

BRB No. 02-0735 BLA

LOWELL MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/31/2003
	)	
OLD BEN COAL COMPANY	)	
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

McGRANERY, J.:

Employer appeals the Decision and Order (1984-BLA-4679) of Administrative Law Judge Robert L. Hillyard awarding 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 U.S.C. '901 *et seq.* (the Act).<sup>1</sup> This case is before the Board for the sixth time. The record indicates that claimant filed an application for benefits on January 25, 1980, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., in a Decision and Order issued on November 3, 1986, after finding that claimant established thirty-four years and nine months of coal mine employment, invocation of the interim presumption pursuant to 20 C.F.R. '727.203(a)(1), and that employer established rebuttal of the presumption pursuant to 20 C.F.R. '727.203(b)(2). On appeal, the Board affirmed the findings regarding the years of coal mine employment and invocation of the presumption as unchallenged on appeal, but vacated the denial of benefits, and remanded the case for the administrative law judge to reconsider rebuttal at Section 727.203(b)(2) in light of *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7<sup>th</sup> Cir. 1987).<sup>2</sup> *Mitchell v. Old Ben Coal Co.*, BRB No. 86-3023 BLA (Nov. 30, 1988)(unpub.). The Board also directed the administrative law judge to consider rebuttal at 20 C.F.R. '727.203(b)(3), if reached, and noted that the finding of invocation at Section 727.203(a)(1), precluded rebuttal at 20 C.F.R. '727.203(b)(4). *Id.*

On remand, Judge Gilday found the evidence insufficient to establish rebuttal of the

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<sup>1</sup>The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations, except for citations to the regulations at 20 C.F.R. Part 727. DOL has discontinued publication of the regulations at 20 C.F.R. Part 727, and the Part 727 criteria may be found at 43 Fed. Reg. 36818 (1978), or at 20 C.F.R. Parts 500 to end, edition revised as of April 1, 1999. *See* 20 C.F.R. '725.4.

<sup>2</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit inasmuch as claimant=s coal mine employment occurred in the State of Illinois. *See* Director=s Exhibit 5; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

interim presumption, and awarded benefits as of the month claimant filed his claim. On appeal, the Board affirmed the award of benefits. *Mitchell v. Old Ben Coal Co.*, BRB No. 89-3555 BLA (Aug. 19, 1992)(unpub.). Subsequently, the Board granted employer=s request for reconsideration, but reaffirmed the award of benefits. *Mitchell v. Old Ben Coal Co.*, BRB No. 89-3555 BLA (Aug. 18, 1994)(unpub. Decision and Order on Motion for Reconsideration). Following employer=s appeal, the United States Court of Appeals for the Seventh Circuit vacated Judge Gilday=s findings at Section 727.203(a)(1), and remanded the case for reconsideration in light of the holding in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh=g denied*, 484 U.S. 1047 (1988). The Seventh Circuit also vacated the findings at Section 727.203(b)(2), (3), and remanded the case for further consideration in light of the holdings in *Freeman United Coal Mining v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7<sup>th</sup> Cir. 1994), *cert. denied*, 115 S. Ct. 1399 (1995), and *Freeman United Coal Mining Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7<sup>th</sup> Cir. 1992), and *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7<sup>th</sup> Cir. 1992). *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7<sup>th</sup> Cir. 1995).

On remand, the case was transferred to Administrative Law Judge Hillyard (the administrative law judge), who found the record evidence insufficient to establish invocation of the interim presumption, or entitlement pursuant to 20 C.F.R. Part 718, and benefits were denied. On appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to reopen the record for the submission of new evidence relevant to the changes in law. *Mitchell v. Old Ben Coal Co.*, BRB No. 97-0464 BLA (Nov. 28, 1997)(unpub.).

On remand, the administrative law judge awarded benefits after finding invocation of the interim presumption pursuant to Section 727.203(a)(4), which was not rebutted pursuant to Section 727.203(b). On appeal, the Board affirmed the findings of no invocation at Section 727.203(a)(1)-(3), and no rebuttal at Section 727.203(b)(1), (4), as unchallenged on appeal, but vacated the award of benefits and remanded for the administrative law judge to reconsider the findings at Section 727.203(a)(4), in light of *Beasley*, 957 F.2d 324, 16 BLR 2-45, and to reconsider rebuttal at Section 727.203(b)(2), in accordance with *Foster*, 30 F.3d 834, 18 BLR 2-329. The Board also instructed the administrative law judge to reconsider the issue of rebuttal at Section 727.203(b)(3), if reached, as well as to fully discuss the evidence regarding the date of onset of benefits, if awarded on remand. *Mitchell v. Old Ben Coal Co.*, BRB No. 99-0261 BLA (June 30, 2000)(unpub.).

In the Decision and Order on Remand, the administrative law judge found the evidence sufficient to establish invocation of the interim presumption at Section

727.203(a)(4), and insufficient to establish rebuttal at Section 727.203(b)(2), (3). Accordingly, benefits were again awarded, as of the month claimant filed his claim. On appeal, the Board affirmed the finding of invocation at Section 727.203(a)(4), but again vacated the award of benefits and remanded the case for reconsideration of rebuttal at Section 727.203(b)(2) in light of *Foster*, 30 F.3d 834, 18 BLR 2-329. The Board also directed the administrative law judge to reconsider rebuttal at Section 727.203(b)(3), and held that in the absence of evidence indicating the precise date that claimant became totally disabled due to pneumoconiosis, awarding benefits as of the month in which claimant filed his claim did not violate the provisions of the Administrative Procedure Act (the APA), 5 U.S.C. '557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a). *Mitchell v. Old Ben Coal Co.*, BRB No. 01-0234 BLA (Nov. 30, 2001)(unpub.).

In the most recent Decision and Order on Remand, the administrative law judge again found the evidence of record insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203 (b)(2), (3). Accordingly, the administrative law judge awarded benefits, and pursuant to Section 725.503, found that benefits should commence the first day of the month in which claimant filed his claim because the medical evidence failed to establish the precise month when claimant became totally disabled due to pneumoconiosis.

On appeal, employer challenges the findings of the administrative law judge that the evidence is sufficient to establish invocation of the interim presumption at Section 727.203 (a)(4), and insufficient to establish rebuttal at Section 727.203(b)(2)-(4). Employer further renews its previous contentions that the Board erred by remanding the case in its 1997 Decision and Order to allow for reopening of the record, and challenges the validity of Section 725.503. Employer also contends that its due process rights have been violated by the lengthy litigation in the instant claim, thereby necessitating transfer of liability for the present claim to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter asserting that employer=s due process rights have not been violated in the present case, and that Section 725.503 is a valid regulation, but has not addressed the merits of the claim.

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).

Initially, employer contends that the recent holding in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 21 BLR 2-311 (7<sup>th</sup> Cir. 2001), constitutes intervening case law requiring remand of the administrative law judge=s finding of invocation at Section 727.203(a)(4). Specifically, employer contends that the administrative law judge=s crediting of the medical reports of Drs. Rosecan and Khan, was based solely on Dr. Rosecan=s status as claimant=s treating physician. As we held in our Decision and Order issued on November 30, 2001, the administrative law judge did not mechanically credit Dr. Rosecan=s opinion diagnosing totally disabling coal workers= pneumoconiosis, due solely to the doctor=s status as a treating physician, but rather explained why he found that Dr. Rosecan=s opinion was better reasoned and documented than Dr. Tuteur=s contrary opinion. Decision and Order on Remand dated October 13, 2000 at 6; Employer=s Exhibit 1; Claimant=s Exhibit 2; Director=s Exhibit 26; see *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, BLR 2- (7<sup>th</sup> Cir. 2002). The Board=s prior disposition of this issue constitutes the law of the case, as employer has advanced no new argument in support of altering the Board=s previous holding, and no intervening case law has contradicted the Board=s resolution of this issue since the administrative law judge=s findings are consistent with *McCandless*, 255 F.3d 465, 21 BLR 2-311; *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).<sup>3</sup> Accordingly, we reject employer=s contention.

Employer also contends that the administrative law judge erred in finding the evidence of record insufficient to establish rebuttal of the interim presumption at Section 727.203(b)(2). We disagree. In our prior Decision and Order, the Board instructed the administrative law judge to consider whether the evidence of record supports a finding of rebuttal in light of the holding of the Seventh Circuit in *Foster*, 30 F.3d 834, 18 BLR 2-329.<sup>4</sup>

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<sup>3</sup>Employer reiterates its prior assertion that the Board erred in its November 28, 1997 Decision and Order directing the administrative law judge to reopen the record on remand. The Board=s previous disposition of this issue constitutes the law of the case, since there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception has been demonstrated. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we decline to revisit this issue.

<sup>4</sup>In *Freeman United Coal Mining v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7<sup>th</sup> Cir. 1994), *cert denied*, 115 S.Ct. 1399 (1995), the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at Section 727.203(b)(2), where the miner=s inability to work was due to a back injury which occurred during his coal mine employment, and not due to pneumoconiosis.

*Employer argues that on remand, the administrative law judge erroneously weighed only the most recent evidence of record, and omitted consideration of whether the earlier evidence, which established a pre-existing totally disabling condition, would preclude a finding of total disability due to pneumoconiosis pursuant to Foster, 30 F.3d 834, 18 BLR 2-329. Employer=s Brief at 16-18. See Decision and Order on Remand dated June 28, 2002 at 4-6; Employer=s Exhibits 1, 31, 32; Claimant=s Exhibits 1, 2, 5; Director=s Exhibits 10, 26; see also Beasley, 957 F.2d 324, 16 BLR 2-45.*

The record contains three reports by Dr. Rosecan, dated April 14, 1983, March 20, 1986, and June 2, 1998, all of which diagnose totally disabling coal workers= pneumoconiosis, and a history of heart disease which in 1983, and 1986 produced some disability which was resolved by the time of his most recent report. Claimant=s Exhibits 2,5; Director=s Exhibit 26. Dr. Kahn reached a similar diagnosis in a report dated May 22, 1998. Claimant=s Exhibit 1. In several reports dated between May 5, 1983 and June 4, 1986, Drs. Castle, Renn and O=Neill found no coal workers= pneumoconiosis, or a totally disabling respiratory impairment, or any other totally disabling condition. Employer=s Exhibits 31, 32; Director=s Exhibit 26. In December 1983, Dr. Getty also found no evidence of coal workers= pneumoconiosis, or a totally disabling respiratory impairment, and diagnosed heart disease, without indicating if it was totally disabling. Director=s Exhibit 26. On August 3, 1998, Dr. Tuteur found no evidence of coal workers= pneumoconiosis or coal dust induced disease, but found that claimant was totally disabled due to arteriosclerotic heart disease and obstructive pulmonary disease due to smoking. Employer=s Exhibit 1.

In his Decision and Order on Remand dated October 13, 2000, the administrative law judge fully discussed the earlier reports of Dr. Rosecan, the only physician of record to diagnose a disabling heart condition, in addition to Dr. Rosecan=s 1998 report which indicated that claimant=s heart condition had been improved by claimant=s heart bypass surgery. Decision and Order on Remand dated October 13, 2000 at 2-4; Claimant=s Exhibits 2, 5; Director=s Exhibit 26. The administrative law judge also discussed the earlier reports of Drs Renn, Castle, O=Neill and Getty, who indicated that claimant did not have pneumoconiosis, or a totally disabling respiratory impairment, but did not diagnose any other pre-existing totally disabling impairment which would preclude entitlement. *Id.* at 3-5; Claimant=s Exhibit 5; Employer=s Exhibits 31, 32; Director=s Exhibits 10, 26.

Contrary to employer=s argument, the record indicates that Dr. Rosecan clearly diagnosed totally disabling pneumoconiosis throughout claimant=s treatment but diagnosed claimant=s heart disease as only a Asignificant medical problem@ in 1983. Director=s Exhibit 26. In addition, the administrative law judge found that in 1986, Dr. Rosecan attributed claimant=s heart disease and disability to his coal mine employment. Decision and

Order on Remand dated October 13, 2000 at 3. The administrative law judge therefore rationally determined in the most recent Decision and Order on Remand, that Dr. Rosecan=s opinion, did not rebut the interim presumption. Decision and Order on Remand dated June 28, 2002 at 4-6; Claimant=s Exhibits 2, 5; Director=s Exhibit 26; *Foster*, 30 F.3d 834, 18 BLR 2-329; *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7<sup>th</sup> Cir. 1994);<sup>5</sup> *see generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Employer further argues that the administrative law judge erred by failing to determine if Dr. Rosecan=s opinions and Dr. Khan=s report, stating that claimant=s pneumoconiosis was a significant part of his total disability, were reasoned and documented. Claimant=s Exhibits 1, 2, 5; Director=s Exhibit 26. Specifically, employer contends that they are insufficient to establish entitlement since they do not state whether claimant=s age or heart disease would have prevented claimant from working as a miner prior to the onset of his totally disabling pneumoconiosis. Employer=s Brief at 22-23, Claimant=s Exhibits 1, 2, 5; Director=s Exhibit 26. We find no merit in these arguments since the administrative law judge specifically found that Dr. Rosecan=s 1998 report is documented and reasoned, because it is Asupported by the pulmonary function study evidence on which he relied, and is consistent with his prior opinions,@ Decision and Order on Remand dated October 13, 2000 at 5-6, and that Dr. Khan=s opinion was also documented and reasoned as it was based on claimant=s symptoms, employment and smoking histories, and the results of claimant=s pulmonary function study. Decision and Order on Remand dated October 13, 2000 at 6-7. The Board has previously rejected employer=s assertion that these opinions are unreasoned, therefore our prior holding constitutes the law of the case. Decision and Order dated November 30, 2001; *Coleman*, 18, BLR 1-9, 15. Moreover, after invocation of the interim presumption, it is employer=s burden to establish rebuttal of the presumption by one of the methods available at Section 727.203(b); it is not claimant=s burden to rule out total disability due to causes other than pneumoconiosis. *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7<sup>th</sup> Cir. 2002).

We previously rejected employer=s argument that Dr. Rosecan=s opinion is unreasoned since it is based on a suspect pulmonary function study, and because this physician=s 1998 report which indicates that claimant=s heart condition was asymptomatic

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<sup>5</sup>In *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7<sup>th</sup> Cir. 1994), the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3), where the miner became totally disabled by a non-coal dust related stroke, and where there was no evidence connecting the miner=s stroke and his respiratory condition.

at that time due to his bypass surgery, is inconsistent with his earlier opinions in which he found a disabling heart condition. Claimant=s Exhibits 2, 5; Director=s Exhibit 26. We therefore decline to disturb our prior holding which is the law of the case. *Coleman*, 18 BLR 1-9, 15; *Brinkley*, 14 BLR 1-147, 150-151.

Similarly, we also reject employer=s contention that the opinions of Drs. Rosecan and Khan are unreasoned because they relied on a discredited x-ray reading since the administrative law judge may not reject a medical report based, in part, on a positive x-ray reading merely because the record contains later negative readings. *Winters v. Director, OWCP*, 6 BLR 1-877 (1984). We further find no merit in employer=s assertion that Dr. Khan=s opinion is unreasoned because the physician relied on an inaccurate smoking history, and did not explain how the objective evidence supported his opinion, or indicate whether claimant=s pneumoconiosis was a significant cause of his total disability. Dr. Kahn diagnosed totally disabling coal workers= pneumoconiosis and pulmonary emphysema, and noted that contributory factors were claimant=s history of hypertension and heart disease. Claimant=s Exhibit 1. This diagnosis was based on a twenty year smoking history, a physical examination, and claimant=s objective tests which Dr. Khan stated produced values indicative of a respiratory impairment. Claimant=s Exhibit 1. The administrative law judge found that ADr. Khan does not express the opinion that the [c]laimant would have been unable to work, due to emphysema alone,@ and that he Aprovides the reasons for his conclusions and lists the data upon which he relied.@ Decision and Order on Remand at 5. Accordingly, the administrative law judge found that this opinion was well documented and reasoned, and that ADr. Khan=s opinion establishes that pneumoconiosis is at least a contributing cause of the [c]laimant=s total disability.@ Decision and Order on Remand at 5-6. Since the administrative law judge=s finding on this issue is supported by the record, and is rational, it is affirmed. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We also find no merit in employer=s contention that rebuttal of the presumption has been established under *Foster*, 30 F.3d 834, 18 BLR 2-329, since claimant retired from mining in 1978 to take a non-mine related position, at which time there was no evidence that claimant suffered from a respiratory disability. Entitlement is not premised on a finding of total respiratory disability at the date of claimant=s last coal mine employment, since the relevant issue is whether claimant is totally disabled at the time of the hearing. *Foster*, 30 F.3d 834, 838, 18 BLR 2-329, 339.

Employer additionally argues that since the administrative law judge previously determined that the evidence developed prior to 1998 did not establish invocation of the

interim presumption, and asserts that Dr. Rosecan=s opinion is unreasoned, and outweighed by the contrary opinions of Drs. Renn, Castle, O=Neill and Getty, that these unchallenged findings constitute the law of the case and preclude entitlement. We reject this argument, as we have previously held that it was rational for the administrative law judge to rely on the more recent evidence of record and employer has not demonstrated that an exception to the law of the case doctrine applies herein. *Coleman*, 18 BLR 1-9, 15.

Regarding Dr. Tuteur=s opinion, that claimant is not disabled due to coal workers=pneumoconiosis, but was disabled due to arteriosclerotic heart disease and chronic obstructive pulmonary disease due to smoking, Employer=s Exhibit 1, employer contends that the administrative law judge erred by mischaracterizing this opinion, and by finding it unreasoned. Employer=s arguments are without merit. The administrative law judge accorded less weight to Dr. Tuteur=s opinion because Ahe failed to explain why the [c]laimant=s thirty-eight year coal mine employment history failed to contribute in any way to his impairment,@ Decision and Order on Remand at 5, and also due to this physician=s Alack of reasoning as compared with the better reasoned and documented opinions of Drs. Rosecan and Khan.@ Decision and Order on Remand at 5-6. The Board=s prior holding that the administrative law judge rationally found Dr. Tuteur=s opinion unreasoned constitutes the law of the case. *See Villain*, 312 F.3d at 336 (Seventh Circuit upheld finding Dr. Tuteur=s opinion unreasoned). Since employer has advanced no new argument in support of altering the Board=s previous holding and no intervening case law has contradicted the prior resolution of this issue, we decline to disturb our previous holding. *Coleman*, 18 BLR 1-9, 15; *Brinkley*, 14 BLR 1-147, 150-151; *see also Peabody Coal Co. v. Director, OWCP [Goodloe]*, 116 F.3d 207, 21 BLR 2-140 (7<sup>th</sup> Cir. 1997). As the administrative law judge=s finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2), (3), is supported by substantial evidence, it is affirmed.

Employer also argues that the instant case should be remanded for reconsideration of rebuttal at Section 727.203(b)(4), asserting that the administrative law judge erroneously failed to address this issue on remand by finding that invocation at Section 727.203(a)(1) precluded rebuttal at this section. The Board=s Decision and Order dated June 20, 2000, affirmed the administrative law judge=s finding of no rebuttal at Section 727.203(b)(4), as unchallenged on appeal. Consequently, this holding constitutes the law of the case, and as no exception to this doctrine has been demonstrated, we decline to address employer=s argument. *Coleman*, 18 BLR 1-9, 15; *Brinkley*, 14 BLR 1-147, 150-151; *Bridges*, 6 BLR 1-988, 989-990 (1984). Since we hold that substantial evidence of record supports the administrative law judge=s determination that employer failed to establish rebuttal of the interim presumption at Section 727.203(b), we affirm the award of benefits.

Employer also asserts its previously raised contention that the administrative law judge erred by awarding benefits prior to 1998, the date of the evidence on which he relied in finding invocation of the presumption established and entitlement to benefits. Employer argues that Section 725.503(b) is invalid as it provides claimant with a windfall by permitting an award of benefits based on the date of filing, does not implement a statutory provision that permits burden shifting and violates the provisions of the APA. The Seventh Circuit and the Board have both held that this provision, although it shifts the burden of production of evidence, does not shift the ultimate burden of proof, and therefore, does not violate the APA. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Chubb*, 312 F.3d 882; *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7<sup>th</sup> Cir. 1997); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Moreover, as the Board's prior holding on this issue constitutes the law of the case, we reject employer's argument as no exception to this doctrine has been demonstrated, and decline to further address this contention. *Coleman*, 18 BLR 1-9, 15; *Brinkley*, 14 BLR 1-147, 150-151.

Employer also argues that the length of this litigation, which employer attributes to the Department of Labor's repeated inability to properly resolve the claim, violates employer's due process rights. Employer's Brief at 28. Employer contends it cannot now receive a fair adjudication after this lengthy delay, and suggests that liability should be transferred to the Trust Fund. We agree with the Director, however, that employer received proper notice of the instant claim and has fully participated at every level during the course of the litigation. Employer has, moreover, failed to demonstrate any prejudice resulting from the delay of the resolution of the claim. Accordingly, we find no merit in employer's argument, and hold that as no violation of employer's due process rights has been established, liability properly rests with employer. *Chubb*, 312 F.3d 882; *Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4<sup>th</sup> Cir. 1998).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY  
Administrative Appeals Judge

I concur:

BETTY JEAN HALL  
Administrative Appeals Judge

GABAUER, J., concurring:

I concur in the result only.

PETER A. GABAUER, Jr.  
Administrative Appeals Judge