FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

July 26, 2010

TIMOTHY S. SHEFFER,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. KENT 2010-15-D
v.	:	Case No. MADI-CD-2009-13
	:	
ADVENT MINING, LLC,	:	
Respondent	:	Mine ID 15-18547
	:	Mine: Onton #9

DECISION GRANTING RESPONDENT'S MOTION TO DISMISS
ORDER OF DISMISSAL

Before: Judge Paez

This proceeding is brought by Timothy S. Sheffer ("Sheffer" or "Complainant") against Advent Mining, LLC ("Advent" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815(c)(3), and 29 C.F.R. § 2700.40 et seq. Sheffer alleges that due to prior physical disabilities, including a crushed hand and a seizure disorder, he was discriminated against and terminated from employment at Respondent's Onton No. 9 facility. Respondent filed a motion to dismiss in which it denies Sheffer's claims of discrimination but argues that, even if they are accurate, he is not entitled to relief under the Mine Act. Sheffer filed a transcript of his discussion with a Mine Safety and Health Administration ("MSHA") investigator and a statement to support his claim.

At issue is whether Sheffer has stated a claim which, if true, would constitute discrimination under section 105(c) of the Act. Commission Procedural Rule 42 requires Sheffer to submit a short and plain statement of the facts, setting forth the alleged discrimination and a statement of the relief requested. 29 C.F.R. § 2700.42.[1] Should Sheffer's complaint fail to meet this minimal burden, the case may be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] Fed. R. Civ. P. 12(b)(6).

[1] Commission Procedural Rule 42 provides as follows: "A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42.

[2] Commission Procedural Rule 1(b) directs that in the event the Mine Act does not control on a question of procedure, "the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b).

For the reasons discussed below, I determine that Sheffer has not stated a claim that can be granted relief under section 105(c) of the Mine Act. Accordingly, I grant Respondent's Motion to Dismiss. The facts below are either not in dispute or are facts provided by Sheffer.

I. PROCEDURAL BACKGROUND

On June 18, 2009, Sheffer filed a discrimination complaint with MSHA after Advent laid off employees, including Sheffer, during April 2009 in what Advent claims was an economically motivated reduction in its workforce. (Resp't Mot. to Dismiss at 1.) MSHA conducted an investigation, which included an interview of Sheffer, and notified Sheffer by letter dated September 15, 2009, that it had found no violation of the Mine Act. (Letter from Carl E. Boone, II to Tim Sheffer of Sept. 15, 2009; Resp't Mot. to Dismiss: Ex. B.)

After being informed that the Secretary of Labor did not intend to file a discrimination complaint on his behalf, Sheffer filed his own complaint with the Federal Mine Safety and Health Review Commission ("Commission") on October 1, 2009, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). (Resp't Mot. to Dismiss: Ex. C.) Sheffer retained an attorney, Kyle F. Biesecker, who entered his appearance and submitted a detailed list of the relief sought by Sheffer on November 2, 2009. (Resp't Mot. to Dismiss: Ex. E.) On November 17, 2009, Advent filed its motion to dismiss. Attorney Biesecker did not file a response to the motion. This case was assigned to me on February 1, 2010. In response to my law clerk's inquiry on the status of this case, Attorney Biesecker filed a notice on March 8, 2010, that he had withdrawn from his representation of Sheffer. (Notice of Withdrawal as Att'y.) By letter dated March 19, 2010, my law clerk provided Sheffer with a copy of the motion to dismiss and requested a response. (Letter from Shannon Fitzgerald to Tim Sheffer of Mar. 19, 2010.) Sheffer responded by facsimile on March 26, 2010, in a handwritten note that stated, "I disagree with the motion to dismiss and would like to proceed with this case."

Due to the skeletal nature[3] of Sheffer's complaint, his pro se status, and the lack of any factual statement in Sheffer's response to the motion to dismiss, I issued an Order to Show Cause why this case should not be dismissed on April 28, 2010. Specifically, I instructed Sheffer to present a short and plain statement of the facts, setting forth the alleged discrimination or discharge, in compliance with Commission Procedural Rule 42.[4] In response, Sheffer

[3] The complaint in its entirety states as follows: "I am requesting an appeal on the decision by MSHA. I have read Section 105(c) over and over and I see discrimination all through this section. If the agency can't see that there was definite discrimination in my case, or does not fall within your rules, would you please direct me to the proper authority. There is definitely a case here." (Resp't Mot. to Dismiss: Ex. C.)

[4] Sheffer was given 10 days to respond upon his receipt of the Order to Show Cause. Sheffer received the Order on May 12, 2010. On May 17, 2010, he called to ask for an extension of time, which was granted. Sheffer thus had until May 27, 2010 to respond in a timely manner, which he did.

submitted to the Commission a copy of a Freedom of Information Act ("FOIA") request. The request was for a transcript of his interview taken by MSHA on June 29, 2009, during its investigation of his case. Thereafter, Sheffer submitted a statement along with the transcript on June 17, 2010.[5] Given Sheffer's pro se status and that he was awaiting a reply from MSHA to his FOIA request, I accept these documents as Sheffer's response to my order to show cause and have considered them in my examination of this case. The facts below are those set forth by Sheffer in these collective pleadings, also referred to as "Complainant's Response."

II. STATEMENT OF FACTS

In February 2006, Sheffer began work at Advent's Onton #9 Mine. (Compl. Resp. 3.) In his more than three years with Advent, he worked underground as a roof bolter and car driver. (*Id.*) At the time of his interview with MSHA, Sheffer was 41-years old and had been working in the coal mines for ten years. (*Id.* at 3, 6.)

Sheffer has suffered throughout his adult life from a medical condition which causes him to have seizures, and he takes medication to control his attacks. (Compl. Resp. 4, 11.) While employed at the Onton #9 Mine, he suffered at least two attacks. (*Id.* at 1, 4, 11.) In addition, one of Sheffer's hands was crushed in a prior accident at another mine, a fact he brought to Advent's attention during his employment. (*Id.* at 9.) Otherwise, Sheffer has tried not to let his disabilities interfere with his work, his attitude being to "deal with it and carry on." (*Id.* at 1.)

While assigned to the position of roof bolter, Sheffer requested that he be given other work. (Compl. Resp. 14.) "I begged and pleaded you know to get me off of it. They were wearing me out." (*Id.*) Advent eventually responded by assigning him to a shuttle car after his co-worker made the request. (*Id.*) However, according to Sheffer, he and his co-worker were given inferior equipment after being assigned to a shuttle car and then were harassed for not meeting production standards. (*Id.*) "[T]he whole time they are hammering us to run coal, run coal and it was impossible. So now we've got reputations of we are no good." (*Id.*)

Sheffer alleges that during his employment less experienced miners were promoted ahead of him, and although he was "griped at" for being slow, he was a steady roof bolter yet was often reprimanded or written up for common work mistakes that were overlooked when displayed by other miners. (Compl. Resp. 2, 9-10, 12-16.) He was also frequently required to take drug tests during the course of his employment, usually after sustaining minor injuries. (*Id.* at 11.) On at least one occasion around Father's Day the year before, Sheffer communicated to a supervisor that he felt he was being singled out, and for sometime thereafter "they all left [him] alone." (*Id.* at 8.) In addition to his medical condition, Sheffer states that management's animus toward him may stem from his family's antagonistic history with one supervisor who had fired Sheffer at another mine and then was hired by Advent sometime after Sheffer began working at Advent. (*Id.* at 12-16.)

[5] On June 17, 2010, Respondent filed its Statement in Opposition to Complainant's Untimely Response to Order to Show Cause of April 28, 2010, wherein it renews its motion to dismiss.

Advent terminated Sheffer on April 25, 2009, along with about 20 other employees. (Compl. Resp. 4-5.) Three weeks prior to his termination, he suffered a seizure while underground, an event which he believes prompted Advent to fire him. (*Id.*) He takes medication for his seizures, and in the past only suffered them when he forgot to take his medication. (*Id.* at 11.) Sheffer had suffered a seizure above ground about one year after he had started with Advent, when he was taken to the hospital and underwent a drug test at that time. (*Id.*) Sheffer argues that instead of firing him, "a simpler solution would have been to give me a lesser job with lesser pay if need be." (*Id.* at 4.) He adds that he suffered harassment in the form of a "hostile" and "intimidating" workplace environment. (*Id.* at 2.) Sheffer alleges these facts constitute "obvious discrimination and can be proven." (*Id.*) In support of this contention, Sheffer lists damages, including an amount for "pain, suffering, and emotional distress" and cites to Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. (*Id.* at 1-2.)

III. PRINCIPLES OF LAW

Section 105(c) of the Mine Act

In drafting the Mine Act, Congress recognized the need to protect miners who report safety violations, arguing "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted in* 1977 U.S.C.A.A.N. 3401, 3435. Section 105(c) of the Mine Act thus prohibits discrimination against miners for exercising any protected right under the Act. 30 U.S.C. § 815(c).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

Motion to Dismiss

When a complaint alleges facts that cannot possibly amount to a violation of any legal right, the opposing party may move to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, both the Supreme Court and the Commission have explicitly held that this form of dismissal is very difficult to achieve, particularly when the complainant has filed pro se. *Ribble v. T & M Dev.*, 22 FMSHRC 593 (May 2000); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (Nov. 1996). In *Ribble*, the Commission quoted from its earlier decision in *Perry* regarding Rule (12)(b)(6):

> It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Additionally, we hold the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts.

Ribble, 22 FMSHRC at 594-95 (quoting *Perry*, 18 FMSHRC at 1920 (internal citations omitted)). Consequently, the threshold for dismissal under Rule 12(b)(6) is high; it must be clear that no legal relief can be granted, even after all allegations made by the complainant are assumed to be true, and all necessary inferences made in the complainant's favor. *Erikson v. Pardus*, 551 U.S. 89, 94 (2007); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. ANALYSIS

Because Sheffer is a pro se complainant opposing a motion to dismiss, the entire record must be read and considered in the light most favorable to him. *Ribble*, 22 FMSHRC at 594-95. Sheffer does not need to establish his *prima facie* case at this stage, although he is obligated to meet the minimal pleading requirements of Commission Procedural Rule 42, 29 C.F.R. § 2700.42. *Id*. at 595. This means he must provide at least some fact, or set of facts, that could constitute an allegation of discrimination.

Although Sheffer lists his claims against Advent in his complaint, I have in my review also considered the claims and facts he asserts in his statement of facts and interview transcript with MSHA. (Compl. Resp. 1-20.) In these pleadings, Sheffer relates how he has coped with a number of especially difficult circumstances. If his allegations are true, they detail a lamentable state of affairs and render his frustration understandable. Nevertheless, the Mine Act was not drafted to remedy any of the inequities he describes, and as such, I am precluded from finding a possible violation of section 105(c).

Protected Activity and Work Refusal Doctrine

A finding that Advent discriminated against Sheffer would require that Sheffer (1) engaged in a protected activity and (2) suffered adverse treatment as a result of the protected activity. *Sec'y of Labor v. Consolidation Coal Co.*, 2 FMSHRC at 2797-800. In his list of allegations and throughout his interview, Sheffer claims he suffered discriminatory treatment as a result of his medical condition and injured hand. However, this cannot amount to discrimination under section 105(c) if it is not based on a protected activity. Here, no protected activity with regard to mine safety and health, real or perceived, is even alleged. Rather, Sheffer states in the MSHA transcript his belief that management's animus toward him may stem from a combination of his seizure disorder and his and his family's antagonistic history with one of his

supervisors. (Comp. Resp. 12-16.) Thus, I must examine the facts related by Sheffer to see whether a protected activity can be inferred from the record.

Under the plain language of section 105(c), it is clear that a protected activity occurs when a miner makes a safety complaint or refuses to work under dangerous conditions. 30 U.S.C. § 815(c) ("No person shall . . . discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or relating to this Act, including a complaint . . . of an alleged danger or safety or health violation."). A miner's disclosure of a pre-existing disability to his supervisors is not in and of itself a protected act. Yet, in some instances, the Commission has recognized that a miner's own physical limitation may serve as the basis for that miner's protected refusal to work. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984). Though not statutorily defined, the "work refusal doctrine" emerged as a consequence of the Senate Report on the 1977 Mine Act, which supported a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990) (quoting S. Rep. No. 95-181, at 35 (1977)). Thus, the Commission has found that a miner's refusal to work can be a protected act, when the refusal is elicited by a reasonable and good faith belief in hazardous working conditions. *Sec'y of Labor v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981).

The Commission has further held that a miner establishes a refusal to work when he or she engages in "some form of conduct or communication manifesting an actual refusal to work." *Sammons v. Mine Servs. Co.*, 6 FMSHRC 1391, 1397 (June 1984). The Commission found no such communication occurred in the case of a miner who, due to a medical condition aggravated by her normal work environment, requested an alternative placement. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988). In *Perando*, the complainant developed bronchitis while working underground; on the advice of her doctors, she requested a transfer from her underground assignment to a surface position. *Id.* at 492. The Commission held no work refusal occurred where the complainant and her doctors only made recommendations, and not an ultimatum, regarding her job placement, and where she accepted her employer's offer of a surface position. *Id.* at 494.

In *Shepard v. Black Hills Bentonite*, 25 FMSHRC 129 (Mar. 2003) (ALJ), Judge Manning granted the operator's motion to dismiss after reaching a similar conclusion regarding the work refusal doctrine on facts analogous to the present case. In *Shepard*, the complainant strained his neck while lifting extremely heavy bags of clay. *Id.* at 129. The complainant and his doctor requested that he be given a less strenuous assignment, but he was told by his supervisor there was no other work available. *Id.* at 130. He thus continued with his heavy lifting assignments, even though he was in pain and believed his supervisor had found easier work for other injured employees. *Id.* He alleged he did not refuse to work because he did not know the Mine Act might protect him in such an instance. *Id.* at 131. Rather, he argued he engaged in a protected act when he told his supervisor he could not perform heavy-duty work, and suffered disparate treatment when he was not assigned a lighter-duty alternative. *Id*. Judge Manning dismissed his complaint for failure to state a claim under section 105(c), emphasizing that a request for a change in work assignments does not amount to a refusal to work. *Id.*

Here, as in *Perando* and *Shepard*, the work refusal doctrine is of no avail to Sheffer for the simple reason that Sheffer never refused to work. As a roof bolter, he claims he "begged and pleaded" to have his assignment changed. These requests were likely motivated by the discomfort he experienced while performing onerous work with an injured hand. It is possible that such work presented a hazard to his health: given his condition he may have had less control while lifting equipment, less precision while drilling, and the exertion required by such activities may have indeed caused Sheffer to honestly believe his health was at risk. However, Sheffer never suggested, much less communicated, to Advent that he would discontinue working if supervisors failed to meet his requests for reassignment. Furthermore, Advent eventually responded by moving him to a shuttle car job, and he accepted the position. Just like the complainant in *Perando*, Sheffer asked to be accommodated due to a preexisting physical condition, and his supervisors granted the request. Advent's accommodation of Sheffer went one step beyond the supervisor in *Shepard*, who claimed he was unable to provide alternative work for the complainant. Consequently, as Sheffer in no way indicated he would not perform his assigned tasks, I cannot find that he engaged in a work refusal.

Assuming *arguendo* that Sheffer refused to work and Advent failed to accommodate him, his presumptive refusal would not necessarily be protected under section 105(c). In *Shepard*, Judge Manning noted that "[s]ection 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury." *Id.* at 134. This observation is instructive in so much as it clarifies that a miner who refuses to work solely on the basis of a disability is not automatically protected under the Mine Act. Like the complainant in *Shepard*, Sheffer performed grueling manual labor in spite of a physical injury and disability that for most individuals would render the prospect of such work unimaginable. Notwithstanding the impressive resolve displayed by both men, the Mine Act was not designed to "provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible." *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ). In alleging that he suffered adverse treatment as a result of his disabilities, and not due to some other protected activity, Sheffer effectively brings his case outside the scope of the Act. As noted in *Collette*, "[i]t is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances." *Id.* Consequently, I find that no protected activity under the Mine Act is even alleged nor can be inferred from the record.

Adverse Treatment

In his list of allegations and throughout his interview, Sheffer claims he suffered discriminatory treatment as a result of his medical condition and injured hand. He claims he was passed over for promotions, harassed by management because he was not a fast worker and for common work mistakes as a roof bolter that were overlooked in other employees, and eventually fired. These claims, if true, are certainly adverse to Sheffer. However, they cannot amount to

discrimination under section 105(c) because they are not based on a protected activity. As discussed above, not only is the alleged disparate treatment not based on a protected activity, but no protected activity is even alleged or can be inferred from the record.

Sheffer also alleges disparate treatment that closely resembles the allegations made in *Shepard*. Both men claim they saw other similarly situated employees treated better than they were treated. The complainant in *Shepard* saw other injured workers given lighter-duty assignments, while he was told he could not be accommodated. Likewise, Sheffer saw employees less tenured than himself given better positions in the mine. In addition, Sheffer feels when he was reassigned to a shuttle car, he was given inadequate equipment. He also alleges that he was subjected to a hostile work environment because he did not work fast, was subject to more drug tests than warranted, and was being written up for common work mistakes when others were not. Lastly, he claims that he was discriminated against because Advent fired him, rather than giving him "a lesser job with lesser pay." (Compl. Resp. 4.) However unfair such claims might appear to be, none of them constitute discrimination under section 105(c) because, as in *Shepard*, Sheffer did not engage in a protected act. Rather, Sheffer's statement to MSHA reflects his belief that management's animus toward him may stem from a combination of his seizure condition and his and his family's antagonistic history with one of his supervisors, who had fired Sheffer at another mine and then was hired by Advent after Sheffer began work at the Onton #9 mine. (Comp. Resp. 12-16.) Neither allegation has a remedy under section 105(c).

Moreover, the Commission has warned against adjudication influenced by broader notions of fairness, rather than guided by the more limited purpose of the Mine Act: "the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (internal citations omitted). The allegations raised by Sheffer in his complaint and pleadings square with the Commission's cautionary words, but do not give rise to relief under the Mine Act's anti-discrimination provisions.

Commission precedent mandates that a pleading filed by a pro se complainant be liberally construed in the complainant's favor. *Ribble*, 22 FMSHRC at 594-95. At the same time, Commission Procedural Rule 42 requires a complainant to state at least some fact or set of facts that can establish discrimination under the Mine Act, lest the case be dismissed because no violation of the law is alleged. 29 C.F.R. § 2700.42; Fed. R. Civ. P. 12(b)(6). This is one of those rare occasions, such as in *Shepard*, where it is beyond doubt that the complainant can prove no set of facts in support of his claim under the Mine Act. In reviewing the entire record that is before me, particularly Sheffer's version of the facts contained in the transcript of his MSHA investigative interview, I am unable to perceive any facts that would allow Sheffer to satisfy his burden of pleading under Commission Procedural Rule 42 and thus survive dismissal. I therefore conclude that Respondent's Motion to Dismiss must be granted.

V. ORDER

For the reasons set forth above, Advent Mining's motion to dismiss is **GRANTED** and the complaint of discrimination filed by Tim Sheffer under section 105(c) of the Mine Act is **DISMISSED.**

Alan G. Paez
Administrative Law Judge

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