

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-195

**JANET HILL,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH
Employer-Respondent.**

Appeal from a December 18, 2012 Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL12-053¹, DCP No. 761011-0007-2003-0002

Richard J. Link, Esquire, for the Claimant-Petitioner
Margaret P. Radabaugh, Esquire, for the Employer-Respondent

Before HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the December 18, 2012, Order issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ dismissed the Claimant's application for Formal Hearing, as a final determination had not been issued by the Employer. We AFFIRM.

¹ We note that the Dismissal Order refers to PBL No. 08-045. We will treat this as an administrative error as the scheduling order issued setting the case for a Formal Hearing as well as both parties pleadings, refers to PBL No. 12-053.

BACKGROUND AND FACTS OF RECORD

The Claimant suffered a work related injury to her back and right ankle on January 22, 2003. The Employer accepted the claim and paid the Claimant disability benefits through 2006 at which time the Claimant returned to work for the Employer.

In 2008, the Claimant suffered an alleged recurrence of her injury and subsequently went out of work until September 2011. The Employer set up an Additional Medical Evaluation (AME) which the Claimant initially failed to attend. Based upon this failure to attend the AME, the Employer issued a Notice of Determination (NOD) controverting the Claimant's claim and requested the Claimant attend an AME. The Claimant subsequently did attend an AME.

On July 30, 2012, the Claimant filed an Application for Formal Hearing (AFH) which was scheduled for December 19, 2012. The Employer filed a Motion to Dismiss. On December 18, 2012, the ALJ issued a Dismissal Order. The ALJ determined that since an NOD had not been issued, the Application for Formal Hearing was premature as the D.C. Comprehensive Merit Personnel Act of 1978, as amended, §§ 1-623.01, *et seq* ("the Act") requires an NOD prior to filing for a Formal Hearing, citing §1-623.24(b)(1) in support.

The Claimant timely filed an application for review of the Order with the Employer opposing.

THE STANDARD OF REVIEW

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).

DISCUSSION AND ANALYSIS

The Claimant's arguments primarily outline the difficulty in obtaining a NOD over the last several years, a statutory scheme that that the Claimant says is "patently unfair" and violates the Claimant's due process rights. Claimant's argument unnumbered at 4. The Claimant does concede that a NOD has not been issued.

As we have held previously, the plain language of §1-623.24(b)(1) of the Act requires "the issuance of a decision" by the Employer 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 [the Department of Employment Services ("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.²

² *Sisney v. D.C. Public Schools*, CRB No. 08-200, AHD No. PBL 08-066 (July 2, 2012), *citing 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).

In other words, the Act is clear that the actual issuance of a Final Determination, as opposed to a constructive denial, 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. 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.³

Consistent with the language enacted by the City Council in § 1-623.24(b)(1), the Employer's issuance of a Final Determination is a condition precedent to AHD obtaining jurisdiction. The Employer's failure to issue a Final Determination, therefore, prevents AHD from obtaining the authority to conduct a formal hearing to adjudicate Mr. Gibson's claim for benefits.⁴

The Claimant argues that her due process rights have been violated in that the Employer has failed to act after four years. We have stated,

Although workers' compensation disability benefits are a protected interest under the U.S. Constitution and as such an unreasonable delay in the administrative processing of workers' compensation claims may be actionable in another forum, nothing...confers jurisdiction upon AHD in the absence of Final Determination.⁵

³*Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

⁴ See *Dorsey v. District of Columbia*, 917 A.2d 639, 641 (D.C. 2007).

⁵*Newby v. D.C. Public Schools*, CRB No. 10-162, AHD No. PBL 01-064D (September 11, 2012). The CRB in *Newby* referred to *Winstead v. District of Columbia*, 620 F. Supp. 2d 119 (D.D.C. 2009), a case which addressed lengthy delays, in some cases lasting up to 8 years, between the period of time for a request for action and a lack of action. The Court stated,

That is certainly not the law, for it would render the District liable automatically upon a showing of delay even though (a) the delay was justified by countervailing factors and (b) occurred in isolated instances. That, in turn, would be doing what cannot be done, subjecting a municipality to liability upon a showing of at most negligent behavior by a few of its employees that could not possibly have given the District notice of a prevalent violation of constitutional rights which the District disregarded. See *Brooks v. Celeste*, 39 F.3d 125, 129 (6th Cir. 1994) (repeated acts of negligence do not in themselves establish deliberate indifference: "Lack of objective

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

ORDER

The December 18, 2012 Dismissal Order is not arbitrary or capricious and is in accordance with the law. The December 18, 2012 Dismissal Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

July 9, 2013

DATE

reasonableness, i.e., a failure to act as a reasonable person would have acted, does not by itself equal deliberate indifference.")