PART IX

REGULATORY PRESUMPTIONS

A. *20 C.F.R. §727.203 INTERIM PRESUMPTION*

2. REBUTTAL OF THE INTERIM PRESUMPTION GENERALLY

b. Section 727.203(b)(2)

Subsection (b)(2) allows the party opposing entitlement to rebut the interim presumption by showing that the miner is able to do his usual coal mine work or comparable and gainful work. Both subsection (b)(2) and the statutory and regulatory definitions of total disability are phrased in terms of work capability; *i.e.*, an inability to engage in usual coal mine employment *or* gainful employment requiring the skills and abilities comparable to those of the miner's usual coal mine employment. 30 U.S.C. §902(f)(1)(A); 20 C.F.R. §410.412(a)(1).

Originally, the Board held that rebuttal pursuant to subsection (b)(2) could be established in one of two ways: by showing that the miner has no respiratory or pulmonary impairment, or by showing that although the miner does have some respiratory or pulmonary impairment, it does not prevent him from performing his usual coal mine employment or comparable and gainful work. ***Sykes v. Itmann Coal Co.***, 2 BLR 1-1089 (1980); ***Lyons v. Amax Coal Co.***, 4 BLR 1-285 (1981); *see also* ***Parks v. Director, OWCP***, 9 BLR 1-82 (1986); ***Wheaton v. North American Coal Corp.***, 8 BLR 1-21 (1985); ***Miles v. Central Appalachian Coal Co.***, 7 BLR 1-744 (1985); ***Bibb v. Clinchfield Coal Co.***, 7 BLR 1-134 (1984); ***Perry v. Consolidation Coal Co.***, 6 BLR 1-1107 (1984); ***Pickett v. U.S. Steel Corp.***, 6 BLR 1-117 (1983).

In 1986, however, the Third Circuit reversed the Board's holding in ***Sykes v. Itmann Coal Co.***, 2 BLR 1-1089 (1980), and held that total disability is without regard to cause and thus, in order for a party to establish rebuttal of the interim presumption pursuant to subsection (b)(2), the party must show that the miner is not disabled for *any* reason. A showing that the miner is not disabled for pulmonary or respiratory reasons alone is not sufficient to establish rebuttal under (b)(2). Once total disability is established, the issue of the cause of disability should be addressed in subsection (b)(3). ***Kertesz v. Crescent Hills Coal Co.***, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Following the Third Circuit's holding in ***Kertesz***, the Fourth, Sixth, Seventh, and Eleventh Circuits handed down similar decisions. ***Sykes v. Director, OWCP***, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); ***York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987); ***Wetherill v. Director, OWCP***, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); ***Martin v. Alabama By-Products Corp.***, 864 F.2d 1555, 12 BLR 2-170

(11th Cir. 1989). In addition, the Third, Fourth and Sixth Circuits have also held that a general conclusion of no impairment is insufficient to establish rebuttal of the interim presumption under subsection (b)(2). ***Sykes v. Director, OWCP***, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); ***Wright v. Island Creek Coal Co.***, 824 F.2d 505, 10 BLR 2-185 (6th Cir. 1987); ***Gonzales v. Director, OWCP***, 869 F.2d 776, 12 BLR 2-192 (3d Cir. 1989).

In those circuits that have not issued decisions changing subsection (b)(2) rebuttal, namely the First, Second, Fifth, Eighth and Tenth Circuits, the Board's (b)(2) rebuttal standard allowing rebuttal by a showing that the miner suffers no respiratory or pulmonary impairment, ***Sykes****, supra*, or by showing that although the miner does have some respiratory or pulmonary impairment, it does not prevent him from performing his usual coal mine employment or comparable and gainful work, ***Lyons****, supra*, is still available. Although the Tenth Circuit appears to agree with the Board's (b)(2) rebuttal standard, the Court may have been declining to address the issue noting that claimant failed to raise (b)(2). ***Mitchelson v. Director, OWCP***, 808 F.2d 265, 12 BLR 2-399 (10th Cir. 1989).

Case Listings and Digests for this section are broken into the following subsections for easy reference:

b. Section 727.203(b)(2)

(1). Subsection (b)(2) Generally

(a). General
(b). Circuits other than the Third, Fourth, Sixth, Seventh and Eleventh.

(2). Determining the Miner's Ability to do Usual Coal Mine Work

(3). Determining the Miner's Ability to do Comparable and Gainful Work

b. Section 727.203(b)(2)

(1). Subsection (b)(2) Generally

(a). General

CASE LISTINGS

[adjudicator's error in denominating rebuttal analysis as subsection (b)(3) when actually subsection (b)(2) harmless as findings supported by substantial evidence] ***Rasnake v. Beatrice Pocahontas Co.***, 4 BLR 1-586 (1982); *see also* ***Leabhart v. Consolidation Coal Co.***, 4 BLR 1-728 (1982).

[subsection (b)(2) as matter of law based on uncontradicted medical report] ***Sheckler v. Clinchfield Coal Co.***, 7 BLR 1-128 (1984); ***Watkins v. G. M. & W. Coal Co.***, 6 BLR 1-924 (1984).

[cause of respiratory impairment not relevant under subsection (b)(2)] ***Richmond v. Armco Steel Corp.***, 7 BLR 1-505 (1984); ***Fairclough v. Youghiogheny and Ohio Coal Co.***, 7 BLR 1-45 (1984).

[Fourth Circuit held medical report incomplete as probative opinion under subsection (b)(2) as no exercise tolerance test, pulmonary function or arterial blood gas studies administered; medical opinions of "no impairment" and that claimant "capable at this point of engaging in gainful employment with respect to his lungs" insufficient to satisfy requirement that claimant be able to do usual coal mine or comparable and gainful work] ***Wilson v. Benefits Review Board***, 748 F.2d 198, 7 BLR 2-38 (4th Cir. 1984).

[finding of rebuttal of interim presumption pursuant to subsection (b)(2) precludes entitlement under Part 410] ***Wheaton v. North American Coal Corp.***, 8 BLR 1-21 (1985).

[if change in circuit law, proper for Board to remand case for appropriate findings, *not* to require supplemental briefs] ***Toler v. Eastern Associated Coal Co.***, 12 BLR 1-49 (1988)(en banc) [distinguishing ***Witherow v. Rushton Mining Co.***, 8 BLR 1-232(1985)].

DIGESTS

The Sixth and Eleventh Circuits as well as the Board have held that the party opposing entitlement need not introduce vocational evidence to establish that claimant is able to

do his usual coal mine employment. ***Adams v. Peabody Coal Co.***, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); ***Ramey v. Kentland Elkhorn Coal Corp.***, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); ***Taft v. Alabama By-Products Corp.***, 733 F.2d 1518, 6 BLR 2-68 (11th Cir. 1984); ***Foreman v. Peabody Coal Co.***, 8 BLR 1-371 (1985); ***Ousley v. National Mines Corp.***, 6 BLR 1-560 (1983).

Although a physician's diagnosis of no pulmonary or respiratory impairment may be insufficient for (b)(2) rebuttal under ***Sykes***, ***supra***, the report is nevertheless relevant under subsection (b)(3). The Board remanded the case for reconsideration of the medical opinion pursuant to (b)(3). ***Marcum v. Director, OWCP***, 11 BLR 1-23 (1987).

In light of the Circuit Court decisions in ***Sykes*** and ***Kertesz***, rebuttal pursuant to 20 C.F.R. §727.203(b)(2) is unavailable in this case, where the administrative law judge found the claimant to be totally disabled by a back impairment, i.e., a non-respiratory disability and the Director did not challenge this finding. ***Buckley v. Director, OWCP***, 11 BLR 1-37 (1988).

Extent of disability should be assessed in terms of the extent of disability at the time of the hearing. ***Cooley v. Island Creek Coal Co.***, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); ***Parsons v. Black Diamond Coal Co.***, 7 BLR 1-236 (1984); ***Klouser v. Hegins Mining Co.***, 6 BLR 1-110 (1983); ***Coffey v. Director, OWCP***, 5 BLR 1-404 (1982).

The Board construes as dictum the statement in ***Wright v. Island Creek Coal Co.***, 824 F.2d 505, 10 BLR 2-185 (6th Cir. 1987) regarding the relevance of medical opinions contraindicating continued coal dust exposure to rebuttal under Section 727.203(b)(2). The Board therefore continues to hold that a physician's opinion recommending that a miner not return to work in a dusty environment is not adequate to establish total disability and, consequently, should not be considered relevant medical evidence under subsection (b)(2). ***Justice v. Island Creek Coal Co.***, 11 BLR 1-91 (1988); ***Carter v. Beth-Elkhorn Corp.***, 7 BLR 1-15 (1984). *See also* ***Zimmerman v. Director, OWCP***, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

In a case where the Board raised a Circuit Court's change in the 20 C.F.R §727.203(b)(2) rebuttal standard *sua sponte*, the Board holds that employer is not deprived of fair hearing where claimant has raised subsection (b)(2) on appeal. ***Toler v. Eastern Associated Coal Corp.***, 12 BLR 1-49 (1988)(citing ***Homel v. Helvering***, 312 U.S. 522, 558-59 (1941)).

The Board rejected employer's argument that the Board's application of intervening law, *i.e.*, the new subsection (b)(2) rebuttal standard as enunciated in ***York***, ***supra***, results in "manifest injustice" (*see* ***Tackett v. Benefits Review Board***, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986), since employer introduced evidence below regarding the extent of claimant's disability relevant to its burden under subsection (b)(2) as required by ***York***. ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146 and 13 BLR 1-57 (1989)(en banc

recon.)(McGranery, J., concurring).

A finding of rebuttal of the interim presumption pursuant to subsection (b)(2) precludes entitlement under 20 C.F.R. §410.490. ***Minnich v. Pagnotti Enterprises, Inc.***, 9 BLR 1-89 (1986). However, the Court of Appeals for the Seventh Circuit held that a finding of rebuttal under subsection (b)(2) does not preclude entitlement under 20 C.F.R. §410.490. ***Taylor v. Peabody Coal Co.***, 892 F.2d 503 (7th Cir. 1989), *cert. granted*, 111 S.Ct. 2880, 14 BLR 2-79 (1990).

b. Section 727.203(b)(2)

(1). Subsection (b)(2) Generally

(b). Circuits other than the Third, Fourth, Sixth, Seventh and Eleventh.

CASE LISTINGS

[if employer proves miner is capable of performing usual coal mine work, does not need to prove miner can perform comparable and gainful work as miner is not totally disabled for purposes of the Act] ***Lyons v. Amax Coal Co.***, 4 BLR 1-285 (1981).

[adjudicator's finding that claimant's disability not caused by respiratory or pulmonary impairment sufficient under subsection (b)(2) to prove miner not disabled by respiratory or pulmonary impairment] ***Rasnake v. Beatrice Pocahontas Co.***, 4 BLR 1-586 (1982).

[diagnosis of "no pathologic diagnosis" relevant to subsection (b)(2)] ***Senick v. Keystone Coal Mining Co.***, 5 BLR 1-395 (1982).

[remand for adjudicator to consider under subsection (b)(2) medical opinions finding no evidence of disability and no industrial disability] ***Seese v. Keystone Mining Corp.***, 6 BLR 1-149 (1983).

[adjudicator's finding of subsection (b)(2) rebuttal affirmed based in part on medical report finding miner's cardio-pulmonary system within normal limits] ***Kennedy v. Jewell Ridge Coal Corp.***, 6 BLR 1-843 (1984)(Smith, J., dissenting).

[evidence of total disability due to non-respiratory/pulmonary conditions does not preclude finding that miner not totally disabled due to respiratory or pulmonary impairment] ***Sacolick v. Rushton Mining Co.***, 6 BLR 1-930 (1984); ***Byrne v. Allied Chemical Corp.***, 6 BLR 1-734 (1984); ***Coletti v. Consolidation Coal Co.***, 6 BLR 1-698 (1983); ***Olszewski v. The Youghiogheny and Ohio Coal Co.***, 6 BLR 1-521 (1983).

[diagnosis of "no objective basis for incapacitation secondary to shortness of breath from either C.O.P.D. or congestive heart failure" could rebut under subsection (b)(2)] ***Gilliam v. G & O Coal Co.***, 7 BLR 1-59 (1984).

[where doctor attributed miner's inability to work solely to arteriosclerotic heart disease and severe atherosclerosis, adjudicator could reasonably infer that report indicated

claimant had no respiratory or pulmonary impairment] ***White v. Director, OWCP***, 7 BLR 1-348 (1984).

[opposing party's burden to establish miner's respiratory or pulmonary impairment not totally disabling, without regard to disability by non-respiratory conditions, to rebut pursuant to subsection (b)(2)] ***Keen v. Laurel Creek Coal Co.***, 7 BLR 1-498 (1984); ***Sampson v. Laurel Branch Coal Co.***, 6 BLR 1-1259 (1984); ***Grayson v. North American Coal Corp.***, 6 BLR 1-851 (1984); ***Williams v. Harmar Coal Co.***, 6 BLR 1-802 (1984); ***Byrne v. Allied Chemical Corp.***, 6 BLR 1-734 (1984).

[Sixth Circuit rejected Board's use of "reasonable opportunity to hire" test in determining whether claimant could do comparable and gainful work, *see* ***Fletcher v. Central Appalachian Coal Co.***, 679 F.2d 1086, 4 BLR 2-92 (4th Cir. 1982); benefits to be based on inability to work due to disability not due to unemployment with proper inquiry whether "in light of the impairment, age, education, and work experience or skills of the miner, he is unable to engage in any comparable and gainful work that is available to him in the immediate area of his residence"] ***Shamrock Coal Co. v. Lee***, 751 F.2d 187, 7 BLR 2-96 (6th Cir. 1985).

[if showing miner has no respiratory or pulmonary impairment, need not also show miner can do usual coal mine work] ***York v. Director, OWCP***, 7 BLR 1-641 (1985); ***Aglio v. Jones & Laughlin Steel Corp.***, 4 BLR 1-462 (1982).

[finding of no totally disabling respiratory or pulmonary impairment under Section 410.414(b) also establishes rebuttal under subsection (b)(2)] ***Mendis v. Director, OWCP***, 7 BLR 1-855 (1985).

[to support rebuttal under subsection (b)(2), physician's opinion must assess existence or severity of pulmonary or respiratory impairment] ***Aleshire v. Central Coal Co.***, 8 BLR 1-70 (1985); ***Stanley v. Eastern Associated Coal Corp.***, 6 BLR 1-1157 (1984).

[subsection (b)(2) by medical opinions of no significant or mild pulmonary or respiratory impairment] ***King v. Consolidation Coal Co.***, 8 BLR 1-262 (1985); ***York v. Director, OWCP***, 7 BLR 1-641 (1985); ***Gilliam v. Director, OWCP***, 7 BLR 1-519 (1984); ***Richmond v. Armco Steel Corp.***, 7 BLR 1-505 (1984); ***Massey v. Eastern Asso. Coal Corp.***, 7 BLR 1-37 (1984); ***Ross v. Director, OWCP***, 6 BLR 1-1039 (1983).

[circumstantial evidence and inferences drawn therefrom may be sufficient to establish subsection (b)(2) rebuttal; medical records silent as to existence of pulmonary impairment may support inference that miner does not have pulmonary impairment] ***Allen v. Union Carbide Corp.***, 8 BLR 1-393 (1985)(Tait, J., dissenting).

The Sixth Circuit held that rebuttal under Section 727.203(b)(1) requires a finding that a miner is *doing* work comparable to his usual coal mine work; Section 727.203(b)(2) rebuttal requires a finding that the miner is *capable* of doing such work. The distinction between the two sections is obvious. A claimant might not be working at all at the time of his hearing, yet is capable of working. Similarly, a claimant might be working at the time of his hearing at a job not comparable to his usual coal mine work, yet be found able to do comparable work. It would thus appear the Section 727.203(b)(2) rebuttal is normally considered *after* its determined that Section 727.203(b)(1) rebuttal is not available. ***Bowling v. Director, OWCP***, 823 F.2d 165, 10 BLR 2-169 (6th Cir. 1990).

The Board held that as this case arises with the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit, the administrative law judge properly determined that a finding that claimant has no totally disabling pulmonary or respiratory impairment is sufficient to establish rebuttal pursuant to Section 727.203(b)(2). *See* ***Mitchelson v. Director, OWCP***, 880 F.2d 265, 12 BLR 2-399 (10th Cir. 1989) wherein the court stated "[w]e are not here concerned with whether claimant is eligible for some form of social security benefits we are concerned with whether he is entitled to black lung benefits which by statute and regulations are limited to those who are totally disabled by black lung arising out of coal mine employment." ***Maddaleni v. The Pittsburg & Midway Coal Mining Co.***, 14 BLR 1-135 (1990).

b. Section 727.203(b)(2)

(2). Determining the Miner's Ability to do Usual Coal Mine Work

CASE LISTING

[adjudicator may conclude that medical assessment of claimant's physical capabilities is respiratory evaluation when it appears in response to question concerning chronic respiratory or pulmonary disease] ***Olszewski v. The Youghiogheny and Ohio Coal Co.***, 6 BLR 1-21 (1983).

[adjudicator must match assessment of claimant's physical limitations with exertional requirements of usual coal mine work before determining if they conflict with medical opinions of no disability] ***Bartley v. L & M Coal Co.***, 7 BLR 1-243 (1984).

[medical diagnosis of "mild hypoxemia" and "mild obstruction" establishes existence of impairment, not to what degree impairment disabled claimant and not substantial evidence to rebut; no basis for comparing physical ability with usual coal mine employment] ***Boyd v. Freeman United Coal Mining Co.***, 6 BLR 1-159 (1983).

[miner's testimony of overtime in two years precluding retirement provided additional support for adjudicator's finding of no total disability] ***Kozele v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-378 (1983).

[permissible to credit opinion of physician with more thorough knowledge of miner's usual coal mine work duties] ***Kozele v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-378 (1983).

[effect of altitude on blood gas studies is relevant to subsection (b)(2), but may only be considered where evidence in form of expert opinion] ***Casias v. Director, OWCP***, 6 BLR 1-438 (1983).

[medical evidence as whole need not establish total disability before lay testimony may be used to defeat rebuttal] ***Crider v. Dean Jones Coal Co.***, 6 BLR 1-606 (1983).

[Fourth Circuit reversed Board's finding of subsection (b)(2) rebuttal as matter of law, rejecting Board's holding of a clear and uncontradicted medical report establishing absence of disability; retraction of earlier disability diagnosis was found equivocal, later report not addressing earlier qualifying arterial blood gas study; Court found that medical report based on ventilatory study that concluded absence of disability, was

undermined by qualifying blood gas study] ***Beavan v. Bethlehem Mines Corp.***, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984).

[Sixth Circuit held medical opinion of no respiratory impairment based only on normal ventilatory test cannot rebut presumption] ***Bozick v. Consolidation Coal Co.***, 732 F.2d 64, 6 BLR 2-23, *remanded for recon.*, 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984).

[doctors, aware of miner's work history, had sufficient information regarding usual coal mine work to determine total disability] ***Moore v. Hobet Mining & Construction Co.***, 6 BLR 1-706 (1983).

[adjudicator erred in considering claimant's age, diplopia, tinnitus, and dizzy spells in determining total disability from respiratory standpoint to perform usual coal mine work] ***Byrne v. Allied Chemical Corp.***, 6 BLR 1-734 (1984).

[medical finding of respiratory or pulmonary impairment attributed to heart disease more properly considered under subsection (b)(3); diagnosis not whether miner able to do usual coal mine work or that he suffered no respiratory impairment] ***Cardwell v. Circle B Coal Co.***, 6 BLR 1-788 (1984).

[error for adjudicator to discount medical opinion of capacity to perform only light duty because claimant still employed in mines at time of medical exam; adjudicator must consider circumstances of employment before summarily discounting evidence of impairment] ***Kennedy v. Jewell Ridge Coal Corp.***, 6 BLR 1-843 (1984).

[medical opinion of no pulmonary or respiratory impairment based in part on qualifying blood gas study sufficient for rebuttal; interpretation of objective data is medical determination] ***Grayson v. North American Coal Corp.***, 6 BLR 1-851 (1984); ***Booze v. Jones and Laughlin Steel Corp.***, 6 BLR 1-712 (1983).

[substantial evidence supports adjudicator's finding that claimant could perform usual coal mine work as coal loader operator] ***Braden v. Tennessee Consolidated Coal Co.***, 6 BLR 1-991 (1984).

[physician may find claimant has no respiratory impairment or is not totally disabled even though clinical studies have qualifying results] ***Bogan v. Consolidation Coal Co.***, 6 BLR 1-1000 (1984).

[finding that rebuttal under subsection (b)(2) not established cannot be based solely on lay testimony, must be corroborated by some quantum of medical evidence] ***Wilson v. U.S. Steel Corp.***, 6 BLR 1-1055 (1984); ***Looney v. Jim Walters Resources, Inc.***, 6 BLR 1-361 (1983).
[example of adjudicator matching physician's assessment of impairment/limitations and claimant's testimony on job duties to find total disability] ***Laird v. Alabama By-***

Products Corp., 6 BLR 1-1146 (1984).

[adjudicator may determine whether physician properly considered exertional requirements of claimant's usual coal mine work] ***Newland v. Consolidation Coal Co.***, 6 BLR 1-1286 (1984); ***McCune v. Central Appalachian Coal Co.***, 6 BLR 1-996 (1984).

[medical opinions that miner's medical tests revealed no impairment; if credited, could establish rebuttal under subsection (b)(2)] ***Carter v. Beth-Elkhorn Corp.***, 7 BLR 1-15 (1984).

[whether finding of "moderately severe hypoxemia" based on blood gas study is sufficient to preclude rebuttal is question of fact for adjudicator] ***Strunk v. Monarch Coal Co.***, 7 BLR 1-49 (1984).

[adjudicator properly relied on medical opinion that miner could perform usual coal mine work even though doctor unaware of exact amount of walking job required, since doctor knew that work involved significant walking] ***Cunningham v. Pittsburg and Midway Coal Co.***, 7 BLR 1-93 (1984).

[adjudicator rationally concluded two medical opinions insufficient to rebut due to subsequent medical opinions or pulmonary function studies] ***Bates v. Director, OWCP***, 7 BLR 1-113 (1984)

[adjudicator erred at subsection(b)(2) by rejecting medical report as inconsistent with blood gas study adjudicator viewed as abnormal] ***Sheckler v. Clinchfield Coal Co.***, 7 BLR 1-128 (1984).

[qualifying or non-qualifying nature of particular blood gas study not conclusive evidence of miner's ability to engage in usual coal mine or comparable and gainful work, absent medical opinion regarding relevancy of those values] ***Nelson v. Kaiser Steel Corp.***, 7 BLR 1-283 (1984); ***Strunk v. Monarch Coal Inc.***, 7 BLR 1-49 (1984).

[adjudicator must consider physical requirements of miner's usual coal mine work in conjunction with medical opinions regarding capacity for work in general when considering ability to perform usual coal mine work] ***Stanley v. Eastern Associated Coal Corp.***, 6 BLR 1-1157 (1984); *see also* ***Parsons v. Black Diamond Coal Co.***, 7 BLR 1-236 (1984).

[medical report finding "percentage" of disability relevant and must be weighed in light of exertional requirements of claimant's usual coal mine work] ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Stanley v. Eastern Associated Coal Corp.***, 6 BLR 1-1157 (1984); ***Looney v. Jim Walters Resources, Inc.***, 6 BLR 1-361 (1983).
[age, educational background, and work experience non-respiratory factors not relevant in determining whether miner can perform usual coal mine employment] ***Allen v.***

Alabama By-Products Corp., 6 BLR 1-1094 (1984). ***Bolyard v. Peabody Coal Co.***, 6 BLR 1-767 (1984); ***Byrne v. Allied Chemical Corp.***, 6 BLR 1-734 (1984); ***Coletti v. Consolidation Coal Co.***, 6 BLR 1-698 (1983); ***Gilliam v. Director, OWCP***, 7 BLR 1-519 (1984).

[irrational for adjudicator to find medical opinion sufficient to invoke presumption under subsection (a)(4) unreliable and insufficient to establish total disability when same opinion weighed on rebuttal under subsection (b)(2)] ***Wike v. Bethlehem Mines Corp.***, 7 BLR 1-593 (1984).

[Fourth Circuit held that adjudicator properly found no subsection (b)(2) rebuttal based on claimant's, co-worker, brother's testimony and medical report finding dyspnea; adjudicator concluded that this evidence outweighed three medical opinions that claimant suffered no impairment and could perform regular coal mining job, as well as four (out of five) non-qualifying ventilatory studies and two non-qualifying blood gas studies] ***Zbosnik v. Badger Coal Co.***, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985).

[Sixth Circuit held nothing in statute or regulations requires consideration of age as factor in determining whether presumption of total disability due to pneumoconiosis is rebutted under subsection (b)(2) by showing miner can perform usual coal mine work] ***Kolesar v. The Youghiogheny and Ohio Coal Co.***, 760 F.2d 728, 7 BLR 2-211 (6th Cir. 1985).

[no requirement that doctor actually view miner's usual coal mine work before determining whether miner could perform that work] ***Wright v. Director, OWCP***, 7 BLR 1-475 (1984).

[if physician has inaccurate understanding of usual coal mine work requirements, adjudicator must decide whether claimant retains functional capacity, from a respiratory standpoint, to perform rigors of that job] ***Hardy v. Director, OWCP***, 7 BLR 1-722 (1985); ***Daft v. Badger Coal Co.***, 7 BLR 1-124 (1984); ***Grezlik v. North American Coal Corp.***, 4 BLR 1-298 (1981).

[proper inquiry under subsection (b)(2) not whether particular clinical test yield qualifying or non-qualifying results, but whether record as whole establishes that miner is not totally disabled] ***Sykes v. Itmann Coal Co.***, 7 BLR 1-820 (1985).

[non-qualifying ventilatory and blood gas studies not sufficient by themselves to establish rebuttal by showing ability to do usual coal mine work] ***Patellos v. Director, OWCP***, 7 BLR 1-661 (1985); ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Pruett v. Pickands Mather & Co.***, 6 BLR 1-824 (1984).

[medical opinion not assessing degree of claimant's impairment of physical limitations cannot support rebuttal under subsection (b)(2) by establishing ability to do usual coal

mine work] ***Aleshire v. Central Coal Co.***, 8 BLR 1-70 (1985).

[medical opinion relying on qualifying tests may still be used for rebuttal] ***Hoffman v. B & G Construction Co., Inc.***, 8 BLR 1-65 (1985); ***Carpeta v. Mathias Coal Co.***, 7 BLR 1-145 (1984).

DIGESTS

The Seventh Circuit rejected the Fourth Circuit's decisions in ***Hampton***, 678 F.2d 506 (4th Cir. 1982) and ***Whicker***, 733 F.2d 346 (4th Cir. 1984), which held that objective tests could not be used as the principal or exclusive means of rebutting the presumption under subsection (b)(2). The court noted that, except for the provision that no claim shall be denied solely on the basis of the results of a chest roentgenogram, the statute imposed no limitation on the use of objective evidence, which it stated was the best available indicator of the extent of a respiratory impairment. ***Kuehner v. Zeigler Coal Co.***, 788 F.2d 439, 8 BLR 2-199 (7th Cir. 1986).

The Fourth Circuit reversed its holding that non-qualifying test results could not be used as the principal or exclusive means of rebutting the presumption as stated in, ***Whicker v. U.S. Department of Labor, Benefits Review Board***, 733 F.2d 346, 6 BLR 2-42 (4th Cir. 1984); *see also* ***Hampton v. U.S. Dept. of Labor, Benefits Review Board***, 678 F.2d 506, 4 BLR 2-82 (4th Cir. 1982), reasoning that its decision was required by the statutory directive in 30 U.S.C. §923(b) that, in the adjudication of claims, all relevant evidence must be considered. ***Stapleton v. Westmoreland Coal Co.***, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986); *see also* ***Parks v. Director, OWCP***, 9 BLR 1-82 (1986).

In a case arising in the Fourth Circuit, the Board affirmed the administrative law judge's reliance on a medical opinion based principally on non-qualifying objective studies to establish subsection (b)(2) rebuttal. The Board noted that this was not a case where bare non-qualifying test results were offered in evidence without supporting medical interpretation related to the extent of disability suffered. ***Wagner v. Badger Coal Co.***, 9 BLR 1-69 (1986).

In a case arising in the Fourth Circuit, the Board vacated the administrative law judge's subsection (b)(2) rebuttal finding and remanded for proper consideration of the probative evidence which consists of blood gas studies, pulmonary function studies, and physicians' interpretations thereof under ***Stapleton***, 785 F.2d 424 (4th Cir. 1986). ***Parks v. Director, OWCP***, 9 BLR 1-82 (1986).

The Board has stated that non-qualifying objective studies are relevant rebuttal evidence and may be part of the overall rebuttal inquiry in light of all relevant evidence. ***Parks v. Director, OWCP***, 9 BLR 1-82 (1986); ***Schoenecker v. Allegheny River***

Mining Co., 8 BLR 1-501 (1986); ***Sykes v. Itmann Coal Co.***, 7 BLR 1-820 (1985); ***White v. Director, OWCP***, 7 BLR 1-348 (1984); ***Drenning v. Delta Mining Co.***, 6 BLR 1-60 (1983).

The Tenth Circuit held that on rebuttal an administrative law judge must consider medical evidence attributing blood gas study results to a miner's age and altitude. ***Big Horn Coal Co. v. Temple***, 793 F.2d 1165, 9 BLR 2-67 (10th Cir. 1986).

The effect of altitude on arterial oxygen pressure as measured in blood gas studies is relevant to rebuttal under subsection (b)(2). ***Nelson v. Kaiser Steel Corp.***, 7 BLR 1-283 (1984); ***Casias v. Director, OWCP***, 6 BLR 1-438 (1983); ***Martino v. United States Fuel Co.***, 6 BLR 1-33 (1983); *see also* ***Big Horn Coal Co. v. Temple***, 793 F.2d 1165, 9 BLR 2-67 (10th Cir. 1986).

The Court of Appeals for the Sixth Circuit has held that an administrative law judge's finding that the miner does not have a disabling respiratory impairment is equivalent to a finding that the miner can perform his usual coal mine work where there is no evidence of any other impairment. ***Neace v. Director, OWCP***, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989).

b. Section 727.203(b)(2)

(3). Determining the Miner's Ability to do Comparable and Gainful Work

CASE LISTINGS

[burden on opposing party entitlement to show availability of and ability to perform comparable and gainful work by identifying type and location of jobs requiring miner's skills] ***Fletcher v. Central Appalachian Coal Co.***, 1 BLR 1-785 and 1 BLR 1-980 (1978); *see also* ***Lewis v. Pittsburg & Midway Coal Co.***, 6 BLR 1-643 (1983); ***Fletcher*** standard limited to establishing rebuttal by showing ability to perform comparable and gainful work] ***Lewis****, supra*; ***Waugh v. Valley Camp Coal Co.***, 6 BLR 1-430 (1983); ***Chach v. Harmar Coal Co.***, 6 BLR 1-493 (1983); ***Porkorny v. U.S. Steel Corp.***, 6 BLR 1-67 (1983).

[no subsection (b)(2) rebuttal under ***Fletcher*** where employer failed to show availability of comparable and gainful work within *immediate* area of claimant's home; adjudicator found 65 mile radius unreasonable measure of immediate area] ***Lewis v. Pittsburg & Midway Coal Co.***, 6 BLR 1-643 (1983).

[no subsection (b)(2) rebuttal where employer failed to show comparability between claimant's usual coal mine employment and last job as an auditor; also failed to demonstrate claimant currently could perform previous auditing job or any comparable and gainful work] ***Bertz v. Consolidation Coal Co.***, 6 BLR 1-820 (1984).

[rational for adjudicator to discredit vocational expert's report that miner could perform certain comparable and gainful work given 15 percent impairment of pulmonary capacity reported by 1974 West Virginia Pneumoconiosis Board report; adjudicator found report outdated: 1977 report by same Board reflected 40% impairment] ***McCune v. Central Appalachian Coal Co.***, 6 BLR 1-996 (1984).

[adjudicator properly found positions comparable by comparing skills of former coal mine employment with those required in present teaching position] ***Caton v. Amax Coal Co.***, 6 BLR 1-571 (1983); ***Francis v. Slab Fork Coal Co.***, 7 BLR 1-666 (1985).

[claimant's answers on DOL forms alone provide sufficient basis to consider *generally* whether skills and abilities required by usual coal mine employment are comparable to those current non-coal mine employment; adjudicator's failure to make comparison constituted reversible error] ***Dempsey v. Director, OWCP***, 8 BLR 1-269 (1985).

DIGESTS

If claimant is performing his usual coal mine work, then the adjudicator need not consider vocational factors for "comparable and gainful work." Consider vocational factors only when determining "comparable and gainful work." ***Adams v. Peabody Coal Co.***, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); ***Ramey v. Kentland Elkhorn Coal Corp.***, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); ***Taft v. Alabama By-Products Corp.***, 733 F.2d 1518, 6 BLR 2-68 (11th Cir. 1984); ***Foreman v. Peabody Coal Co.***, 8 BLR 1-371 (1985); ***Ousley v. National Mines Corp.***, 6 BLR 1-560 (1983).

The administrative law judge's finding that rebuttal was not established at 20 C.F.R. §727.203(b)(2) was affirmed because the record contained no medical opinion stating that the miner was able to do his usual coal mine employment, and the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment did not satisfy employer's burden at 20 C.F.R. §727.203(b)(2) to establish that claimant is not totally disabled for any reason, *see* ***Youghiogheny & Ohio Coal Co. v. Webb***, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); ***York v. Benefits Review Board***, 819 F.2d 134, 137, 10 BLR 2-99, 2-103-04 (6th Cir. 1987). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

11/99