

BRB No. 91-1264 BLA

HENRY CORT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Matthew P. Levin (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-BLA-7316) of Administrative Law Judge Jeffrey Tureck denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969,

as amended, 30

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

U.S.C. §901 et seq. (the Act). This case is on appeal to the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with approximately eleven years of qualifying coal mine employment, and found that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), based on the Director's stipulation that the x-ray evidence of record established the existence of pneumoconiosis. The administrative law judge further found, however, that the evidence of record established rebuttal pursuant to 20 C.F.R. §727.203(b)(1) and (b)(2), and that claimant failed to establish entitlement pursuant to the provisions at 20 C.F.R. Part 410, Subpart D, 20 C.F.R. §410.490, or 20 C.F.R. Part 718. Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's finding that rebuttal had been established at Section 727.203(b)(1) and (b)(2), and remanded this case for reconsideration of the evidence of record relevant to rebuttal at Section 727.203(b)(1), (b)(2) and (b)(3), pursuant to the applicable standard for each rebuttal method as articulated by the United States Court of Appeals for the Third Circuit, wherein appellate jurisdiction of this claim lies. Cort v. Director, OWCP, BRB No. 88-332 BLA (Oct. 17, 1990)(Bonfanti, J., dissenting) (unpub.). On remand, the administrative law judge

found rebuttal established pursuant to Section 727.203(b)(3), and consequently denied benefits. Claimant appeals, challenging the administrative law judge's rebuttal findings. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding rebuttal established pursuant to Section 727.203(b)(3) based on the opinions of Drs. Mariglio and Luschinsky, because these physicians did not discuss whether claimant was capable of performing his usual coal mine employment.¹ Claimant's argument is without merit. In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must establish that the miner's pneumoconiosis is not a contributing cause of total disability. Bernardo v. Director, OWCP, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986); Carozza v. United States Steel Corp., 727 F.2d 74, 6 BLR

¹ As the Board has previously affirmed the administrative law judge's crediting of the opinions of Drs. Mariglio and Luschinsky over that of Dr. Kraynak, and no exception to the law of the case doctrine has been demonstrated, we need not address claimant's arguments concerning the probative value of these opinions. See Brinkley v. Peabody Coal Co., 14 BLR 1-147 (1990).

2-15 (3d Cir. 1984); see also Kline v. Director, OWCP, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989). The administrative law judge concluded that claimant had no medical impairment, and therefore rebuttal pursuant to Section 727.203(b)(3) had been established, based on the opinion of Dr. Mariglio, who found no non-respiratory impairment and no evidence of respiratory impairment based on cardiopulmonary disease, and who checked the "no" box on the Department of Labor (DOL) Form CM-988, indicating that the diagnosed condition was not related to dust exposure in claimant's coal mine employment; and on the opinion of Dr. Luschinsky, who also checked the "no" box on Form CM-988, and stated that there was no disability evident, "cardiac and pulmonary system negative." Decision and Order on Remand at 1; Decision and Order at 9, 10; Director's Exhibits 14, 30. The Board has held that a "no" response to the DOL Form 904 causation question is sufficient to establish that the miner's impairment did not arise out of coal mine employment. See Simpson v. Director, OWCP, 6 BLR 1-49 (1983); see also Warman v. Pittsburgh and Midway Coal Mining Co., 829 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); Hall v. Director, OWCP, 12 BLR 1-133 (1989). Additionally, a physician's diagnosis of no pulmonary impairment is sufficient to establish rebuttal pursuant to Section 727.203(b)(3) under the Bernardo standard, since the absence of a pulmonary impairment precludes pneumoconiosis as a cause of total disability. See Marcum v. Director, OWCP, 11 BLR 1-2 (1987). Consequently, we affirm the administrative law judge's findings pursuant to Section 727.203(b)(3), as supported by substantial

evidence, and affirm his denial of benefits.²

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge

² We need not address the merits of claimant's contentions concerning rebuttal pursuant to Section 727.203(b)(1) and (b)(2), inasmuch as we previously vacated the administrative law judge's findings thereunder, and the administrative law judge did not reach these methods of rebuttal on remand. See generally Endrizzi v. Bethlehem Mines Corp., 8 BLR 1-11 (1985).

