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FRANCIS M. JANOSKI V. R AND F COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FRANCIS M. JANOSKI, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 85-16-D
v.	MSHA No. VINC CD 84-14
R AND F COAL COMPANY, RESPONDENT	Rice No. 1 Strip Mine

ORDER DISMISSING COMPLAINT

Before: Judge Koutras

Statement of the Case

On July 17, 1984, the complainant Francis M. Janoski, filed a discrimination complaint pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, with MSHA's St. Clairsville, Ohio, field office. Mr. Janoski's complaint stated that he was employed by the respondent from September 22, 1983 to November 11, 1983 and from May 11 to May 25, 1984, as a "seasonal truck driver," and that his employment with the respondent was terminated on May 25, 1984, after a physical examination he had taken on May 10, 1984, revealed that he had pneumoconiosis (black lung). His claim was that his termination or discharge was discriminatory and a violation of section 105(c) of the Act.

MSHA conducted an investigation of Mr. Janoski's complaint, and by letter dated November 16, 1984, informed him that on the basis of a review of the information gathered during the investigation, MSHA concluded that a violation of section 105(c) had not occurred. The letter also advised Mr. Janoski that since it was possible that his complaint "may be applicable to section 428 of the Mine Act," it was being forwarded to the Department of Labor, Employment Standards Administration, for its consideration. Mr. Janoski was also informed of his right to file a complaint with this Commission.

By letter dated November 26, 1984, and received November 28, 1984, Mr. Janoski filed a complaint with the Commission pursuant to section 105(c)(1) of the Act, and his complaint states in pertinent part as follows:

> I was employed by R and F Coal Company from September 22, 1983, to November 11, 1983, and again from May 11, 1984, to May 25, 1984, as a seasonal truck driver. On May 25, 1984, my foreman, Brad Ankrom, informed me that Bill Gossett, Superintendent, instructed him to tell me that May 25, 1984, would be my last day of work, due to a problem with my physical. Dr. Ajit S. Modi, was employed by R and F Coal Company to conduct a physical examination and concluded "the chest x-ray revealed chronic lung disease and pneumoconiosis.' The doctor suggested that I no longer work in dusty areas. My physical examination was conducted on May 10, 1984. (copy of Dr. Modi's letter attached.)
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> I feel that R and F Coal Company wanted to terminate my employment with them because if indications revealed that I had pneumoconiosis (black lung) then as my employer they would have to pay into my black lung benefits and not any previous employer. Previous to my seasonal work with R and F Coal Company, I was working for many years with another coal company. I did not know until the physical examination on May 10, 1984, that I had any symptoms of black lung. When I had an examination in September 1983 for R and F Coal Company there was no mention of any chest x-ray problems.
>
> MSHA's reason for denying my 105(c) discrimination complaint was based on Part 90 rights, which is for underground employees of mines and I, however, am a surface coal miner and was discriminated against on the basis of "applicant for employment.' I have never worked in the underground coal mines and feel this was an unfair decision to reach.

On February 4, 1985, the respondent filed an answer to Mr. Janoski's complaint, and at the same time filed a motion to dismiss the complaint, with a supporting memorandum. The respondent admits that Mr. Janoski was employed as a temporary, seasonal truck driver from September 22, 1983 to November 11, 1983, and that he received an offer of temporary employment in early May 1984, contingent upon his satisfactorily passing a physical examination. Respondent also admits that Mr. Janoski was given a physical examination on May 10, 1984, and that on May 25, 1984, he was informed that since he had failed to meet all of the requirements for employment, the offer of temporary employment was rescinded.

Respondent's arguments in support of the motion to dismiss.

In support of its motion to dismiss, the respondent maintains that the Commission lacks subject matter jurisdiction, and that Mr. Janoski's complaint fails to state a claim under section 105(c) of the Act.

With regard to the assertion that the Commission lacks jurisdiction to entertain the complaint, the respondent cites two cases where the former Interior Board of Mine Operations Appeals and the Commission ruled that claims involving alleged pneumoconiosis discrimination cannot be processed through the Commission under section 105(c), but instead lie within the jurisdiction of the Secretary of Labor. Higgins v. Old Ben Coal Corporation, 1 MSHC 1169 (1974) aff'd on other grounds sub. nom. Higgins v. Marshall, 585 F.2d 1035 (D.C.Cir.1978). cert. denied, 441 U.S. 931 (1979); Matala v. Consolidated Coal Co., 1 MSHC 2001 (1979).

Higgins involved a claim by several miners that they were discriminated against by virtue of the fact that they suffered from pneumoconiosis in that the mine operator failed to maintain their current rate of pay after transferring them to less dusty areas of the mine. The Interior Board of Mine Operations Appeals dismissed the complaint for lack of jurisdiction, and stated as follows at 1 MSHC 1172:

> . . . since there is specific statutory provision for review of discharge and/or discrimination of a miner based upon the fact that such miner suffers from pneumoconiosis, as here alleged, we need not speculate whether, in the absence of such provision, this Board could or should assume jurisdiction under some other provision of the Act, specifically 110(b). We think it highly unlikely that Congress intended to confer jurisdiction upon both the Secretary of Labor and the Secretary of the Interior pertaining to the same subject matter within the confines of the same Act. Higgins, 1 MSHC at 1172. (Section 110(b) of the 1969 Act is substantially similar to Section 105(c) of the Act.)

Matala involved a claim similar to that in Higgins, and Matala's complaint was pending on appeal with the Interior Board of Mine Operations Appeals at the time the Secretary of the Interior's adjudicative functions under the 1969 Coal Act were transferred to the Commission. Upon consideration of Matala's appeal of the dismissal of his complaint, the Commission cited with approval the prior ruling by the Board in Higgins as quoted above, and stated as follows at 1 MSHC 2002:

> We conclude, however, that Matala's allegation of discrimination should be resolved under the extensive provisions of section 428(b) of the Black Lung Benefits Act, which are enforced by the Secretary of Labor, not the Commission. Despite Matala's attempt to characterize this dispute as a section 110(b) discrimination claim, his application raises issues of discrimination related exclusively to rights of miners afflicted with pneumoconiosis. Congress has provided a more specific remedy in the black Lung Benefits Act for claims of discrimination based on pneumoconiosis and there is no need for this Commission to apply the more general provisions of section 110(b) of the 1969 Act in Order to provide Matala with a remedy for any discriminatory practices which might be present in this case.

In support of its conclusion that Mr. Janoski has no discrimination claim under section 105(c) of the Act, the respondent points out that Mr. Janoski alleges that he was an applicant for employment who was the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 of the Act, and was thus protected by the clause in section 105(c) prohibiting discrimination against any miner or applicant for employment who is the subject of such medical evaluations and potential transfer.

Respondent maintains that the standards promulgated pursuant to section 101 are those set out as 29 C.F.R. Part 90, and that section 90.1 provides that such standards are only applicable to miners who are employed at underground coal mines or at surface work areas of underground coal mines. Since the respondent operates a surface coal mine, and since Mr. Janoski admits that he is a surface coal miner and had never worked in the underground coal mines, respondent concludes that Mr. Janoski is not a protected person entitled to relief under section 105(c) of the Act.

Discussion

Section 105(c)(1) of the Mine Act provides in pertinent part 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 is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * *. (Emphasis added.)

Section 101(a)(7), of the Mine Act provides in pertinent part as follows:

> * * * where appropriate, any such mandatory standards shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

Section 428(a) of the Black Lung Benefits Act, 30 U.S.C. 938(a), provides as follows:

> 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.

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90.

Pursuant to those regulations a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

Richard C. Johnston v. Olga Coal Company, WEVA 82-236-D, 5 FMSHRC 1151 (June 20, 1983), and Gary Goff v. The Youghiogheny and Ohio Coal Company, 6 FMSHRC 2055 (August 24, 1984), were both decided by Commission Judge Gary Melick subsequent to the Matala and Higgins cases. The Johnston case involved a complaint by a miner pursuant to section 105(c)(3) of the Mine Act alleging that his level of pay was reduced by the mine operator in violation of his statutory rights as a miner deemed to have been transferred because of pneumoconiosis. The case proceeded to hearing, and after finding that the complainant had voluntarily waived and relinquished his right to transfer, Judge Melick held that the complainant had failed to meet his initial burden of proving that his reduction in pay was in violation of section 105(c)(1) of the Mine Act, and he dismissed the complaint.

The Goff case concerned a complaint of alleged discrimination under section 105(c)(1) of the Mine Act because of an underlying medical condition, pneumoconiosis. Relying on Matala v. Consolidation Coal Co., supra, Judge Melick summarily dismissed the complaint and ruled that a complaint of discrimination on the basis of pneumoconiosis should be resolved under section 428(b) of the Black Lung Benefits Act, rather than under section 105(c) of the Mine Act. Judge Melick stated as follows at 6 FMSHRC 2057:

> 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 discrmination 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.

Mr. Goff filed an appeal of Judge Melick's dismissal of his complaint with the Commission, and on September 26, 1984, the Commission granted his petition for discretionary review, and the case is now before the Commission for further adjudication.

Conclusion

I take note of the fact that under section 428 of the Black Lung Benefits Act, a coal mine operator is prohibited from discharging, or otherwise discriminating against, a miner employed by him by reason of the fact that the miner is suffering from pneumoconiosis. Applicants for jobs in a coal mine are not covered by section 428, and are not afforded the protections provided in section 428 for employees. On the other hand, the discrimination prohibitions found in section 105(c) of the Mine Act extend to coal mine applicants as well as miners on the payroll. Applicants who are the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 are protected by section 105(c). However, the extent of any such protection is specifically tied to the regulations promulgated pursuant to section 101 of the Mine Act.

Mr. Janoski asserts that MSHA's denial of his discrimination complaint under section 105(c) of the Mine Act was based on the fact that as a surface coal miner he was not covered by MSHA's Part 90 regulations, and therefore had no rights under those regulations. The applicable MSHA regulations promulgated pursuant to section 101 are those found in Part 90, Title 30, Code of Federal Regulations, 30 C.F.R. Part 90. As correctly pointed out by the respondent, those regulations only apply to miners who are employed at underground coal mines or at surface work areas of underground coal mines. Since the respondent operates a surface coal mine, and since Mr. Janoski has admitted that he is a surface coal miner and has never worked in the underground coal mines, I conclude that he is not a protected person entitled to relief under section 105(c) of the Mine Act. Accordingly, I conclude that his complaint should be dismissed.

Since I have concluded that Mr. Janoski has no cause of action under section 105(c) of the Mine Act, I see no need to address the jurisdictional question raised by the respondent as part of its motion to dismiss. The issue concerning the Commission's jurisdiction to entertain complaints of this kind is now pending before the Commission in the Goff case.

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ORDER

The respondent's motion to dismiss the complaint on the ground that it fails to state a claim under section 105(c) of the Mine Act, IS GRANTED, and the complaint IS DISMISSED.(Footnote.1)

George A. Koutras
Administrative Law Judge

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Footnotes start here:-

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1. I take official notice of a Memorandum of Understanding between MSHA and the Employment Standards Administration (ESA), a separate agency within the Department of Labor, 44 Fed.Reg. 75,952, December 21, 1979. The agreement provides for a central clearing house for inquiries and investigations by MSHA and ESA for discrimination complaints filed under section 105(c) and 428 of the Mine Act. MSHA and ESA are responsible for coordination and consultation in the handling of such complaints, and since MSHA has advised Mr. Janoski that it has forwarded his complaint to ESA, he should contact MSHA or ESA directly to ascertain the status of his complaint within the ESA. I believe that MSHA has a duty to monitor Mr. Janoski's ESA complaint, and to specifically advise him of the status of its referral to that agency. I also believe that MSHA has a duty to specifically and fully advise Mr. Janoski as to the reasons supporting its conclusion that his rights under section 105(c) were not violated.