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GARY GOFF V. YOUGHIOGHENY & OHIO COAL
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GARY GOFF

v. Docket No. LAKE 84-86-D

YOUGHIOGHENY & OHIO COAL COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises in connection with a discrimination complaint filed by Gary Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq (1982)("Mine Act" or "Act"). Prior to any hearing, a Commission administrative law judge granted the operator's motion to dismiss Mr. Goff's complaint for failure to state a cause of action under the Mine Act. 6 FMSHRC 2055 (August 1984)(ALJ). The judge concluded that a discrimination complaint, such as Goff's, based on allegations that the miner was discriminated against because he suffers from Black Lung (pneumoconiosis), can be resolved only under section 428 of the Black Lung Benefits Act, 30 U.S.C. $ 901 et se . (1982)("BLBA"). 1/ We granted Goff's petition for discretionary review and permitted the amicus curiae participation of the United Mine Workers of America and the Secretary of Labor.

For the reasons that follow, we hold that a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based on the miner's being "the subject of medical evaluations and potential transfer" under 30 C.F.R. Part 90. These provisions contain mandatory health standards governing transfer of miners evidencing the development

1/ Section 428(a) of the BLBA provides:

> 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.

30 U.S.C. $ 938(a). Section 428(b), 30 U.S.C. $ 938(b), permits miners who believe that they have been discriminated against in violation of subsection (a) to file a complaint with the Secretary of Labor.

of pneumoconiosis. 2/ We conclude that Goff has pleaded such a cause of action and is entitled to a determination on the merits of his claim. Accordingly, we reverse and remand.

The following summary of the case's factual background is based largely on allegations in Goff's complaint (prepared without assistance of counsel) and on the various documents related to those allegations that he has submitted, without objection by the operator, to the Commission. For purposes of reviewing the judge's grant of a motion to dismiss for failure to state a claim, we will treat the allegations as true. See e.g., Hughes v. Rowe 449 U.S. 5, 9-10 (1980).

Goff worked as a labor foreman for the Youghiogheny & Ohio Coal Company ("Y&0") from September 1976 to January 20, 1984, when he was discharged. Goff alleges that in August 1982, he first received an x-ray diagnosis indicating that he suffered from pneumoconiosis. He states that a second x-ray taken in October 1983 confirmed that he had developed pneumoconiosis. Goff further alleges that Y&0 was informed of his condition and that he was assigned to outside work at Y&O's Allison Mine.

2/ Section 105(c)(1) of the Mine Act provides:

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

this [Act].

30 U.S.C. $ 815(c)(1) (emphasis added).

As a result of the subsequent closing of the Allison Mine, Goff was transferred to an underground job at Y&O's Nelms No. 2 Mine effective January 9, 1984. Goff states that on January 12, 1984, he was too ill to go to work. He went to his physician and was diagnosed as having bronchitis. According to Goff, his doctor advised him not to return to work until January 25, 1984. When Goff informed mine management of this development, an appointment was made for him to see the company's physician on January 13, 1984. Y&0 alleges that its doctor found no x-ray evidence of pneumoconiosis or any other health problem preventing Goff from working underground.

On or about January 14, 1984, Goff mailed a letter and x-rays to the Department of Labor's Mine Safety and Health Administration's ("MSHA") Coal Mine Safety and Health Office in Arlington, Virginia. Goff's letter requested a determination of his eligibility for participation in 30 C.F.R.'s Part 90 transfer program. This program was developed pursuant to section 101(a)(7) of the Mine Act, which authorizes the Secretary of Labor to promulgate improved mandatory standards providing for the transfer of miners whose health has been impaired by exposure to a designated hazard. 3/ Under the Part 90 program, a miner who has been

3/ Section 101(a) of the Mine Act, 30 U.S.C. $ 811(a), directs the Secretary of Labor to "develop, promulgate, and revise as may be appropriate improved mandatory health or safety standards...." In relevant part, section 101(a)(7) states:

> [W]here appropriate, [any mandatory health or safety standard promulgated under this subsection] 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 [a] 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 on the new work classification. ...

30 U.S.C. $ 811(a)(7). 30 C.F.R. Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard of respirable dust, have developed pneumoconiosis. The improved Part 90 standards supercede the interim

mandatory health standards contained in section 203(b) of the Mine Act, 30 U.S.C. $ 843(b), which provided specifically for the transfer of miners with evidence of the development of pneumoconiosis. See 30 U.S.C. $ 841(a); 30 C.F.R. $ 90.1. The Part 90 standards also guarantee extensive protection against any pay loss related to an authorized transfer. See 30 C.F.R. $ 90.103.

determined to have evidence of development of pneumoconiosis may exercise an option to work in a low-dust area of the mine without experiencing a loss in pay. See 30 C.F.R. $$ 90.1. to 90.103. Goff's letter was received by MSHA's Coal Mine Safety and Health Office on January 16, 1984.

During the week of January 16, 1984, Goff met with two of Y&O's managers at the Nelms Mine and was told that if he did not return to work on January 20, 1984, he would be terminated. Goff states that because his physician advised him not to return to work until January 25, 1984, he did not report on January 20, 1984, as ordered by Y&0. The next day, he received a letter from Y&0 dated January 20, informing him that he was discharged for failure to report to work. The letter stated that Goff's "allegation of not being able to work has not been documented by medical certification." The letter also noted that the results of Goff's examination by Y&O's physician on January 13 did not indicate any reason that would have prevented Goff from working underground.

Following Goff's discharge, and while his Part 90 application was pending with the Department of Labor, he initiated discrimination proceedings against Y&0 pursuant to section 105(c) of the Mine Act by timely filing a discrimination complaint with MSHA on March 19, 1984. This complaint apparently asserted that he had been discharged discriminatorily because of his alleged pneumoconiosis. Attached to Goff's brief on review is a photocopy of a statement that Goff appears to have given to an MSHA special investigator on March 28, 1984. In his statement, Goff referred to his belief that he had pneumoconiosis and to the Part 90 application that he had made shortly before his discharge. After completing its investigation of Goff's complaint, MSHA determined administratively that a violation of section 105(c) had not occurred and declined to file a complaint on Goff's behalf. 30 U.S.C. $ 815(c)(2). In the MSHA letter dated June 6, 1984, informing Goff of this determination, no mention was made of any right that Goff may have had to pursue a pneumoconiosis-related discrimination claim under the BLEA. 4/ Goff then filed his own complaint with this independent Commission on July 6, 1984, alleging that his discharge violated the Mine Act. 30 U.S.C. $ 815(c)(3).

4/ The Department of Labor is charged with the duty under both the Mine Act and the BLBA to investigate pneumoconiosis-related discrimination complaints. Accordingly, the Department of Labor's MSHA and its Employment Standards Administration (ESA) have entered into a Memorandum of Understanding to coordinate their investigations. 44 Fed. Reg. 75952 (Dec. 21, 1979). We note that the record evidences

the Department's failure to follow its announced procedures in the processing of Goff's complaint. Although MSHA determined that a complaint did not lie under the Mine Act, the matter was not further processed by ESA. Only after issuance of the Commission's order granting Goff's petition for review was Goff's case referred to ESA. An examination by the Department of the implementation of its MOU may be appropriate.

Meanwhile, Goff's Part 90 application filed with the Department of Labor had been acted upon. By letter dated July 2, 1984, an official within the Department of Health and Human Services, which is authorized to determine whether a miner has evidence of pneumoconiosis (30 C.F.R. $ 90.3(a)), notified MSHA that an x-ray taken of Mr. Goff had been interpreted to indicate evidence of pneumoconiosis. By letter also dated July 2, 1984, MSHA informed Goff that because of this diagnosis he was eligible to participate in the Part 90 transfer program and to exercise an option to work in a low dust area of the mine. Goff responded that he would exercise this option, but on August 8, 1984, MSHA rescinded its transfer authorization after being informed by Y&0 that Goff had been discharged in January 1984.

With respect to Goff's pending section 105(c) discrimination complaint before the Commission, Y&0 filed a motion to dismiss asserting that Goff had failed to state a claim cognizable under the Mine Act. This motion was granted by the Commission's administrative law judge on August 24, 1984.

The judge relied on the Commission's decision in John Matala v. Consolidation Coal Company, 1 FMSHRC 1 (April 1979). In Matala which arose under the anti-discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977) ("1969 Coal Act"), the Commission held that discrimination complaints based on allegations that the miner suffers from pneumoconiosis were to be filed and resolved under section 428 of the BLBA, which specifically covers discrimination based on pneumoconiosis, rather than under the more general provisions of the 1969 Coal Act. 1 FMSHRC at 3. The judge in the present case, while acknowledging that the anti-discrimination provisions of section 105(c) of the Mine Act are broader than the comparable provisions of the 1969 Coal Act, held that "the rationale [in Matala] for having discrimination complaints based on allegations that the miner suffers from pneumoconiosis resolved under the specific statutory provisions set forth in the [BLBA] has continuing validity." 6 FMSHRC at 2057.

We conclude that the judge erred. As discussed below, the effect of the judge's decision would be to remove from section 105(c)(1) its protection for miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. We find no warrant for this result in either the text or legislative history of the Mine Act. We address first the judge's reliance on Matala and the language of the 1969 Coal Act.

Former section 110(b) of the 1969 Coal Act, 30 U.S.C. $ 820(b) (1976), protected miners from certain specified forms of discrimination but contained no language shielding them from retaliation based on their medical evaluation or transfer. In comparison, section 105(c) of the Mine Act granted miners broader protection and relief for a wider range of discriminatory actions and was intended by Congress to

be interpreted expansively. See, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 134 n. 15 (February 1982). Most importantly, Congress included in section 105(c) specific protection from discrimination for miners who were the subject of medical evaluation and potential transfer. The legislative history states:

> The legislation protects a miner from discrimination because he "is the subject of medical evaluation and potential transfer under a standard published pursuant to section 10[1]." Under section 10[1] standards promulgated by the Secretary must provide[s] as appropriate, that where it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, the miner shall be moved from such exposure and reassigned.... The Committee intends section 10[5](c) to bar, as discriminatory, the termination or laying-off of a miner in such circumstances, or his transfer to another position with compensation at less than the regular rate of pay for the classification held by the miner prior to transfer.

S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (1978). Congress was aware of the existence of section 428 of the BLBA when it enacted the medical evaluation and transfer clause of section 105(c). Congress must have intended for both provisions to be administered, applied, and interpreted harmoniously. Therefore, Matala is not controlling and, indeed, possesses only limited relevance to the construction of section 105(c). 5/

We have no difficulty concluding that Goff has pleaded a cause of action under the medical evaluation and transfer clause of section 105(c)(1). The Part 90 standards, promulgated pursuant to section 101(a)(7) of the Act, are clearly the kind of standards to which that clause applies. This case does not require us to articulate the full extent of the protection afforded Part 90 miners by section 105(c) or to identify every form of discrimination that may arise in this context. Certainly, however, a miner is protected from adverse personnel actions

5/ The Commission has emphasized previously that precedent arising

under section 110(b) of the 1969 Coal Act is to be "applied carefully" in interpreting section 105(c). Dunmire and Estle, supra, 4 FMSHRC at 134 n. 15.

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. In the instant proceeding, Goff has presented sufficient allegations to plead a cause of action. Several days prior to his discharge, he applied for classification as a Part 90 miner. This application made him "the subject of medical evaluation and potential transfer" within the meaning of section 105(c)(1). In addition, Goff also appears to allege that Y&0 had knowledge of his possible pneumoconiosis and his intent to file under Part 90 prior to the mailing of his application. In either case, we interpret Goff's pleadings and documentation to present a claim cognizable under the Mine Act that he was discharged because he was "the subject of medical evaluation and potential transfer" under Part 90. Accordingly, he is entitled to a determination on the merits.

Therefore, we vacate the judge's decision and remand this matter for appropriate proceedings on the merits. We also direct the Secretary to advise the judge as to whether he stands by his denial of representation of Mr. Goff in this case or whether he will reconsider in light of his amicus brief to us and this decision.

Accordingly, on the bases discussed above, the judge's decision is vacated and remanded for proceedings consistent with this decision. 6/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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