

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

DUANE E. FREEMAN : CIVIL ACTION  
 :  
 v. :  
 :  
 ALEXIS HERMAN, et al. : NO. 98-2649

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J.

November 24, 1998

Presently before the Court are Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 5), Plaintiff's response thereto (Docket No. 6), Plaintiff's addendum to that response (Docket No. 8), and Plaintiff's Emergency Motion for a Ruling on Summary Judgment (Docket No. 9). For the reasons stated below, the Defendant's motion is **GRANTED** and Plaintiff's Complaint is dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

**I. BACKGROUND**

On May 22, 1998, Plaintiff Duane E. Freeman ("Freeman" or the "Plaintiff") brought this action against Defendants Alexis T. Herman, Secretary of Labor, United States Department of Labor ("Secretary") and Office of Workers' Compensation Programs ("OWCP," and collectively as "Defendants") alleging violations of the Federal Employees' Compensation Act Title V, 5 U.S.C. § 8123(d)

(1994) ("FECA"). In his complaint, Freeman alleges, in substance, that the Defendants wrongfully terminated his disability compensation benefits, and seeks an order requiring the Defendants to reinstate those benefits.

Freeman was a letter carrier employed by the United States Postal Service between 1985 and October 1990. On October 18, 1990, he filed a Notice of Traumatic Injury with the United States Department of Labor, Office of Workers' Compensation Program ("OWCP"). Freeman explained that he had been severely injured in an employment-related motor vehicle accident that same day. On December 11, 1990, Freeman filed a Claim for Compensation under the FECA based on the October 18, 1990 injury. On December 14, 1990, the claim was accepted by OWCP for lumbar strain and compensation was paid for total temporary disability.

Between March 1991 and November 1993, several physicians examined Freeman, each who gave differing opinions as to the Plaintiff's physical condition. Because of the conflict in medical opinions, OWCP first referred Freeman to Dr. Mark Zimmerman, and then to Dr. Michael Okin for an impartial examination.

In his report of January 12, 1994, Dr. Okin noted a discordance between Freeman's subjective complains and his physical condition upon examination. Dr. Okin concluded that physical effects of the Freeman's injury were not present and that "some psychological and functional components" were present. Based on Dr. Okin's assessment that "psychological and functional

components" were present, OWCP referred the Plaintiff to psychiatrist Dr. Perry Berman for a psychological evaluation. By letter dated February 17, 1994, OWCP advised the claimant of an appointment scheduled for March 9, 1994 with Dr. Berman. The letter advised Freeman that failure to keep the appointment could result in suspension of his compensation benefits under 5 U.S.C. § 8123(a).

Freeman failed to appear for the March 9, 1994, appointment. Accordingly, OWCP wrote to Freeman on March 11, 1994, again advising of a potential suspension of benefits under 5 U.S.C. § 8123(a) and giving him thirty (30) days to present a valid reason for failing to keep the scheduled appointment. In an undated letter, Freeman wrote to OWCP stating that the agency had "no right" to schedule an appointment for him with a psychiatrist. On July 22, 1994, OWCP notified Freeman of another appointment with Dr. Berman scheduled for August 10, 1994, and reiterated the consequences provided under 5 U.S.C. § 8123(d) for failure to submit to keep or submit to a medical examination.

On July 29, 1994, Freeman wrote to OWCP questioning why the examination by Dr. Berman was necessary. OWCP responded to Freeman's letter on August 5, 1994, informing him that he had been referred to Dr. Berman because of Dr. Okin's opinion that there were functional and psychological components to Freeman's condition. In letters dated August 8, 1994, and August 9, 1994, Freeman expressed his disagreement with OWCP's referral to Dr.

Berman. Freeman failed to appear for the August 10, 1994, appointment with Dr. Berman. On August 11, 1994, OWCP again wrote to Freeman regarding his failure to attend the scheduled examination with Dr. Berman. The agency reminded Freeman of the provisions of 5 U.S.C. § 8123, and advised him of his right to provide reasons for his failure to attend.

On September 28, 1994, the District Office of OWCP issued a decision suspending Freeman's compensation benefits in accordance with § 8123(d). On June 12, 1995, OWCP's Office of Hearings and Review affirmed the District Office's suspension of compensation benefits under § 8123. Freeman appealed this decision to the Employees' Compensation Appeals Board ("ECAB"), however, the appeal was unsuccessful. Consequently, the Plaintiff filed the instant action against the Defendants asserting violation of 5 U.S.C. § 8123(d), for which he seeks an order reversing the suspension of his right to payment of compensation pursuant to 5 U.S.C. § 8128(a), 20 C.F.R. §§ 10.138(b)(1)(I) and (ii).

On August 4, 1998, Defendant Secretary filed a Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or, in the alternative, for Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. On August 14, 1998, the Plaintiff filed an Answer in Opposition to this Motion. The

Plaintiff also filed an Addendum to that Answer on August 17, 1998. On November 9, 1998, the Plaintiff filed an Emergency Motion for a Ruling on Summary Judgment.

## II. STANDARD OF REVIEW

The Secretary has moved to dismiss or, in the alternative, for summary judgment. The Secretary's dispositive challenges, however, relate to whether this court has subject matter jurisdiction over this action. Lack of subject matter jurisdiction should be raised and adjudicated by a motion to dismiss, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, not a motion for summary judgment. Solomon v. Solomon, 516 F.2d 1018, 1027 (3d Cir. 1975) (citing Fed. R. Civ. P. 12(h)(13)). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court determines whether it has authority or competence to hear and decide the case, whereas a motion for summary judgment goes to the merits of the action, See 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 543, 547.

In deciding whether there is subject matter jurisdiction, affidavits and other matters outside the pleadings may be considered. See Mortenson v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 549-50. As the Third Circuit stated in Mortenson, the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the

case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Mortenson, 549 F.2d at 891; see Dunlap v. Sears, Roebuck & Co., 478 F. Supp. 610, 611 n. 1 (E.D. Pa. 1979) (citing Mortenson). Unlike the practices under Rule 12(b)(6), the fact that matters outside the pleadings are considered does not transform a Rule 12(b)(1) motion to dismiss into a motion for summary judgment. See Lefkowitz v. Lider, 443 F. Supp. 352, 254 (D. Ma. 1978); Progressive Steelworkers Union v. Int'l Harvester Corp., 70 F.R.D. 691, 692 (N.D. Il. 1976) (citing 2A J. Moore's Federal Practice P 12.09).

### **III. DISCUSSION**

The Plaintiff's Complaint seeks declaratory and injunctive relief. Freeman alleges, in substance, that the Defendants wrongfully terminated his disability compensation benefits. He asserts that in its analysis of his claim, the Department of Labor violated his right to "due process" and violated "the regulations set forth [in FECA]" failing to obtain a report from Dr. Zimmerman and wrongfully allowing Freeman's employing agency to participate in the claims adjudication process.

In her motion, the Secretary contends that § 8128(b) of FECA bars judicial review of the Department of Labor's adjudication of Freeman's FECA claim. The Secretary asserts that the allegations of the complaint do not constitute a substantial, cognizable constitutional claim over which the district court would have jurisdiction despite § 8128(b). Finally she argues that no exception exists under § 8128(b) for claims of a violation of a clear statutory mandate and, in any event, the allegations of the complaint do not constitute such a claim. This Court must agree.

**A. Judicial Review of FECA Claim**

FECA explicitly provides that all questions "arising under" the FECA shall be decided by the Secretary, and her decision in allowing or denying a payment "is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). The Supreme Court has cited FECA as a model review preclusion statute. See Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 90 (1991) (stating that "FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary's determination of FECA coverage") (citing Lindahl v. Office of Personnel Management, 470 U.S. 768, 780, and n. 13 (1985); see 5 U.S.C. § 8128(b)).

The Third Circuit has found that "[a]fter an administrative review procedure, the Secretary's decision is final, and 'not subject to review by another official of the United States or by a court by mandamus or otherwise.'" Miller v. Bolger, 802 F.2d 660, 662 (3d Cir. 1986) (citing 5 U.S.C. § 8128(b)); see McDougal-Saddler v. Herman, No. CIV. A. 97-1908, 1997 WL 835414, at \*2 (E.D. Pa. Dec. 24, 1997) ("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.'" (quoting 5 U.S.C. § 8128(b)(2) (1996), aff'd on other grounds, 1998 WL 793202 (3d Cir. Nov. 17, 1998); see also Hancock v. Mitchell, 231 F.2d 952 (3d Cir. 1956) (holding that the prohibition on judicial review of FECA claims is constitutional)).

Similarly, the Ninth Circuit has found that "[s]ection 8128(b) of FECA precludes judicial review of an action of the Secretary 'in allowing or denying a payment.'" Rodrigues v. Donovan, 769 F.2d 1344, 1347 (9th Cir. 1985). In Rodrigues, the Court declared that Congress' intent under the Federal Employees Compensation Act, 5 U.S.C.A. § 8128(b), was that courts not be burdened by flood of small claims challenging merits of compensation decisions. Id. In light of the language and structure of the FECA's judicial review preclusion provision, 5 U.S.C. § 8128(b), the Plaintiff's allegations are precisely the

kind Congress intended to preclude with the explicit language of § 8128(b).

**B. Plaintiff's Constitutional Claim**

This Court, however, must decide whether the Plaintiff's Complaint raises a valid constitutional claim because the Supreme Court has construed constitutional challenges as an exception to judicial review preclusion provisions. See Johnson v. Robison, 415 U.S. 361, 373 (1974). In Johnson, the Supreme Court held that a statute prohibiting judicial review of the decisions of the Administrator of Veterans' Affairs did not prohibit review of constitutional questions. Id. (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). The Court noted that to hold otherwise "would, of course, raise serious questions concerning the constitutionality of § 211(a)...." Id. at 366.

Lower courts have recognized a limited exception to § 8128(b) for the consideration of substantial, cognizable constitutional claims. See McDougal-Saddler, 1997 WL 835414, at \*2 (recognizing an exception to the prohibition on judicial review in FECA if the plaintiff presents evidence of a "cognizable" constitutional violation, but cautioning that "the constitutional claim must be more than an allegation"), aff'd on other grounds, 1998 WL 793202 (3d Cir. Nov. 17, 1998); Czerkies v. U.S. Dep't of Labor, 73 F.3d 1435, 1437 (7th Cir. 1996) (FECA's bar against judicial review does not extend to constitutional claims); Paluca v. Secretary of Labor, 813 F.2d 524, 526 (1st Cir. 1987) (district

court has jurisdiction to review Secretary's compliance with the Constitution in administration of FECA); Rodrigues, 769 F.2d at 1347 (district court has jurisdiction over due process challenge to compensation decision).

In Czerkies, the Seventh Circuit found that a "garden-variety claim for benefits" to which a constitutional label is affixed is plainly barred by § 8128(b). Czerkies, 73 F.3d at 1443. In Paluca, the First Circuit stated that FECA precludes a district court's jurisdiction over a constitutional challenge that is "so attenuated and unsubstantial as to be absolutely devoid of merit." Paluca, 813 F.2d 524, 526 (citing Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). In Rodrigues, the Ninth Circuit found that "[a] mere allegation of a constitutional violation" is not sufficient to avoid § 8128(b)'s precluding effect. Rodrigues, 769 F.2d at 1348.

In the instant matter, the Plaintiff's Complaint alleges without substantiation that the Secretary has denied him "procedural due process." (Pls.' Complaint ¶ 12.) The essential requirements of procedural due process are that a deprivation of life, liberty or property be preceded by "notice and an opportunity to respond." Cleveland Board v. Loudermill, 470 U.S. 532, 546 (1985). Freeman does not allege that the Secretary failed to afford him either notice or an opportunity to respond prior to suspension of his benefits. As such, the Plaintiff's "mere allegation of a constitutional violation" is not sufficient to

avoid § 8128(b)'s precluding effect.

### **C. Plaintiff's Claim of a Violation of a Clear Statutory Mandate**

The Supreme Court has found that Congress may insulate certain agency actions from review even where they are alleged to violate a clear statutory mandate. See Board of Governors v. MCorp fin., Inc., 502 U.S. 32, 32 (1991). In MCorp, the Supreme Court affirmed the decision of the Court of Appeals finding that the plain language of the judicial review provisions of the Financial Institutions Supervisory Act of 1966 (FISA), particularly 12 U.S.C. § 1818(i)(1), deprived the district court of jurisdiction to enjoin either administrative proceeding. The MCorp Court noted that § 1818(i)(1)'s "plain, preclusive language" provided:

[N]o court shall have jurisdiction to affect by injunction ... the issuance or enforcement of any [Board] notice or order.

12 U.S.C. 1818(i)(1).

Some courts of appeals have recognized an exception to the prohibition on judicial review in FECA 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. Dep't of Labor, 28 F.3d 746, 747 (8th Cir. 1994); Woodruff v. Dep't of Labor, 954 F.2d 634, 640 (11th Cir. 1992). The Third Circuit has not yet ruled on this issue. See McDougal-Saddler, 1997 WL 835414, at \*2, aff'd on other grounds, 1998 WL 793202, \*6 (3d Cir. Nov. 17, 1998). In McDougal-Saddler, assuming that a violation of "clear statutory mandate"

created subject matter jurisdiction for a court to hear a case brought under FECA, the district court found that the plaintiff had not made a showing of such a violation. McDougal-Saddler, 1997 WL 835414, at \*2. Affirming the lower court decision, the Third Circuit noted that "despite the importance of the jurisdiction and substantive issues which [this case] raises, they cannot be addressed in this case." McDougal-Saddler, 1998 WL 793202, \*6.

Similarly, because Freeman fails to allege a violation of "clear statutory mandate" the Court need not consider further. Freeman implies that OWCP violated a statutory mandate by failing to obtain a medical report from a physician to whom he was referred and by permitting Freeman's employer (the United States Postal Service) to participate in the adjudication of his claim. No evidence in record, however, supports these contentions.

Freeman's compensation benefits were suspended because he failed to appear for a psychiatric examination scheduled by OWCP. In a letter dated August 5, 1994, OWCP informed Freeman that he had been referred to Dr. Berman for a "psychological evaluation" because of Dr. Okin's opinion that there were "functional and psychological components" to Freeman's condition. Section 8123(a) of the FECA provides:

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is 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). Section 8123(d) of the FECA provides:

If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.

5 U.S.C. § 8123(d). Under those provisions, it was appropriate for OWCP to suspend the Plaintiff's compensation. Assuming arguendo that the Plaintiff's factual assertions are true, OWCP did not violate a clear statutory mandate in not obtaining the medical report of a physician to whom he was referred and allowing Freeman's employer to participate in the adjudication of Freeman's claim. The statute does not require the Secretary to obtain such a medical report or forbid the Secretary from allowing an employer to participate in evaluating a plaintiff's claim. See Hanauer, 82 F.3d at 1309 (finding that the Secretary's regulations and procedures embody policy choices that are entirely within her discretion).

This Court's Final Judgment follows.

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

DUANE E. FREEMAN : CIVIL ACTION  
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 v. :  
 :  
 ALEXIS HERMAN, et al. : NO. 98-2649

**FINAL JUDGMENT**

AND NOW, this 24th day of November, 1998, upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 5), Plaintiff's response thereto (Docket No. 6), Plaintiff's addendum to that response (Docket No. 8), and Plaintiff's Emergency Motion for a Ruling on Summary Judgment (Docket No. 9), IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion for Summary Judgment on Plaintiff's claim is **DENIED**; and

(2) Defendant's Motion to Dismiss is **GRANTED** and Plaintiff's Complaint is **DISMISSED with prejudice** pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

BY THE COURT:

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HERBERT J. HUTTON, J.