 24 BRBS 15(CRT) (9th Cir. 1990), for the proposition that Congress' use of different language in companion subsections of the same provision gives those subsections different meanings. Employer responds that the Director's interpretation of Section 1(a)(5) ignores the effect of the Grant Act upon federal funding and acquisition mechanisms. Employer contends that the term "contract" must be analyzed in the same manner under both subsections (a)(4) and (a)(5) so that the Grant Act analysis is consistently applied under both subsections.

> contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work, and every contract shall contain provisions requiring that the contractor . . . (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 . . . 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)(4) (emphasis added).

We reject employer's proposed interpretation of Section 1(a)(5) as it is inconsistent with the canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 746, 36 BRBS 18, 21(CRT) (5th Cir. 2002) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)). Moreover, employer's suggestion that the analysis of whether the employee is engaged in employment under a contract is the same under both subsections (a)(4) and (a)(5) contravenes the Supreme Court's recent pronouncement that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Pacific Operators Offshore, LLP v. Valladolid*, 132 S.Ct. 680, 688, 45 BRBS 87, 90(CRT) (2012)(internal quotations and citation omitted); *see also Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1356 n.5, 46 BRBS 15, 18 n.5(CRT) (2012); *Mobley*, 920 F.2d at 560-61, 24 BRBS at 52-53(CRT). We agree with the Director's reading, which gives effect to the textual distinction between subsections (a)(4) and (a)(5), and we therefore concur in his 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*.

With respect to the case before us, the Director acknowledges that the administrative law judge correctly found that the agreement between employer and USAID is a grant and the agreement between employer and DOS is a cooperative agreement, and that neither of these agreements is a "contract." The Director contends, however, that the administrative law judge erred by concluding that coverage under Section 1(a)(5) is foreclosed simply because employer did not enter into contractual relationships with USAID and DOS. Noting the evidence that claimant worked under an employment agreement, or contract, with employer, EX-A, the Director avers that there is a genuine issue of material fact as to whether this employment agreement constitutes a contract that was approved and financed by the United States within the meaning of Section 1(a)(5).[7] As previously discussed, it is undisputed that the USAID grant to employer was expressly made under the FAA. EX-D at 1. Moreover, employer acknowledged in its motion for summary decision that claimant's work for employer was performed pursuant to funding provided under both the USAID grant and the DOS cooperative agreement. *See* Emp. Motion for Summary Judgment at 17-18. Section 1(a)(5) has been held to apply to a contract that is funded under the FAA, whether that funding is exclusive or partial. *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291 (2d Cir. 1974); *Ross v. Dyncorp*, 362 F.Supp. 2d 344, 357 (D.D.C. 2005); *see also Vance v. CHF Int'l*, 914 F.Supp. 2d 669, 679-80 (D.Md. 2012). Although this issue was

[7]As noted by the Director, no court has yet directly addressed the issue presented by this case as to whether Section 1(a)(5) coverage extends to employment performed under an employment contract that is approved and financed by the United States through a grant under the FAA to the employee's employer.

not addressed by the administrative law judge, the evidence, construed in the light most favorable to claimant as the non-moving party, supports a finding that claimant's work under a contract with employer was at least partially financed by the USAID grant which was made pursuant to the FAA. This evidence would satisfy the "financed by the United States" requirement of Section 1(a)(5). *See Ross*, 362 F.Supp. at 357. Thus, it cannot be said that employer is entitled to a decision in its favor as a matter of law. *See, e.g., Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), c*larified on recon.*, 47 BRBS 9 (2013).

The remaining inquiry, which also was not addressed by the administrative law judge, is whether the "approved . . . by the United States" prong of Section 1(a)(5) is met. We agree with the Director that a genuine issue of material fact exists with respect to this issue. The references in the USAID Agreement documents cited by the Director, when viewed in the light most favorable to claimant, could support a finding that claimant's aircraft maintenance work was performed under an employment contract with employer that was approved by USAID through its grant to employer.[8] In response to the Director's argument regarding the "approval" prong of Section 1(a)(5), employer asserts that the record contains no explicit evidence that claimant's employment agreement was approved by the United States. Employer contends that the administrative law judge could have rationally concluded, based on the evidence before him, that claimant's employment agreement was not "approved" by the United States. Acceptance of employer's argument would require that the evidence be weighed and that inferences be drawn in favor of employer, neither of which is permissible in ruling on a motion for summary decision. Not only must there be no genuine issue as to evidentiary facts, but there must be no controversy regarding inferences to be drawn from those facts. *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35, 36 (2008) (citing *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987)); *see also Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996) (In considering whether to grant summary judgment, the court is to "construe all evidence in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes."). Thus, the administrative law judge's grant of employer's motion for summary decision must be vacated.

Employer additionally argues that Section 1(a)(5) does not provide coverage in this case because neither the DOS or USAID agreements nor claimant's employment agreement include the provisions set forth in Section 1(a)(5) regarding the securing of

[8]Specifically, the Director cites documents in the record reflecting that 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 USAID. *See, e.g.*, EX-D at 1, 4; EX-E at 2; EX-F at 2; EX-G at 2, 3, 12, 13.

compensation under the DBA.[9] In employer's view, Section 1(a)(5) does not confer coverage unless the relevant legal instruments contain those provisions requiring the securing of DBA benefits, and in this case, none of the documents includes the required language. The Director responds to employer's argument asserting that the Section 1(a)(5) provision regarding the securing of compensation under the Act is not an element of coverage but, rather, merely a ministerial requirement to be included in documents where DBA coverage otherwise exists; thus, the Director posits that the omission of the security/insurance clause from the documents in this case cannot defeat coverage if it otherwise exists.

We note that although employer presented argument regarding this issue before the administrative law judge, *see* Emp. Motion for Summary Judgment at 26-29, the administrative law judge did not reach the issue. As the issue is purely one of law, the Board may appropriately address it in the interest of judicial economy. *Logara v. Jackson Eng'g*, 35 BRBS 83 (2001). We find persuasive the Director's analysis that the omission of the security/insurance clause does not foreclose coverage under Section 1(a)(5). *See generally Tanner v. Director, OWCP*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993). The Director persuasively argues that employer's position is undercut by the terms and structure of the DBA. Specifically, the DBA sets forth in Section 1(e), 42 U.S.C. §1651(e), a mechanism to waive DBA coverage for employment, which requires an affirmative decision by the Secretary of Labor to waive coverage.[10] Section 1(e),

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[9]Section 1(a)(5) states, in pertinent part, that,

> every such contract shall contain provisions requiring that the contractor... 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, ….

42 U.S.C. §1651(a)(5).

It is uncontested that employer did not obtain a DBA insurance policy and that the relevant documents do not include a security/insurance clause.

[10]Section 1(e) provides in pertinent part:

> Upon the recommendation of the head of any department or other agency of the United States, the Secretary of Labor, in the exercise of his discretion, may waive the application of this section with respect to any contract, subcontract, or subordinate contract, work location under such contracts, or classification of employees. Upon recommendation of any employer referred to in clause (6) of subsection (a) of this section, the Secretary of

which is not applicable to this case, represents the sole method by which the United States may waive DBA coverage for employment which would otherwise be covered. We therefore agree with the Director that a federal agency contracting officer or an employer does not have the authority to waive or avoid DBA coverage where it otherwise exists merely by omitting the security/insurance clause from the relevant legal instruments.[11] *See generally Texas v. United States*, 497 F.3d 491, 503 (5th Cir. 2007)("It stands to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio.*"). Consequently, contrary to employer's argument, coverage under Section 1(a)(5) cannot be defeated by the omission of a security/insurance provision in the relevant legal agreement.

Accordingly, as there remain genuine issues of material fact in this case and as employer is not entitled to a decision in its favor at this juncture, we vacate the administrative law judge's grant of employer's motion for summary decision and the consequent dismissal of the claim under the DBA. *See Morgan*, 40 BRBS at 13. We remand the case for further proceedings with respect to the issue of whether claimant's employment is covered under Section 1(a)(5) of the DBA in accordance with this

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> Labor may waive the application of this section to any employee or class of employees of such employer, or to any place of employment of such an employee or class of employees.

42 U.S.C. §1651(e); *see also* 48 C.F.R. §28.305(d).

[11]As under the Longshore Act, an employer's securing compensation under the DBA immunizes it from tort liability. *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012); *see* 33 U.S.C. §§904(a), 905(a), 932, 936. Failure of an employer to secure coverage under the Longshore Act cannot defeat the claimant's coverage under that Act. *See Director, OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980).

decision. The administrative law judge should hold an evidentiary hearing if one is requested by any party or otherwise receive additional evidence and argument on the issues presented. 33 U.S.C. §919(d); 5 U.S.C. §557; 20 C.F.R. §§702.332, 702.346.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge