

## PART II

### DEFINITIONS

#### H. EFFECT OF CURRENT COAL MINE EMPLOYMENT OR COAL MINE EMPLOYMENT AT TIME OF DEATH

Section 402(f) of the Act defines total disability in terms of work capacity. 30 U.S.C. §902(f). Evidence of continued coal mine employment may thus be utilized to show that an individual is not disabled, and accordingly not entitled to benefits, if certain criteria are satisfied. Such evidence could preclude claimant from establishing the existence of a chronic respiratory or pulmonary impairment. See e.g., *Barnes v. Zeigler Coal Co.*, 2 BLR 1-265, 1-268 (1979); *Kincaid v. Eastern Associated Coal Co.*, 1 BLR 1-60, 1-63 (1977). It could also be used to rebut a presumption of disability, invoked by clinical tests. See e.g., *Williamson v. United States Steel Corp.*, 2 BLR 1-470, 1-479 (1979); *Vance v. Buffalo Mining Co.*, 1 BLR 1-555, 1-560 (1978).

In general, the mere fact of an individual's continued employment in a mine does not conclusively establish that he is or was not totally disabled. See 30 U.S.C. §902(f)(1)(B); *Marsella v. Starvaggi Industries, Inc.*, 2 BLR 1-286, 1-289 (1979). In order for continued employment to preclude a finding of total disability, the circumstances of the employment must be inconsistent with such a finding. *Mondragon v. C. F. & I. Steel Corp.*, 1 BLR 1-323, 1-324 (1977); see also *Smith v. Consolidation Coal Co.*, 4 BLR 1-522, 1-525 (1982). Moreover, the Act's implementing regulations provide certain criteria governing the use of continued employment evidence to establish the absence of total disability. Section 727.205(a) states that evidence of current employment shall not be used as conclusive evidence that a living miner is totally disabled if the record also contains evidence of changed circumstances of employment indicative of reduced work ability. This subsection also provides that, in a claim involving a deceased miner who was employed at the time of death, all relevant evidence must be considered in determining whether he was totally disabled at that time. 20 C.F.R. §727.205(a). In addition, Section 725.204(d) provides that neither evidence of continued employment, nor evidence pertaining to a miner's earnings prior to death, shall by themselves be sufficient to rebut the presumption provided by Section 411(c)(5) of the Act. 30 U.S.C. §921(c)(5); see 20 C.F.R. §727.204(d)(1), (2).

It is well established that, in determining the evidentiary effect of a miner's continued employment, the administrative law

judge must discern whether the record contains evidence bearing on the quality of the miner's work performance; *i.e.*, the administrative law judge must render a determination as to whether the miner's recent work record reflects "changed circumstances" attributable to his condition. See generally ***Mondragon v. C. F. & I. Steel Corp.***, 1 BLR 1-323 (1977); see also ***Kinnick v. National Mines Corp.***, 2 BLR 1-221, 1-229 (1979); ***Kurimcak v. United States Steel Corp.***, 2 BLR 1-75, 1-81 (1979).

The administrative law judge, therefore, did not err in finding that rebuttal of the presumption at Section 411(c)(5) of the Act had been established because, at the time of death, the miner "was working full time, in a satisfactory manner" at the same job he had held for the last twenty years. The administrative law judge further found that the testimony of two former supervisors indicated that the miner had performed his job satisfactorily, had rarely missed work and had worked overtime, even in the period immediately prior to his death. See ***Feathers v. Consolidation Coal Co.***, 8 BLR 1-25 (1985).

If no "changed circumstances" are found, the fact-finder judge may find that the miner's continued employment establishes the absence of disability. Where disability is established despite continued employment because there are changed circumstances of employment, a living miner is precluded by 20 C.F.R. §727.205(c) from receiving benefits while he is still employed. [For further discussion of this issue, see Part X B. of the Desk Book]. Moreover, any miner who is determined to be eligible for benefits while currently employed must terminate his employment within one year after the date such determination becomes final in order to be entitled to benefits.

#### CASE LISTINGS

[evidence miner's work or earnings record not continuous or steady can establish changed circumstances] See, *e.g.*, ***Vance v. Buffalo Mining Co.***, 1 BLR 1-555, 1-560 (1978).

[evidence miner recently put in less strenuous job for health reasons, or frequently receives assistance from coworkers in his duties can support finding of changed circumstances] ***Kinnick v. National Mines Corp.***, 2 BLR 1-221, 1-229 (1979); ***Spencer v. Winston Mining Co., Inc.***, 1 BLR 1-686, 1-689 (1978), *aff'd on recon.*, 1 BLR 1-996 (1978).

[administrative law judge *must* evaluate any record evidence bearing on possible "changed circumstances" of the miner's recent employment] ***Marsella v. Starvaggi Industries, Inc.***, 2 BLR 1-286, 1-289 (1979); ***Kinnick v. National Mines Corp.***, 2 BLR 1-221, 1-229

(1979); **Carr v. Bethlehem Mines Corp.**, 1 BLR 1-734, 1-737 (1978); see also **Krantwashl v. Kaiser Steel Corp.**, 7 BLR 1-263, 1-266 (1984) (Ramsey, C.J. dissenting on other grounds); **Smith v. Consolidation Coal Co.**, 4 BLR 1-522, 1-525 (1982).

[Third Circuit held finding off no rebuttal of the Section 411(c)(5) presumption supported where continuous employment until death without reduced earnings accomplished only by miner's coworkers help] **United States Steel Corp. v. Oravetz**, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); see also **Consolidation Coal Co. v. Smith**, 699 F.2d 446, 5 BLR 2-51, 2-57 (8th Cir. 1983) [opposing party burden to establish work as "usual," especially where coworkers "carry" miner]

[no subsection (b)(1) rebuttal: continued employment accompanied by evidence of "changed circumstances"] **Watkins v. G.M. & W. Coal Co.**, 6 BLR 1-924, 1-926 (1984).

[rebuttal not established in survivor's claim solely because miner worked at the time of death; burden to prove miner's performance of his work at time of death was "usual"] **Martin v. Regina Fuel Corp.**, 6 BLR 1-1206, 1-1208 (1984).

[fact-finder must consider circumstances of employment before discounting evidence of impairment] **Kennedy v. Jewell Ridge Coal Corp.**, 6 BLR 1-843, 1-846 (1984).

[evidence miner's latest job temporary position and not "usual" coal mine work may support finding of changed circumstances] **Regalis v. Director, OWCP**, 5 BLR 1-873, 1-876 (1983) (Ramsey, C.J. dissenting); see also **Fazio v. Consolidation Coal Co.**, 8 BLR 1-223, 1-224 (1985); **Krantwashl v. Kaiser Steel Corp.**, 7 BLR 1-263, 1-266 (1984) (Ramsey, C.J., dissenting on other grounds).

[evidence that recent job performance adversely affected as health deteriorated may show changed circumstances] **Bizzarri v. Consolidation Coal Co.**, 7 BLR 1-343, 1-346 (1984); **Kinnick v. National Mines Corp.**, 2 BLR 1-229 (1979).

[Section 727.205(a) provides that evidence of changed circumstances must be considered before evidence of present employment may be used to bar entitlement at Section 727.203(b)(1)] **Zamora v. C.F. & I Steel Corp.**, 7 BLR 1-568, 1-570 (1984).

[Section 727.205(c) is not applicable where no evidence of record establishes changed circumstances that could preclude the use of the miner's employment as conclusive evidence that the miner was not totally disabled] **Thomas v. Jim Walter Resources, Inc.**, 7 BLR 1-189, 1-191 (1984).

[considering the steady and productive nature of miner's work, the similarity between the physical demands and skills of current position as threading machine operator as compatible with employment as laborer, the physical exertion of positions need not be identical to establish (b)(1) rebuttal] **Chabala v. Director, OWCP**, 7 BLR 1-6 (1984).

### DIGESTS

Administrative law judge erred in failing to properly discuss the comparability of skills and ability between claimant's current work as a computerized boring mill operator and his previous job as a coal loader where the three factors of skill, abilities and physical exertion must be weighed and balanced and the weight of only one of those factors by itself cannot dictate the outcome of a decision. **Caudill v. Director, OWCP**, 9 BLR 1-174 (1986).

The administrative law judge erred in comparing claimant's usual coal mine employment with a previous job, and not with his current work, for purposes of Section 727.203(b)(1) rebuttal. **Parks v. Director, OWCP**, 9 BLR 1-82 (1986).

The Board rejected claimant's argument that the administrative law judge was required to consider vocational evidence supportive of total disability pursuant to Section 718.204(e)(3)(iii) where there is no requirement that changed circumstances of employment be used to support a finding of total disability. The Board also held that the administrative law judge erred in finding claimant could perform his usual coal mine job where claimant had transferred, by request, to a less strenuous position, and the less strenuous job was not claimant's usual coal mine work. **Mazgaj v. Valley Camp Coal Co.**, 9 BLR 1-201 (1986).

Claimant's argument that his most recent job as a coal mine inspector did not qualify as coal mine employment based on the "function" requirement, where the Board previously ruled in *Moore* that the duties performed by an inspector were "integral to the extraction and preparation of coal," was found to be without merit. Therefore, since claimant's job as an inspector qualified as coal mine employment, rebuttal was correctly established where claimant was working as a miner at the time of the hearing. **Uhl v. Consolidation Coal Co.**, 10 BLR 1-72 (1987).

Once claimant has presented a *prima facie* case of total disability pursuant to Section 718.204 with respect to usual work, the burden shifts to the opposing party to go forward with proof that claimant has the capacity for substantial gainful activity. **Taylor v. Evans and Gambrel Co., Inc.**, 12 BLR 1-83 (1988).

Rebuttal pursuant to Section 727.203(b)(1) was proper since claimant held the position of a federal mine inspector at the time of adjudication and no evidence established that claimant left his former job in the underground mines because of an inability to perform the work. **Bartley v. Director, OWCP**, 12 BLR 1-89 (1988) (Tait, J., concurring).

Section 718.204(b) does not place the burden of proving inability to perform comparable and gainful work upon claimant. Rather, this section broadly defines total disability, and once claimant has presented a *prima facie* case of total disability with respect to usual work, the burden shifts to the opposing party to go forward with proof that the claimant has the capacity for substantial gainful employment. **Taylor v. Evans and Gambrel Company, Inc.**, 12 BLR 1-83 (1988).