UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

EDWARD STOCKLEY *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case 2:14-cv-00342-AJS**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION

Defendant, the United States of America, submits this memorandum in support of its motion to dismiss Plaintiffs' claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–80, based on lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3). Plaintiffs aver that Edward Stockley sustained personal injuries from exposure to *Legionella* bacteria experienced during his November 2011 visits to the U.S. Department of Veterans Affairs (VA) University Drive Hospital "relative to his application" to serve there as a "non-paid volunteer." (Compl. ¶¶ 26-29, 70, 118). They allege that following his November 4, 2011 application to serve as an unpaid volunteer, Mr. Stockley returned to the VA facility "to undergo various medical tests" as part of "the application process," including a tuberculosis test on November 15, fingerprinting, and photographing for an identification card; and that "each time" he visited the VA "relative to his application to be a volunteer," he came into contact with

the *Legionella* bacteria that ultimately caused his infection. (Compl. ¶¶ 26-29, 70, 118). His wife, Paula Stockley, asserts derivative claims for loss of companionship, services and consortium. (Compl. ¶ 120).

Based on Plaintiffs' averments and evidence submitted in support of this jurisdictional Motion, their suit must be dismissed because the FTCA's limited waiver of sovereign immunity does not encompass suits by federal employees, including authorized volunteers, for job-related injuries. Plaintiffs' exclusive remedy is under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193.

FACTS

Mr. Stockley's status as volunteer at the VA University Drive facility is undisputed. On November 4, 2011, he submitted his application for voluntary service "as a VA without-compensation employee" in the VA Voluntary Service Program, by which "VA … entered into this agreement by the authority of 38 U.S.C., Section 513." (Exhibit 1, Application for Voluntary Service, Nov. 4, 2011). VA promptly began the volunteer retention process – interviewing Mr. Stockley and performing the first of his two-step tuberculosis skin test that same day, November 4, followed by a skin test check on November 7, the second skin test on November 15, and a check for the second test on November 17. (Exh. 2, "New Volunteer Checklist" for Edward Stockley, at University Drive). Also on November 17, Mr. Stockley certified that he had completed the training for serving at the VA and affirmed his commitment "[a]s an employee/volunteer" of the VA to safeguard personal information about Veterans and their families, VA employees, volunteers and applicants. (Exh. 3, Statement of Commitment and Understanding, signed

Nov. 17, 2011). On November 29, 2011, Mr. Stockley presented to the VA Hospital emergency room with complaints of chill[s], nausea and vomiting for several days, and left-sided chest pain for three days (since November 26). (Compl. ¶¶ 106-07). On December 1, the nature of his infection was confirmed by a positive *Legionella* urinary antigen test. (Compl. ¶ 108). Solely for purposes of this motion, the Government presumes that Mr. Stockley's *Legionella* infection was contracted due to his visits to VA University Drive.[1] Because Mr. Stockley was in the VA facility only in connection with his retention as a volunteer, these volunteer-related visits were the sole source of his alleged exposure.

STANDARD OF REVIEW

The United States, as sovereign, may not be sued unless it consents, and that consent defines the scope of a court's jurisdiction. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193-94 (1983); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The consent to suit must be unequivocally expressed, not implied. *FAA v. Cooper*, ___ U.S. ___, 132 S. Ct. 1441, 1444 (2012) ("waiver of sovereign immunity must be unequivocally expressed in the statutory text … and any ambiguities are to be construed in favor of immunity"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-35 (1992); *United States v. Williams*, 514 U.S. 527, 531 (1995) ("Our task is to discern

[1] Mr. Stockley's onset of symptoms on November 26, 2011, is consistent with his averred exposure occurring during the CDC's two-to-fourteen day latency period from exposure (presumably between November 12 and 24) to disease onset. *See* Exh. 4, Centers for Disease Control and Prevention, *Legionella: Top 10 Things Every Clinician Should Know – Legionnaires Disease – CDC* (Feb. 5, 2013). www.cdc.gov/legionella/clinicians.html

the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity.").

The FTCA constitutes a limited waiver of sovereign immunity. Whether a tort claim is barred by FECA's exclusive remedy provision is a jurisdictional matter and properly presented as a Fed. R. Civ. P. 12(b)(1) motion to dismiss. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) (courts have no jurisdiction over FTCA claims where FECA applies); *Lockheed Aircraft Corp. v. United States*, 460 U.S. at 193-94 (FECA's exclusive remedy provision serves as a limit on the FTCA's waiver of sovereign immunity); *Heilman v. United States*, 731 F.2d 1104, 1109 (3d Cir. 1984) (federal courts lack jurisdiction to entertain an action raising a claim covered by FECA); *DiPippa v. United States*, 687 F.2d 14, 16-17 (3d Cir. 1982) (federal court lacks subject matter jurisdiction over FTCA claim for injury covered by FECA); *Schlosser v. Lyras*, 2006 U.S. Dist. LEXIS 64125, 21-23, 34-35, 41-44 (W.D. Pa. 2006) (same); *Nekula v. Banovsky*, 2011 U.S. Dist. LEXIS 151315, 15-16 (W.D. Pa. 2011) (court lacks subject matter jurisdiction over FTCA claim where FECA applies because injury was job-related); *DiPillo v. United States*, 1985 U.S. Dist. LEXIS 16469, 3-4 (E.D. Pa. (1985) ("If a claim is covered by FECA, the federal courts have no subject matter jurisdiction to entertain the claim, and the claim should be dismissed.").[2]

[2] *Accord, Diaconu v. Sec'y of Def.*, 393 Fed. Appx. 1 (3d Cir. 2010) (court lacks subject matter jurisdiction over FTCA suit for work-related injury since FECA provides the exclusive remedy); *Horton v. United States*, 144 Fed. Appx. 931 (3d Cir. 2005) (district court properly determined that it lacked subject matter jurisdiction over FTCA suit where there was a substantial question whether plaintiff's claim was covered by FECA); *Izzo v. United States Gov't*, 138 Fed. Appx. 387 (3d Cir. 2005) (upholding district court's determination that it lacked jurisdiction over a wrongful death claim covered by FECA);

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction tests the Court's power to hear a case. Fed. R. Civ. P. 12(b)(1); *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) ("At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case.'"); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *Judkins v. HT Window Fashions Corp.*, 514 F.Supp.2d 753, 759 (W.D. Pa. 2007). When subject matter jurisdiction is challenged, "the plaintiff bears the burden of persuasion." *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) (citing *Mortensen*, 549 F.2d at 889); *McCluskey v. United States*, 2010 U.S. Dist. LEXIS 108874, 7-9 (W.D. Pa. 2010) (plaintiff bears burden that his FTCA claim is not covered by FECA and thus within the court's jurisdiction); *Connor v. United States Dep't of Labor*, 2007 U.S. Dist. LEXIS 23545, 10-12 (E.D. Pa. 2007) (plaintiff asserting FTCA subject matter jurisdiction "bears the burden of persuasion" that his claim is not covered by FECA).[3]

A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction. *Gould Elecs., Inc. v. United States*, 220 F.3d 169 (3d Cir. 2000); *Mortensen*, 549 F.2d at 891; *Patsakis v. Greek Orthodox Archdiocese of*

McCluskey v. United States, 2010 U.S. Dist. LEXIS 108874, 14-18 (W.D. Pa. 2010) (court lacks subject matter jurisdiction over federal employee's FTCA suit because FECA provides the exclusive remedy); *Zawoysky v. Charles E. Kelley Support Facility*, 2010 U.S. Dist. LEXIS 48378 (W.D. Pa. 2010) (court has no jurisdiction over FTCA suit where FECA provides the exclusive remedy).

[3] *Accord, Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction … and the burden of establishing the contrary rests upon the party asserting jurisdiction."); *Development Fin. Corp., v. Alpha Hous. & Health Care*, 54 F.3d 156, 158 (3d Cir. 1995) (as party asserting jurisdiction, plaintiff bears burden of proof that his claims are properly before the court); *Mortensen*, 549 F.2d at 891 (plaintiff carries burden of proof that jurisdiction exists); *Nekula*, 2011 U.S. Dist. LEXIS 151315 (same).

Am. 339 F. Supp.2d 689, 692 (W.D. Pa. 2004). When a Rule 12(b)(1) movant challenges a plaintiff's factual allegations concerning a court's power to hear a case, the court need not consider the allegations of the complaint as true, but is free to weigh evidence outside the pleadings to satisfy itself as to its power to hear the case. *Atkinson v. Pa Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007); *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000); *Mortensen*, 549 F.2d at 891; *Nekula*, 2011 U.S. Dist. LEXIS 151315. *Accord*, *Gould Elecs.*, 220 F.3d 169 ("In reviewing a factual attack, the court may consider evidence outside the pleadings."); *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997). Here, on the face of Plaintiffs' complaint, the facts relevant to jurisdiction are undisputed, and confirmed by evidence outside the pleadings.

ARGUMENT

I. FECA Divests the Courts of Jurisdiction Over FTCA Claims Brought by Federal Employees, Including Volunteers, for Work-Related Injuries.

Plaintiffs filed suit against the United States under the FTCA, which provides a limited waiver of sovereign immunity for certain types of torts. 28 U.S.C. §§1346(b)(1), 2671–80. But the FTCA's waiver of sovereign immunity does not extend to claims by federal employees for injuries related to their employment. *See Lockheed Aircraft Corp.*, 460 U.S. at 193–94. Instead, the employees' sole remedy is FECA, which provides compensation to federal employees for injuries sustained while performing their duties. *See* 5 U.S.C. §§ 8102(a), 8116(c); *Johansen v. United States*, 343 U.S. 427, 432 (1952). As the Supreme Court has explained, FECA "was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity." *Lockheed Aircraft Co.*, 460 U.S. at 193-

94. FECA is a comprehensive workers' compensation system for federal employees, providing the exclusive remedy for job-related personal injuries. *United States v. Lorenzetti*, 467 U.S. 167, 168 (1984).

In enacting FECA, "Congress adopted the principal compromise—the '*quid pro quo*'—commonly found in workers' compensation legislation" whereby employees are guaranteed the right to pursue immediate, fixed benefits, regardless of fault and without need for litigation, but lose the right to sue the Government. *Lockheed Aircraft Corp.*, 460 U.S. at 193-94; *United States v. Demko*, 385 U.S. 149, 151 (1966); *In re McAllister Towing & Transp. Co.*, 432 F.3d 216 (3d Cir. 2005); *Elman v. United States*, 173 F.3d 486 (3d Cir. 1999); *McCluskey*, 2010 U.S. Dist. LEXIS 108874 at 12-14; *Schlosser*, 2006 U.S. Dist. LEXIS 64125 at 34-35. Like workers' compensation statutes generally, FECA is intended only to "substitute" for tort suits against the United States, not to supplement them. *Demko*, 385 U.S. at 151 (compensation laws are, generally, substitutes for common law tort actions); *Miller v. Bolger*, 802 F.2d 660 (3d Cir. 1986); *Cardwell v. United States*, 1992 U.S. Dist. LEXIS 18571, 1992 WL 368495, at *5 n.3 (E.D. Pa. 1992), aff'd, 6 F.3d 778 (3d Cir. 1993), cert. denied, 511 U.S. 1051 (1994). It provides the lone avenue of redress for a "personal injury sustained while in the performance of his duty" as a federal employee. 5 U.S.C. § 8102.

In defining FECA's exclusive scope over claims within its purview, Congress included an exclusive-liability provision that, as discussed in section II *infra*, deprives this Court of jurisdiction over Mr. Stockley's tort claim *and* his wife's derivative claim:

> The liability of the United States . . . under [FECA] with respect to the injury or death of an employee is **exclusive and instead of all other**

> **liability** of the United States . . . to the **employee**, … his **spouse** . . . and any other person otherwise entitled to recover damages from the United States . . . because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

5. U.S.C. § 8116(c) (emphasis added). Where FECA applies, the courts lack jurisdiction over all FTCA claims regardless of whether they are compensable under FECA. *Lorenzetti*, 467 U.S. at 169 ("United States' liability for work-related injuries under FECA is exclusive," barring recovery "for losses … not compensated under FECA"); *Frushon v. United States Dept. of Labor*, 2006 U.S. Dist. LEXIS 62901 (M.D. Pa. 2006) (where FECA applies, it unambiguously precludes all other liability of the United States under a federal tort liability statute even if a particular type of damage or consequence the claimant suffered is not compensable under FECA; it is the existence of FECA coverage, and not actual compensation, that bars suit). FECA's bar applies if the claim seeks a remedy for an injury suffered on the job; whether FECA benefits can or will be paid is immaterial to its application.[4] To bring an FTCA action, a federal employee must show that the injury is not work-related. *Horton v. United States*, 144 Fed. Appx. 931, 932 (3d Cir. 2005).

The Supreme Court has consistently adhered to this principle of exclusivity of FECA and other federal workers' compensation schemes, expressly declining to overrule or narrow it. *See, e.g., Demko*, 385 U.S. at 151-52; *Lockheed Aircraft Corp.*, 460 U.S. at

[4] *See, e.g., Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) (FTCA claim must be dismissed if FECA applies, even if benefits are not awarded); *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 265 (6th Cir. 1991); *Griffin v. United States*, 703 F.2d 321, 322 (8th Cir. 1983).

196 (Congress intended 5 U.S.C. § 8116(c) to bar FTCA suits brought by federal employees, their relatives, and others claiming through them or on their behalf). In short, Congress has mandated that the United States' liability for work-related claims shall be **exclusively** considered under FECA, and not the FTCA or any other statute. *See* 5 U.S.C. § 8116(c). Thus, as Plaintiffs' injuries allegedly arose out of Mr. Stockley's unpaid service as a federal volunteer, this Court lacks jurisdiction to adjudicate their claims since their sole remedy is under FECA.

II. Volunteers are Federal Employees for Purposes of FECA's Exclusive Remedy Provision.

As this Court has repeatedly held, in both *Nekula* and *Schlosser*, FECA's exclusive remedy provision applies to bar tort claims of not only paid employees, but also persons performing services for a governmental agency as volunteers, since they are federal employees for purposes of FECA coverage. See *Nekula*, 2011 U.S. Dist. LEXIS 151315 at 16-17, quoting 5 U.S.C. § 8101 (1)(B) (FECA defines "employee" to include "an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes acceptance or use of the service, or authorizes payment of travel or other expenses of the individual."); *Schlosser*, 2006 U.S. Dist. LEXIS 64125 at 18-23, 34-44 (quoting 5 U.S.C. § 8101 (1)(B) definition of "employee" under FECA and holding that since FECA bars FTCA claims by VA volunteers who under federal law would be employees of the United States, any related claims for contribution and indemnity are also barred under state law); *DiPillo*, 1985 U.S. Dist. LEXIS 16469 (holding that FECA bars FTCA suit for wrongful death of a BLM volunteer killed while performing volunteer

services pursuant to a statute authorizing BLM to accept services from volunteers). As another court in this Circuit discussed in *DiPillo*, FECA expressly encompasses those providing volunteer services to the government within its definition of employees covered by the Act. See 5 U.S.C. § 8101(1)(B), quoted above. *See also Wake v. United States*, 1996 U.S. App. LEXIS 35578 (2d Cir. 1996) (*Feres* doctrine barring FTCA claims of military personnel for injuries incident to service also bars tort suit by student enrolled in ROTC program for injuries sustained while riding in ROTC vehicle, though she lacked official military status, was not on active duty, and was voluntarily traveling to a military clinic for a precommissioning physical exam to qualify as flight navigator, a position for which she volunteered).

The Secretary of Veterans Affairs is empowered by statute to "accept uncompensated services … for such necessary services (including personal services) as the Secretary may consider practicable." 38 U.S.C. § 513; *accord, McNicholas v. United States*, 226 F. Supp. 965 (N.D. Ill. 1964). Since persons allegedly injured while voluntarily providing services or supplies, without compensation, at VA hospitals are rendering personal services that Congress authorized VA to accept, their exclusive remedy against the United States is a claim under FECA as a federal employee. *Levine v. United States*, 478 F. Supp. 1389 (D. Mass. 1979); *McNicholas*, 226 F. Supp. 965 (approvingly cited by *DiPillo*, 1985 U.S. Dist. LEXIS 6469 at 5-6).

Since Plaintiffs' injuries allegedly arose out of Mr. Stockley's unpaid service as a federal volunteer, this Court lacks jurisdiction to adjudicate their claims since the sole remedy is under FECA.

III. Plaintiffs' Complaint and the Undisputed Evidence Establish that Plaintiffs' Alleged Injuries Relate to Mr. Stockley's Volunteer Employment for the VA, for which FECA Provides the Exclusive Remedy.

Plaintiffs seek recovery for injuries allegedly sustained in connection with Mr. Stockley's service as a volunteer employee for the VA. (Compl. ¶¶ 26-29, 70, 118). Because Plaintiffs' own averments and the undisputed evidence establish that their claimed injuries arise out of Mr. Stockley's volunteer service for the VA, FECA constitutes their exclusive remedy and this Court lacks subject matter jurisdiction over their FTCA claims. *See* 5 U.S.C. § 8116(c). *See also Lorenzetti*, 467 U.S. at 169 (since United States' liability for work-related injuries under FECA is exclusive, plaintiffs cannot recover even for losses not compensated under FECA). Mr. Stockley's several visits to VA University Drive in November 2011, prior to his hospitalization on November 29, were for his retention as a volunteer, including medical and training requirements. See Compl. ¶¶ 26-29, 70, 118; Exhs. 1-3. Prior to the onset of his infection around November 26, he had already completed the medical procedures and training required of volunteers, and had signed the November 17th certification for completion of training and affirmed his commitment for service as a volunteer. See Exhs. 1-3.

Absent a substantial question as to FECA coverage, the Court need not stay this FTCA suit but may dismiss it without waiting for a Department of Labor determination on FECA coverage. *Heilman* 731 F.2d at 1109-10 ("It is unnecessary for a district court to stay an action and retain jurisdiction where the complaint clearly alleges a work-related injury."); *DiPillo*, 1985 U.S. Dist. LEXIS 16469 at 3-4. *Accord, Diaconu v. Sec'y of Def.*, 393 Fed. Appx. 1, 2-3 (3d Cir. 2010). Dismissal is appropriate where it clearly

appears from the averments of the complaint, as here, that FECA coverage unquestionably applies since the injury occurred while the employee was performing his duty on behalf of the United States or a federal agency. *Heilman*, 731 F.2d at 1110; *DiPillo*, 1985 U.S. Dist. LEXIS 16469 at 3-4.

Consequently, this Court cannot entertain Plaintiffs' FTCA claims since they allege facts that establish that the FECA bar applies. *See Lockheed Aircraft Corp.*, 460 U.S. at 190 (FECA protects United States from suits under FTCA and related statutes).

IV. This FTCA Suit Cannot Proceed Because Even Absent Averments That Bring Plaintiffs' Claims Within FECA, There is At Least a Substantial Question of FECA Coverage.

Even if Plaintiffs could raise some doubt whether Mr. Stockley's claim is covered by FECA, this would still fail to establish this Court's jurisdiction over their FTCA claim. An FTCA action may proceed **only if the Court determines with certainty that there can be no FECA coverage**. *Diaconu*, 393 Fed. Appx. 1, at 2-3; *Horton*, 144 Fed. Appx. 931 (plaintiff "**must first seek relief under the FECA**" and can pursue an FTCA claim **only if** the Secretary of Labor determines that plaintiff "cannot proceed under the FECA"); *DiPippa*, 687 F.2d at 16; *DiPillo*, 1985 U.S. Dist. LEXIS 16469 at 3-4. "Only the Secretary of Labor or his designee may determine the scope of FECA coverage." *Di Pippa*, 687 F.2d 14, citing 5 U.S.C. § 8128(b). In deference to the Secretary of Labor's statutory authority to determine the scope of FECA coverage, federal courts will not entertain FTCA claims where a "substantial question" of FECA coverage exists, but must refrain from further action until the Secretary of Labor has made a determination regarding FECA coverage. *Diaconu*, 393 Fed. Appx. 1 at 2-3; *Heilman*, 731 F.2d at 1110;

Di Pippa, 687 F.2d at 16; *Joyce v. United States*, 474 F.2d 215, 219 (3d Cir. 1973); *Somma v. United States*, 283 F.2d 149, 151 (3rd Cir. 1960). "A 'substantial question' of FECA coverage exists unless it is 'certain' that the Secretary of Labor "would find no coverage."[5] *Diaconu*, 393 Fed. Appx. 1, at 2-3; *Heilman*, 731 F.2d at 1110; *DiPippa*, 687 F.2d at 16.

The Secretary of Labor's decision regarding FECA coverage is absolutely immune from judicial review, and thus conclusive. *DiPippa*, 687 F.2d 14, citing 5 U.S.C. § 8128(b). *See also, SW. Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) (FECA contains an "'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage."); *Heilman*, 731 F.2d at 1110 (the Secretary of Labor, and not the courts, is the ultimate and conclusive arbiter of the question of FECA coverage); *Zawoysky v. Charles E. Kelley Support Facility*, 2010 U.S. Dist. LEXIS 48378, 11-12 (W.D. Pa. 2010) (same).

At a minimum, a "substantial question" of FECA coverage exists where, as here, plaintiff avers an injury or disease from an exposure occurring in the workplace. *Diaconu*, 393 Fed. Appx. 1, at 2-3 (allegation of cancer from workplace exposure); *Heilman*, 731 F.2d at 1111 (affirming dismissal of suit for radiation injury while performing work duties since "the allegations in the pleadings themselves establish

[5] For example, even if the injury occurred while plaintiff was on his lunch break or en route to work or home, there is a "substantial question of FECA coverage." *Horton*, 144 Fed. Appx. 931, citing *Woodruff v. United States*, 954 F.2d 634, 638 (11th Cir. 1992), and *White v. United States*, 143 F.3d 232, 238 (5th Cir. 1998). *See also, Elman v. United States*, 173 F.3d 486 (3d Cir. 1999) (FECA bars FTCA suit for injury sustained offsite by federal employee while walking on Government-maintained public sidewalk to a job-sponsored event).

FECA coverage to a certainty"). Where a "substantial question" exists whether a claim is covered by FECA, the courts must stay an FTCA suit until the Secretary of Labor makes a determination regarding FECA coverage. *Di Pippa*, 687 F.2d at 16. *Accord*, *Diaconu*, 393 Fed. Appx. 1, at 2-3. Since Plaintiffs have failed to obtain a determination from the Secretary of Labor that there is no FECA coverage for Mr. Stockley's claim, their FTCA suit cannot proceed and thus should be dismissed or, alternatively, stayed pending their submission of a FECA claim and a determination by the Secretary that the claim is not covered by FECA.[6]

CONCLUSION

Whether the Court reviews only Plaintiffs' factual allegations, or considers evidence outside of the pleadings, there is no dispute that Plaintiffs allege injuries from exposures received in the course of Mr. Stockley's federal service as a VA volunteer. Since FECA precludes the Court from exercising subject matter jurisdiction over this suit, the Court should dismiss Plaintiffs' action. Alternatively, the United States seeks a stay of these proceedings pending Mr. Stockley's presentation of a FECA claim to the Department of Labor and a determination by the Secretary of Labor or his designee whether the claim is covered by FECA.

[6] A claim for compensation under FECA "must be filed within 3 years after the injury or death." 5 U.S.C. § 8122(a). Since Mr. Stockley had the first onset of symptoms on November 26, 2011, he can file a FECA claim up to at least November 26, 2014.

Dated: June 16, 2014.

Respectfully submitted,

J. PATRICK GLYNN
Director

CHRISTINA M. FALK
Assistant Director

ADAM DINNELL (TX Bar #24055405)
Senior Trial Counsel

/s/ *Leon B. Taranto*
LEON B. TARANTO (DC Bar #325951)
Trial Attorney
United States Department of Justice
Civil Division, Torts Branch
1331 Pennsylvania Ave., N.W., Suite 800-S
Washington, DC 20004
leon.b.taranto@usdoj.gov
Telephone: (202) 616-4231
Facsimile: (202) 616-4473

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, the foregoing document was filed via the U.S. District Court's CM/ECF electronic filing system and a copy thereof was served upon:

HARRY S. COHEN
Pennsylvania Bar No. 30682
Harry S. Cohen & Associates, P.C.
Two Chatham Center, Suite 985
Pittsburgh, PA 15219
Phone: (412) 281-3000
Email: hcohen@medmal1.com

DOUGLAS L. PRICE
Pennsylvania Bar No. 64056
Harry S. Cohen & Associates, P.C.
Two Chatham Center, Suite 985
Pittsburgh, PA 15219
Phone: (412) 281-3000
Email: dprice@medmal1.com

*//s// Leon B. Taranto*_____
LEON B. TARANTO (DC Bar #325951)