COMPENSATION REVIEW BOARD
CRB No. 10-062

ANDRE T. BROOKS,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,[1]
Employer–Petitioner.

Appeal from a Compensation Order of
The Honorable Belva D. Newsome
AHD No. PBL96-065B, DCP No. 7610100001199-0016

Pamela Smith, Esquire for the Petitioner
Kirk D. Williams, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,[2] and LAWRENCE D. TARR, *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 ("DOES") Director's Administrative Policy Issuance No. 05-01 (February 5, 2005).

[1] Although the caption of this case notes the D.C. Department of Mental Health as the employer, the Compensation Order states "Claimant was employed at D.C. General Hospital as a Motor Vehicle Operation [*sic*] within the Transportation Department from September 14, 1987 to August 6, 1990." *Brooks v. D.C. Department of Mental Health*, AHD No. PBL96-065B, DCP No. 7610100001199-0016 (January 15, 2010), p. 2. The parties' submissions are of little assistance with resolving this issue because the petitioner notes "District of Columbia Department of Mental Health" as the self-insured employer, but the respondent notes "District of Columbia Department of Public Works" as the employer.

[2] Judge Leslie has been appointed by the Director of the Department of Employment Services ("DOES") as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL POSTURE

On August 6, 1990, Mr. Andre T. Brooks injured his back at work. He received continuation of pay and temporary total disability compensation benefits.

From 1991 through 2009, various letters advising Mr. Brooks of changes to the amount of his temporary total disability compensation benefits were issued. On April 12, 1996, a Notice of Loss of Wage Earning Capacity was issued. The Notice of Loss was not appealed.[3]

At a formal hearing, an administrative law judge ("ALJ") addressed the issue of "whether Claimant is receiving the proper amount of [temporary total disability compensation] benefits due to child support deductions and an alleged failure to pay [cost of living adjustments.]"[4] In a Compensation Order dated January 15, 2010, the ALJ awarded Mr. Brooks a recalculation of his basic compensation from January 25, 1991 to the present and continuing, payment for disability compensation benefits improperly reduced and cost-of-living adjustments since January 25, 1991.

On appeal, the D.C. Department of Mental Health asserts no Final Determination[5] has been issued since April 12, 1996. As a result, pursuant to §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"),[6] the Compensation Order must be vacated because the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD")[7] lacked jurisdiction to hold a formal hearing. In the alternative, the D.C. Department of Mental Health asserts the Compensation Order's ruling regarding the amount of Mr. Brooks' compensation is not supported by substantial evidence.

---

[3] The Notice of Loss of Wage Earning Capacity states, "If you disagree with the findings you have the right to appeal, within 30 days of receipt of the DCP-27 LWEC form, through a hearing. Information pertaining to the hearing process will be forwarded to you with the DCP-27 LWEC form. You will receive further information within 15 working days from the date of this letter." There is no indication in the record whether or not a DCP-27 LWEC form was sent to Mr. Brooks.

[4] *Brooks*, *supra*, at 4.

[5] 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.

[6] 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.

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

In response, Mr. Brooks concedes that the Disability Compensation Program ("DCP")[8] modified his benefits without issuing any notices. Nonetheless, Mr. Brooks asserts AHD had jurisdiction to order a recalculation of his benefits.

ISSUE ON APPEAL

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

ANALYSIS[9]

The fundamental problem in this case is that AHD does not have jurisdiction to audit or control the administrative activities of DCP. The ALJ's assertion that "[Employer] raises due process as an issue because the record does not reflect any notice of Claimant's right to a hearing[; therefore, t]he due process issue need not be reached"[10] is a misapplication of the law because the due process issue did need to be reached.

In *Tellish v. D.C. Public Schools*,[11] 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]

---

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

[9] 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).

[10] *Brooks*, *supra*, at 5 nt. 2.

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

[12] *Id*.

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

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. <u>It is only if the injured worker is dissatisfied with the determination</u> 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 <u>and resolution</u>.")[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.

---

[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).

[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*, *supra*.

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

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.

In order to conform to the requirements of the D.C. Administrative Procedures Act ("APA"),[18] (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.[19] When an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.[20] The CRB is no less constrained in its review of Compensation Orders;[21] however, regarding the issue of jurisdiction, the parties agree that Mr. Brooks has not received any Final Determination since 1996, and when the record is devoid of evidence necessary to make a finding, the party with the burden of proof fails to satisfy that burden, no remand is necessary.[22] AHD does not have jurisdiction over this claim because DCP has not issued a Final Determination. [23]

ORDER

The January 15, 2010 Compensation order is VACATED.

---

[18] D.C. Code § 2-501 *et seq.* (2006).

[19] *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

[20] *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

[21] *See WMATA v. DOES*, 926 A.2d 140 (D.C. 2007).

[22] *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)).

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

[23] 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. Brooks' request for benefits; however, this is an issue the legislature must resolve.

FOR THE COMPENSATION REVIEW BOARD:

_____

MELISSA LIN JONES
Administrative Appeals Judge

August 16, 2012
DATE