

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

JACQUELINE BRASCH : CIVIL ACTION
: :
v. : :
: :
UNITED STATES OF AMERICA : NO. 01-1179

O R D E R

AND NOW, this 29th day of October, 2001, upon consideration of the Government's Motion to Dismiss (Docket #3), the plaintiff's response to the motion, and various supplemental filings by the parties, it is hereby ORDERED and DECREED that said motion is GRANTED and the complaint is dismissed with prejudice for the following reasons.

The plaintiff alleges that her decedent died of cardiac arrest, as a result of the failure of his employer, the United States Postal Service ("USPS"), properly to assist him when he became ill on July 29, 1992. The plaintiff seeks relief under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671, et seq., and, alternatively, under the Constitution for alleged denial of due process. The government argues that both claims are barred

by the exclusivity provision **of** the Federal Employer Compensation Act ("FECA"), 5 **U.S.C.** §8101, et seq. The Court agrees.

The plaintiff alleges that her decedent became ill, suffering chest pain and shortness of breath, while at work with the USPS. The plaintiff alleges that because the nurse for the postal facility did not call 911 immediately, the decedent **was** denied the kind of emergency assistance that would have saved his life.

The plaintiff filed a FECA claim with the Office of Workers Compensation Programs ("OWCP"). The plaintiff alleges that OWCP erroneously perceived a conflict in the medical opinion as to whether the delay in calling emergency assistance contributed to decedent's death. Because of the perceived conflict, OWCP referred the case to an independent medical specialist; the report of the independent medical specialist was unfavorable to plaintiff. OWCP denied the claim on the **basis of** the report of the independent specialist. The plaintiff alleges that the claim was denied before she received the report **of** the independent medical specialist and had an opportunity to cross-examine him and rebut **his** findings. She alleges that this was a denial of due process of **law**.

FECA provides that an employee of the **federal** government **is** entitled to be compensated for "personal injury

sustained **while** in the performance of his (or her) duty." 5 U.S.C. §8102 (a). The **OWCP** has determined that these benefits cover "any deleterious result of medical services furnished by the (employer) for non-work related illnesses or injuries." **FECA** Program Memorandum No. 42, and its supplement, No. 186.

The liability of the United States under the **FECA** program is exclusive. 5 U.S.C. §8116 (c). See Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983); Elman v. United States, 173 F.3d 486, 488-489 (3d Cir. 1999); DiPippa v. United States, 687 F.2d 14, 16 (3d Cir. 1982). Federal courts will not entertain suits under the FTCA, "where a substantial question of FECA coverage exists." DiPippa, 687 F.2d at 16. A "substantial question" exists "unless it is 'certain that [**the Secretary of Labor**] would find no coverage,". *Id.*, quoting Concordia v. USPS, 581 F.2d 439, 442-43 (5th Cir. 1978). Here the Secretary of Labor has found coverage, but has denied the claim on the merits.

The plaintiff claims that FECA Program Memorandum No. 42, **and** its supplement, No. 186, which state that **FECA covers** injury from medical services provided by the employer, are void because they were not **submitted** for notice and *comment* **under** the Administrative **Procedures Act**. Because the Program Memorandum **is** void, the plaintiff argues that she is not relegated to **FECA** but

may bring an action under the FTCA. In order for the plaintiff to succeed with this argument, she must establish that the Program Memorandum is "legislative", rather than "interpretive". If legislative, notice and comment were required; if interpretive, they were not. The Court holds that **Program Memorandum 42** is interpretive.

In Dia Navigation Co. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1992), our Court of Appeals explained that legislative rules **have** "substantive legal effect'", while interpretive **rules** "typically involve construction or clarification of a statute or regulation." Id. at 1264 (citing FLRA v. Department of the Navy, 966 F.2d 747 (3d Cir. 1992) (en banc)). **Thus**, "[i]f a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive'", or "legislative". Id. at 1264 (quoting La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992)).

If the rule results from the exercise of **the agency's** judgment in the "implement[ation of] a general statutory mandate, **the rule** is likely a legislative one'", Dia, 34 F.3d at 1264 (quoting United Technologies Corp. v. EPA, 821 F.2d 714, 719-720 (D.C. Cir. 1987)). On the other hand, if the **rule is** founded **on** specific statutory provisions and "its validity stands

or **falls** on the correctness **of** the agency's interpretation **of** those provisions", it is interpretive. See Dia, F.3d at 1264 (quoting United Tech. Corp., 821 F.2d at 719-20). See also Star Enterprise v. EPA, 235 F.3d 139, 146 (3d Cir. 2000) (citing Dia).

Program Memorandum 42 is interpretive. It clarifies what is meant by the statutory phrase: "personal injury sustained while in the performance of his (or her) duty." The validity of Program Memorandum 42 stands or falls on the correctness of the agency's interpretation of that provision.

The Rule is not an exercise in judgment designed to flesh out or implement a "general statutory mandate". The statutory mandate in this case is not general. Rather, it is specific -- to compensate federal employees who are injured during the performance of their duties -- and the purpose of the Rule is to interpret the reach **of** one portion of that mandate.

The plaintiff's second argument against exclusivity is that the principle does not cover constitutional claims. Courts have recognized an exception to the prohibition on judicial review in FECA if the plaintiff presents evidence of a "cognizable" constitutional violation. See, e.g., Rodriques v. Donovan, 769 F.2d 1344, 1347-48 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996). The constitutional claim, however, must be more than an allegation.

The constitutional claim advanced by the plaintiff here is insubstantial.

The plaintiff claims that OWCP deprived her **of** due process of law by rejecting her claim before she received the report of the independent medical specialist, and thus **before** she had an opportunity to **reply** to his report, rebut his findings, and cross-examine him.

'The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976)

(citations omitted). What constitutes a meaningful time and manner is **flexible**, varying based on the situation. See

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "The quantum and quality of the process due in a particular situation depends on the need to serve the purpose **of** minimizing risk of error."

Greenholz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979). Courts balance three factors to determine the process warranted in a given case:

(1) the private interest that will be affected by the official action;

(2) the **risk** of an erroneous deprivation **of** that interest through the procedures used and **the probable value**, if any, of additional or substitute procedural safeguards; and

(3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See Matthews, 424 U.S. at 335.

First, the private interest in a claim to FECA benefits is strong, and deprivation of that right can act to the serious detriment of the claimant. See Jones-Booker v. United States, 16 F. Supp.2d 52, 61 (D.Mass. 1998). However, courts have properly recognized that the strength **of** the interest in a FECA claim is weaker than to claims to certain other government entitlements like welfare; a lesser hardship is incurred when FECA benefits are denied because claimants have recourse to other government entitlement programs if their income **is** below subsistence level. See Soeken v. Herman, 35 F. Supp.2d 99, 105 n.9 (D.D.C.1999); United States v. Woods, 931 F. Supp. 433, 439 (E.D.Va. 1996).

Second, the risk of erroneous deprivation from the procedures in question here governing FECA benefits is minimal. In making out a claim **for** FECA benefits, a claimant has an opportunity to present her case and medical evidence in support thereof, including a report from the attending physician. Where there **is** a conflict between that physician's opinion and the opinion of **a physician for the United States**, an **impartial** physician is appointed to make an examination to resolve the

conflict. See 5 U.S.C. § 8123(a). According to the FECA Procedures Manual, "an impartial specialist's report is entitled to grater weight than other evidence of record, as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning." Part **Two**, Chapter 2-810.11c.(2); McDougal-Saddler v. Herman, 184 F.3d 207, 209 (3d Cir. 1999).

The plaintiff claims that her inability to participate in the selection of this impartial specialist and to review and rebut his report unreasonably increased the risk of an erroneous deprivation. This Court disagrees for a number of reasons. First of all, because the impartial physician **has** access **to** the reports, and factual bases, of the two physicians before **it**, there is minimal likelihood **of** factual error. Furthermore, the analysis of the impartial specialist is only given increased weight upon a finding that it is supported by substantial medical reasoning. Finally, even if there were to be an error, either of fact or reasoning, the FECA procedures set forth a **procedure** whereby a decision based on such an erroneous report could **be** reconsidered.' See **FECA** Procedure Manual Chapter 2-1602 (Reconsiderations). It is unclear why the additional procedure plaintiff seems **to be calling** for here - participation in the

'Plaintiff did not take advantage of this remedy.

selection of **the** impartial specialist and prior review and rebuttal of their reports - is significantly more likely to detect errors.

Third, the government has a powerful interest in swift resolution of claims for FECA eligibility - as does the claimant, for that matter. See United States v. Woods, 931 F. Supp. at 440; cf. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (welfare authorities and recipient have interest in speedy resolution). Adding time to the review process could be costly, and result in the adjudication of fewer claims.²

Accordingly, because the risk of error from the existing procedures **is** low, and in the absence of a reason to believe the additional procedure would do more good than harm to the system as a whole, this Court finds no constitutional infirmity. The motion to dismiss is granted.

BY THE COURT:



MARY A. McLAUGHLIN, J.

FAXED 10/29/01 to:

Robert Land, Esq.
James Sheehan, Esq.
Richard Bernstein, Esq.

²Although fiscal and administrative constraints are not dispositive, courts must weigh them in evaluating procedures that are challenged. See Matthews, 424 U.S. at 348.