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

GARY GOFF, A.K.A. GARRY GOFF, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 84-86-D
v.	MSHA Case No. VINC CD 84-03
THE YOUGHIOGHENY AND OHIO, COAL COMPANY, RESPONDENT	Nelms No. 2 Mine

DECISION

Appearances: Frank K. Leyshon, Esq., Leyshon & Leyshon, Cambridge, Ohio for Complainant;
Gerald P. Duff, Esq., Hanlon, Duff & Paleudis Co., LPA, St. Clairsville, Ohio for Respondent.

Before: Judge Melick

This case is before me on remand by the Commission to determine whether the Complainant, Gary Goff, was discharged by The Youghiogheny and Ohio Coal Company (Y & O) because he was "the subject of medical evaluation and potential transfer" under the regulatory standards set forth in 30 C.F.R. Part 90 (FOOTNOTE 1) and therefore in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act." (FOOTNOTE 2) For the reasons that follow I find that Mr. Goff was not discharged in violation of that section of the Act.

The evidence shows that Mr. Goff began working for Y & O in 1976 as a salaried foreman and continued working in a supervisory capacity until his discharge on January 20, 1984. From 1980 to early January 1984 Goff worked at the Y & O Allison Mine primarily on the surface. The Allison Mine was not then producing coal and was in the process of recovering equipment and closing down following an explosion. When the Allison Mine was closed completely in January 1984, Goff was transferred to the Nelms No. 2 Mine, the only Y & O mine then remaining in operation.

Nelms No. 2 is an underground mine and with the exception of the surface superintendent all the supervisory employees were required to work underground. Goff was to be a labor foreman working primarily in the outby areas of the mine away from the face where the coal is actually extracted. He would also be expected to work closer to the face at times filling in for absent section foremen.

Goff testified that on his first day at the Nelms No. 2 Mine he gave Mine Manager Charles Wurscham copies of doctor's notes and x-rays. The reports included physician's statements that he had "borderline pneumoconiosis" and "pneumoconiosis" and brief "Rx" notes that he should not work "underground." Goff also told Wurscham to keep him out of the dust. On the fourth day of his new job, Goff claims that his chest was "tight" so he called in sick. Goff visited his doctor that day and later called the mine advising a mine official that he would be off "for 2 weeks or until he recovered."

Apparently because of Goff's reluctance to work underground, the existence of inconclusive and rather summary medical evidence, and past experience with altered doctor's slips, Y & O then set up its own appointment on January 13, 1984, for Goff to be medically examined. According to this exam, including x-ray interpretation by certified "B" Readers, Drs. Terry Elliott and Robert Altmeyer,(FOOTNOTE 3) Goff did not have pneumoconiosis. The x-rays were reported as "essentially normal" and of an "essentially healthy chest." Spirometry tests, measuring the breathing capacity of the lungs, pulmonary function tests and arterial blood gas tests were also reported as "normal."

In particular Dr. Terry Elliott stated in reference to the January 13, 1984, examination of Goff as follows:

> "Chest x-ray was within normal limits. No evidence of pneumoconiosis was seen.
>
> There was no evidence of any significant respiratory or pulmonary disease physiologically.
>
> I find no medical reasons at this time that would prevent Mr. Goff from being able to work underground as a supervisor."
>
> Dr. Altmeyer agreed and said:
>
> "On the basis of the above studies, there is no evidence of any significant respiratory or pulmonary disease, physiologically."

On or about January 14, 1984, Goff mailed a letter and copies of some x-rays to the Federal Mine Safety and Health Administration (MSHA), requesting a determination of eligibility for a "Part 90" transfer. There is no evidence however that Y & O had any knowledge of this application. Meanwhile Goff also wrote a letter to Y & O personnel manager Don Weber on January 16, 1984, in which he asserts that he had a note from his doctor advising that he was "unable to perform the duties" as labor foreman due to pneumoconiosis and that he "should be worked outside the mine do [sic] to the extent of pneumoconiosis shown in the two x-rays" and that "until you have a job for me that is out of the dust I will be off work under doctor's advice."

On January 19 Goff, who had still not returned to work, met with Weber and Wurscham to review the results of the most recent medical exam. Goff was told that based upon the medical reports he would be able to return to work and that if he did not report for work the next day he would be fired. Goff never did return to work as directed and was accordingly discharged effective January 20, 1984.

In order for Mr. Goff to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by the protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2686 (1980), rev'd on other grounds sub, nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In determining that Y & O was not motivated in any part in discharging Goff by his being "the subject of medical evaluation and potential transfer" under 30 C.F.R. Part 90, I note

first of all the absence of any evidence that any Y & O personnel knew, prior to his discharge, that he had filed a Part 90 application. In addition, although Y & O officials had been apprised by Goff prior to his discharge of some medical evidence that he had pneumoconiosis, that evidence was inconclusive and of questionable reliability.

On the other hand, at the time of Goff's discharge, Y & O had obtained the results of a current and complete medical evaluation of Goff's condition including reports by certified "B" Readers concluding that Goff did not have pneumoconiosis, that his lungs were normal and that he could return to work as a labor foreman without restriction. These conclusions were supported by a battery of medical tests including spirometry tests, pulmonary function studies and arterial blood gas tests. Under the circumstances Y & O officials could reasonably have given greater weight to the credible medical evidence that Goff did not have pneumoconiosis. It may reasonably be inferred therefore that the Y & O officials who discharged Goff did so under the belief that indeed he was not then "the subject of medical evaluation and potential transfer" under Part 90 because the best medical evidence then available showed that he in fact did not have pneumoconiosis.

In addition it is contrary to reason and common sense to believe that even had it been known that Goff had applied for Part 90 status, that Y & O would have had any reason to discharge him on that basis. Under Part 90 (30 C.F.R. 90.1) a qualifying miner is entitled only to transfer to a dust-reduced area where the concentrations of respirable dust are less than 1 milligram per cubic meter of air. The miner is not entitled to transfer if he is already working in an area that meets these standards. In this regard Wurschum believed that the entire Nelms No. 2 Mine complied with the Part 90 requirements. Indeed it is not disputed that in 1984 the average respirable dust concentration in the outby areas of the Nelms No. 2 Mine where Goff would ordinarily be expected to work as a labor foreman, was only 0.55 milligrams per cubic meter. Even in the inby areas of the mine near the faces the respirable dust concentration was less than the 1 milligram per cubic meter requirement.

Thus it is apparent that even had Goff become a Part 90 miner he would not have been entitled to any transfer or change in his work assignment as a labor foreman. Accordingly it is not reasonable to believe that Y & O would have been motivated to discharge Goff for the reasons alleged even had it been known that he would become eligible for Part 90 status. In other words since Part 90 status for Goff would have had no effect on his work assignment there would have been no reason to discharge or discriminate against him

because of his being "the subject of medical evaluation and potential transfer" under Part 90.

Under the circumstances Goff has failed in his burden of proving that Y & O was motivated in any part in discharging him because he was "the subject of medical evaluation and potential transfer" under the Part 90 regulations. His complaint of unlawful discharge is accordingly denied and this proceeding dismissed.

Gary Melick
Administrative Law Judge

1 Under Part 90 a miner who has been determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air.

2 Section 105(c)(1) of the Act provides in 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, . . . in any coal or other mine . . . because such miner, . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [of the Act] . . . .

3 A "B" reader is a person receiving the highest qualifications to read x-rays for evidence of pneumoconiosis by the National Institute of Occupational Safety and Health.