**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

November 8, 2022

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| HASKELL ADDINGTON, | : | DISCRIMINATION PROCEEDING |
| Complainant, | : | |
| | : | Docket No. WEVA 2022-0114-D |
| v. | : | MSHA No. PINE CD 2021-06 |
| | : | |
| XMV, INC., | : | |
| | : | |
| and | : | Mine No. 39 |
| | : | Mine ID 46-09261 |
| DEBRA VAUGHAN, | : | |
| Respondents. | : | |

**DECISION GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION**

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Chief Administrative Law Judge Glynn F. Voisin assigned me this case on January 3, 2022. On January 27, 2022, I set this case to be heard on June 14–15, 2022, in Beckley, West Virginia. On April 5, 2022, the parties filed a Joint Motion to Continue Hearing Date, which I granted and thus rescheduled the hearing for September 13–15, 2022. Due to a delay in completing discovery the parties asked for, and I agreed to, a revision of the prehearing order deadlines.

On August 26, 2022, Respondents filed their Motion for Summary Decision.[1] I issued an order on August 31, 2022, continuing the hearing to allow time to consider the extensive documentary evidence provided in Respondents' motion, as well as any opposition filed by the Complainant. (Order to Continue Hr'g Pending Determination on Resp'ts' Mot. for Summ. Decision at 1–2.) My order also permitted Addington time to file an opposition without simultaneously preparing for hearing. On September 7, 2022, Complainant filed his Response in Opposition to the Motion for Summary Decision. Thereafter, on September 15, 2022, Respondents filed a Motion for Leave to File Reply, which I do not consider.[2]

[1] In this decision, the Memorandum of Law in Support of Respondents' Motion for Summary Decision that accompanies their two-page motion for summary decision is cited as "Mot. Mem. at __" with references to its Exhibits A–T. Complainant's Response in Opposition to Motion for Summary Decision is cited as "Opp'n at __," with references to its Exhibits 1–3.

[2] Pursuant to Commission Procedural Rule 67 no reply brief is contemplated after an opposition is filed to a motion for summary decision. 29 C.F.R. § 2700.67. Respondents had an opportunity to lay out their view of the case in their motion for summary decision with its

Based on the entire record, I determine Addington alleges no genuine issue as to any material fact and conclude that Respondents are entitled to summary decision as a matter of law.[3]

## I. PROCEDURAL AND FACTUAL BACKGROUND

### A. Addington's Complaints Filed with MSHA and the Commission

On August 30, 2021, Addington filed a discrimination complaint with MSHA using the agency's standard form and naming as the violators Respondents XMV, Inc. ("XMV") and Debra Vaughan, the company's human resources manager. (Compl., Ex. A; Mot. Mem., Ex. A at 1–2.) In MSHA Forms 2000-123 and 2000-124 Addington alleges that XMV and Vaughan discriminated and retaliated against him and interfered with the assertion of his Part 90 rights by "refusing to afford [him] access to benefits or a reasonable accommodation for [his] breathing impairment . . . due to [his B]lack [L]ung [D]isease" (coal workers' pneumoconiosis) after Respondents became aware that his chest X-ray under the Coal Workers' Health Surveillance Program showed complicated Black Lung Disease. (Compl., Ex. A; Mot. Mem., Ex. A at 1–2.) In his statement to the MSHA investigator, Addington acknowledges he received a June 19, 2020, letter as part of this health surveillance program regarding a free chest X-ray, which he took on October 30, 2020. (Mot. Mem., Ex. D at 5–6.) On October 27, 2021, MSHA notified Addington of its investigation into his discrimination claim and its determination that a violation of section 105(c) of the Mine Act had not occurred.[4] (Compl., Ex. B; Mot. Mem., Ex. S.)

Thereafter, on November 26, 2021, Addington filed a complaint with the Commission pursuant to section 105(c)(3) of the Mine Act. Addington's section 105(c)(3) complaint alleges that XMV and Vaughan engaged in wrongful discrimination, retaliation, and interference when they "improperly accessed information about" Addington's Part 90 eligibility "and then withheld that information" from Addington, "preventing him from availing himself of his Part 90 rights to remove himself from dusty coal environments until after his [B]lack [L]ung [D]isease had

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voluminous attachments. Although Complainant filed no response to the Motion for Leave to File Reply, Respondents are not entitled to the proverbial "second bite at the apple," and their motion is hereby **DENIED**.

[3] Per Commission Procedural Rule 67(b), a motion for summary decision is granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

[4] The Mine Act provides that upon receipt of a discrimination complaint, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . ." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that if the Secretary determines no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3).

progressed to the point of respiratory failure, causing him to lose wages and benefits."[5] (Compl. at 1.) Addington also alleges that Respondents refused to provide requested accommodations or any ongoing assistance with healthcare premiums while Addington was unable to work due to his Black Lung Disease. (Compl. at 1.) Addington claims that after he expressed concerns about his Black Lung Disease, Respondents took away his customary Saturday work hours and reduced his pay by $10,000, whereby according to Addington's Prehearing Statement "beginning in 2017" XMV departed from an arrangement of "agreeing to keep him in non-dusty areas of the mines" and "require[ed] him to work underground shoveling belts . . . that increased his exposure to coal mine dust. . . . [and] began reducing his wages repeatedly" from a top salary of "$125,000 annually." (Complainant's Pre-hr'g Statement at 2–3.)

The documentary evidence, including Addington's statement to the MSHA investigator, reveals he lost $10,000 off his salary around December 2016 (Mot. Mem., Ex. D at 4), and Addington's deposition testimony (Mot. Mem., Ex. B at 139) establishes that the last of these $10,000 salary cuts occurred on April 26, 2020, before Addington applied for Part 90 status "in the fall of 2020." (Complainant's Pre-hr'g Statement at 1; Compl. at 2; Mot. Mem., Exs. D at 4–5, G.) In his September 3, 2021, statement to the MSHA investigator Addington does not allege any changes in his salary or work environment after applying for his chest X-ray, which was taken on October 30, 2020. (Mot. Mem., Ex. D at 5–6.) Addington's last transfer at work occurred on September 22, 2020, when he transferred from Mine 43 (working on the surface areas of that mine) to Mine 39 (also on the surface areas of the mine) with the same title of "Foreman Projects" and doing "the same work that [he] had been doing at [Mine] 43" at the same payrate of "$105,000 + $800 VAP." (Opp'n, Ex. 2 at 23; Mot. Mem., Exs. B at 23, 139, D at 5, H.) Addington told the MSHA investigator that "on January 18, 2021[,] I had acute respiratory failure and that was my last day of work at [Mine] 39," whereafter "I got set up on short term disability benefits in January [2021]." (Mot. Mem., Ex. D at 6.)

**B. Respondents' Allegations**

In their motion for summary decision Respondents argue, among other things, primarily: (1) section 105(c) of the Mine Act is an inappropriate vehicle for Addington's generalized claims of discrimination and failure to accommodate based on his Black Lung Disease; (2) Addington's claims are unsupported by the record because XMV did not and could not have discriminated against him given the timeline of events; (3) Addington's claims are procedurally improper and barred by the statute of limitations; and (4) there is no issue of material fact and thus Respondents are entitled to summary decision as a matter of law. (Mot. Mem. at 1, 7, 17–19.)[6]

[5] Addington seeks the following remedies—an injunction barring Respondents from engaging in further retaliation and discrimination, back pay with interest for his reduced hours and work allegedly missed for failure to move him to a less dusty area, retention of his current healthcare coverage without paying for healthcare premiums beginning October 2021 to assist with the costs of his lung transplant, retention of his life insurance benefits, and attorney costs and fees. (Compl. at 2, 5, 6.)

[6] Respondents also allege that Addington's complaint violated the statute of limitations because section 105(c)(2), 30 U.S.C. § 815(c)(2), requires a miner to file any complaint under

For purposes of Commission Procedural Rule 67, I must examine and address the material facts as laid out in the parties' pleadings, depositions, and documentary evidence, to rule on Respondents' motion.

## C. Material Facts in the Pleadings, Depositions, and Documentary Evidence

It is undisputed that Complainant Addington was a coal miner who worked for XMV since 2012, and that he developed and suffered from a severe form of Black Lung Disease called complicated pneumoconiosis. In an affidavit dated May 20, 2015, Addington acknowledges that a doctor diagnosed him with "complicated pneumoconiosis" in early 2015 and that Addington had "sufficient residual ventilatory capacity to return to [his] last coal mine job." (Mot. Mem, Ex. C at 1.) Addington returned to work at XMV despite acknowledging "the potential for exposure to dust and a possible progression of [his] lung condition." (Mot. Mem, Ex. C at 2.)

Over two years later on October 10, 2019, a U.S. Department of Labor Administrative Law Judge ("ALJ") noted in his decision adjudicating Addington's federal Black Lung Benefits claim that XMV "stipulates that [Addington] has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis." *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 3 (Oct. 10, 2019) (ALJ).[7] The Department of Labor ALJ who determined Addington suffered from complicated pneumoconiosis wrote that Addington "had to stop [work at XMV] on October 7, 2014, due to breathing problems," which comports with Addington's journal notes. (Opp'n, Ex. 1); *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 3. The ALJ wrote that a "chest X-ray dated January 6, 2015, was read as positive for complicated pneumoconiosis," whereby the agency issued its decision awarding Addington benefits on September 29, 2016. *Addington v. XMV, Inc.*, Case No. 2017-BLA-05663, slip op. at 2. Indeed, the ALJ stated, "[t]he only issue [XMV] contests is whether [Addington's] benefits should be offset by his wages." *Id.* That's because Addington decided to return to work at XMV even with his complicated pneumoconiosis diagnosis, per the affidavit he signed on May 20, 2015. (Mot. Mem., Ex. C.) Despite Addington's diagnosis of complicated pneumoconiosis and Black Lung Benefits award, he did not apply for Part 90 status at that time.

Not until receiving a notice dated June 19, 2020, whereby XMV miners could obtain a free chest X-ray to determine Part 90 eligibility did Addington contemplate applying for Part 90 status. (Mot. Mem., Ex. I); *see generally* 30 C.F.R. Part 90 (Mandatory Health Standards–Coal

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this section "within 60 days after such violation occurs," and that Addington added claims after the initial filing of the MSHA forms. I find these issues inapposite given my ruling.

[7] I take judicial notice of the U.S. Department of Labor ALJ decision inasmuch as it is a public document discussing an issue at the heart of this case—the determination that Addington suffered from complicated pneumoconiosis and his employer's knowledge of it. *See, e.g.*, *Sec'y on behalf of McGary v. The Marshall Cty. Coal Co.*, 38 FMSHRC 2006 (2016) (finding Commission Judge did not abuse discretion in admitting federal court complaint because "the court complaint is a publicly-filed document regarding a dispute over the reporting of mine safety and health hazards at Respondents' mines, an issue that is at the heart of this case").

Miners Who Have Evidence of the Development of Pneumoconiosis). As he explains in his deposition, Addington consciously decided not to seek Part 90 status earlier:

> Q: You indicated you were getting the chest X-ray because you wanted to try to get Part 90 status. But what did you understand Part 90 status to entail?
>
> A: Again, you know, after we talked about Dale, you know, he had mentioned that — and honestly, I didn't get the Part 90 early on is because I didn't want to harm the company, because I knew that they would have to run dust — on me or I would have filed it a long time ago, but I wanted to be as fair as I could be. As long as I could continue to work and nobody really bothered my pay and my benefits, then I just wanted to leave it as is because if I got fired at XMV and I went to try to pursue another job somewhere else, then I knew the Part 90 would affect me in getting a job somewhere else because managers and people at the coal mine know what the Part 90 — the protections that have to come along with the Part 90. So I elected not to do it …"

(Mot. Mem., Ex. E at 29.)

Addington underwent a chest X-ray at a local hospital on October 30, 2020, as part of the process administered by the National Institute for Occupational Safety and Health ("NIOSH"), a component of the Department of Health and Human Services ("HHS"), for miners to be screened for Part 90 eligibility. (Mot. Mem., Ex. D at 6.) In his statement to the MSHA investigator, Addington noted a delay in the reading of his October 30, 2020, X-ray due to a nurse at the hospital making a mistake and not processing his results. (Mot. Mem., Ex. D at 6; Opp'n, Ex. 2 at 33.) Addington's chest X-ray was read by two NIOSH-approved doctors on January 11, 2021 (Mot. Mem., Ex. J), and January 18, 2021 (Mot. Mem., Ex. K), as being positive for pneumoconiosis. *See* 42 C.F.R. §§ 37.52, 37.53 (HHS regulations on radiograph classifications).

On January 20, 2021, HHS made a final determination that Addington's October 30, 2020, chest X-ray was positive for pneumoconiosis making him eligible to assert his Part 90 transfer rights. (Mot. Mem., Ex. L); *see* 42 C.F.R. § 37.102 (transfer to less dusty area). After being notified of his Part 90 eligibility Addington exercised his Part 90 rights by signing an "Exercise of Option to Transfer" form and sending it to MSHA on January 21, 2021. (Mot. Mem., Ex. M.) MSHA notified XMV that Addington exercised his rights to dust monitoring and a transfer to a low-dust area of the mine by letter dated January 29, 2021. (Mot. Mem., Ex. N.)

## II. PRINCIPLES OF LAW

### A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to

interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

## B. Protections under Section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act[8] bars discrimination against or interference with miners asserting a protected right. For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The Commission has no settled legal test for claims of interference. *See Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary's two-prong test, which asks first whether the alleged interfering actions reasonably can be viewed as "tending to interfere with the exercise of protected rights," and, second, whether the interfering person can "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *See, e.g., Armstrong Coal Co.*, 39 FMSHRC 1072, 1089 (May 2017) (ALJ) (applying Secretary's proposed test for interference), *appeal dismissed per settlement stipulation*, 40 FMSHRC 973, 974 (July 2018). Some Commissioners, however, would replace the second prong of the test with a requirement that the complainant demonstrate the interfering actions were motivated by animus to the exercise of protected rights. *Monongalia Cty. Coal Co.*, 40 FMSHRC at 708–29.

[8] "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [this Act]." 30 U.S.C. § 815(c)(1).

### C. "Part 90 Miner" Rights under 30 C.F.R. Part 90

One set of rights protected under the Mine Act are the Part 90 rights afforded to miners employed at coal mines who have evidence of pneumoconiosis. *See* 30 C.F.R. § 90.2 (definition of "Part 90 miner"). Part 90 rights include a miner's option to transfer without a loss of pay to a less dusty area of the mine that is subject to testing 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. 30 C.F.R. §§ 90.1, 90.3; *see Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776, 1778–79 (Nov. 1985) (holding miner could maintain discrimination claim while Part 90 application was pending), *and affirming decision on remand*, 8 FMSHRC 1860, 1862–63 (Dec. 1986) (upholding ALJ decision on remand that mine operator had rebutted the miner's prima facie case of discrimination).

A multi-step interagency process exists for a miner to apply under Part 90 and exercise the option to become a "Part 90 miner." *See* 30 C.F.R. §§ 90.2, 90.3; 42 C.F.R. §§ 37.52, 37.53, 37.102. HHS/NIOSH sends miners an initial letter notifying them of the availability of getting a free chest X-ray that may indicate pneumoconiosis and make them eligible for the Part 90 program. *See* 30 C.F.R. § 90.3(a). After the chest X-ray is taken and read, the Secretary of HHS interprets the results and, if the miner has pneumoconiosis, the miner is notified in writing of his rights along with an Option to Exercise form. *Id.*; *see Rochester & Pittsburgh Coal Co.*, 12 FMSHRC 189, 190–91 (Feb. 1990). Upon signing and dating the Option to Exercise form, the miner becomes a Part 90 miner with rights to transfer to a low dust area of the mine with respirable dust sampling and no loss of pay. *Rochester & Pittsburgh Coal Co.*, 12 FMSHRC at 192–93; *Goff*, 7 FMSHRC at 1778–79.

## III. DISCUSSION AND ANALYSIS

Because Addington alleges discrimination, retaliation, and interference with his Part 90 rights, I review his allegations pursuant to the Commission's case law on these issues.

As Addington points out, the Commission has jurisdiction and has opined on miners filing discrimination cases under section 105(c)(1) for violations of their protections under Part 90. (Opp'n at 6–8); *see Goff v. Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1776. The key holding of *Goff* is that "a miner is protected from adverse personnel actions based on his medical evaluation or potential transfer pursuant to Part 90 at least as early as the date on which he files his application for Part 90 status." *Goff*, 7 FMSHRC at 1781–82; *see also McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ) (ruling section 105(c) protections apply to Part 90 miner applicant). In *Goff*, the Commission noted that the miner "presented sufficient allegations to plead a cause of action," inasmuch as "[s]everal days prior to his discharge, he applied for classification as a Part 90 miner," and "[t]his application made him 'the subject of medical evaluation and potential transfer' within the meaning of section 105(c)(1)." *Goff*, 7 FMSHRC at 1782. The Commission further noted in *Goff* that the miner "also appears to allege that [the coal mine operator] had knowledge of his possible pneumoconiosis and his intent to file under Part 90 prior to the mailing of his [Part 90] application." *Id.* Thus, the Commission in *Goff* interpreted the miner's pleadings and documentation to present a claim cognizable under section 105(c)(1) of the Mine Act.

Consequently, I must examine Addington's pleadings and the entire record to determine whether Addington presents a cognizable claim. Using the *Pasula-Robinette* test for section 105(c) discrimination claims, I must determine whether Addington has presented sufficient allegations to plead a cause of action under section 105(c)(1) for this case to proceed.

## A. Protected Activity Under Section 105(c)

Addington makes allegations and presents facts that he engaged in protected activity when he had a chest X-ray on October 30, 2020, under the auspices of HHS/NIOSH as part of applying for Part 90 status.[9] The Mine Act protects miners from discrimination who are engaged in the process of seeking Part 90 status. 30 U.S.C. § 815(c)(1); *Goff*, 7 FMSHRC at 1782.[10] Thus, Addington's allegations would satisfy the first element under the *Pasula-Robinette* test for a discrimination or retaliation claim under section 105(c)(1). Also, this would qualify as an exercise of a protected activity under the interference tests articulated by the Commission.

## B. Adverse Action for Discrimination or Retaliation Claims Under Section 105(c)

Although Addington pleads facts sufficient to meet the first element under the *Pasula-Robinette* test in that he engaged in protected activity by filing a Part 90 application, Addington fails under the second element to allege any adverse action taken by Respondents during the period of his Part 90 application or after his qualification as a Part 90 miner. Examining the

[9] Addington makes general allegations about his inability to work due to his breathing condition after his hospitalization on January 18, 2021, but I cannot construe this as protected activity under a work refusal theory. *See Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463–64 (Dec. 1993) (miner has right under section 105(c) to refuse work, if miner has a good faith, reasonable belief in a hazardous condition); *see also Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (Feb. 2000) (citing *Simpson v. Fed. Mine Safety & Health Rev. Comm'n*, 842 F.2d 453, 461–63 (D.C. Cir. 1988)) (adverse action may be constructive discharge where operator has no conscious retaliatory motive but fails to reasonably remedy intolerable conditions, leading to resignation of miner who reported conditions). Indeed, the Commission flatly rejected a Commission Judge's determination that a miner's "medically substantiated inability to work underground" constituted the "functional equivalent of a work refusal" that could be deemed protected activity. *Perando v. Mettiki Coal Corp*., 10 FMSHRC 491, 494–96 (1988). Here, Addington does not allege he refused to work on or after January 18, 2021, and his general factual allegations do not constitute a work refusal under Commission case law.

[10] Addington also alleges he engaged in protected activity by complaining to management over the years about his difficulty breathing due to his pneumoconiosis. (Compl. at 4; Opp'n at 3, Ex. 2 at 23–24.) In paragraph 19 of his Complaint, Addington believes his status as a miner with pneumoconiosis provides him protections from reductions in work hours or pay, and that Respondents refused to offer Addington any reasonable accommodation or unpaid leave with benefits. (Compl. at 4.) The Commission, however, has not recognized a discrimination claim under section 105(c)(1) for a miner simply having pneumoconiosis, absent a showing that the miner also "was 'the subject of medical evaluation and potential transfer' under Part 90." *Goff*, 7 FMSHRC at 1781–82.

parties' undisputed timeline of events surrounding Addington's Part 90 application demonstrates the hole in Addington's claims as to his allegations of any adverse action by Respondents.

Addington's Part 90 application timeline is as follows: (1) the June 19, 2020, letter from HHS/NIOSH notified Addington of the availability of a free chest X-ray to apply for Part 90 status; (2) Addington had his free chest X-ray taken at a local hospital on October 30, 2020; (3) a delay in processing Addington's X-ray occurred due to an administrative error by a nurse at the hospital; (4) two NIOSH-approved doctors read Addington's chest X-ray as being positive for pneumoconiosis on January 11, 2021 (Mot. Mem., Ex. J), and January 18, 2021 (Mot. Mem., Ex. K); (5) based upon the X-ray readings HHS made a final determination on January 20, 2021, that Addington was eligible under Part 90 (Mot. Mem., Ex. L); (6) Addington received notice of his Part 90 eligibility from MSHA and exercised his Part 90 rights by signing his "Exercise of Option to Transfer" and sending it to MSHA on January 21, 2021 (Mot. Mem., Ex. M); and (7) by letter dated January 29, 2021, Respondents were notified that Addington exercised his option to transfer to a low-dust area with quarterly respirable dust testing (Mot. Mem., Ex. N).

A review of the entire record including pleadings, deposition testimony, and documentary evidence, reveals that Addington raises no issues of *material* fact or alleges that he suffered any adverse action at the hands of Respondents during the pendency of his Part 90 application. Addington's last salary cut occurred on April 26, 2020, nearly two months before Addington received the June 19, 2020, notice from HHS/NIOSH about applying for Part 90 status. (Complainant's Pre-hr'g Statement at 1; Compl. at 2; Mot. Mem., Exs. D at 4–5, G.) Addington had his free chest X-ray taken on October 30, 2020, yet his last work transfer took place over a month earlier on September 22, 2020, when he moved to the surface area of XMV's Mine 39 at his same pay rate of $105,000 per year and with the same title he had at Mine 43, which was his prior assignment also on the surface area of the mine. (Mot. Mem., Exs. B at 135, H.) He makes no allegations that this transfer was an adverse personnel action. Indeed, Addington makes no allegations of any adverse personnel action or work change up to the time he took himself to an urgent care center due to breathing problems on January 18, 2021, when he was then admitted to the hospital. (Mot. Mem., Exs. H, O.) As Addington stated to the MSHA investigator: "[O]n January 18, 2021[,] I had acute respiratory failure and that was my last day of work at [Mine] 39," whereafter "I got set up on short term disability benefits in January [2021]." (Mot. Mem., Ex. D at 6.) Absent from the record are any allegations to suggest Respondents took any adverse action against Addington after he applied for Part 90 status in the fall of 2020, or after he become a Part 90 miner on January 21, 2021.

Addington's loss of company life insurance, health insurance, and other employee benefits as noted in the letter he received from Respondents on July 12, 2021 (Opp'n, Ex. 3), arose from his own inability to return to work after being admitted to the hospital in respiratory failure on January 18, 2021. (Mot. Mem., Exs. E at 66, O.) Addington's allegation he was somehow treated differently while unable to return to work is also inapposite, because to date he is still not cleared by his doctors to return to work. (Mot. Mem., Exs. B at 21, Q, R, T.)

### C. Adverse Action Motivated in Any Part by Protected Activity

Because Addington has not alleged any adverse action by Respondents during the pendency of his Part 90 application or after, it is not possible to analyze the third prong of the

*Pasula-Robinette* test for discrimination, i.e., whether the adverse action was motivated in part by the protected activity. Consequently, I determine that Addington has not presented sufficient allegations to plead a cause of action for discrimination or retaliation under section 105(c).

**D. Interference Claim**

Although Addington makes factual allegations that he engaged in protected activity by applying for Part 90 status, which could satisfy an element of a claim of interference under section 105(c), he must also plead allegations of interfering actions by Respondents during the pendency of his Part 90 application or after he exercised his option to become a Part 90 miner.[11]

In his complaint Addington alleges that XMV and Vaughan engaged in wrongful interference when they "improperly accessed information about" Addington's Part 90 eligibility "and then withheld that information" from Addington. (Compl. at 1.) The crux of Addington's claim is contained in paragraph 9 of his complaint filed with the Commission where he states:

> In December 2020, Josh Judd and Debra Vaugh[a]n informed Addington that the company had learned that Addington had received Part[] 90 status. They did not inform Addington of his rights to be moved to a low-dust area. They did not inform him that he had to take any additional action to assert his Part 90 right. They did not afford any protection to [] Addington.

(Compl. at 3.) These are serious allegations which require thorough analysis.

If by the above statement (i.e., "the company had learned that Addington had received Part[] 90 status") Addington means that Respondents knew he was a Part 90 miner in November or December 2020 (which they deny), then that would defy logic. The undisputed facts reveal HHS made its final determination that Addington's X-ray was positive for pneumoconiosis on January 20, 2021 (Mot. Mem., Ex. L), and Addington became a Part 90 miner on January 21, 2021, when he signed his "Exercise of Option to Transfer" form and sent it to MSHA. (Mot. Mem., Ex. M.) Thus, it is impossible for Respondents to have known in November or December 2020 about an event that took place on January 21, 2021.

Looking at the entire record including the pleadings, deposition testimony, and documents *in the light most favorable to Addington*, it is quite possible that XMV and Vaughan not only believed Addington would apply for Part 90 status because XMV agreed to pay for free X-rays as stated in the notice dated June 19, 2020 (Mot. Mem., Ex. I), but that Addington would eventually qualify as a Part 90 miner because of his pneumoconiosis diagnosis years earlier. (Mot. Mem., Ex. C at 1.) Both Addington and XMV knew of, and accepted, Addington's complicated pneumoconiosis diagnosis several years before Addington ever applied for Part 90 status under the Mine Act during the fall of 2020. Indeed, XMV knew of Addington's complicated pneumoconiosis diagnosis at least as early as 2015, so if Addington applied for Part 90 protections it would not have taken a leap in logic to conclude he would qualify.

[11] I need not decide between the two interference tests because Addington fails both.

But Addington's allegations in his complaint hinge on a misplaced belief that Judd and Vaughan's knowledge of his pneumoconiosis and possible filing of his Part 90 application *before* HHS made a final determination that his chest X-ray was positive for pneumoconiosis and *before* MSHA had officially notified Addington of his Part 90 status, somehow qualifies as interference with his Part 90 rights. Knowledge alone does not qualify as interference, and such an allegation is legally erroneous and factually immaterial given the structure of the Part 90 program as discussed below.

XMV and Vaughan's alleged foreknowledge of Addington's pneumoconiosis and his Part 90 application is immaterial here because, even if true, an operator possesses no role in the process of a miner qualifying for, or exercising his transfer option under, Part 90. Per the Part 90 program regulations, only NIOSH-approved doctors review a miner's chest X-ray and HHS makes the final determination on whether a miner has pneumoconiosis and is eligible for Part 90 status, whereby notification is given *to the miner* about the miner's qualification and transfer rights under Part 90. *See* 30 C.F.R. §§ 90.1, 90.3; 42 C.F.R. §§ 37.52, 37.53, 37.102. And only *after* a miner exercises the transfer option does MSHA notify a coal mine operator about the miner's Part 90 status. *See* 30 C.F.R. §§ 90.2 ("Part 90 miner" definition), 90.100, 90.102(b), (c) (multiple references to operator's "notification from MSHA that a part 90 miner is employed at the mine").

Further, under the Part 90 regulations neither XMV nor Vaughan would have a duty to transfer Addington to a less dusty area of the mine or begin respirable dust sampling *prior* to being notified by MSHA that Addington had exercised such option under Part 90. *See* 30 C.F.R. § 90.3(a); §§ 90.100–90.104. Thus, even if Addington's allegations of Respondents' foreknowledge were proven true, they would have no bearing on his claim of interference, given that HHS made its final determination on January 20, 2021 (Mot. Mem., Ex. L), and Addington exercised his Part 90 rights on January 21, 2021 (Mot. Mem., Ex. M). Respondents had no legal obligation to transfer Addington to a less dusty area of the mine or to "run dust" (i.e., conduct respirable dust sampling) at Addington's workplace until MSHA notified them, which did not happen until January 29, 2021, when Respondents received a letter from MSHA that Addington was a Part 90 miner. (Mot. Mem., Ex. N.)

Given the structure of the Part 90 program discussed above, whether Judd and Vaughan allegedly knew about Addington's pneumoconiosis and Part 90 application are not by themselves *material* facts. Put another way, it makes no difference whether Respondents knew in November or December 2020 that Addington had pneumoconiosis or that he had applied for Part 90 status, because Respondents neither had a role in the Part 90 approval process or in Addington becoming a Part 90 miner, nor had they any duty to transfer Addington to a less dusty area or to conduct respirable dust sampling until notified by MSHA. Knowledge of Addington's pneumoconiosis and Part 90 application alone—without an allegation of some interfering action by Respondents—cannot satisfy a claim of interference.

Yet, in his Opposition to the Motion for Summary Decision, Addington focuses on his belief that Judd and Vaughan notified him of his Part 90 status earlier in November or December 2020, rather than after January 21, 2021, when he exercised his transfer option to become a Part

90 miner. (Opp'n at 8–9; Compl. at 3.)[12] Addington points to his deposition testimony to buttress the veracity of his allegations that Judd and Vaughan called and advised him of his Part 90 status in late November or early December (Opp'n at 2–4, 8–9, Ex. 2 at 33–34), despite documentary evidence that no final determination on Addington's Part 90 status was made by HHS until January 20, 2021. (Mot. Mem., Ex. L.)

But as explained above, any such foreknowledge by Respondents about Addington's application and potential eligibility for Part 90 status means nothing under section 105(c) without allegations of some interfering action by XMV or Vaughan. Here, Addington comes up empty because he conflates foreknowledge with an interfering action. His bald accusation that Respondents somehow delayed his becoming a Part 90 miner holds no water, because the administrative process of becoming a Part 90 miner lies with HHS and MSHA, not Respondents. Moreover, Addington raises no genuine issue of material fact, and he makes no allegations that he suffered any actual delay or interference at the hands of Respondents during the processing of his Part 90 application in the fall of 2020 up through his exercising of the option to become a Part 90 miner on January 21, 2021, or thereafter. No genuine, triable issue of material fact exists.

Addington's interference claim must fail due to the lack of allegations regarding any interfering action by Respondents that would have delayed, hindered, or otherwise interfered with, his Part 90 application or process of becoming a Part 90 miner. Accordingly, I determine that Addington has not presented sufficient allegations to plead a cause of action for a cognizable claim of interference under section 105(c)(1).

### C. Conclusion

The entire record shows that no genuine issues of material fact exist, and Addington makes no allegations of an adverse action or interfering action to satisfy a claim under section 105(c)(1) that Respondents engaged in any discrimination, retaliation, or interference during the pendency of his Part 90 application or after becoming a Part 90 miner. Addington was not terminated, forced to leave, transferred to a more dusty area, or subject to a pay cut by Respondents during the pendency of his Part 90 application. And Addington's inability to return to work is not an adverse action caused by Respondents. Rather, Addington was unable to work due to medical reasons on January 18, 2021. HHS only made a final determination that Addington's X-ray showed pneumoconiosis making him eligible under Part 90 on January 20, 2021. By the time Addington exercised his Part 90 transfer rights on January 21, 2021, he was already unable to physically return to work. Indeed, over more than a year later during his deposition taken on June 27, 2022, Addington stated he had not yet been cleared by his doctors to return to work and had no timetable as to a possible return.[13] (Mot. Mem., Ex. B at 21.)

[12] In his opposition, Addington attaches his journal notes from 2014 and 2015 (Opp'n, Ex. 1), as well as excerpts of his deposition transcript (Opp'n, Ex. 2), and the suspension of benefits letter from XMV and Vaughan dated July 12, 2021. (Opp'n, Ex. 3.)

[13] In his deposition Addington states he currently receives federal Black Lung Benefits, as well as Social Security benefits. (Mot. Mem., Ex. E at 72.)

Even when viewed in a light most favorable to Addington, the record and inferences drawn show he fails to make a cognizable claim, as his allegations are insufficient to plead a cause of action under section 105(c)(1). Legally, Addington's claims of discrimination, retaliation and interference fail, and Respondents' motion must be granted. This ruling applies only to Addington's claims under the Mine Act and does not address any separate claims or remedies he may seek under other statutes, such as section 428 of the Black Lung Benefits Act.

Respondents prevail because of an administrative process that puts the onus on miners to apply for Part 90 status—a process that took months even when the miner and coal mine operator would agree the result should be the applicant's qualification as a Part 90 miner. Requiring a miner like Addington to go through the Part 90 application process seems to be a blind spot in the intersection of the Black Lung Benefits Act and the Mine Act. The only factor in play was time, which begs the question—why would a miner adjudicated as suffering from complicated pneumoconiosis and receiving Black Lung Benefits need to apply to receive a chest X-ray and wait for HHS to tell him he had pneumoconiosis to determine his eligibility as a Part 90 miner? Only the policymakers for the Part 90 rule know. Had Addington been able to exercise his transfer option at the time of the June 19, 2020, notice, or earlier, without going through the superfluous chest X-ray process, perhaps Addington would still be working.

Because there is no genuine issue as to any material fact and Addington has not presented any cognizable claim under section 105(c) even after viewing the entire in the light most favorable to Addington, Respondents demonstrate their entitlement to summary decision as a matter of law. Therefore, I conclude that summary decision is appropriate and that Addington's section 105(c) complaint must be dismissed.

## IV. ORDER

Respondents' Motion for Summary Decision is **GRANTED**, and this proceeding is hereby **DISMISSED**.

Alan G. Paez
Administrative Law Judge

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