

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

CLEOPATRA MCDUGAL-SADDLER :	CIVIL ACTION
vs. :	
ALEXIS M. HERMAN, SECRETARY, :	NO. 97-1908
U.S. DEPARTMENT OF LABOR :	

MEMORANDUM AND ORDER

AND NOW, to wit, this 24th day of December, 1997, upon consideration of the Motion to Dismiss filed by defendant, Alexis M. Herman, Secretary, United States Department of Labor (Document No. 3, filed May 19, 1997); the Memorandum in Opposition to Defendant's Motion to Dismiss filed by plaintiff, Cleopatra McDougal-Saddler (Document No. 4, filed June 2, 1997), and Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss (Document No. 5, filed June 26, 1997) **IT IS ORDERED** that Defendant's Motion to Dismiss is **GRANTED** and the action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Defendant's Motion to Dismiss is granted for the following reasons:

I. Facts

1. Plaintiff, Cleopatra McDougal-Saddler, a former employee of the United States Postal Service, suffered injuries at her workplace on May 8, 1982 and April 5, 1985. Beginning in 1982, she was paid workers' compensation benefits under the Federal Employee Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., based on the opinion of her physician, Dr. David S. Schwartz,

that she was totally disabled as a result of her injuries.¹

2. In May 1989, Dr. William H. Simon, a physician appointed by the Office of Workers' Compensation Programs of the Department of Labor ("OWCP"), examined plaintiff and submitted two reports. In the first report, dated October 25, 1989, Dr. Simon opined that plaintiff's condition was caused by a degenerative condition, not her workplace injuries. After Dr. Simon reviewed a computerized tomography scan of plaintiff's spine, he concluded in the second report, dated November 15, 1989, that degeneration did not wholly explain plaintiff's condition.

3. A medical advisor at OWCP reviewed Dr. Simon's reports and determined that they conflicted with Dr. Schwartz's medical opinion. Therefore, on October 22, 1991, the medical advisor directed plaintiff to be examined by a third physician, Dr. John T. Williams. The referral was based on a provision of FECA requiring appointment of a third physician if there is a disagreement between the claimant's physician and the physician appointed by the Department of Labor. 5 U.S.C. § 8123(a) (1996).²

4. Dr. Williams examined plaintiff and, on January 21, 1992 and March 4, 1992, submitted reports finding that her condition was not the result of her workplace injuries. OWCP therefore decided on September 2, 1992 to terminate plaintiff's workers' compensation, effective September 20, 1992.

5. Plaintiff requested a hearing on the termination, which was held on September 23, 1993.

¹ Plaintiff was paid workers' compensation benefits until she returned to work briefly in March 1985. On April 5, 1985 she sustained a second workplace injury which rendered her unable to work, and she was again paid workers' compensation benefits.

² "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a) (1996).

The OWCP hearing officer found that, based on Dr. Williams' reports, plaintiff's disability due to her workplace injuries had ended by September 2, 1992. Plaintiff twice requested reconsideration, and OWCP denied both requests, first on March 25, 1994 and then on June 6, 1995. Plaintiff then appealed the termination of her benefits to the Employee Compensation Appeals Board ("ECAB"), an appellate body of the Department of Labor.

6. On March 20, 1996, ECAB issued a decision affirming the decision of OWCP. In its decision, ECAB found that Dr. Simon's report was "not sufficient" to conflict with Dr. Schwartz's report, and that plaintiff was therefore improperly referred to Dr. Williams to resolve the alleged disagreement between Drs. Schwartz and Simon. However, ECAB found that Dr. Williams' report constituted the "weight of the medical evidence." Therefore, pursuant to Federal (FECA) Procedure Manual, Ch. 2-810 (April 1993) ("FECA PM 2-810"),³ ECAB concluded that no disagreement existed between Dr. Schwartz and Dr. Williams, and there was no need for plaintiff to be examined by another doctor. Relying on Dr. Williams' reports, ECAB affirmed the termination of plaintiff's workers' compensation benefits.

II. Analysis

7. Plaintiff's complaint seeks declaratory and injunctive relief. She alleges that in its analysis of her claim, ECAB violated her right to due process and violated a "clear statutory mandate" in FECA to refer her to a third physician in view of the disagreement between her physician, Dr. Schwartz, and one of the physicians appointed by the Department of Labor, Dr.

³ "Careful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or 'impartial' specialist." It is only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally [that] the services of a referee specialist must be utilized." FECA PM 2-810 at 11(a).

Williams.

8. Defendant, Alexis M. Herman, Secretary, United States Department of Labor, has moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the action for lack of subject matter jurisdiction pursuant to 5 U.S.C. §8128(b).

9. FECA explicitly bars a court from reviewing an action by the Secretary of Labor “allowing or denying a payment” under the statute: “The action of the Secretary is . . . not subject to review

. . . by a court by mandamus or otherwise.” 5 U.S.C. § 8128(b)(2) (1996); see Hancock v. Mitchell, 231 F.2d 952 (3d Cir. 1956) (holding that the prohibition on judicial review of FECA claims is constitutional).

10. Courts have recognized an exception to the prohibition on judicial review in FECA if the plaintiff presents evidence of a “cognizable” constitutional violation. Rodrigues v. Donovan, 769 F.2d 1344 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996) (citing cases). However, the constitutional claim must be more than an allegation.

11. Some courts of appeals have recognized a second exception to the prohibition if the plaintiff establishes that the actions of the Department of Labor violate a “clear statutory mandate.” See, e.g., Hanauer v. Reich, 82 F.3d 1304, 1309 (4th Cir. 1996); Brumley v. Department of Labor, 28 F.3d 746 (8th Cir. 1994); Woodruff v. Department of Labor, 954 F.2d 634 (11th Cir. 1992). The Third Circuit has not yet ruled on this issue. See, also, Chaklos v. Reich, No. 95-1763, slip op. (W.D. Pa. 1996) aff’d by 101 F.3d 689 (3d Cir. 1996) (table).

12. Plaintiff contends that both exceptions apply in this case. She alleges that ECAB both acted unconstitutionally and violated a clear statutory mandate by affirming the termination of her

benefits.

A. Plaintiff's Constitutional Claim

13. Plaintiff argues that ECAB violated her right to due process under the Fifth Amendment by using the procedures in FECA PM 2-810 to evaluate her workers' compensation claim.

14. FECA provides that “[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” 5 U.S.C. § 8123(a) (1996).

15. FECA PM 2-810 includes criteria for weighing medical evidence to determine if a disagreement exists. The factors to be used include whether the opinion is well reasoned, comprehensive, consistent with physical findings, non-equivocal, and based on “a complete factual and medical background” and an actual examination of the claimant. The qualifications and areas of expertise of the doctor are also considered. FECA PM 2-810 at 3(a-b). FECA PM 2-810 then describes the circumstances which make it necessary for a third physician to examine a claimant: “[W]here the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally, the services of a referee specialist must be utilized.” *Id.* at 11(a).

16. Plaintiff claims that rather than weighing the medical evidence in the reports of Drs. Schwartz and Williams using FECA PM 2-810, see, In re Cleopatra McDougal-Saddler, slip op., No. 95-2634 (ECAB March 20, 1996), ECAB should have remanded her case for an examination by a third physician, (in reality a fourth physician) as required by § 8123(a).⁴

17. According to plaintiff, FECA PM 2-810 alters the meaning of § 8123(a) of FECA, and

⁴ See, supra, note 2.

is therefore a “legislative rule.” See, Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994) (defining a legislative rule as one that “creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself . . .”) (internal citations omitted).

18. To be valid, a legislative rule requires notice in the Federal Register that it has been proposed and a period of public comment before it is implemented. See, Administrative Procedure Act, 5 U.S.C. § 553 (1996). As no notice or comment period was provided before FECA PM 2-810 was implemented, plaintiff contends that it is a void rule and was unconstitutionally used to evaluate her claim for workers’ compensation benefits.

19. Defendant argues that FECA PM 2-810 is an “interpretive” rule used to clarify the word “disagreement” in 5 U.S.C. § 8123(a),⁵ and therefore it did not need public notice or a comment period to be effective. See, Dia Navigation, 34 F.3d at 1255 (“interpretive rules typically involve construction or clarification of a statute or regulation.”) and 5 U.S.C. § 553(b)(A) (1996) (notice and comment requirement does not apply to interpretive rules).

20. The Court concludes that FECA PM 2-810 is an interpretive rule which clarifies the word “disagreement” in 5 U.S.C. § 8123(a). See, FECA PM 2-810 at 2(d) (“A thorough understanding of how to weigh medical evidence will assist the [claims examiner] in determining when and how further medical development should be undertaken and in assigning weight to the medical evidence received”) and see FECA PM 2-810 at 11(a) (“[W]here the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally, the services of a referee specialist must be utilized.”).

21. As an interpretive rule, FECA PM 2-810 did not require public notice or a public

⁵ See, supra, note 2.

comment period to be valid. Thus, ECAB's application of FECA PM 2-810 to plaintiff's claim for benefits did not violate plaintiff's due process rights and did not otherwise create a cognizable constitutional claim.

22. Plaintiff's allegation of a violation of her due process rights does not create subject matter jurisdiction in this case.

B. Plaintiff's Claim of a Violation of a Clear Statutory Mandate

23. Plaintiff argues that the actions of the Department of Labor violated a "clear statutory mandate" in FECA which creates subject matter jurisdiction in this Court.

24. Assuming, arguendo, that a violation of "clear statutory mandate" creates subject matter jurisdiction for a court to hear a case brought under FECA, plaintiff has not made a showing of such a violation.

25. To determine whether a clear statutory mandate has been violated, the Court must conduct a "cursory review of the merits." Hanauer, 82 F.3d at 1309. If the Secretary of Labor's interpretation of the statute is "plausible," then no violation of a clear statutory mandate has occurred. Staacke v. United States Secretary of Labor, 841 F.2d 278 (9th Cir. 1988).

26. In the instant case, plaintiff argues that defendant violated the clear statutory mandate in FECA to refer plaintiff to a third physician if there was a disagreement between plaintiff's physician and the physician appointed by the Department of Labor. See 5 U.S.C. § 8123(a) (1996).⁶

27. Defendant contends that the use of FECA PM 2-810 to interpret the word "disagreement" in § 8123(a)⁷ is plausible, and therefore no violation of a clear statutory mandate has

⁶ See, supra, note 2.

⁷ See, supra, paragraph 15 for a description of the criteria included in FECA PM 2-810.

occurred.⁸

28. The Court concludes that FECA PM 2-810 instructs claims examiners in how to determine whether a “disagreement” between physicians exists, and that defendant’s interpretation of 5 U.S.C. § 8123(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff’s claim based on the weight of the medical evidence.

29. ECAB did not violate a clear statutory mandate in evaluating plaintiff’s claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

BY THE COURT:

JAN E. DUBOIS, J.

⁸ This appears to be a change from earlier ECAB policy. In similar cases, when OWCP mistakenly determined that two doctors disagreed, ECAB would remand the case for examination by a new physician to resolve the conflict between the claimant’s doctor and the doctor who was erroneously appointed as a “third physician” to resolve a disagreement later found not to exist. See, In re Myrtle Pittman, 40 ECAB 880, 881 (1989) (citing cases). However, as discussed supra, this change in policy does not violate a “clear statutory mandate” and would not give this Court subject matter jurisdiction even if the Court accepted the violation of a clear statutory mandate theory of jurisdiction.