COMPENSATION REVIEW BOARD

CRB No. 10-068

TYRONE A. BRYANT,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer–Respondent.

Appeal from a Compensation Order of
The Honorable Anand K. Verma
AHD No. PBL07-064A, DCP No. 30080962811

Kirk D. Williams, Esquire for the Petitioner
Frank McDougald, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §1-623.28, 7 DCMR §118, and the Department of Employment Services Director's Administrative Policy Issuance No. 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL POSTURE

In September 2008, Mr. Tyrone A. Bryant was injured on the job. His claim was accepted.

In November 2008, Mr. Bryant returned to modified duty at his pre-injury wage. Without notice, the Disability Compensation Program ("DCP")[2] terminated Mr. Bryant's workers' compensation disability benefits.

[1] Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-01. (June 20, 2012).

[2] Effective October 1, 2010, the Disability Compensation Program's name was changed to the Public Sector Workers' Compensation Program.

The next month, Mr. Bryant was taken off work by his treating physician. His medical benefits were reinstated; his wage loss benefits were not.

Mr. Bryant filed an Application for Formal Hearing seeking temporary total disability compensation benefits from December 5, 2008 to the date of the formal hearing and continuing. Following a formal hearing, an administrative law judge ("ALJ") issued a Compensation Order.

In a January 21, 2010 Compensation Order, the ALJ ruled the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD")[3] had jurisdiction over Mr. Bryant's claim. Then, the ALJ granted Mr. Bryant temporary total disability compensation benefits from December 5, 2008 through June 23, 2009.

On appeal, Mr. Bryant contends the ALJ erred in terminating temporary total disability benefits as of June 23, 2009 because DCP had failed to issue a Final Determination.[4] Interestingly, Mr. Bryant argues that although AHD had jurisdiction over his claim despite DCP's failure to issue a Final Determination, DCP's failure to issue a Final Determination prevented the ALJ from considering any substantive issues. Mr. Bryant requests the Compensation Order be reversed and his benefits be reinstated until DCP issues a Final Determination.

Although the ALJ denied the motion to dismiss filed by the D.C. Department of Corrections ("Employer"), Employer does not appeal the issue of jurisdiction. Instead, Employer asserts the Compensation Order is supported by substantial evidence and should be affirmed.

ISSUE ON APPEAL

1. Does AHD have jurisdiction over a claim if DCP has not issued a Final Determination?

ANALYSIS[5]

AHD does not have jurisdiction to audit or control the administrative activities of DCP, and even though neither party has raised the issue of jurisdiction on appeal, we cannot affirm a Compensation Order that "reflects a misconception of the relevant law or a faulty application of the law."[6] Because the ALJ ruled he had jurisdiction over Mr. Bryant's claim even though a Final Determination has not been issued by DCP, the law requires we vacate the Compensation Order.

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[3] As of February 2011, the Administrative Hearings Division's name changed to Hearings and Adjudication.

[4] The term "Final Determination" is used generically to refer to any final decision rendered by DCP including but not limited to a Denial of Award of Compensation Benefits or Notice of Loss of Wage Earning Capacity.

[5] Because the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 7 DCMR §266.3; *see* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

[6] *D.C. Department of Mental Health v. DOES*, 15 A.2d 692 (2011) (Internal citations omitted.)

The ALJ recognized that the first issue for resolution was "[w]hether the Application for Formal Hearing was filed in a timely manner to vest proper jurisdiction in the Administrative Hearings Division (AHD) to adjudicate this claim."[7] In resolving that issue, the ALJ found that

> [o]n October 20, 2008, claimant returned to light duty work and on or about October 20, 2008 claimant's temporary total disability benefits were terminated. In accord with § 1-623.24(b)(1), claimant had thirty (30) days to contest the termination of benefits, however, it was not until March 17, 2009, more than five months after the termination of benefits, claimant contested the termination by filing an application for hearing.[8]

The ALJ went on to rule

> [t]he available evidence is somewhat vague on how the termination of benefits was communicated to claimant in that the record contains no notice from employer to claimant apprising him of the cessation of disability benefits because he had resumed work. Absent a written communication to claimant regarding the discontinuance of disability payments, it appears almost certain that discontinuance of the compensation checks was the only indication to claimant that his benefits were terminated. Indeed, cessation of benefits without a companion written notice thereto does not constitute the requisite decision under §1-623.24(b)(1).
>
> The plain language of §1-623.24(b)(1) of [the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* ("Act")] requires "the issuance of a decision" by DCP before an injured worker may request a formal hearing. In other words, the Act is unambiguous that the actual issuance of a Final Determination is a prerequisite to AHD's adjudication of the request for benefits. See *Charles Marshall v. District of Columbia Protective Services*, CRB No. 08-201, AHD No. PBL08-059A, DCP No. DMOPS008027 (May 5, 2009).
>
> Consistent with the language of the preceding provision, the undersigned holds employer has not met its burden of providing claimant with the requisite notice at or after the cessation of his disability benefits. Hence, AHD retains proper jurisdiction to hear and adjudicate the claim claimant may have against employer, albeit not filed, as argued by employer, within 30 days after the issuance of the decision, to terminate his benefits. Claimant should not be penalized for a lapse that occurred on the part of employer.[9]

The ALJ's ruling is contrary to the law and must be vacated.

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[7] *Bryant v. D.C. Department of Corrections*, AHD No. PBL07-064A, DCP No. 30080962811 (January 21, 2010).

[8] *Id*. at 3.

[9] *Id*. At 4.

In *Tellish v. D.C. Public Schools*,[10] the claimant filed an Application for Formal Hearing seeking permanent partial disability compensation benefits before AHD; that Application for Formal Hearing was dismissed by the presiding ALJ for lack of jurisdiction. The ALJ reasoned DCP had not issued a Final Determination, and in the absence of a Final Determination, there was no jurisdiction authorizing AHD to conduct a formal hearing.

This tribunal remanded the case back to AHD holding that despite the lack of a Final Determination, AHD had jurisdiction to proceed to a formal hearing because a "constructive determination" had been effectuated "as a matter of law, due to the lapse of the statutorily prescribed 30-day period [set forth in §1-623.24(b)(1)]."[11] On remand, the ALJ refused to proceed to a formal hearing.

Another appeal ensued, and the CRB reiterated that the phrase "deemed accepted" creates an exception to the requirement of an actual written Final Determination because the Act, "instructs, commands and requires that a failure to issue that decision or a notice of extenuating circumstances within the 30 day period be treated 'as if' a written determination has been issued."[12]

Upon careful consideration, we find *Tellish* is inconsistent with the plain language of the statute and is overruled. The plain language of §1-623.24(b)(1) of the Act requires "the issuance of a decision" by DCP before an injured worker may request a formal hearing:

> The authority of this Agency to review disputes arising out of the Public Sector Workers' Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of [DCP] Determinations by an ALJ in DOES. As a general principle, the only matters that DOES has authority to review are matters upon which [DCP] has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon.[13]

In other words, the Act is clear that the actual issuance of a Final Determination is a prerequisite to AHD's adjudication of the request for benefits:

> While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code §1-623.24 (a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or

[10] CRB No. 07-001, AHD No. PBL05-028A, DCP No. DCPS 007013 (February 16, 2007).

[11] *Id*.

[12] *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL05-028A, DCP No. DCPS 007013 (June 28, 2007).

[13] *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011).

> deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. *See* D.C. Official Code §1-623.24 (b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.")[14]

Such a reading does not "render the provisions of subsections (a-3)(1) and (a-4)(2) meaningless and without recourse."[15] Section 1-623.24(a-3)(1) of the Act does not even apply to a request for permanent partial disability compensation benefits. Pursuant to §1-623.24 (a-4)(2), if DCP fails to provide a written decision after a reconsideration has been requested, "the claim shall be deemed accepted, and payment of compensation to the claimant shall commence on the 31st day following the date the request was filed."[16] Contrary to the meaning previously ascribed to "deemed accepted" in *Tellish*, *supra*, DCP's failure to render a final decision on reconsideration entitles a claimant to payment of compensation, a far more effective recourse under those circumstances than providing for a formal hearing.

Consistent with the language enacted by the City Council in §1-623.24(b)(1), DCP's issuance of a Final Determination is a condition precedent to AHD obtaining jurisdiction. DCP's failure to issue a Final Determination, therefore, prevents AHD from obtaining the authority to conduct a formal hearing to adjudicate Mr. Bryant's claim for benefits.[17]

There is no Final Determination in the record. When the record is devoid of evidence necessary to make a finding, the party with the burden of proof fails to satisfy that burden, and no remand is necessary.[18] Thus, AHD does not have jurisdiction over this claim because DCP has not issued a Final Determination. [19]

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[14] *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

[15] *Tellish, supra*.

[16] Section 1-623.24(a-4)(2) of the Act. This section of the Act has been repealed.

[17] See *Dorsey v. D.C.*, 917 A.2d 639, 641 (D.C. 2007).

[18] *St. Clair v. D.C. Department of Employment* Services, 658 A.2d 1040 (D.C. 1995):

> [T]he Director simply rejected the examiner's *legal conclusion* that the facts as found by the examiner were sufficient to support a claim of retaliatory discharge under the Act[, and] we conclude that the Director's decision does not rest upon any impermissible intrusion into the factfinding function of the examiner. In concluding alternatively that the examiner's finding of retaliatory discharge was not supported by substantial evidence, the Director did not repudiate any factual findings made by the examiner or substitute others. Although the Director observed that there was absent from the record any evidence supporting the claim, and there was evidence showing the contrary, this recitation required no resolution of differing versions of the facts as disclosed by the evidence and no rejection of the examiner's credibility determinations or findings. [Footnote omitted.] Given the state of the record, specifically the lack of evidence which would establish a prima facie case of retaliatory discharge, no purpose would have been served by remanding the case to the examiner for further findings. Thus, assuming any error in the Director's having failed to do so, it was harmless. *See King*, 560 A.2d at 1073 (rule of prejudicial error applicable to review of agency decisions) (citing D.C. Code § 1-1510 (b) (1981)).

ORDER

The January 21, 2010 Compensation Order is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 6, 2012
DATE

See also, *Wise v. Washington Metropolitan Area Transit Authority*, Dir. Dkt. No. 01-01, OHA No. 00-545, OWC No. 543986 (February 1, 2002).

[19] The CRB has not overlooked the fact that there is no statute or regulation establishing a time period within which the DCP must respond to Mr. Bryant's request for benefits; however, this is an issue the legislature must resolve.