

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 09-129

MICHAEL WARE,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Employer–Respondent.

Appeal from an Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL08-095, DCP No. 761020

Benjamin T. Boscolo, Esquire, for the Claimant-Petitioner
Frank McDougald, Esquire, for the Employer-Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,¹ 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).

FACTS OF RECORD AND PROCEDURAL POSTURE

In 2008, Mr. Michael Ware requested permanent partial disability compensation benefits and medical benefits as a result of a work-related injury. When the Disability Compensation Program (“DCP”)² failed to respond to his request, Mr. Ware filed an Application for Formal Hearing with

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 DCP’s name was changed to the Public Sector Workers’ Compensation Program.

the Office of Hearings and Adjudications, Administrative Hearing Division (“AHD”).³

On December 2, 2008, an administrative law judge (“ALJ”) presided over a hearing during which the D.C. Department of Public Works (“Employer”) argued a motion to dismiss based on lack of jurisdiction. The ALJ dismissed Mr. Ware’s Application for Formal Hearing because in the absence of a Final Determination,⁴ AHD lacked jurisdiction over Mr. Ware’s claim.

On appeal, Mr. Ware argues DCP’s failure to make a timely determination on his claim deprives him of due process and of a remedy to secure benefits pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* (“Act”). Mr. Ware also argues Employer should be estopped from asserting that DCP’s inaction does not constitute a constructive determination because Employer has taken a contrary position in a different case in a different court. Consequently, Mr. Ware requests the July 27, 2009 Order be vacated and this matter be remanded for a formal hearing.

In response, Employer argues Mr. Ware’s arguments are misplaced. Employer asserts the ALJ’s Order must be affirmed because it is in accordance with the plain language of the Act which requires issuance of a Final Determination before a claimant can proceed to a formal hearing before AHD.

ISSUE ON APPEAL

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

ANALYSIS⁵

Mr. Ware asserts §1-623.24 of the Act vests jurisdiction in AHD to adjudicate his request for permanent partial disability compensation benefits and medical benefits. We disagree. Sections 1-623.24(a), (a-1), (a-2), and (a-3) of the Act do not apply to Mr. Ware’s request for disability compensation benefits. In *Nixon v. DOES*,⁶ 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*,⁷ the Director of DOES ruled that the plain meaning of Section 2324(a) of the Act (currently codified at §1-623.24) entitled “Time for making claim; findings of fact; awards; right to hearing; conduct at hearing” is

³ As of February 2011, AHD’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).

⁶ 954 A.2d 1016, 1021(D.C. 2008).

⁷ ECAB No. 98-20, H&AS No. PBL92-06, ODC No. 325142 (July 15, 1999).

applicable when an initial claim is made, a claim made by filing a claim and a supervisor's report. 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 Mr. Ware's argument that §1-623.24(a) applies to the case under review.

In addition, Mr. Ware asserts that pursuant to *Tellish v. D.C. Public Schools*,⁸ §1-623.24(b)(1)⁹ confers jurisdiction on AHD to adjudicate his request for permanent partial disability compensation 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)]."¹⁰ 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."¹¹

Upon careful consideration, we find *Tellish* is inconsistent with the plain language of the statute and is overruled. Regardless of Employer's position in this case or any other, 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

⁸ CRB No. 07-001, AHD No. PBL05-028A, DCP No. DCPS 007013 (February 16, 2007).

⁹ 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.

¹⁰ *Id.*

¹¹ *Tellish v. D.C. Public Schools*, CRB No. 07-001, OHA No. PBL05-028A, DCP No. DCPS 007013 (June 28, 2007).

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.^[12]

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."^[13]

Such a reading does not "render the provisions of subsections (a-3)(1) and (a-4)(2) meaningless and without recourse."¹⁴ Section 1-623.24(a-3)(1) of the Act does not apply to a request like the one made by Mr. Ware, 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."¹⁵ 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.

¹² *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).

¹³ *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

¹⁴ *Tellish, supra*.

¹⁵ 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. DCP's failure to issue a Final Determination, therefore, prevents AHD from obtaining the authority to conduct a formal hearing to adjudicate Mr. Ware's claim for benefits.¹⁶

The case on appeal is analogous to *Washington v. D.C. Public Schools*.¹⁷ 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.¹⁸

For the foregoing reasons, AHD does not have jurisdiction over this claim because DCP has not issued a Final Determination.¹⁹

ORDER

The July 27, 2009 Dismissal Order is not arbitrary or capricious and is in accordance with the law. The July 27, 2009 Dismissal Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

August 7, 2012
DATE

¹⁶ See *Dorsey v. D.C.*, 917 A.2d 639, 641 (D.C. 2007).

¹⁷ CRB No. 08-160, AHD No. PBL05-18B, DCP No. LTDMOPS0006086 (November 13, 2008).

¹⁸ *Id.*

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