

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 07-045

ERICA SMITH,

Claimant-Petitioner,

v.

DISTRICT OF COLUMBIA FIRE & EMS DEPARTMENT,

Employer-Respondent.¹

Appeal from an Order of
Administrative Law Judge Terri Thompson Mallett,
Administrative Hearings Division
DCP No. 2050026²

Benjamin T. Boscolo, Esq., for Claimant-Petitioner

Frank McDougald, Esq., for Employer- Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Review Panel; SHARMAN J. MONROE, *Administrative Appeals Judges*, concurring in part and dissenting in part:

DECISION AND REMAND ORDER

¹ In the Application for Review filed with the CRB the Petitioner identifies the D.C. Disability Compensation Program as the “Insurer” notwithstanding that the Administrative Hearings Division (AHD) Order from which appeal has been taken does not make this identification. Accordingly, we identify only the D.C. Fire & EMS Department as the Employer-Respondent herein. *See, Tellish v. D.C. Public Schools*, CRB No. 07-001, AHD No. PBL-095-028A (February 16, 2007), at fnt 1 (noting that as far as the CRB can determine, there is no institutional governmental entity known as the “D.C. Disability Compensation Program”, but instead a program under the jurisdiction of the D.C. Office of Risk Management (ORM)).

² No case number was assigned by the Administrative Hearings Division (AHD) to this matter upon its presentation to AHD. Notwithstanding, the Application for Review filed with the CRB constitutes an appeal from an Order issued by AHD, and the remand herewith ordered by the CRB is to AHD.

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR §118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).³

BACKGROUND

This appeal follows the issuance of an Order by the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, D.C. Department of Employment Services, dismissing Claimant-Petitioner's Application for Formal Hearing.⁴ On November 16, 2006, Petitioner filed a claim with the Office of Risk Management (ORM) seeking temporary total disability benefits. Subsequently, having received no written determination by ORM or notice of extenuating circumstances precluding such a determination, on December 27, 2006 Petitioner filed an Application for Formal Hearing with AHD and thereafter, on January 4, 2007, filed a Motion to Set Matter for Formal Hearing.⁵ By Order issued January 17, 2007, AHD denied Petitioner's motion and dismissed the Application for Formal Hearing.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation Review Panel, whether as established by the District of Columbia Workers' Compensation Act of 1979, as amended (as set forth in footnote 2, *infra*, the private sector act), or pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, (the public sector act, or the Act) at §1-623.28(a), and as contained in the governing regulations, is limited to making a determination as

³ Pursuant to D.C. Official Code §1-623.28, DOES is afforded administrative review authority over awards for or against payment of compensation made pursuant to D.C. Official Code §1-623.24(b)(1)). Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

⁴ AHD certified to the CRB that no AHD evidence record existed in this matter. The only record received from AHD was a copy of the AHD Order that is herein appealed. Consequently, the background statement's procedural recount of this case is based on the procedural representations found within the AHD Order and the representations of the parties before the CRB on appeal, of which this Review Panel takes administrative notice for purposes of disposition of the instant Application for Review only.

⁵ It is unclear from the limited record whether Petitioner's Application for Formal Hearing and Motion to Set Matter for Formal Hearing are one and the same, or filed at the same time or on different dates. In any event, since timeliness of Petitioner's Application for Formal Hearing is not at issue, we will ascribe the earlier date reflected in the records as the AFH date.

to whether the factual findings of an order under review are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. “Substantial evidence,” as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold an order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion, so long as the decision in that order is in accordance with the law. *Marriott*, 834 A.2d at 885.

On appeal to the Compensation Review Board, Petitioner asserts that the Administrative Hearings Division erred as a matter of law in dismissing her Application for Formal Hearing for lack of jurisdiction; that Petitioner is entitled to a formal hearing before AHD pursuant to D.C. Official Code §1-623.24(b)(1) in light of the “constructive determination” resulting from ORM’s failure to issue a formal determination within the 30 day period mandated by D.C. Official Code §1-623.24(a).

Based on Petitioner’s assertion of error, it would seem that the instant appeal raises the same issue that the CRB recently addressed in *Tellish v. D.C. Public Schools*, CRB No. 07-001, AHD No. PBL 05-028A (February 16, 2007). Under the facts therein, the Board held that the failure of the Office of Risk Management (ORM) to issue a formal written determination, including findings of fact and an award for or against payment of compensation, within the 30-day period mandated by D.C. Official Code §1-623.24(a) resulted in a “constructive determination” of the claimant’s claim sufficient for the claimant therein to invoke the jurisdiction of AHD pursuant to D.C. Official Code §1-623.24(b)(1). The CRB remanded *Tellish* to AHD for a determination, upon further development of the record, as to whether the claimant was thus entitled, as matter of law, to the award of her claim in light of ORM’s failure to issue a timely formal decision, or whether ORM was legally excused from complying with the prescribed period for issuing its decision under the provisions of subsection 623-24(a-3)(1).

Review, however, of the ALJ’s Order in the instant case suggests that the issue on appeal is neither as clear nor as straightforward as Petitioner contends.⁶ The Order initially holds that AHD does not have jurisdiction to entertain Petitioner’s Application for Review because there is no issue in dispute. As the ALJ explains, “As of the date of this order, Employer appears to have failed to issue a final determination or a notice of extenuating circumstances precluding Employer [sic] from making a decision within the statutory period.” Citing D.C. Official Code §1-623.24(a-3)(1), the ALJ concludes that “by the plain language of the statute, ‘the claim shall be deemed accepted’ and DCP ‘shall commence payment of compensation on the 31st day following the date the claim was filed.’” Based upon the foregoing, the ALJ apparently concluded that the matter presented to AHD by way of Petitioner’s Application for Review is, in effect, an enforcement proceeding for which relief, in the ALJ’s opinion, must be found by resort to the D.C. Superior Court rather than before the Office of Hearings and Adjudication. Accordingly, the AFH was dismissed and the case remanded to ORM.

⁶ Our inability to clearly discern the nature of the appeal before us further complicated by the lack of an AHD record other than the Order that has been appealed.

Based upon the foregoing, both Petitioner's assertions to the CRB in support of her Application for Review and the language contained in the AHD Order itself, this Review Panel finds itself in the unusual circumstance of having to rule in the alternative, which in either event results in remand of this case to AHD for further proceedings.

To the extent that this appeal presents the CRB with the legal question of whether AHD's jurisdiction to entertain an Application for Formal Hearing pursuant to D.C. Official Code §1-623.24(b)(1) was properly invoked, for the same reasons as stated in *Tellish, supra*, we hold that AHD had the necessary jurisdiction to entertain Petitioner's AFH, to conduct the requested hearing, and to make the necessary assessment as to whether Petitioner is entitled, as a matter of law, to award of the benefits she seeks. Such proceedings, in our opinion, are not "enforcement proceedings" for which OHA would not have jurisdiction; rather they are the very type of proceedings for which AHD has jurisdiction in order to determine whether a claimant is entitled to the award of benefits under the Act.

On the other hand, if the ALJ, in issuing the Order herein appealed, was effectively holding that the requirements of D.C. Official Code §1-623.24(a-3)(1) had been met such that Petitioner is entitled to the benefits she seeks,⁷ then it would seem that this matter is concluded. Petitioner has prevailed on her claim as a matter of law, and is entitled to the payment of the claimed benefits commencing on the 31st day following the date she filed her original claim with ORM.

Regardless of the proper interpretation to be accorded the instant appeal, this case is remanded to AHD for further proceedings. If the issue is exclusively a question of AHD's jurisdiction to entertain the Application for Formal Hearing that had been filed, our holding that AHD had the requisite jurisdiction requires that AHD conduct such further proceedings as are deemed necessary, including a hearing, to determine Respondent's liability, if any, for payment of the benefits sought. On the other hand, if this issue was addressed in the Order that has herein been appealed, then this matter is remanded for clarification of that determination. In such an eventuality, it would seem that remand to ORM for further proceedings would be unnecessary, as AHD has the authority to issue a Compensation Order awarding benefits.

CONCLUSION

To the extent that the Order herein appealed was dismissed by AHD for lack of jurisdiction, the Order is not in accordance with the law. AHD had the necessary jurisdiction to hear Petitioner's Application for Formal Hearing notwithstanding the lack of a formal written determination by ORM denying Petitioner's claim for disability benefits. In the alternative, to the extent the Order herein appealed reached the determination that Petitioner's claim was effectively awarded by force of law as a "constructive determination" under D.C. Official Code §1-623.24(a-3)(1), this case is remanded to AHD for clarification of that result and for such further proceedings as may be required consistent with the discussion herein.

⁷ If such is the case, then jurisdiction is not at issue, as the ALJ, in issuing an order requiring of ORM "such further action as may be appropriate under the Act", effectively asserted the jurisdiction of AHD over the matter.

ORDER

The Order of January 17, 2007 herein appealed is VACATED, and this matter is remanded to AHD for further proceedings consistent with the foregoing Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Chief Administrative Appeals Judge

February 28, 2007
DATE

SHARMAN J. MONROE, *Administrative Appeals Judge*, concurring in part and dissenting in part:

I both concur, in part, and respectfully dissent, in part, from the majority in this case.

I agree with the majority that AHD possess jurisdiction pursuant to D.C. Official Code §1-623.24(b)(1) to entertain the Petitioner's Application for Hearing. The decision cited by AHD to deny jurisdiction, *Thomas v. District of Columbia Department of Employment Services*, 547 A.2d 1034 (D.C. 1988), is distinguishable from the situation at hand. In *Thomas*, the Court affirmed the agency's holding that an injured worker is not entitled to a hearing and compensation award where there are no material issues in dispute and the employer is voluntarily paying benefits. Herein, the Respondent clearly is not voluntarily making compensation benefits.

I disagree with the majority that AHD has the authority to issue a Compensation Order, without a hearing, if it determines that, as a matter of law, the Petitioner is entitled to payment of benefits for several reasons. One, in this jurisdiction, a hearing at AHD is considered a "contested case" under the D.C. Administrative Procedures Act (DCAPA). Consequently, the Compensation Order resulting therefrom must contain findings of fact and conclusions of law. *See* D.C. Official Code § 2-509. Such a requirement is necessary so that an appellate reviewer can determine whether the decision is based on substantial evidence and is in accordance with the law. Herein, there is no record from which the AHD can make findings of fact and conclusions of law. Two, neither the Act nor the DCAPA, grants AHD with authority to issue a Compensation Order under these circumstances.⁸ Third, issuing a Compensation Order, without

⁸ Of course, the AHD has the authority in any case to order the parties to file briefs on given issues with exhibits to be submitted into evidence in lieu of a hearing.

a hearing, effectively puts AHD in the position of enforcing the “constructive determination”. Unlike with the D.C. Workers’ Compensation Act of 1979, the D.C. City Council did not create such an enforcement remedy in the instant Act.⁹ At this point in time, the resolution of this case rests squarely with the ORM, who through inaction, obligated the Respondent to pay benefits pursuant to D.C. Official Code § 1-623.24(a-3) (1).

SHARMAN J. MONROE
Administrative Appeals Judge

⁹ D.C. Official Code § 32-1522(c) states:

If any employer or his officers or agents fail to comply with a compensation order making an award that has become final, any beneficiary of such award, or the Mayor, may apply for the enforcement of the order to the Superior Court of the District of Columbia for enforcement of such order and upon showing that such employer or his officers or agents have failed to comply therewith, the Court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.