

PART II
DEFINITIONS

I. COMPARABLE AND GAINFUL WORK

Comparable and gainful work has been defined as that employment that is "available in the immediate area of [the miner's] residence requiring the skills and abilities comparable to those of any work in the coal mines in which the miner previously engaged with some regularity and over a substantial period of time." **Fletcher v. Central Appalachian Coal Co.**, 1 BLR 1-980, 1-987 (1978). In **Bentley v. Director, OWCP**, 7 BLR 1-612 (1984), the Board held that the miner's age, education, and work experience are relevant in determining whether the miner can perform or is performing comparable and gainful work. See also 20 C.F.R. §410.412.

The party opposing entitlement must actually identify the employment argued to be "comparable and gainful" work and show that such work is available. See **Fletcher, supra**, 1 BLR at 1-986. The Fourth and Sixth Circuits have explicitly rejected the Board's holding in **Fletcher, supra**, that availability can only be shown by demonstrating that the miner had a reasonable opportunity to be hired. **Shamrock Coal Co., Inc. v. Lee**, 751 F.2d 187, 7 BLR 2-96 (6th Cir. 1985); **Central Appalachian Coal Co. v. Benefits Review Board [Fletcher]**, 679 F.2d 1086, 4 BLR 2-92 (4th Cir. 1982). The Sixth Circuit added that the party opposing entitlement need not establish the existence of actual job vacancies to show job availability. **Lee, supra**.

In determining whether work is comparable, the level of physical exertion of a job in relation to the miner's usual coal mine work is important. Identical levels of exertion are not required, however, for a job to be considered comparable. **Lynch v. Director, OWCP**, 6 BLR 1-1088 (1984). The Third Circuit, while acknowledging that other factors are relevant to the comparability determination, held that relative compensation is the prime criterion. **Echo v. Director, OWCP**, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984). The Board has declined to follow **Echo** in cases not arising in the Third Circuit, holding instead that, while all aspects of the jobs need not be comparable, the comparability determination must consider the required skills, abilities, and physical exertion and must be based on all the factors as no one factor is dispositive. **Francis v. Slab Ford Coal Co.**, 7 BLR 1-666 (1985)(Smith, J., dissenting); but see **Romanoski v. Director, OWCP**, 8 BLR 1-407 (1985).

The Sixth and Tenth Circuits have held that the comparability determination is *not* based on whether the present job is better, from an economic standpoint, than the former mine work but rather whether the skills and abilities required in the present job

are comparable to the duties in the former mine work. The jobs must be compared to determine health impairment, *i.e.*, whether the claimant is physically sound, rather than earning capacity. **Ratliff v. Benefits Review Board**, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987); **Big Horn Coal Co. v. Director, OWCP [Alley]**, 897 F.2d 1050, 13 BLR 2-372 (10th Cir. 1990). Finally, the Seventh Circuit, reviewing the holdings in **Echo** and **Ratliff**, held that the statute requires job comparability, not identity. The Court determined that the administrative law judge should consider comparability in skills, abilities, status, responsibility and pay. **Pate v. Director, OWCP**, 834 F.2d 675, 10 BLR 2-339 (7th Cir. 1987).

CASE LISTINGS

[lay testimony may be relied on to establish exertional level of prior coal mine employment or current physical capabilities in determination of ability to do comparable and gainful work] **Neal v. Clinchfield Coal Co.**, 1 BLR 1-427, 1-431 (1978).

[fact-finder must make specific findings regarding the exertional levels and skills required by jobs to be compared] See *e.g.*, **Sebben v. Director, OWCP**, 2 BLR 1-177, 1-185 (1979); **Young v. Harper Valley Coal Co.**, 2 BLR 1-167, 1-174 (1979); **Cutter v. Director, OWCP**, 1 BLR 1-691, 1-693 (1978).

[Third Circuit list relevant factors in considering comparability of present employment; Court stressed if current compensation is less is strong evidence that present work is not comparable] **Echo v. Director, OWCP**, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984); see also **Fidler v. Director, OWCP**, No. 88-3702 (3d Cir., March 29, 1989)(unpublished) [**Echo** applied to Part 718].

[where only difference between current work and usual coal mine work was the level of physical demands, claimant had not met burden of proving total disability] **Kane v. Director, OWCP**, 6 BLR 1-791, 1-793 (1984).

[miner's non-coal mine and mining jobs need not be identical to establish comparable and gainful work; physical exertion level may be considered] **Caton v. Amax Coal Co.**, 6 BLR 1-571, 1-575 (1983).

[Section 727.203(b)(2) rebuttal not established where employer failed to show comparability between miner's coal mine and last job and that claimant currently could perform such work] **Bertz v. Consolidation Coal Co.**, 6 BLR 1-820, 1-823 (1984).

[Section 727.203(b)(2) rebuttal not established under **Fletcher** where employer failed to show availability of comparable and gainful work within *immediate* area, here a 65-mile radius, of claimant's home] **Lewis v. Pittsburg & Midway Coal Co.**, 6 BLR 1-643, 1-

646 (1983); see also **Temple v. Big Horn Coal Co.**, 7 BLR 1-573, 1-575 (1984).

[miner's current supervisory job not comparable to former coal mine job as a railroad car dropper based on dissimilarity of exertion, skills, and abilities required by the two jobs] **Carter v. Beth-Elkhorn Corp.**, 7 BLR 1-15, 1-16 (1984).

[physical exertion of current job and former coal mine job need not be identical] **Chabala v. Director, OWCP**, 7 BLR 1-6, 1-8 (1984); **Lynch v. Director, OWCP**, 6 BLR 1-1088, 1-1090 (1984).

[Sixth Circuit followed Fourth Circuit's decision in **Fletcher**, rejecting the reasonable-opportunity-to-be-hired test; employer need not establish the existence of actual job vacancies to show job availability] **Shamrock Coal Co., Inc. v. Lee**, 751 F.2d 187, 7 BLR 2-96, 2-99 (6th Cir. 1985).

[Board applied the reasonable-opportunity-to-be-hired test in a case not arising in the Fourth Circuit] **Temple v. Big Horn Coal Co.**, 7 BLR 1-573 (1984).

[factors such as age and educational background, while *not* relevant to determining ability to perform usual coal mine work, may be considered in the comparability determination] See e.g., **Bentley v. Director, OWCP**, 7 BLR 1-612 (1984); **Byrne v. Allied Chemical Corp.**, 6 BLR 1-734, 1-736 n.2 (1984); **Coletti v. Consolidation Coal Co.**, 6 BLR 1-698, 1-700 (1983), *rev'd on other grounds*, No. 83-3922 (6th Cir., Dec. 7, 1984)(unpublished).

[comparability of skills and abilities must be established as mere finding that current work is steady and productive not sufficient to establish comparable and gainful work] **Chabala v. Director, OWCP**, 7 BLR 1-6, 1-7 (1984).

[claimant's answers on appropriate DOL forms alone provide sufficient basis for *general* consideration of whether skills and abilities required by usual coal mine employment are comparable to those of current non-coal mine employment, **Caton**, 6 BLR 1-571 (1983); fact-finder's failure to make comparison constituted reversible error] **Dempsey v. Director, OWCP**, 8 BLR 1-269 (1985).

[application of **Echo v. Director, OWCP**, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984), in this Third Circuit case; Circuit's emphasis on compensation as prime criterion of comparability could support finding that higher paying non-mining job comparable to prior coal mine employment, even though not comparable in physical exertional requirements and working conditions] **Romanoski v. Director, OWCP**, 8 BLR 1-407 (1985).

DIGESTS

The Sixth and Tenth Circuits have held that the comparability determination is *not* based on whether the present job is better, from an economic standpoint, than the former mine work but rather whether the skills and abilities required in the present job are comparable to the duties in the former mine work. The jobs must be compared to determine health impairment, *i.e.*, whether the claimant is physically sound, rather than earning capacity. ***Ratliff v. Benefits Review Board***, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987); ***Big Horn Coal Co. v. Director, OWCP, [Alley]***, 897 F.2d 1050, 13 BLR 2-372 (10th Cir. 1990).

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Relying upon ***Echo v. Director, OWCP***, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984), the Board reversed the administrative law judge's award of benefits, holding that claimant's present position as a Sub-District Manager constitutes comparable and gainful employment pursuant to 20 C.F.R. §718.204(b)(2) inasmuch as he currently earns a substantially higher salary than that which he previously earned as a miner. ***Garcia v. Director, OWCP***, 15 BLR 1-8 (1991).

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