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GARY GOFF V. YOUGHIOGHENY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GARY GOFF,
COMPLAINANT

v.

THE YOUGHIOGHENY AND OHIO
COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. LAKE 84-86-D
MSHA Case No. VINC CD 84-03

Nelms No. 2 Mine

DECISION GRANTING DISMISSAL

Before: Judge Melick

In his complaint filed with this Commission on July 6, 1984, the Complainant, Mr. Goff, alleges that he was discharged by Respondent in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "1977 Act" 1 because of an underlying medical condition, pneumoconiosis.

In John Matala v. Consolidation Coal Company, 1 FMSHRC 1 (1979), the Commission held that review of discrimination complaints of a miner based on allegations that the miner (FOOTNOTE 1)

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suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428(b) of the Black Lung Benefits Act 2 rather than under the (FOOTNOTE2)

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general anti-discrimination provisions of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, the "1969 Act." That case was, therefore, in accordance with section 428 of the Black Lung Benefits Act, transferred to the Department of Labor for adjudication by one of its administrative law judges.

While the anti-discrimination provisions of section 105(c)(1) of the 1977 Act replacing and enhancing the provisions of section 110(b) of the 1969 Act are broader in coverage than the comparable provisions of the 1969 Act, the rationale for having discrimination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the Black Lung Benefits Act has continuing validity.

Accordingly, it is appropriate to dismiss further proceedings before this Commission in this case. If the Complainant wishes to proceed with this matter, he should apply to the Secretary of Labor in accordance with section 428 of the Black Lung Benefits Act. (FOOTNOTE 3)

ORDER

Case Docket No. LAKE 84-46-D is dismissed

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE ONE

1 Section 105(c)(1) of the 1977 Act provides as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

~FOOTNOTE_TWO

2 Section 428 of the Black Lung Benefits Act provides as follows:

"(a) Mine operators. No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of this subsection the term "miner" shall not include any person who has been found to be totally disabled.

(b) Determination by Secretary; procedure. Any miner who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, or any representative of such miner may, within ninety days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Each administrative law judge presiding under this section and under the provisions of subchapters I, II, and III of this chapter shall receive compensation at a rate not less than that prescribed for GS-16 under section section 5332 of Title 5. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein.

(c) Costs and penalties. Whenever an order is issued under this subsection granting relief to a miner at the request of such miner, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by such miner for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing the violation."

~FOOTNOTE_THREE

3 While Mr. Goff's complaint that he presumably filed with the Secretary of Labor under section 105(c)(2) of the Act has not been made a part of this record, it appears from Respondent's pleadings that the specific complaint of discrimination now

raised before this Commission was not previously brought to the attention of the Secretary.