

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DUANE E. FREEMAN,

Plaintiff

CIVIL ACTION

v.

:
:

ELAINE CHAO, et. al.,
SECRETARY, U.S. DEPARTMENT
OF LABOR,

Defendants

NO. 01-459

ORDER AND MEMORANDUM

AND NOW, this 24 day of May, 2001, upon consideration of Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment (Docket #9), and the plaintiffs objection thereto, **IT IS HEREBY ORDERED** that said motion is **GRANTED** and the case is **DISMISSED WITH PREJUDICE** for the following reasons.

This case arises from a workers' compensation claim initiated by the plaintiff under the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101 et. seq. (FECA)¹. On October 18,

¹ FECA is the workers' compensation statute for federal employees. The statute provides that the United States "shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). The Secretary of Labor has the authority to administer the payment of benefits, adjudicate claims, and promulgate the regulations necessary for implementation of the statute. 5 U.S.C. §§ 8145, 8124(a), 8149. The Secretary has delegated this authority to the Director of the Office of Workers' Compensation Programs (OWCP).

In the event the Director of OWCP makes a determination adverse to the claimant, there are three methods of administrative review available upon the claimant's timely request: (1) a hearing before or review of the written record by an OWCP hearing examiner, 5 U.S.C. § 8124, 20 C.F.R. § 10.615; (2) reconsideration conducted by a senior claims examiner not involved in the original decision, 5 U.S.C. § 8128(a), 20 C.F.R. § 10.615; or (3) appeal to the Employees' Compensation Appeals Board (ECAB). See 5 U.S.C. § 8149, 20 C.F.R. Part 500.

1990, Mr. Freeman, a letter carrier for the United States Postal Service, was injured when the postal vehicle he was driving **was** involved in a *car* accident. On December 11, 1990, Mr. Freeman filed a claim under **FECA** for compensation for his injuries. On December **14**, 1990, the claim was accepted by **OWCP** for lumbar strain and compensation **was** paid for total **and** temporary disability. Between March 1991 and January 1994, Mr. Freeman saw numerous doctors regarding **his** injuries. On November **24**, 1993 **OWCP** referred plaintiff to **Dr.** Michael E. Okin for diagnosis. Dr. Okin later submitted a report **stating** that he did not believe the physical effects of plaintiffs **injuries and** instead believed that there were psychological and functional components present.

In light of Dr. Okin's report, **OWCP** notified Mr. Freeman **that** they had scheduled a March 11, 1994 appointment for **him** with Dr. **Perry** Berman, a board certified psychiatrist. Mr. Freeman did not attend that appointment and OWCP sent him a notice of a re-scheduled appointment **with** Dr. Berman **and** explaining that he had thirty **days** to explain his failure to attend the appointment. On **July** 22, 1994, OWCP notified plaintiff of a new appointment set ~~for~~ August 10, 1994, and reiterated the consequences for failure to submit to a medical examination. Mr. Freeman responded to OWCP questioning the necessity of the examination. **OWCP** cited Dr. **Okin's** opinions regarding the functional and psychological components to plaintiff's condition. Plaintiff sent two letters dated **August** 8 and 9, 1995, stating that he disagreed **with** Dr. **Okin's** opinions. Plaintiff did not show up at the re-scheduled appointment on August 10, 1994. On **August** 11, 1994, **OWCP** advised plaintiff by letter of his right to provide reasons for his failure to attend. On September 28, 1994 **OWCP** issued a decision suspending plaintiff's compensation benefits in accordance with 5 **U.S.C** § 8123(d) for **failing to attend the scheduled** examination with **Dr. Berman**.

Mr. Freeman requested a written review of OWCP of its September **28**, decision.

OWCP's Office of Hearings and Review reviewed the September 28 order and affirmed the decision on June 12, 1995. Mr. Freeman appealed the affirmance to the Employees' Compensation Appeals Board (ECAB). On January 7, 1998, ECAB affirmed the September 28, 1994 suspension of benefits and adopted the findings and conclusions of the June 12, 1995 OWCP decision. Plaintiff filed a petition for reconsideration of the January 7 ECAB decision, and on September 30, 1999, Mr. Freeman also filed a petition for intervention in the same case. On October 15, 1999, ECAB issued a decision denying Mr. Freeman's petition for reconsideration stating that he did not establish any error of fact or law warranting further consideration.

On May 22, 1998, Mr. Freeman filed suit in federal court alleging violations of the FECA statute and deprivation of his Fifth Amendment right to procedural due process. Judge Hutton of this Court dismissed the suit with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Presently before this Court is Mr. Freeman's second civil suit, filed on January 29, 2001 seeking judicial review of the defendants' actions in suspending FECA benefits. The complaint alleges that ECAB failed to follow its regulations in issuing its January 7, 1998 decision. Mr. Freeman contends that ECAB's decision failed to include the relevant facts of the case and reasoning behind its decision. ECAB's deficiencies allegedly undermined plaintiffs ability to apply for reconsideration based on errors of fact and law. Mr. Freeman further challenges ECAB's failure to address his September 30, 1999 request for intervention in its October 15, 1999 decision.

The defendant argues that the plaintiffs complaint should be dismissed on two grounds. First, defendants argue that to the extent that Mr. Freeman challenges the constitutionality of the defendants' procedures which resulted in his suspension of benefits, that issue has been previously decided by this Court, and is precluded by res judicata. Second, the defendants assert that

plaintiff has failed to allege a substantial, cognizable, constitutional **claim**. This **Court agrees with** both **of the** defendants' **arguments**.

To **prevail on a** claim of **res** judicata, there must be a showing that there **has** been! (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privies and; (3) a subsequent suit based on the same cause of action. Churchill v. Star Enterprises, 183 F.3d **184**, 194 (3d Cir. **1999**); United States v. Athlone Industries, Inc., 746 F.2d 977,983 (3d Cir. **1984**).

In the present **case**, Judge **Hutton's dismissal** of plaintiffs **first** suit "with prejudice" constitutes a final judgment on the **merits**. **Judge** Hutton dismissed plaintiffs claim with **prejudice** for **lack of** subject **matter** jurisdiction. Freeman v. Herman, No. CIV. A. 98-2649, 1998 **W L** 813426 (E.D.Pa. 1998). That dismissal **was affirmed** by the Third Circuit **Court of Appeals**. See **181 F.3d 85** (1999)(Table). The term "with prejudice" is an acceptable form of shorthand for **an** adjudication upon the merits. See Semtek Int'l Incorp. v. Lockheed Martin Corn. et. al., 531 U.S. **497**, **---**, **121 S.Ct.** 1021, 1026 (2001); C. Wright and A. Miller, Federal Practice and Procedure, § **2373** at **396 n. 4** (1995). Dismissal for lack of subject matter jurisdiction, while not binding as to all **matters which** could have been raised, **is** conclusive **as** to matters **actually** adjudged. Bromwell v. Michigan Mutual Insurance Co., 115 F.3d **208,212-13** (3d Cir. 1997). **A** judgment dismissing a case for **lack** of subject matter jurisdiction does not preclude re-litigation of the same cause of action in a court of competent jurisdiction but does preclude the **party** from re-litigating whether the first **court** had jurisdiction. Okoro v. Bohman et. al., 164 F.3d 1059, 1062-63 (7th Cir. 1998); Oeala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Min. Co., 722 F.2d 1407, 1411 (8th Cir. 1993). Consequently, **Judge** Hutton's decision is **properly characterized as** an adjudication on the merits **as** to subject matter jurisdiction.

The second element, **requiring** the **same parties**, is met by the fact that the parties in

both cases **are** exactly the **same**. Mr. Freeman **has** named the Secretary of **Labor** in both of his actions.

The third **element** requires both cases to involve the same cause of action. The Third Circuit takes a broad view **of the** term “cause of action” for **purposes** of res judicata. Churchill, 183 F.3d at 194. A determination of whether two lawsuits are based on **the** same cause of action **turns** on **the** similarity of the underlying events **giving rise** to the **various legal** claims. Althone Industries, 746 F.2d at 983. In **his** first action, filed May **22**, 1998, Mr. Freeman claimed that the Secretary of Labor denied him “procedural due **process**” and wrongfully terminated his disability compensation benefits. In the present complaint, Mr. **Freeman** states that ECAB deprived him of his Fifth Amendment due process right **by** failing to follow its regulations **in** issuing decisions **that** affirmed **his** suspension **of** benefits. Mr. **Freeman’s** current allegations arise from the identical set of circumstances **from** which his **prior** complaint arose -- the denial of his **request** to reverse the suspension **of** benefits.

Defendants’ second challenge **to** the complaint relies on language in 5 **U.S.C. § 8128(b)** **stating** that judicial review of benefit determinations by the Secretary of **Labor** is foreclosed. This Circuit **has** specifically **held** that the Secretary of Labor’s decisions on **FECA** benefit determinations are not subject to judicial review, McDougal-Saddler v. Herman, 184 F.3d 207,214 (3d Cir. 1999). Courts recognize a limited exception to § 8128(b) permitting judicial review of substantial, cognizable, constitutional claims. Johnson v. Robison, 415 **U.S.**361 (1974); Czerkies v. U.S Dept. of Labor, 73 F.3d 1435, 1437 (7th Cir. 1996)(*en banc*); Paluca v. Secretary of Labor, 813 F.2d 524,526-27 (1st Cir. 1987); Rodrigues v. Donovan, 769 F.2d 1344, 1348 (9th Cir. 1985). This **Court** **agrees with the** defendants’ contention that Mr. Freeman has **failed** to allege a **substantial** constitutional **claim**.

In his complaint, plaintiff **avers** that he **was** deprived of procedural **due process** **because** ECAB **failed** to follow its own rules when issuing its January 7, 1998 decision affirming **the suspension** of benefits, Plaintiff contends that he **was** deprived of an opportunity to challenge the suspension because **ECAB's** failure to abide by the regulations prevented plaintiff from effectively seeking reconsideration of the January 7 order. **Although** Mr. Freeman cites a series of regulations that ECAB did not follow, he **fails** to state which regulation **was** ignored **and** how that regulation **related** to **ECAB's** decision. Furthermore, none of the regulations cited by Mr. Freeman are related to 5 U.S.C. § **8123**, which addresses physical examinations of claimants and was the basis for the suspension of benefits.

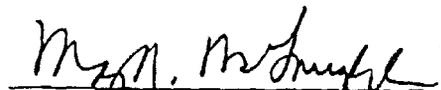
In addition, plaintiffs constitutional claim **with** respect to **ECAB's** failure to follow **20 C.F.R. § 501.6** is **equally** unavailing. The regulation requires ECAB to issue a **written** decision that sets "forth the reasons for **the** action taken and an appropriate order." Mr. Freeman incorrectly cites the provision **as** requiring ECAB to identify the facts in its decision. Despite plaintiff's mistaken citation, **the** January 7, 1998 ECAB decision states that it "adopts the findings and conclusions of the Office Hearing representative." ECAB justifies its affirmance stating that OWCP's decision **was** in accordance with the **facts and** law in this case. **It is** clear that **ECAB has** fully complied with its **regulations**.

Plaintiff further claims that the fact that ECAB did not address his Petition for Intervention **in** its October 15, 1999 decision amounts to a deprivation of procedural due process. Based on the language in 20 C.F.R. § **501.12**, it **appears** that petitions for intervention **are** generally reserved for those individuals **who** are not parties to an action but nevertheless are affected by **the** outcome. By **filing** a petition for intervention, Mr. Freeman sought to intervene in a case in which he was already a **party**. Furthermore, an examination of Mr. Freeman's petition for intervention and

his reply to **OWCP's** response to his reconsideration **request** demonstrates that these pleadings raise the same **issues**; ECAB's failure to follow its regulations in issuing its **January 7, 1998** decision. Therefore, ECAB's October **15 decision** addressed the same concerns in Mr. Freeman's petition for intervention.

Lastly, **plaintiff** cannot credibly **claim** to have been **deprived** of procedural due process, **See Radtich v. United States, 929 F.2d 478,480 (9th Cir. 1991)**(holding that the Department of Labor's post-deprivation procedures more than adequately provide due process to claimants). Mr. Freeman **was** twice given notice of **the** consequences of **failing** to appear for a scheduled **appointment**, and twice **was** given the opportunity to explain his failure to appear. Following the September **28, 1994 decision** to suspend his **FECA benefits, plaintiff sought** and received **written** review by **OWCP** of the decision to suspend. He received **de novo review** by ECAB in **its analysis** of OWCP's decision to suspend. He further received reconsideration by **ECAB of its** decision affirming **the** suspension of **his** benefits. Many courts have deemed the FECA procedures to comport with due process. **See Raditch, 929 F.2d at 480; Czerkies, 73 F.3d 1435, Rodrigues, 769 F.2d 1344; Paluca, 813 F.2d 624.** The **defendants** have adequately provided due process to **Mr. Freeman** and **as a** result, he has failed to allege a substantial, **cognizable,** constitutional claim.

BY THE COURT:


MARY A. McLAUGHLIN, J.