U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0444 BLA

BILL E. FITZPATRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 08/31/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Subsequent Claim and Order Denying Motion for Reconsideration of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey Swanson and Allman), Indianapolis, Indiana, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Subsequent Claim and Order Denying Motion for Reconsideration (2013-BLA-05304) of Administrative Law Judge Christine L. Kirby rendered on a claim filed on February 6, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Prior to the hearing, employer asked the administrative law judge to subpoena Department of Labor (DOL) employees to testify concerning the continuing validity of the scientific premises set forth in the preamble to the 2001 regulations. The administrative law judge denied employer's request, and employer's subsequent Motion for Reconsideration and Request for Continuance.

In her Decision and Order, the administrative law judge determined that employer is the properly designated responsible operator,[2] and that claimant established at least sixteen and a quarter years of underground coal mine employment. The administrative law judge also found that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv) and, consequently, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Therefore, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[3] The administrative law judge also found that employer did not rebut the presumption and awarded benefits. Employer submitted a Motion for Reconsideration, alleging that the administrative law judge erred in finding employer's experts' opinions to be inconsistent with the preamble to the 2001 regulations. In support of its allegation, employer again challenged the

[1] Claimant filed an initial claim for benefits on December 17, 1990, which was denied by the district director on March 25, 1991, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action before filing the current claim.

[2] The administrative law judge observed that employer was a subsidiary of Horizon Natural Resources Company, which has been liquidated in bankruptcy, and there is a dispute regarding the status of a surety that must be decided by the federal courts. Decision and Order at 6.

[3] Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

administrative law judge's denial of its motion to subpoena the DOL. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge erred in refusing to issue a subpoena to DOL personnel for the purpose of developing evidence regarding the validity of the preamble, while relying on the preamble to find that employer did not rebut the Section 411(c)(4) presumption. Employer also maintains that the administrative law judge misinterpreted the preamble in determining that employer's experts relied on premises that conflict with the preamble. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order, as it is supported by substantial evidence and is in accordance with applicable law. The Director, Office of Workers' Compensation Programs (the Director), has responded and contends that the administrative law judge did not abuse her discretion in denying employer's request to subpoena DOL personnel and reasonably determined that employer did not rebut the Section 411(c)(4) presumption.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Employer is the properly designated responsible operator; claimant has 16.25 years of underground coal mine employment; claimant suffers from a totally disabling respiratory impairment; claimant invoked the rebuttable presumption at Section 411(c)(4); and claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

I. Denial of Employer's Request for a Subpoena

Prior to the hearing on claimant's 2012 subsequent claim, employer submitted a Request for Issuance of a Subpoena to DOL "to compel testimony from and production of documents by a person . . . qualified to testify concerning the scientific validity of and applicability to individual claims . . . of medical conclusions set forth in the preamble to the revised black lung regulations . . . and the related research studies that DOL considered and/or relied on during that rulemaking process." Employer's July 28, 2014 Request for Issuance of a Subpoena to DOL at 1. The Director responded, urging denial of employer's request. In an order issued on August 27, 2014, the administrative law judge rejected employer's request, finding that it "would only serve to confuse issues and unnecessarily delay the hearing by raising legal challenges already well-settled by case law." August 27, 2014 Order Denying Request for Subpoena at 2. She also noted, "if [e]mployer believes that the preamble language is misapplied to my decision in the current claim before me, [e]mployer may argue that point on appeal." *Id*. Employer filed a Motion for Reconsideration and Request for Continuance, which the administrative law judge also denied, stating that employer's motion was premature, as she had yet to conduct a hearing, review any evidence, or make a decision. September 10, 2014 Order Denying Motion for Reconsideration at 1-2. The administrative law judge also determined employer selected the wrong forum to challenge errors that might have been committed by other administrative law judges in using the preamble. *Id*. at 2.

Employer contends that the administrative law judge did not provide a valid rationale for denying its request for a subpoena, as there is no other avenue by which it can meaningfully challenge the scientific premises underlying the revised definition of legal pneumoconiosis set forth in the 2001 regulations.[6] Employer also alleges that the administrative law judge mischaracterized the relevant language in finding that employer's experts relied on premises that conflict with the preamble. The Director asserts in response that the administrative law judge acted within her discretion in rejecting employer's request for a subpoena. In support of his position, the Director

[6] Pursuant to 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." The regulation specifies that "a disease 'arising out of coal mine employment' is any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added). Under 20 C.F.R. §718.201(c), pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."

maintains that employer had the opportunity to submit its own evidence challenging the continuing validity of the scientific views discussed in the preamble. The Director further contends that the premises identified by employer as incorrect – that pneumoconiosis can be latent and progressive and that coal dust and cigarette smoke can have additive effects – are well grounded. Employer maintains in reply that, contrary to the Director's position that employer can rely on its own experts to challenge the preamble, circuit courts have rejected this evidence as contrary to the DOL's interpretation of the scientific views that prevailed at the time the 2001 regulations were promulgated.

Pursuant to 20 C.F.R. §725.351(b)(3), an administrative law judge is authorized to "compel the production of documents and appearances of witnesses by the issuance of subpoenas." Because it is related to the development of the evidentiary record, the administrative law judge is granted broad discretion in exercising this authority. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-153 (1989) (en banc). Accordingly, a party seeking to overturn an administrative law judge's ruling on a request for a subpoena must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting). After reviewing employer's arguments and the Director's response, we hold that employer has failed to show that the administrative law judge abused her discretion in denying employer's subpoena request.

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that once the revised definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2) became final and effective, claimants could rely on it, without having to adjudicate its scientific validity. *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Consistent with this principle, the burden falls on the party challenging the regulation's validity to establish that the scientific consensus upon which it is based has changed, such that the regulation no longer reflects the prevailing scientific view. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 269, 18 BLR 2A-1, 2A-3 (1994), *citing* 5 U.S.C. §556(d) of the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a). In this case, the administrative law judge determined correctly that employer could satisfy this burden by offering its own evidence demonstrating that the scientific conclusions accepted by the DOL in the preamble are no longer accepted as correct. *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1262 (10th Cir. 2015) (An employer could "submit evidence or expert opinions to persuade the administrative law judge that the preamble's findings were no longer valid or were not relevant to the facts of this case."); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-

645 (6th Cir. 2014) (Recognizing that an employer can submit evidence that purports to invalidate the DOL's position as expressed in the preamble); August 27, 2014 Order Denying Request for Subpoena at 2.

Although employer is correct that there is a dearth of case law finding that an employer proffered evidence sufficient to invalidate the science that the DOL relied on in promulgating the revised definition of legal pneumoconiosis, this does not establish that it is impossible for an employer to develop such evidence. The Seventh Circuit held in *Shores* that, in light of the deference afforded an agency's judgment, the burden of invalidation can be satisfied by submitting evidence establishing "that the agency was not entitled to use its delegated authority to resolve the scientific question" in the manner reflected in the regulation. *Shores*, 358 F.3d at 490, 23 BLR at 2-26, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In *Sterling*, the United States Court of Appeals for the Sixth Circuit acknowledged that, when employers allege that the DOL relied on a mistaken or archaic view of the scientific consensus and submit supporting evidence, the issue must be adjudicated by the administrative law judge. *Sterling*, 762 F.3d at 491, 25 BLR at 2-645. The court in *Sterling* considered whether Dr. Rosenberg's opinion was sufficient to establish that the DOL's revised definition of legal pneumoconiosis is based on invalid premises. Dr. Rosenberg opined that, contrary to the DOL's view, more recent medical studies show that there may be forms of chronic obstructive pulmonary disease (COPD) unrelated to a reduced FEV1/FVC ratio, and those forms of COPD are much more frequently associated with coal dust exposure.[7] The court ruled that, although "Dr. Rosenberg may be right as a matter of scientific fact," his analysis did not preclude the existence of forms of coal dust-induced COPD that are related to a reduced FEV1/FVC ratio. The court affirmed, therefore, the administrative law judge's decision to discredit Dr. Rosenberg's opinion because it conflicted with the DOL's position that "COPD caused by coal dust exposure may be associated with decrements in the FEV1/FVC ratio." *Sterling*, 762 F.3d at 491, 25 BLR at 2-645, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (The more recent studies cited by one of employer's experts did not address coal dust exposure, and there was no "testi[mony] as to scientific innovations that archaized or invalidated the science underlying the [p]reamble.") Thus, the administrative law judge reasonably determined that employer could have developed and submitted its own scientific evidence challenging the premises underlying the DOL's definition of legal

[7] The similarities between the opinion that the court addressed in *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014), and the opinion that Dr. Rosenberg offered in this case are detailed *infra*.

pneumoconiosis without questioning DOL personnel on this issue. *See Harris*, 23 BLR at 1-108; August 27, 2014 Order Denying Request for Subpoena at 2. We affirm, therefore, the administrative law judge's denial of employer's request to subpoena DOL employees as within her discretion.

II. Rebuttal of the Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[8] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §725.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis based on his consideration of the x-ray and medical opinion evidence. Decision and Order at 18. In evaluating whether employer was also able to disprove the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg and Jarboe that claimant's totally disabling respiratory impairment is due solely to cigarette smoking.[9] *Id*. at 19-21; Director's Exhibit 19; Employer's Exhibits 5, 7. The administrative law judge determined that their opinions conflict with studies the DOL cited in the preamble to the 2001 regulations in support of the premises that coal dust-induced emphysema and cigarette smoke-induced emphysema occur through similar mechanisms and that the risks of cigarette smoking and coal dust exposure are additive. Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The administrative law judge observed correctly that Dr. Istanbouly's opinion, that claimant has pulmonary emphysema due to coal dust exposure and cigarette smoking, does not aid employer in rebutting the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19; Director's Exhibit 13; Claimant's Exhibit 5.

In addition, the administrative law judge found that neither physician adequately explained why coal dust could not also have contributed to claimant's emphysema/COPD, even if it is not necessarily "the most significant cause or factor." Decision and Order at 20. The administrative law judge also gave less weight to their opinions because their view that claimant's reduced FEV1/FVC ratio is not characteristic of coal dust-related COPD is inconsistent with the DOL's observation in the preamble that coal dust exposure can cause obstruction as measured by a decreased FEV1 and a decreased FEV1/FVC ratio. Decision and Order at 20, *citing* 65 Fed. Reg. 69,920, 79,943 (Dec. 20 2000). Therefore, the administrative law judge determined that employer did not rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 21. The administrative law judge also determined that, because they did not diagnose legal pneumoconiosis, the opinions of Drs. Rosenberg and Jarboe are insufficient to rebut the presumed causal relationship between pneumoconiosis and total disability under 20 C.F.R. §718.305(d)(1)(ii). *Id.*

Employer asserts that the administrative law judge's findings at 20 C.F.R. §718.305(d)(1)(i)(A) are based on an incorrect interpretation of the preamble, such that employer is precluded from establishing rebuttal as a matter of law. Employer maintains that the opinion of Drs. Rosenberg and Jarboe that smoking causes a disproportionate reduction in the FEV1/FVC ratio when compared to coal dust exposure is documented in the 1995 National Institute for Occupational Safety and Health (NIOSH) Criteria that the DOL cited in the preamble. Further, employer alleges that the administrative law judge erred in relying on unpublished Board decisions affirming the discrediting of Dr. Rosenberg's opinion, as these decisions "are not precedential and applying them to deprive [employer] of its right to a hearing by a fair and impartial [administrative law judge] violates the APA." Employer's Brief in Support of Petition for Review at 21. Finally, employer argues that the administrative law judge did not consider the new studies that Drs. Rosenberg and Jarboe described as showing that smoking causes much greater damage to lung function than coal dust exposure.

As an initial matter, we reject employer's argument that the administrative law judge transformed the rebuttable presumption into an irrebuttable presumption by relying on the studies credited by the DOL in the preamble to discredit the medical opinions of Drs. Rosenberg and Jarboe. Every circuit court that has addressed the issue has held that, when assessing the credibility of the medical opinion evidence, an administrative law judge may consult the preamble as an authoritative statement of medical principles accepted by the DOL. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see also A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). In the present case,

therefore, the administrative law judge permissibly referred to the scientific evidence cited by the DOL when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment and permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies. *See Beeler*, 521 F.3d at 726, 25 BLR at 2-103.

In so doing, the administrative law judge acted within her discretion in finding that the opinions of Drs. Rosenberg and Jarboe are insufficient to rebut the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *See Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-424 (7th Cir. 2013). The administrative law judge observed correctly that Drs. Rosenberg and Jarboe eliminated coal dust exposure as a source of claimant's disabling obstructive pulmonary impairment, in part, because they found a marked decrease in claimant's FEV1/FVC ratio, a characteristic that they found inconsistent with coal mine dust-induced lung disease.[10] Decision and Order at 20; Director's Exhibit 19; Employer's Exhibits 5, 7. The administrative law judge rationally found their premise – that coal dust exposure causes proportional decrements in FEV1 and FVC, thereby preserving the FEV_1/FVC ratio – conflicted with the scientific evidence credited by the DOL in the preamble. *See Shores*, 358 F.3d at 490, 23 BLR at 2-26. As observed by the administrative law judge, the DOL relied, in particular, on the summary of the medical literature developed by NIOSH in conjunction with its determination of a permissible dust exposure limit. The DOL stated:

> [I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis],

[10] Dr. Rosenberg found that "while [claimant's] FEV1 is moderately to severely reduced, his FEV1/FVC ratio is markedly diminished to around 39%" and that "this pattern of impairment is inconsistent with the presence of legal [coal workers' pneumoconiosis]. Rather, it is classic for the presence of smoking-related [chronic obstructive pulmonary disease (COPD)]." Director's Exhibit 19. In his supplemental report, Dr. Rosenberg reiterated that "the extreme decline in [claimant's] ratio down to 40% . . . indicates that the obstruction is entirely related to cigarette smoking." Employer's Exhibit 7. Dr. Jarboe opined that claimant has a "disproportionate reduction of FEV1 compared to FVC[,]" which "is the type of functional abnormality seen in cigarette smoking and not usually caused by coal dust inhalation." Employer's Exhibit 5.

> epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, *especially FEV1 and the ratio of FEV1/FVC*."

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* NIOSH *Criteria Document* 4.2.3.2 (citations omitted) (emphasis added); Decision and Order at 20.

We further reject employer's argument that the administrative law judge erred in failing to credit the physicians' criticisms of the literature cited by the DOL, or their citation to more recent literature. Employer does not identify the specific new studies that purportedly support its position, nor does employer explain how these studies, or its experts' critiques of the older studies, invalidate the DOL's recognition that coal dust exposure can cause obstructive lung disease that is detectable from reductions in the FEV1/FVC ratio. 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Sterling*, 762 F.3d at 491, 25 BLR at 2-645. We also find no merit in employer's contention that the administrative law judge improperly treated unpublished Board decisions affirming the discrediting of Dr. Rosenberg's views as binding precedent. Rather, she permissibly cited them as supportive of her decision to discredit the opinions of Drs. Rosenberg and Jarboe on the significance of the FEV1/FVC ratio in this case. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding that it is appropriate to consider the persuasive reasoning of unpublished opinions); Decision and Order at 20.

In addition, we affirm, as supported by substantial evidence, the administrative law judge's finding that the opinions of Drs. Rosenberg and Jarboe are entitled to less weight because they did not adequately explain why coal mine dust could not have been a causal factor in claimant's disabling obstructive impairment, in addition to cigarette smoking. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Freeman United Coal Mining Co. v. Summers*, 72 F.3d 473, 483, 22 BLR 2-265, 2-280 (7th Cir. 2001); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). Therefore, we affirm the administrative law judge's conclusion that the opinions of Drs. Rosenberg and Jarboe are insufficient to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[11] *See Burris*, 732 F.3d at 735, 25 BLR at 2-425; *Minich*, 25 BLR at 1-154-56.

[11] We decline to address employer's argument that the administrative law judge erred in finding the opinions of Drs. Rosenberg and Jarboe contrary to the recognition in the preamble that the effects of cigarette smoke and coal dust on COPD are additive, as the administrative law judge provided valid alternative rationales for discrediting their opinions. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

With respect to rebuttal of the presumed causal relationship between pneumoconiosis and claimant's total pulmonary disability under 20 C.F.R. §718.305(d)(1)(ii), employer does not specifically challenge the administrative law judge's determination that employer failed to satisfy its burden of proof. Because the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Jarboe on the issue of total disability causation was based on her rational credibility findings on the issue of legal pneumoconiosis, we affirm the administrative law judge's determination that employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 25 BLR 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); Decision and Order at 21.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Subsequent Claim and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge