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GARRY GOFF V. YOUGHHIOGHENY & OHIO COAL
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FMSHRC-WDC
December 19, 1986

GARRY GOFF

Docket No. LAKE 84-86-D

v.

YOUGHIOGHENY & OHIO COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding concerns a discrimination complaint filed by Garry Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)(the "Act"). Following a previous determination by the Commission that Goff's complaint stated a cause of action under section 105(c)(1) of the Act, the matter was remanded to Commission Administrative Law Judge Melick. The purpose of the remand was to determine whether Goff was discriminatorily discharged by the Youghiogheny and Ohio Coal Company ("Y&0") because he was "the subject of medical evaluation and potential transfer" under the standards set forth in 30 C.F.R. Part 90. 1/ 7 FMSHRC 1776 (November 1985). On remand, the judge examined that issue and found that Goff was not discharged in violation of section 105(c)(1). 2/ 8 FMSHRC 741 (May 1986)(ALJ). The Commission granted Goff's petition for discretionary review. For the reasons that follow, we affirm.

1/ Under 30 C.F.R. Part 90, a miner 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 ("mg/ms").

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 this [Act]....

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

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This proceeding began when Goff filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Following investigation of the complaint, MSHA determined that a violation of section 105(c)(1) of the Act had not occurred. Goff then filed a complaint in his own behalf with this independent Commission alleging :hat his discharge violated the Act. Y&0 moved to dismiss the complaint for failure to state a cause of action. The administrative law judge concluded that Goff's complaint was based on an allegation that Goff was discriminated against because he suffers from Black Lung (pneumoconiosis) and that such a complaint could be resolved only under section 428 of the Black Lung Benefits Act, 30 U.S.C. $ 901 et seq. (1982) ("BLBA"). Therefore, the judge granted the motion to dismiss. 6 FMSHRC 2055 (August 1984). On review, we reversed the judge's decision, holding that a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based upon the miner being "the subject of medical evaluations and potential transfer" under Part 90 and remanded the proceeding to the judge to determine whether Goff had been discharged unlawfully.

Our task on review is to determine whether the judge properly concluded that Goff was not discriminatorily discharged in violation of section 105(c)(1) of the Act. A number of collateral issues were raised by the complainant which lie outside the scope of our review and which we do not address; for example, whether Goff in fact had pneumoconiosis, which of the various doctors seen by Goff correctly diagnosed his medical condition, and whether Y&O's leave policies were reasonable. Further, our review in no way addresses any separate remedy Goff may be seeking under section 428 of the BLBA. 30 U.S.C. $ 938. 3/

I.

Goff worked as a supervisory foreman for Y&0 from September 1976 until January 20. 1984. In August 1982, while employed at Y&O's Allison Mine, Goff's doctor diagnosed him as having pneumoconiosis and Goff thereafter was assigned to work primarily outside the mine. In October 1983, Goff again was diagnosed by his doctor as having pneumoconiosis.

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3/ The BLBA is administered by the Employment Standards Administration ("ESA") of the Department of Labor. 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's MSHA and its ESA have entered into a

Memorandum of Understanding ("MOU") to coordinate their investigations and to clarify their jurisdiction: and procedures. 44 Fed. Reg. 75952 (Dec. 21, 1979).

Under the MOU, ESA makes the determination as to whether a violation of section 428 of the BLBA has occurred and MSHA makes a determination whether a violation of section 105(c) of the Mine Act has occurred. If the aggrieved person proceeds with complaints under both sections, MSHA proceeds first with the section 105(c) complaint and ESA may then proceed with the section 428 complaint. The MOU reflects that the two sections may provide different remedies.

In January 1984 Y&0 closed the Allison Mine and Goff was transferred to an underground job as a labor foreman at Y&O's Nelms Mine, effective January 9, 1984. As a labor foreman Goff would work primarily in the less dusty outby areas but would work near or at the face when necessary. Upon reporting to work on January 9, 1984, Goff gave Charles Wurschum, the Nelms mine manager, copies of slips from his doctor stating that he had pneumoconiosis and should not work underground. On January 12, 1984, Goff called in sick to John Ronevich, his immediate supervisor. Goff went to his doctor and was diagnosed as having bronchitis and advised not to return to work for two weeks or until he recovered. After Goff relayed this advice to Ronevich, he was requested by Y&0 to undergo a medical examination at the Wheeling Park Hospital. The next day Goff reported for that examination. He was given a battery of medical tests, had chest x-rays taken, and was examined by a certified "B" reader of chest x-rays. 4/ The results of his examination were not immediately available. 5/

On January 14, 1984, the day after his medical examination at the Wheeling Park Hospital, Goff mailed a Part 90 application and chest x-rays to MSHA. These x-rays had been taken at a local clinic in October 1983. Goff's application requested a determination by MSHA of his eligibility for participation in the Part 90 transfer program.

On January 16, 1984, Goff wrote a letter to Donald Weber, Y&O's director of personnel, calling attention to his chest x-rays of August 1982 and October 1983 and stating that he was unable to perform his duties as a labor foreman due to pneumoconiosis and that he should not be working underground in the dust. Goff further stated that until he had a job out of the dust, he would be off work under doctor's advice, but was willing to return to work with his doctor's release. The letter made no reference to Part 90 status. On January 19, 1984. Goff met with Weber and Wurschum and was advised that review of the medical report from Wheeling Park Hospital indicated that there was nothing preventing Goff from working underground as a supervisor, and that if he did not

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4/ A "B" reader is a person possessing the highest qualifications to substitute read chest x-rays for evidence of pneumoconiosis by the National of Occupational Safety and Health.

5/ Goff states that while awaiting his examination, he was asked by a nurse whether he wanted to complete a Part\90 application and have the application and his x-rays sent to MSHA for a Part 90 status determination. Goff states that he completed the application but that

the application and the Wheeling Park Hospital x-rays were not sent to MSHA. Tr. 196-97, 200. On review, Goff alleges that Y&0 prevented the mailing of the application and the x-rays. There is, however, no evidence in the record which supports even an inference to support this allegation.

return to work the next day, he would be discharged. 6/ Goff testified that he told Weber and Wurschum that he would be unable to work until his doctor authorized his return. Goff did not report to work on January 20, 1984. On January 21, he received a letter from Y&0 dated the previous day informing him that he was discharged for failing to report to work. The letter stated that Goff's "allegation of not being able to work has not been documented by medical certification" and noted that the results of Goff's medical examination on January 13 did not indicate any reason that would prevent Goff from working underground. On January 30, 1984, Goff took a medical release dated January 24, 1984, to Weber, who indicated that Y&0 was not hiring.

On July 2, 1984, Goff received a letter from MSHA stating that based on the chest x-ray reports he had sent to MSHA on January 14, pneumoconiosis was indicated and he was eligible under Part 90 to work in an area of the mine with an average concentration of respirable dust at or below 1.0 mg/ms of air. On August 8, 1984, however, Goff was further advised by MSHA that because he no longer was employed at an underground coal mine, Part 90 status was not applicable to him.

II.

In concluding that Y&0 did not discharge Goff unlawfully, the judge noted that for Goff to establish a violation of section 105(c)(1), Goff had to prove that he engaged in protected activity and that his discharge was motivated in any part by the protected activity. 8 FMSHRC at 743. (Citing to Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981).) With respect to the motivational issue, the judge indicated that there was no evidence that any Y&0 personnel knew, prior to Goff's discharge, that he had filed a Part 90 application. 8 FMSHRC at 743-44. In addition, the judge concluded that Y&0 officials could reasonably have given greater weight to the medical evidence they obtained from the Wheeling Park Hospital medical evaluation of Goff, which indicated that Goff did not have pneumoconiosis and was capable of working. 8 FMSHRC at 744.

6/ Dr. Elliott stated in his medical report:

> 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 reason at this time that would prevent
Mr. Goff from being able to work underground as a supervisor.

8 FMSHRC at 742-43.

Finally, the judge found that even if Y&0 had known that Goff applied for Part 90 status, Y&0 would not have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment as a labor foreman. 8 FMSHRC at 744. Under Part 90, a qualifying miner is entitled only to transfer to a dust reduced area where concentrations of respirable dust are at or below 1.0 mg/ms of air, and the judge noted that Wurschum believed the dust concentrations in the entire Nelms Mine were less than 1.0 mg/m of air. The judge further noted that in 1984 the average respirable dust concentration in the outby areas of the mine, where Goff ordinarily would have worked, was 0.55 mg/m of air and that even near the face the average concentration wass less than 1.0 mg/ms of air. 8 FMSHRC at 244. The judge concluded that Goff had "failed in his burden of proving that Y&0 was motivated in any part in discharging him because he was 'the subject of medical evaluation and potential transfer' under Part 90." 8 FMSHRC at 745.

III.

For the reasons that follow, we affirm the judge's conclusion that Goff's discharge did not violate the Act. A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

The medical examinations and procedures to which Goff was subjected in this case were intended to determine whether he suffered from pneumoconiosis, an initial step in obtaining Part 90 status, and as such, were protected activities. Further. Goff engaged in protected activity in applying to MSHA for a determination of his eligibility for Part 90 status. Like the medical evaluations, the application process is a necessary preliminary step and comes within the statutory protection afforded miners who are the "subject of medical evaluations and potential transfer" under Part 90.

We conclude, however, that although these events constituted

protected activities, Goff did not establish that Y&0 was motivated in any part by knowledge of such protected activities.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709

F.2d 51 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The present record contains no direct evidence that Y&0 was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

In examining the record for instances in which discriminatory intent could be inferred, we note that, with respect to Goff's medical evaluations of August 1982 and October 1983, Y&0 did not discharge Goff because of these evaluations. To the contrary, the record indicates that Y&0 accommodated Goff by assigning him work primarily on the surface. Not until the Allison Mine closed in early January 1984, approximately a year and a half after Goff's first diagnosis of pneumoconiosis, was he transferred to underground work. 7/

Similarly, no inference of discriminatory intent can be inferred from Y&O's response to Goff's medical evaluation of January 1984. Substantial evidence supports the judge's conclusion that Y&0 reasonably relied upon Wheeling Park Hospital's January 1984 evaluation of Goff which, based upon specific medical tests and x-rays, indicated that Goff was fit to return to work.

With respect to Goff's Part 90 application, we affirm the judge's finding that Y&0 did not know prior to his discharge that Goff had filed a Part 90 application. There is no evidence that Goff told supervisory personnel at Y&0 that he had applied or was going to apply for Part 90 status. Goff states that he told mine manager Wurschum on January 1984, that he wanted to take one or two days off to "get x-rays taken" to settle the situation concerning his pneumoconiosis. Goff Dep. 58, Tr. 188. According to Wurschum, Goff asked only whether he was going to be allowed to take some days off and Goff said nothing about having x-rays taken or applying for Part 90 status. Tr. 401. We note that Goff actually filed his application on January 14, 1984. After that date Goff easily could have notified Y&0 personnel that he had filed for Part 90 status (for example: in his January 16, 1984, letter to Weber or at the January 19, 1984, meeting). Goff did not do so. We hold that the record therefore supports the judge's finding that there is no "evidence that any Y&0 personnel knew, prior to his discharge, that [Goff] had filed a Part 90 application." 8 FMSHRC at 744.

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7/ Goff also argues that Y&0 interfered with his section 105(c)(1) rights by failing to report his illness as required by 30 C.F.R. Part 50 when Y&0 first became aware that he had been diagnosed with pneumoconiosis. We do not agree. Under Part 50, an operator

is required to report illness, including pneumoconiosis, to the appropriate MSHA District Office and to the MSHA analysis center in Denver. 30 C.F.R. $$ 50.20 and 50.20-6. Failure to report as required may be a violation of Part 50, but it does not constitute discrimination. The purpose of reporting a miner's illness under Part 50 is to gather occupational illness statistics, not to effectuate the rights of medical evaluation and transfer inherent in Part 90 and protected by section 105(c)(1).

Moreover, substantial evidence supports the judge's conclusion that even if Y&0 had known that Goff applied for Part 90 status, it is not reasonable to believe it would have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment. The Nelms Mine manager testified that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/ms of air, and the average concentration in inby areas was less than 1.0 mg/ms of air. That testimony was not disputed. 8/ Nevertheless, Goff stated in his letter to Weber that on the advice of his doctor, he would be off work until he had a dust free job. Neither the Act nor Part 90 gives a miner with evidence of the development of pneumoconiosis the right to work in a mining environment that is totally free of respirable dust. Rather, section 203(b)(2) of the Act, 30 U.S.C. $ 843(b)(2), and 30 C.F.R $ 90.3(a) give a miner with evidence of the development of pneumoconiosis the right to exercise an option to transfer to an area of the mine with an average respirable dust concentration at or below 1.0 mg/ms of air, not to cease work altogether.

There is no proof in this record that Goff would have encountered excessive and impermissible respirable dust concentrations in his underground assignment. As previously indicated, there is persuasive evidence that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/ms of air and the average concentration in inby areas was less than 1.0 mg/ms of air.

By refusing to report to work until he was assigned a dust-free job, Goff acted beyond the purview of section 203 of the Act and 30 C.F.R. Part 90. As such, his work refusal was not protected by the statute.

8/ Although the mine manager's testimony was based on the results ofrespirable dust samples taken pursuant to 30 C.F.R. Part 70, the results are indicative of the respirable dust concentrations that Goff could expect to encounter. They reflect average concentrations of respirable dust in areas where Goff ordinarily would be expected to work. Tr. 355-56.

We find that Goff did not establish that the protected activity, being "the subject of medical evaluation and potential transfer", in any way motivated Y&0 to discharge him. Rather, Y&0 discharged Goff because he refused to report for work as ordered. We therefore affirm the judge's dismissal of Goff's complaint.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Garry Goff
57920 Rocky Fork Road
Jacobsburg, Ohio 43933

Gerald P. Duff, Esq.
Hanlon, Duff & Paleudis Co., LPA
46770 National Road West
P.0. Box 77
St. Clairsville, Ohio 43950

Administrative Law Judge Gary Melick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041