

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD
CRB No. 08-200

NETTIE J. SISNEY,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer–Respondent.

Appeal from an Order of
Administrative Law Judge Gerald D. Roberson
AHD No. PBL08-066, DCP No. DCP007970

Michael J. Kitzman, Esquire, for the Claimant-Petitioner
Andrea G. Comentale, Esquire, for the Employer-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 2008, Ms. Nettie J. Sisney filed an Application for Formal Hearing (“Application”) with the Office of Hearings and Adjudication, Administrative Hearings Division (“AHD”).² Because no

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

² As of February 2011, the Administrative Hearings Division's name changed to Hearings and Adjudication.

Final Determination³ from the Disability Compensation Program (“DCP”)⁴ had been submitted to AHD, on June 5, 2008, an administrative law judge (“ALJ”) dismissed the Application.

On July 22, 2008, Ms. Sisney filed an Application for Review (“AFR”). As grounds for this appeal, Ms. Sisney asserts that pursuant to §1-623.24 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* (“Act”) and its implementing regulations, the Dismissal Order must be vacated and she must be allowed to proceed to a formal hearing on her claim for permanent partial disability compensation benefits.

The District of Columbia Public Schools (“DCPS”) asserts the CRB must dismiss the AFR for lack of subject matter jurisdiction. Specifically, DCPS asserts the order under review is neither a compensation order nor a final decision of the AHD; consequently, the CRB lacks jurisdiction. In the alternative, DCPS argues the June 5, 2008 Dismissal Order is supported by substantial evidence.

ISSUE ON APPEAL

1. Does the CRB have jurisdiction over the Order on appeal?
2. Does AHD have jurisdiction over a claim if DCP has not issued a Final Determination?

ANALYSIS⁵

Initially, DCPS opposes this appeal by asserting the ALJ’s order is neither a compensation order nor a final decision. As such, DCPS relies upon 7 DCMR §118.2 to support the argument that this tribunal lacks jurisdiction:

[a]ny party adversely affected or aggrieved by a compensation order or final decision issued by the Administrative Hearings Division with respect to a claim for disability benefits pursuant to Title XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Official Code §1-623.1 *et seq.* (2001)) may appeal said compensation order or final decision to the Board by filing an Application for Review with the Board within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision in accordance with and pursuant to the provisions of 7 DCMR section 258

Neither “compensation order” nor “final decision” is defined in the Act or the governing regulations; however, in limiting the CRB’s appellate authority to review of compensation orders or

³ 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.

⁴ Effective October 1, 2010, the Disability Compensation Program’s name was changed to the Public Sector Workers’ Compensation Program.

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).

final decisions, the regulations and the Act make a distinction between orders that represent a final pronouncement as to whether or not a worker is entitled to compensation and orders that neither award nor deny such compensation as a final matter.⁶ The ALJ's order forecloses the opportunity to seek compensation benefits in the previously pending proceeding and is subject to review by this tribunal; therefore, the CRB does have jurisdiction over this appeal.

Ms. Sisney asserts §1-623.24 of the Act vests jurisdiction in AHD to adjudicate her request for permanent partial disability compensation benefits as a "claim." We disagree. Sections 1-623.24(a), (a-1), (a-2), and (a-3) do not apply to Ms. Sisney's request for permanent partial disability compensation benefits. In *Nixon v. DOES*,⁷ the D.C. Court of Appeals held §1-623.24(a-3)(1) applies only to initial claims to initiate payment of disability compensation benefits, "claims documented by a 'report furnished by the employee's immediate supervisor.'"

Moreover, in *White v. D.C. Department of Housing and Community Development*,⁸ the Director of the Department of Employment Services ruled that the plain meaning of Section 2324(a) of the Act entitled "Time for making claim; findings of fact; awards; right to hearing; conduct at hearing" is applicable when an initial claim is made, a claim made by filing a claim and a supervisor's report.⁹ No supervisor's report is contemplated when requesting permanent partial disability compensation benefits years after the initial, work-related injury has reached maximum medical improvement. As such, this Panel respectfully rejects Ms. Sisney's argument that §1-623.24(a) applies to the case under review.

In addition, Ms. Sisney asserts that pursuant to *Tellish v. D.C. Public Schools*,¹⁰ §1-623.24(b)(1)¹¹ AHD has jurisdiction to adjudicate her request for permanent partial disability compensation

⁶ See 7 DCMR §251.2:

The authority of the Board is quasi-judicial in nature, involving the review and determination of appeals from compensation orders (including final decisions or orders granting or denying benefits) by the Administrative Hearings Division and/or the Office of Workers' Compensation under the Public Sector and Private Sector Acts, consistent with statutory authority.

⁷ 954 A.2d 1016, 1021(D.C. 2008).

⁸ ECAB No. 98-20, H&AS No. PBL92-06, ODC No. 325142 (July 15, 1999).

⁹ This section of the Act is currently codified at §1-623.24.

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

¹¹ Section 1-623.24(b)(1) of the Act states:

Before review under §1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge. At the hearing, the claimant and the Attorney General are entitled to present evidence. Within 30 days after the hearing, the Mayor or his or her designee shall notify the claimant, the Attorney General, and the Office of Personnel in writing of his or her decision and any modifications of the award he or she may make and the basis of the decision.

benefits. In *Tellish*, 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)].”¹² 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.”¹³

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.^[14]

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 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.

¹² *Id.*

¹³ *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL05-028A, DCP No. DCPS 007013 (June 28, 2007).

¹⁴ *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).

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.”^[15]

Such a reading does not “render the provisions of subsections (a-3)(1) and (a-4)(2) meaningless and without recourse.”¹⁶ 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.”¹⁷ 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 Ms. Sisney’s claim for benefits.¹⁸

The case on appeal is analogous to *Washington v. D.C. Public Schools*.¹⁹ In *Washington*, the claimant sustained a work-related injury and received temporary total disability compensation benefits for a closed period of time. Thereafter, she requested a formal hearing before AHD to determine her eligibility for permanent partial disability compensation benefits, and her Application for Formal Hearing was dismissed because she had not received a Final Determination from DCP. This tribunal, post-*Tellish*, affirmed the dismissal on the basis that the

request for schedule permanent partial disability benefits is not an initial claim. Rather, her request is a request for a different type of disability benefits than she initially received for her work injury. The thirty (30) day timeframe of the D.C. Official Code § 1-623.24(a-3) does not apply and her request for a schedule award is not “deemed accepted” giving AHD jurisdiction over this matter.^[20]

¹⁵ *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

¹⁶ *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL05-028A, DCP No. DCPS 007013 (June 28, 2007).

¹⁷ Section 1-623.24(a-4)(2) of the Act. This section of the Act has been repealed.

¹⁸ See *Dorsey v. D.C.*, 917 A.2d 639, 641 (D.C. 2007).

¹⁹ CRB No. 08-160, AHD No. PBL05-18B, DCP No. LTDMOPS0006086 (November 13, 2008).

²⁰ *Id.*

For the foregoing reasons, AHD does not have jurisdiction over this claim because DCP has not issued a Final Determination.²¹

ORDER

The CRB has jurisdiction over this appeal. The June 5, 2008 Dismissal Order is not arbitrary or capricious and is in accordance with the law. The June 5, 2008 Dismissal Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

July 2, 2012
DATE

²¹ 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 Ms. Sisney's request for benefits; however, this is an issue the legislature must resolve.