

PART IX

REGULATORY PRESUMPTIONS

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

2. REBUTTAL OF THE INTERIM PRESUMPTION GENERALLY

a. Section 727.203(b)(1)

Section 727.203(b)(1) allows the party opposing entitlement to rebut the interim presumption by showing that the miner is, in fact, doing his usual coal mine work or comparable and gainful work. The use of current employment to establish rebuttal is modified to some extent by 20 C.F.R. §727.205. See Part II H. of the Desk Book. That section provides that a living miner may show total disability despite continued coal mine employment if there are changed circumstances of employment indicative of reduced ability to perform his coal mine work. 20 C.F.R. §727.205(a), (b). A determination of whether changed circumstances exists is based primarily on the lay evidence of record. ***Tucker v. Consolidation Coal Co.***, 5 BLR 1-604 (1983); see also ***George v. Williamson Shaft Contracting Co.***, 8 BLR 1-91 (1985); ***Zamora v. C. F. & I. Steel Corp.***, 7 BLR 1-568 (1984).

In determining whether the miner is performing "comparable and gainful work," the administrative law judge must compare the skills, abilities, and physical exertion required by the miner's present employment with those required by his former coal mine employment. ***Parks v. Director, OWCP***, 9 BLR 1-83 (1986); ***Dempsey v. Director, OWCP***, 8 BLR 1-269 (1985); ***Francis v. Slab Fork Coal Co.***, 6 BLR 1-571 (1983). The similarity of physical exertion required by the current job and the former coal mine employment is one factor to be considered, but identical levels of physical exertion are not required. ***Parks, supra***; ***Dempsey, supra***; ***Carter v. Beth-Elkhorn Corp.***, 7 BLR 1-15 (1984); ***Chabala v. Director, OWCP***, 7 BLR 1-6 (1984); ***Lynch v. Director, OWCP***, 6 BLR 1-1088 (1984); ***Caton v. Amax Coal Co.***, 6 BLR 1-571 (1983). Furthermore, the determination of the nature of the miner's former coal mine work, including its physical requirements, is within the purview of the trier-of-fact. ***Heavlin v. Consolidation Coal Co.***, 6 BLR 1-1209 (1984).

The Third Circuit has set forth a different "comparability analysis" that the Board will follow only in cases arising in the Third Circuit. The Third Circuit held that relative compensation, working conditions, levels of exertion, educational requirements, location of employment, and skills and abilities are relevant factors to be considered in determining the comparability of the miner's present employment with his former coal mine employment. Among these factors, the Court stressed compensation, stating that

the fact that an applicant's current earnings are less than those of his fellow workers in the mines provides strong evidence that his present work is not comparable. **Echo v. Director, OWCP**, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984) *vacating and remanding*, 6 BLR 1-686 (1983); *see also Dempsey v. Director, OWCP*, 8 BLR 1-269 (1985).

The Sixth Circuit has held that the proper standard for rebuttal pursuant to (b)(1) is whether the skills and abilities used by the miner in his new job are "similar" or "equivalent" to those formerly used in the mine. The Court expressly rejected the Board's "balancing test" and instead held that only the miner's physical requirements on the two jobs are to be compared. **Ratliff v. Benefits Review Board**, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987).

CASE LISTINGS

[to establish rebuttal at subsection (b)(1), miner must be working at time of hearing] **Coffey v. Director, OWCP**, 5 BLR 1-404 (1982); **Himes v. Rochester & Pittsburgh Coal Co.**, 5 BLR 1-49 (1982).

[adjudicator's finding of subsection (b)(1) rebuttal upheld when neither claimant nor miner's co-workers testified changed circumstances existed] **Mills v. Itmann Coal Co.**, 5 BLR 1-96 (1982).

[changed circumstances of employment found where testimony established diminished ability of miner to perform usual work and co-workers often stepped in for miner while he caught his breath] **Tucker v. Consolidation Coal Co.**, 5 BLR 1-604 (1983).

[adjudicator's finding of no subsection (b)(1) rebuttal on basis of "changed circumstances" of employment affirmed as miner continued to work due to financial necessity and was being helped on job by co-worker] **Watkins v. G. M. & W. Coal Co.**, 6 BLR 1-924 (1984).

[section 727.205(c) not applicable if no evidence establishes changed circumstances of employment that could preclude use of miner's employment as conclusive evidence of no total disability] **Thomas v. Jim Walter Resources, Inc.**, 7 BLR 1-189 (1984).

[at subsection (b)(1), adjudicator must first determine miner's usual coal mine work and if there are changed circumstances; if not usual coal mine work, adjudicator must determine if present job is comparable and gainful work] **Daft v. Badger Coal Co.**, 7 BLR 1-124 (1984); *see also George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91 (1985); **Sexton v. Southern Ohio Coal Co.**, 7 BLR 1-411 (1984); **Krantwashl v. Kaiser Steel Corp.**, 7 BLR 1-263 (1984).

[changed circumstances must be considered before present employment may be used

to bar entitlement; "changed circumstances" usually are reduced ability to perform coal mine work] **Bizzarri v. Consolidation Coal Co.**, 7 BLR 1-343 (1984); **Watkins v. G. M. & W. Coal Co.**, 6 BLR 1-924 (1984); see also **Sexton v. Southern Ohio Coal Co.**, 7 BLR 1-411 (1984).

[adjudicator properly found subsection (b)(1) rebuttal where miner had taken few sick days, never informed employer he was unable to do his work or required assistance and had neither received marginal earnings nor engaged in makeshift employment]. **Sexton v. Southern Ohio Coal Co.**, 7 BLR 1-411 (1984).

["usual coal mine work" is most recent job performed regularly and over substantial period of time except where assigned because of miner's inability to perform duties of prior more strenuous work] **Zamora v. C. F. & I. Steel Corp.**, 7 BLR 1-568 (1984); **Krantwashl v. Kaiser Steel Corp.**, 7 BLR 1-263 (1984); **Daft v. Badger Coal Co.**, 7 BLR 1-124 (1984).

[adjudicator's finding of subsection (b)(1) rebuttal affirmed; although miner's job less strenuous than previous job, adjudicator found miner's performance in either position satisfactory; failure to determine which job was usual coal mine work harmless error] **Spadafore v. Director, OWCP**, 8 BLR 1-82 (1985).

[adjudicator properly relied on testimony that miner had taken easier job to continue to support family, along with circumstances of miner's employment, to find rebuttal not established] **Peskie v. United States Steel Corp.**, 8 BLR 1-126 (1985).

DIGESTS

In determining "comparable and gainful work" the work to be compared with claimant's usual coal mine work is the work that claimant was performing at the time of the hearing. **Parks v. Director, OWCP**, 9 BLR 1-82 (1986).

The Board affirms the administrative law judge's finding of (b)(1) rebuttal because claimant, a federal mine inspector, is doing his usual coal mine work. Board follows **Mounts**, 8 BLR 1-425 (1985) and **Moore**, 4 BLR 1-40.2 (1981). **Uhl v. Consolidation Coal Co.**, 10 BLR 1-72 (1987).

The administrative law judge's failure to evaluate entitlement to benefits pursuant to 20 C.F.R. §410.490 is harmless error because the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(1) precludes entitlement under Section 410.490(c)(1). **Bartley v. Director, OWCP**, 12 BLR 1-89 (1988)(Tait, J., concurring).

The Fourth Circuit held that voluntary overtime work may *not* be considered in defining

a miner's usual coal mine work. ***Shreve v. Director, OWCP***, 864 F.2d 32, 12 BLR 2-85 (4th Cir. 1988).

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