

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

SEP 26 1984

HERMAN WHALING, ; DISCRIMINATION PROCEEDING
Complainant ;
 ;
v. ; Docket No. WEVA 83-238-D
 ;
 ; Keystone No. 1 Mine
EASTERN ASSOCIATED COAL ;
CORP., ;
Respondent ;

DECISION

Appearances: William B. Talty, Esq., Tazewell, Virginia
for the Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon
& Hasley, Pittsburgh, Pennsylvania and
Sally S. Rock, Esq., Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Fauver

In his complaint, filed with the Commission on August 11, 1983, Complainant alleged that he was discriminated against by Respondent due to the fact that he was a "203-B letter carrier," i.e., that he had been diagnosed as having coal workers' pneumoconiosis, in violation of Section 105(c) (1) of the Federal Mine Safety and Health Act of 1977 ("1977 Act"), 30 U.S.C. § 815(c) (1). Respondent has moved to dismiss the complaint on the basis 'that the Commission and the Administrative Law Judge have no jurisdiction over this matter.

A hearing was held on the motion to dismiss on September 11, 1984. At that time an oral decision was rendered which may be summarized as set forth herein.

The-Motion to Dismiss is grounded on the proposition that discrimination complaints of a miner, based on allegations that the miner suffers from pneumoconiosis, are required, under the statutes and case law of the Commission, to be brought under section 428 of the Black Lung Benefits Act, 30 U.S.C. § 938, rather than under the general anti-discrimination provisions of Section 105(c) of the 1977 Act.

The Commission ruled in Matala v. Consolidation Coal Company, 1 FMSHRC 1 (1979), that the discrimination complaint of a miner who suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428 of the Black Lung Benefits Act, rather than the more general provisions of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(b).

While the anti-discrimination provisions of section 105(c) of the 1977 Act replace and enhance the provisions of section 110(b) of the 1969 Act, giving broader coverage, the rationale for having discrimination complaints, based on allegations that a miner suffers from pneumoconiosis, resolved under section 428, has continuing validity.

In a recent decision by a judge of this Commission, Goff v. Youghiogheny and Ohio Coal Company, Docket LAKE 84-86-D (August 24, 1984), Judge Melick followed the holding in Matala in dismissing a section 105(c) discrimination complaint filed before the Commission.

An examination of Part 90 of 30 C.F.R., the statutory scheme of the 1969 Act, the 1977 amendments thereto and the Black Lung Benefits Amendment, makes it clear that the Complaint, based on Complainant's status as a section 203(b) letter carrier, is properly a matter of jurisdiction for the Department of Labor, and not the Commission. For this reason, the Complaint should be dismissed.

In view of the 90-day limitation period set out in section 428 and concern for the equities with respect to the operation of that statutory limitation period, inquiry was made of Respondent's counsel on that specific point. Respondent has agreed and acknowledged that the 90-day statutory period for filing complaints set out in section 428 for discrimination matters brought in the Department of Labor is tolled from the time that Mr. Whaling filed his Complaint with MSHA, June 15, 1983, until the date of this Decision and Order.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Dismiss is GRANTED and this proceeding is DISMISSED.

William Fauver

-William Fauver
Administrative Law Judge

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