U.S. Department of Labor

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

BRB No. 23-0153

DEVON ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, LLC	)	
	)	
and	)	
	)	
STARR INDEMNITY AND LIABILITY COMPANY	)	DATE ISSUED: 05/29/2024
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Summary Decision and Dismissing Claim of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

John P. Kaplan and Lara D. Merrigan (Merrigan Legal), Campbell, California, and Scott Thaler and Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Michael W. Thomas and Nora Sullivan (Thomas Quinn, L.L.P.), San Francisco, California, for Employer/Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy 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, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Richard M. Clark's Order Granting Summary Decision and Dismissing Claim (2022-LDA-00505) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), and as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

While working for Pacific Architects and Engineers (PAE) as a firefighter in Curaçao,[1] Claimant received a conditional offer of employment, dated April 28, 2021, to work for Employer as a firefighter in Afghanistan. EX 1 at 1.[2] The offer was contingent on, among other things, a background investigation and pre-employment vaccinations and medical examinations. *Id.* He accepted Employer's conditional offer on the same day. EX

[1] At the time of his injury Claimant lived in Curaçao but is a United States citizen and listed California as his state of residence on his LS-203. CX 1. Also, the ALJ's decision was filed by the district director for the Long Beach suboffice of the Western District in California. As such, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).

[2] Employer's Exhibits (EX) are cited to correspond to exhibits in Employer's Motion for Summary Decision as the ALJ used this labeling and pagination in his Order Granting Summary Judgment and Dismissing Claim. EX 2, Virtual Deposition of Devon Adams, is cited based on the actual page numbers of the deposition transcript itself rather than the pagination in the exhibit to correspond to the ALJ's citations. Claimant's Exhibits (CX) are cited to correspond to his pre-hearing witness and exhibit list.

2 at 24. Subsequently, Claimant and Employer coordinated to schedule his pre-deployment medical examinations and vaccinations in Miami, Florida, between May 26, 2021, and May 28, 2021, because the testing could not be done in Curaçao. EXs 2 at 27-28; 3 at 2. Claimant traveled to Miami at his own expense, but Employer paid for the testing he underwent in Miami. EX 3 at 28.

On May 27, 2021, after Claimant completed his dental examination for Employer, he picked up a friend from the airport to go to dinner and, while stopped and waiting to make a turn, was caught in an exchange of gunfire between persons unknown to him; he was shot in his right shoulder by a stray bullet. EXs 2 at 31-32; 7. He underwent surgery and other medical treatment for his injury immediately after the shooting. CX 7. Following the surgery, he attempted to remain in communication with Employer but complications from his injury prevented him from further pursuing the firefighter position. EX 2 at 46. Claimant has not worked since the May 27, 2021 shooting, and PAE withdrew the offer of conditional employment in November 2021. *Id.* at 46-47.

On June 30, 2021, Claimant filed a claim for compensation under the DBA, alleging Employer is liable for the right shoulder and upper extremity injuries he sustained on May 27, 2021. CX 2. Employer controverted the claim on December 28, 2021, contending Claimant was not its employee at the time of the incident. EX 9. On December 7, 2022, Employer filed a motion for summary decision, arguing there is no genuine dispute that it had no employment relationship with Claimant on May 27, 2021. Emp. Mot. For Summary Decision at 6-7.

On January 12, 2023, the ALJ issued an Order Granting Summary Decision and Dismissing Claim (Order). The ALJ considered the parties' briefing and concluded Claimant was not employed by Employer at the time of his injury on May 27, 2021, but, rather, he had an offer of employment conditioned on successfully completing pre-deployment testing. Order at 6. In reaching his decision, the ALJ determined there was a conditional offer of employment between Claimant and Employer based on Claimant's employment with PAE at the time of the incident, Employer's recommendation Claimant not quit his employment with PAE before completing his pre-employment testing, and Claimant's decision to travel to Miami at his own expense for testing. *Id.* He also concluded Claimant could not have been considered an employee at the time of the injury because he was "under no obligation to Employer except to complete additional testing the next day." *Id.* at 6-7. He also stated Claimant was not injured while traveling to or from any of the testing, or while undergoing testing. Consequently, the ALJ found there is no genuine issue of material fact and concluded, as a matter of law, that Claimant was not employed by Employer at the time of the injury. He thus granted Employer's motion for summary decision and dismissed Claimant's claim. *Id.* at 7-8.

Claimant appeals the ALJ's order, contending he erred in determining there was no genuine issue of material fact about whether an employment relationship existed between Claimant and Employer. Cl. Brief at 10. He argues the ALJ did not specify which legal standard he applied in arriving at his conclusion that no employment relationship existed at the time of injury. *Id.* at 12-13. Claimant also asserts he put forth sufficient evidence to demonstrate the existence of an employment relationship, and his injury falls within the zone of special danger doctrine. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (Director) also responds, agreeing with Claimant's argument that the ALJ erred in not specifying which employment test he used and averring the ALJ seemed to incorrectly apply the Act's definition of "employee" under Section 2(3), 33 U.S.C. §902(3), rather than the common law master-servant test used in the DBA.

In determining whether to grant a party's motion for summary decision, the ALJ 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 matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9, 11 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 875 (9th Cir. 1995); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63, 64 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. A fact is "material" if it "might affect the outcome of the suit under the governing law." *O'Hara*, 294 F.3d at 61. An issue of fact is "genuine" if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* As the facts of this case pertaining to his injury are undisputed, there is no genuine issue of fact. Therefore, the question before the Board is whether the ALJ properly applied the law to the established facts in determining there was no employment relationship at the time of the May 27, 2021, incident.

Pursuant to Section 1(a)(4) of the DBA, a claimant must be "an employee engaged in any employment … under a contract … or any subcontract, or subordinate contract with respect to such contract … for the purpose of engaging in public work." 42 U.S.C. §1651(a)(4); *Sheren v. Lakeshore Engineering Services, Inc.*, 54 BRBS 17, 20 (2020). Under both the Act and the DBA, a claimant and an employer must be in an employment relationship at the time of the claimant's injury for the employer to be held responsible. *Sheren*, 54 BRBS at 20. However, the term "employee" is not defined in the DBA; its meaning comes from the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). The term "employee" under the DBA cannot be defined with reference to the term

"employee" in 33 U.S.C. §902(3) of the Act.[3] *Irby v. Blackwater Security Consulting*, 44 BRBS 17, 25 (2010). As such, to be covered by the DBA, one must be an employee under a common law "master-servant" test. *Sheren*, 54 BRBS at 20.

Several different master-servant tests have been utilized in cases under the DBA to determine whether an employment relationship exists, including the "right to control" test, the "nature of the work" test, and the Restatement test.[4] *Sheren*, 54 BRBS at 19, 20 n.9; *see Oilfield Safety and Machine Specialties, Inc.*, 625 F.2d 1248, 1253-1254 (5th Cir. 1980) (applying the "nature of the work" test to determine the claimant was employed by two employers at the time of his injury); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141, 144-145 (1981) (applying the Restatement test to conclude the claimant and the employer were not in an employment relationship); *Burbank v. K.G.S., Inc.*, 12 BRBS 776, 778-780 (1980) (applying the "right to control details of work" test to reverse an ALJ's finding that a go-go dancer was an independent contractor, and identifying the "nature of the work" test as "a helpful tool"). The ALJ may apply whichever test is best suited to the facts of a particular case. *See Herold v. Stevedoring Services of Am.*, 31 BRBS 127, 129 (1997).

Claimant and the Director both assert the ALJ failed to explain which test he applied to determine there was no employment relationship between Claimant and Employer at the time of the May 27, 2021, incident. Claimant claims the ALJ's reliance on factors like whether a contract existed between him and Employer, whether he was paid, and whether he quit his employment with PAE, indicates the ALJ employed the "right to control" test, a test which is – according to Claimant – inappropriate in cases determining the right to

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[3] As previously noted, "Act" refers to the Longshore and Harbor Workers' Compensation Act and "DBA" refers to the Defense Base Act as an extension of the Longshore and Harbor Workers' Compensation Act.

[4] The "right to control" test, also known as the "right to control details of work" test, requires the application of four factors: 1) the right to control the details of the job; 2) the method of payment; 3) the furnishing of equipment; and 4) the right to terminate employment. *See Burbank v. K.G.S., Inc.*, 12 BRBS 776, 778 (1980). The "nature of the work" test analyzes employee-employer relationship based on a two-part analysis, examining 1) the nature of the claimant's work and (2) the relation of that work to the regular business of the employer. *Haynie v. Tideland Welding Service*, 631 F.2d 1242, 1243 (5th Cir. 1980). The Restatement (Second) of Agency, Section 220, Subsection 2 (now updated to Restatement Third of Agency), Section 7.07 cmt. f), enunciates a nine-factor test including, among other things, the extent of control, the kind of occupation, and the method of payment. *Melech v. Keys*, 12 BRBS 748, 750 (1980).

compensation for workplace injuries. Cl. Brief at 14. The Director argues the ALJ relied on incorrect reasoning from a previous United States Department of Labor Office of Administrative Law Judges (OALJ) decision, *Davila v. Constellis Group/Triple Canopy and SOC, LLC*, 2019-LDA-00522 (Nov. 22, 2019),[5] and indirectly misapplied Section 2(3)'s status coverage provision instead of distinctly discussing and applying one of the master-servant common law agency tests. Director Brief at 4.

Without addressing Claimant's and the Director's hypotheses about which test the ALJ may or may not have erroneously applied, we cannot affirm the ALJ's order because he did not identify any test or criteria/factors used to reach his conclusion that there was no employment relationship. In his order, he noted the DBA does not define "employee" and the meaning of the term must come from the conventional master-servant relationship understood by common law agency doctrine. Order at 4. However, as the Director argues, the ALJ subsequently stated, "applying the Longshore Act, here, Claimant's injury must have occurred at a point that was integral and essential to the purpose for which he was hired, or the purpose for which he was present for employer." *Id.* at 5. He then found the facts in this claim similar to those in *Davila* and discussed the undisputed facts to conclude no employer-employee relationship existed:

> Here, there is no dispute that on April 28, 2021, Employer made Claimant a conditional offer of employment to work as a firefighter in Afghanistan. Claimant accepted the job offer contingent on successfully completing pre-deployment testing that the parties agreed would occur in Miami. Employer suggested that Claimant not quit his then-current job because if there was an issue with his pre-deployment medical examinations, he wouldn't have either job. Claimant did not quit his job when he went to Miami for testing and planned to give notice once an actual deployment date was set. Claimant traveled at his own expense to complete the predeployment [sic] testing in Miami but was not placed on Employer's payroll, received no wages or expenses, and was not reimbursed by Employer for his travel or hotel. He also paid for a rental car at his own expense. Claimant did not sign anything

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[5] In *Davila*, the claimant was offered employment with the employer as a security guard in Iraq. *Davila v. Constellis Group/Triple Canopy and SOC, LLC*, 2019-LDA-00522, slip op. at 3 (Nov. 22, 2019). The claimant traveled at the employer's expense to Jordan for training but was not paid any wages nor did he sign any employment agreement. *Id.* He averred he suffered psychological and hearing loss injuries as a result of his time in Jordan. *Id.* The ALJ granted summary decision in favor of the employer, concluding the training involved was neither integral nor essential to the employer's security operations in Iraq. *Id.* at 6.

> other than the "conditional" offer of employment. Other than attending medical appointments, he was under no other obligation to Employer. Even though Claimant had traveled to Miami to undergo testing for Employer because the testing could not be conducted in Curaçao, when he was shot, he was not engaged in any activity for Employer's benefit.

Id. at 6.

The ALJ did not mention any of the common law tests used to determine an employment relationship, and we decline to infer the test or criteria/factors he considered in granting summary decision. While he has discretion in determining what test or other criteria or factors to employ, he must adequately explain the rationale behind his decision and specify the law or other criteria/factors upon which he relied. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

The ALJ's lack of adequate explanation for his findings and conclusion makes it impossible for the Board to adequately apply its standard of review. *See Frazier v. Nashville Bridge Co.*, 13 BRBS 436, 437 (1983) (it is the ALJ's responsibility to fully evaluate the relevant evidence and provide some level of detail in his rationale to enable the reviewing body to accurately assess the decision). Moreover, the ALJ's reference to tasks "integral" and "essential" to Employer's work under the Act suggests he relied upon Section 2(3)'s status requirements, which are not applicable in a case arising under the DBA. 33 U.S.C. §902(3); *Irby*, 44 BRBS at 25; *see generally Pearce v. Director, OWCP*, 603 F.2d 763, 765 (9th Cir. 1979) ("Congress passed the [DBA] in order to provide workers' compensation coverage for specified classes of employees working 'outside the continental United States.'"). We thus cannot affirm the ALJ's determination that Employer is entitled to summary decision as a matter of law. On remand, the ALJ must set forth the specific test or tests he employs, identify the criteria or factors he considers, and explain why they demonstrate an employment relationship or lack thereof.

Accordingly, we vacate the ALJ's Order Granting Summary Decision and Dismissing Claim and remand the case for further proceedings and explanation consistent with this decision.[6]

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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[6] We decline to address Claimant's remaining argument that his injury arose out of his employment under the zone of special danger doctrine, as the ALJ did not render any findings or conclusions on this issue. 33 U.S.C. §921(b)(3); *Bath Iron Works Corp. v. Director, OWCP* [*Jones*], 193 F.3d 27, 32 (1st Cir. 1999).