## PART II

## DEFINITIONS

### E. TOTAL DISABILITY

Section 402(f)(1), 30 U.S.C. §902(f)(1), of the Act states that the term "total disability" is, subject to the exceptions stated therein, defined by the Secretary of Health and Human Services for Part B claims and by the Secretary of Labor for Part C claims. The Act specifically requires that a miner shall be considered totally disabled when pneumoconiosis prevents the miner from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which the miner previously engaged with some regularity and over a substantial period of time. Total disability is defined in the regulations at 20 C.F.R. §§410.412, 718.204(b). *See also* 20 C.F.R. §§727.3, 727.4(b). The affect of *lay* testimony on establishing total disability is discussed in the Desk Book at Part IV.D.5.

### CASE LISTINGS

[Sixth Circuit recognized that full-time work cannot be conclusive evidence of no total disability; regularity of work performed and ability to perform work properly must also be considered] ***Farmer v. Weinberger***, 519 F.2d 627, 630-631 (6th Cir. 1975).

[mere fact of employment does not preclude finding of total disability; circumstances of employment may be consistent with total disability, at times characterized by makeshift position created to carry an individual, sporadic work, poor performance and marginal earnings] ***Mondragon v. C. F. & I. Steel Corp.***, 1 BLR 1-323 (1977); *see also* ***Felthager v. Weinberger***, 529 F.2d 130 (10th Cir. 1976); ***Carr v. Bethlehem Mines Corp.***, 1 BLR 1-734 (1978).

[total disability is established if pneumoconiosis prevents miner from engaging in comparable and gainful work twelve months or more; may be established by medical criteria alone or consider other factors such as age, education, work experience, etc.] 20 C.F.R. §410.412; ***Abney v. Republic Steel Corp.***, 1 BLR 1-51 (1976).

[test of total disability under Section 402(f) of the Act is a functional one not a medical one; but 20 C.F.R. §410.424 provides that medical considerations *alone* may be enough] ***Adams v. Eastern Associated Coal Corp.***, 1 BLR 1-18 (1976).
[Supreme Court upheld constitutionality of Section 402(f) of the Act notwithstanding that

it might allow finding of total disability based on inability to perform usual coal mine work where miner might be capable of performing other work] ***Usery v. Turner Elkhorn Mining Co.***, 428 U.S. 1, 3 BLR 2-36 (1976).

[deceased worker's employment in a mine at time of death shall not be used as conclusive evidence that miner was not totally disabled (30 U.S.C. §902(f)(1)(B)(i)); but 20 C.F.R. §727.205(b) requires that there must be changed circumstances of employment indicative of reduced ability to perform coal mine work; it is employer's burden on rebuttal to show that decedent's work performance at the time of death indicated no reduced ability to perform coal mine work] ***Martin v. Regina Fuel Corp.***, 6 BLR 1-1206, 1-1208 (1984).

[Section 410.426(a) requires consideration of age, education and work experience to determine possible comparable and gainful work. 20 C.F.R. §410.426(a)] ***Bentley v. Director, OWCP***, 7 BLR 1-612, 1-614 (1984); *see* 20 C.F.R. §410.426(e), (f); ***Coletti v. Consolidation Coal Co.***, 6 BLR 1-698 (1983), *rev'd on other grounds* No. 83-3922 (6th Cir., Dec. 7, 1984)(unpublished); ***Allen v. Alabama By-Products Corp.***, 6 BLR 1-1094 (1984).

[Sixth Circuit held that vocational factors, *i.e.*, age, should be considered regarding possibility of comparable employment; such factors not relevant if record substantiates that miner can perform normal coal mine work] ***Kolesar v. The Youghiogheny and Ohio Coal Co.***, 760 F.2d 728, 731, 7 BLR 2-211, 2-215-216 (6th Cir. 1985).

[if claimant meets durational requirements of Section 410.412 and satisfies criteria found in the Appendix to Subpart D, decedent may be found to be totally disabled due to pneumoconiosis at the pertinent time in the absence of evidence rebutting such finding, and need not show that pneumoconiosis was the primary cause of the decedent's total disability] ***Dunlap v. Director, OWCP***, 8 BLR 1-375, 1-376 (1985).

## DIGESTS

The Board held that the administrative law judge is not required by 20 C.F.R. §718.204(e)(3)(iii) to consider certain vocational evidence to be supportive of total disability, since there is no requirement that a claimant's changed circumstances of employment be used to affirmatively support a finding of total disability. ***Mazgaj v. Valley Camp Coal Co.***, 9 BLR 1-201, 1-204 (1986).

The Board held that total disability is defined as the miner's inability, due to pneumoconiosis, to perform his or her usual coal mine work or to engage in gainful work in the immediate area of the miner's residence requiring the skills and abilities comparable to those required for any previous coal mine work in which the miner

engaged with some regularity and over a substantial period of time. 20 C.F.R. §718.204(b); *see also* 30 U.S.C. §902(f). Further, the Board ruled that Section 718.204(c) provides that, in the absence of contrary probative evidence, total disability shall be established by one of several alternative methods. Subsection (c) does not establish total disability upon a mere showing of evidence satisfying any one (or more) of the five alternative methods, but rather provides that such evidence shall establish total disability only in the absence of contrary probative evidence. ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-195, 1-197-198 (1986); *see* ***Gee v. W.G. Moore and Sons***, 9 BLR 1-4, 1-6 (1986).

The Board held that Section 718.204(c) does not establish a presumption of total disability upon a showing of evidence qualifying under any of the five methods but rather provides that such evidence shall establish total disability in the absence of contrary probative evidence. ***Gee v. W.G. Moore and Sons***, 9 BLR 1-4, 1-6 (1986).

The Board held that the term "contrary probative evidence" is not limited to a consideration of medical evidence of the same category or type; rather, the term refers to all evidence (medical and otherwise) that is contrary and probative. ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19, 1-21 (1987). The Board further held that if contrary probative evidence exists, the fact finder must assign this evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. ***Fields****, supra*; *see* ***Rafferty v. Jones & Laughlin Steel Corp.***, 9 BLR 1-231, 1-232 (1987). The Board held that, in considering whether a claimant has established total respiratory disability pursuant to Section 718.204(c), all relevant evidence (medical and otherwise) may be considered. ***Fields****, supra* at 1-22; ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-195, 1-197-198 (1986).

The Board held that under the plain language of Section 411(c)(4) and its implementing regulation, 20 C.F.R. §718.305, claimant is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic, nor arose out of coal mine employment to invoke the presumption. ***Tanner v. Freeman United Coal Co.***, 10 BLR 1-85, 1-86-87 (1987).

The Seventh Circuit held that pursuant to 30 U.S.C. §902(f)(1)(A) an applicant, to be considered totally disabled under the Act, does not have to be incapable of doing any gainful work, but only incapable of doing the sort of work he did in the mines before the onset of his disease. The Court held that the statute requires comparability, *not* identity. In the instant case, the Court found that the jobs are comparable in skills and abilities required, in status and responsibility, and so far as the record reflects, in pay. ***Pate v. Director, OWCP***, 834 F.2d 675, 676-677, 10 BLR 2-339, 2-340-341 (7th Cir. 1987).

The Board held that it is apparent that if Section 718.204(b) is interpreted as requiring claimant to prove not only inability to perform his usual coal mine work but also inability to perform comparable and gainful work, it would be imposing upon claimant a burden

of proof that various Courts of Appeals have not imposed upon claimants under Section 223(d) of the Social Security Act. Thus, the criteria in the Secretary of Labor's regulations for determining total disability would be more restrictive than the criteria under Section 223(d) of the Social Security Act. The Board therefore declined to interpret Section 718.204(b) of the implementing regulations in such a manner. Accordingly, it was held that, under 20 C.F.R. Part 718, once claimant has established an inability to perform his usual coal mine employment, a *prima facie* case for total disability exists. Thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove that claimant is able to perform comparable and gainful employment as defined pursuant to 20 C.F.R. §718.204(b)(2). ***Taylor v. Evans and Gambrel Co., Inc.***, 12 BLR 1-83, 1-87 (1988).

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