

## PART VI

### ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 410

#### C. TOTAL RESPIRATORY DISABILITY

##### 1. SECTION 410.412

The Act and regulations provide that a miner's pneumoconiosis will be deemed totally disabling if it "prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time." 30 U.S.C. §902(f)(1)(A); 20 C.F.R. §410.412. Thus, total respiratory disability is defined in terms of work capability. See **Sykes v. Itmann Coal Co.**, 2 BLR 1-1089 (1980). Section 410.412 also requires that the totally disabling respiratory impairment must be expected to result in death, or last at least twelve months.

The Board has held that once a miner demonstrates an inability to do his usual coal mine work due to pneumoconiosis, a *prima facie* case of total disability has been established under Section 410.412. For a complete discussion of what constitutes a miner's usual coal mine work, see Part II.G. of the Desk Book. The burden of proof shifts to the party opposing entitlement to show the miner's pneumoconiosis does not prevent him from engaging in gainful work available in the immediate area of his residence and requiring skills and abilities comparable to those of any work in a coal mine or mines in which the miner previously engaged with some regularity over a substantial period of time. **Fletcher v. Appalachian Coal Co.**, 1 BLR 1-980 (1978), *aff'd sub nom. Central Appalachian Coal Co. v. Director, OWCP [Fletcher]*, 679 F.2d 1086, 4 BLR 2-92 (4th Cir. 1982). Comparable and gainful work is detailed at Part II.I. of the Desk Book.

Ability to perform comparable and gainful work may be proven in either of two ways. First, it may be established by showing the existence of such comparable and gainful work, and showing that the miner is *capable* of performing it. **Fletcher, supra**. Second, it may be established by showing that the miner is in fact *engaging* in work that is deemed comparable and gainful. **Young v. Harper Valley Coal Co.**, 2 BLR 1-167 (1979). Evidence of the miner's continued coal mine employment may be used to prove that he is not totally disabled. The mere fact that the miner continued to engage in some type of coal mine work after filing a claim for benefits, or up until his death, however, is not conclusive on the issue of whether he is or was totally disabled. For a full discussion of this issue see Part II.H. of the Desk Book.