

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

VICTOR A. IZZO,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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CIVIL ACTION NO. 3:03-CV-1478

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendant's Motion to Dismiss (Doc. 19) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court converted Defendant's motion to a Rule 56 motion for summary judgment. (Doc. 24.) Due to the limitations on Congress' waiver of the United States' sovereign immunity set forth in the Federal Tort Claims Act, 5 U.S.C. § 8101, *et seq.*, and the compensation system established for federal employees by the Federal Employee Compensation Act, 5 U.S.C. § 5101, *et seq.*, the Court lacks jurisdiction over the subject matter of this action. Accordingly, the Court will grant Defendant's Motion to Dismiss (Doc. 19) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Because Defendant's motion will be decided on jurisdictional grounds alone, the Court will not address the converted Rule 12(b)(6) motion.

BACKGROUND

The facts relevant to the Court's jurisdictional determination are as follows: In May, 1994, Plaintiff's son, Brandon Izzo was employed by the United States Army Corps of Engineers at the Beltville Dam located in Franklin Township, Pennsylvania. (Doc. 1 at

7.) On May 23, 1994, the United States Army Corps of Engineers used a carbon monoxide emitting pump in a manhole near the Beltsville Dam. (Doc. 1 at 8.) The following morning, Brandon Izzo was directed to enter the same manhole by his supervisor. (Doc. 1 at 8.) Due to the United States Army Corp of Engineers' disregard for safety standards, a large amount of carbon monoxide remained in the manhole at the time Brandon Izzo entered it. (Doc. 1, Ex. N.) As a result of the presence of carbon monoxide, Brandon Izzo was killed. (*Id.*) On July 18, 1994, Plaintiff filed a compensation claim with the United States Department of Labor. (Doc. 22, Ex. B.) Plaintiff received benefits in the amount of \$1000.00. (Doc. 1, Ex. J.) Plaintiff instituted the present action on August 26, 2003. On December 10, 2003, Plaintiff moved for entry of default against Defendant. (Doc. 7.) Default was entered in favor of Plaintiff on December 12, 2003. (Doc. 8.) On February 12, 2004, the default was set aside. (Doc. 16.) On April 19, 2004, Defendant filed its Motion to Dismiss. (Doc. 19.) The motion is fully briefed and ripe for disposition.

STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of an action where the court lacks jurisdiction over the subject matter of that action. FED. R. CIV. P 12(b)(1). A defendant may challenge the existence of subject matter jurisdiction in one of two ways. See *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A defendant may assert a "facial challenge to jurisdiction, asserting that plaintiffs' complaint, on its face does not allege sufficient [grounds] to warrant the [C]ourt in taking jurisdiction." *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d

68, 75 (3d Cir. 1983). When assessing a facial challenge, the Court must assume that “the allegations contained in the complaint are true.” *Mortensen*, 549 F.2d at 891.

In the alternative, a defendant may assert a factual attack on the jurisdictional allegations in the complaint. *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). Where a defendant utilizes this method, no presumption of truthfulness attaches to the allegations in the complaint. *Carpet Group Int’l v. Oriental Rug Imps. Ass’n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *Mortensen*, 549 F.2d at 891). Moreover, the Court is not bound to the four corners of the complaint when determining whether it possesses the power to hear the case. See *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1977) (citing *Mortensen*, 549 F.2d at 891). Rather, the Court is permitted to weigh the available evidence to determine whether subject matter jurisdiction exists. *Mortensen*, 549 F.2d at 891. In doing so, the Court must “satisfy itself as to the existence of its power to hear the case.” *Id.* Even when the merits of the claim and jurisdiction are closely related, the Court may determine jurisdiction without deciding the merits provided it “demands less in the way of jurisdictional proof than would be appropriate at a trial stage.” *Gould*, 220 F.3d at 178 (quoting *Mortensen*, 549 F.2d at 891). Furthermore, the existence of disputed material facts will not preclude the Court from evaluating the jurisdictional allegations set forth in the complaint. *Id.*

It is well established that in a factual attack, the burden to establish the existence of subject matter jurisdiction rests squarely on the plaintiff’s shoulders. *Packard v. Provident Nat’l Bank*, 994 F.3d 1039, 1045 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Prior to dismissal of the action for lack of subject

matter jurisdiction, the party asserting jurisdiction must have an opportunity to present evidence in support of his jurisdictional contention. *Local 336, Am. Fed'n of Musicians, AFL-CIO v. Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973).

In the instant matter, Defendant has asserted a factual attack on the jurisdictional allegations set forth in Plaintiff's Complaint. (Doc. 19.) Consequently, the Court need not presume the truthfulness of the allegations set forth therein. Moreover, it is proper for the Court to consider all relevant evidence submitted by the parties.

DISCUSSION

1) Limited Scope of Federal Tort Claims

Plaintiff's defamation and civil rights claims against Defendant are barred by the doctrine of sovereign immunity. As a sovereign, the United States enjoys absolute immunity from suit. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). As a result, parties are precluded from bringing a cause of action against the United States without its express consent. *See id.*; *Richards v. United States*, 176 F.3d 652, 654 (3d Cir. 1999). "Sovereign immunity not only protects the United States from liability, it deprives a court of subject matter jurisdiction over claims against the United States." *Richards*, 176 F.3d at 654. With the passage of the Federal Tort Claims Act ("FTCA") in 1946, Congress waived the United States' sovereign immunity for certain torts committed by federal employees. 28 U.S.C. § 1346(b). This self-elected abrogation of sovereign immunity, however, is limited in scope. *See id.* Within the FTCA, Congress expressly excluded certain torts from coverage, including defamation. 28 U.S.C. § 2680(h). Moreover, in *FDIC v. Meyer*, the Supreme Court held that the waiver of sovereign immunity espoused

by Congress in the FTCA extends only to claims cognizable under § 1346(b). 510 U.S. 471, 477 (1994). There, the Supreme Court held that the United States simply has not rendered itself liable under § 1346(b) for civil rights claims. *Id.* at 478 (holding that state, rather than federal, law must be the source of claims cognizable under § 1346(b)).

In the instant matter, Plaintiff has asserted claims for defamation and violation of his civil rights. (Doc. 1 at 9-10.) As discussed in the preceding paragraph, the United States has not waived its sovereign immunity with respect to either claim. Consequently, the Court does not have jurisdiction over the subject matter of this action with respect to these claims. Accordingly, these claims will be dismissed.

2) Exclusivity of Federal Employee Compensation Act

Although the FTCA permits parties to bring a cause of action against the United States for wrongful death, 28 U.S.C. § 1346(b), due to the constraints of the Federal Employee Compensation Act (“FECA”), 5 U.S.C. § 8101, *et seq.*, the Court also lacks jurisdiction over Plaintiff’s wrongful death claim. Congress enacted FECA with an intent to provide a comprehensive remedy to federal employees for injuries “sustained while in the performance of [their] duty.” 5 U.S.C. §§ 8101-9193; *Heilman v. United States*, 731 F.2d 1104, 1109 (3d Cir. 1984). In setting forth the broad coverage of the compensation system established by Congress, § 8102 states that compensation will be paid for *all* such injuries unless proximately caused by the willful misconduct or intoxication of the employee in question. 5 U.S.C. § 8102. Moreover, the broad reach of FECA covers liability created both by the Government’s negligent and intentional acts. *See Heilman*, 731 F.2d at 1111 n.6.

Congress intended the redress available under FECA to be the exclusive remedy available to federal employees, *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193-94 (1983), and their next of kin, 5 U.S.C. § 8116(c); *Heilman*, 731 F.2d at 1109. In *Lockheed*, the Supreme Court noted:

In enacting this provision, Congress adopted the principal compromise - - the 'quid pro quo' - - commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return, they lose the right to sue the Government.

Id. at 194. Clearly, where an injury to or death of a federal employee falls within the broad scope of FECA, it is the sole remedy available.

The determination of whether an employee's injury or death falls within the scope of FECA, thus entitling the employee or his next of kin to benefits, is made exclusively by the Secretary of Labor or his designee. *Heilman*, 731 F.3d at 1109; *Gagliardi v. United States*, No. CIV.A.89-8859, 1991 WL 9361, at *3 (E.D. Pa. Jan. 28, 1991). Moreover, this determination is immune from judicial review, rendering the administration of FECA the exclusive province of the Secretary of Labor. 5 U.S.C. § 8128(b)(2); *Heilman*, 731 F.3d at 1109; *see also DiPappa v. United States*, 687 F.2d 14, 17 (3d Cir. 1982); *Hancock v. Mitchell*, 231 F.2d 652, 652-53 (3d Cir. 1956). "Indeed, if a claim is covered under FECA, then the federal courts have no subject matter jurisdiction to entertain the action." *Heilman*, 731 F.3d at 1109. Only in the presence of near-absolute certainty that a claim is outside the scope of FECA, will federal courts entertain a claim without a prior determination by the Secretary of Labor. *Id.* at 1110. Likewise, "where it appears from the allegations of the complaint that coverage unquestionably [exists]," dismissal for lack

of subject matter jurisdiction is appropriate. *Id.*

Turning to the facts of the instant matter, Plaintiff's son died on May 24, 1994. (Doc. 1 at 7.) Plaintiff does not dispute that this tragedy occurred while the decedent was employed with United States Army Corps of Engineers. (*Id.*) On July 18, 1994, Plaintiff filed a compensation claim with the United States Department of Labor. (Doc. 22, Ex. B.) In a letter dated August 29, 1994, a representative of the Office of Workers Compensation Programs informed Plaintiff that funds representing "payment for burial expenses and administrative costs" would be dispersed to Plaintiff. (Doc. 1, Ex. H.) In subsequent correspondence, Plaintiff was informed that the payment of these benefits was pursuant to § 8133(f) and § 8134(a).¹ (Doc. 1, Ex. J.) Plaintiff acknowledges receipt of said funds. (Doc. 1 at 10.) Due to Plaintiff's receipt of compensation under § 8133(f) and § 8134(a), the Court finds that the Secretary of Labor or its designee did indeed determine that the decedent's death fell within the coverage of FECA. This determination is not subject to judicial review. 5 U.S.C. § 8128(b)(2). Thus, there is no question as to FECA's coverage of Plaintiff's wrongful death claim. Accordingly, the Court will dismiss Plaintiff's wrongful death claim for lack of subject matter jurisdiction.

CONCLUSION

Due to the limitations on Congress' abrogation of the United States' sovereign immunity set forth in the Federal Tort Claims Act, 5 U.S.C. § 8101, *et seq.*, and the

¹ Since the decedent had no dependents at the time of his death, his next of kin, including Plaintiff, were not entitled to continuing benefits. See 5 U.S.C. § 8133. In such cases, FECA provides only for payment of funeral and other administrative expenses. 5 U.S.C. §§ 8133(f), 8134(a).

compensation system established for federal employees by the Federal Employee Compensation Act, 5 U.S.C. § 5101, *et seq.*, the Court lacks jurisdiction over the subject matter of this action. Accordingly, the Court will grant Defendant's Motion to Dismiss (Doc. 19) pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

An appropriate Order will follow.

October 19, 2004

Date

/s/ A. Richard Caputo

A. Richard Caputo

United States District Judge

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(JUDGE CAPUTO)

ORDER

NOW, this 19th day of October, 2004, **IT IS HEREBY ORDERED THAT:**

- (1) Defendant's Motion to Dismiss (Doc. 19) is **GRANTED**.
- (2) The claims are **DISMISSED for lack of jurisdiction**.
- (3) The Clerk of the Court shall mark this case **CLOSED**.

A. Richard Caputo
United States District Judge