

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 2, 2015

CLAIM NO. 201200316

NORTH STAR MINING

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

MALCOLM E. KIMBLER
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. North Star Mining ("North Star") seeks review of the March 11, 2015, Opinion, Award, and Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ") finding Malcolm E. Kimbler ("Kimbler") contracted coal workers' pneumoconiosis ("CWP") while in the employ of North Star and awarding retraining incentive ("RIB") benefits pursuant to KRS 342.732(1)(a)1, 3, and 7. North

Star also appeals from the May 22, 2015, Order overruling its petition for reconsideration.

On appeal, North Star challenges the ALJ's award on three grounds. First, it contends the ALJ's reliance upon the opinions of Dr. Sanjay Chavda is arbitrary. Second, it argues that because the opinion of Dr. Crum diagnosing CWP is biased, Dr. Chavda's opinions also cannot be considered credible.¹ Finally, North Star asserts an equal protection and due process challenge.

In his Form 102-CWP filed March 12, 2012, Kimbler alleged that on October 9, 2009, he became affected by CWP arising out of and in the course of his employment with North Star as an underground miner. Kimbler did not allege a pulmonary impairment as a result of coal dust exposure. He attached the report of Dr. Matthew Vuskovich, a B reader who interpreted the x-ray performed on November 30, 2011, as revealing Category 2/2. The film quality is grade 1.

On May 16, 2012, North Star filed the report of Dr. Alexander Poulos who opined the film quality of the x-ray performed on April 17, 2012, is grade 1 and the x-ray revealed no evidence of CWP.

¹ From reviewing the record, we are unable to determine Dr. Crum's first name.

The Form 108-CWP of Dr. Chavda completed on October 16, 2014, was filed in the record by the Department of Workers' Claims ("DWC") via a Notice of Filing University Evaluation Report. In the Form 108-CWP, Dr. Chavda diagnosed pneumoconiosis resulting from exposure to coal dust in the severance or processing of coal. However, he stated any pulmonary impairment was not the result of exposure to coal dust in the severance or processing of coal. In his three page report attached to the Form 108-CWP, Dr. Chavda set forth the symptoms he observed upon examination. He indicated Kimbler had worked for thirty-five years in underground coal mines. Dr. Chavda stated the chest x-ray of October 16, 2014, revealed 1/1 pneumoconiosis involving the left and right, upper, lower, and middle lung zones. The FVC reading was 95% of predicted and the FEV1 was 105% of predicted. He confirmed his diagnosis is pneumoconiosis as a result of exposure to coal dust in the severance or processing of coal. Similarly, Dr. Chavda reiterated Kimbler had no pulmonary impairment as a result of exposure to coal dust in the severance or processing of coal. Dr. Chavda attached the test results of his pulmonary function analysis as well as Dr. Crum's report concerning his interpretation of the October 16, 2014, x-ray. Dr. Crum's report reflects he is

a B reader and the x-ray revealed pneumoconiosis category 1/1. We note that although no order was prepared directing Kimbler be evaluated by Dr. Chavda, the DWC's notice of filing indicates the report is filed in accordance with KRS 342.315 and KRS 342.316 and the appropriate regulations.²

On December 10, 2014, North Star filed a motion for an order directing the October 16, 2014, x-ray film be released. On that same date, it also filed a motion to have Dr. Westerfield examine the October 16, 2014, x-ray film.³ North Star represented that to this point it had received seven interpretations by Dr. Crum all of which were positive for pneumoconiosis. Since it had not received any negative readings from Dr. Crum, North Star believed it was appropriate that the film be re-interpreted by Dr. Westerfield.

A December 15, 2014, telephonic benefit review conference ("BRC") order and memorandum contains the parties' stipulations and indicates the sole contested issue is benefits per KRS 342.732. Handwritten on the BRC order is "hearing waived after proof time" and "all parties granted sixty days proof time with the plaintiff to have

² The notice of filing actually contains a typographical error as the filing of the university evaluation report reveals the report was filed pursuant to KRS 342.315 and KRS 342.16.

³ The first name of Dr. Westerfield was not provided.

fifteen days thereafter. Claim to be submitted on record." The order signed by the ALJ indicated both parties had seen and agreed to it by phone.

On December 17, 2014, North Star filed articles from the Center for Disease Control ("CDC") entitled "Pneumoconiosis and Advanced Occupational Lung Disease Among Surface Coal Miners - 16 States, 2010-2011" and "Advanced Pneumoconiosis Among Working Underground Coal Miners - Eastern Kentucky and Southwestern Virginia, 2006." It also filed a motion for statistical data on x-ray interpretations of Dr. Crum. In that motion, it asserted the CDC has prepared and published recent studies addressing the prevalence of CWP in the general coal mining population and the population located in Central Appalachia. North Star asserted Dr. Crum appeared to be interpreting x-ray films as positive for CWP in an extreme excess of the percentages provided within these studies. Based on the evidence provided to North Star's counsel, it represented Dr. Crum's medical opinion appears to be biased for the positive interpretation of CWP. Therefore, in order to understand whether a bias actually exists, North Star requested the ALJ order the DWC to provide the statistical breakdown of the number of cases in which Dr. Crum has provided an x-ray reading pursuant to any

evaluation ordered by the DWC under KRS 342.316, including the percentage of x-ray films interpreted as negative, and the percentage of x-ray films interpreted as positive for CWP.

On January 27, 2015, the ALJ entered two orders. One order overruled the motion to compel the DWC to provide the information requested. The ALJ stated he was without authority to order the DWC to compile statistical data on Dr. Crum or any other physician. He observed if statistical data exists or has been previously compiled, the information could be requested in an open records request. In the other order, the ALJ denied the motion to allow Dr. Westerfield to interpret the x-ray films developed at Muhlenberg Community Hospital and interpreted by Dr. Crum. He noted Dr. Westerfield has a memorandum agreement with the DWC which provides he is to avoid serving as an independent medical evaluator in an occupational disease claim for any entity in a state workers' compensation claim for the initial term of the agreement. Thus, Dr. Westerfield was contractually required to avoid reading films in pending state workers' compensation claims.

On March 11, 2015, the ALJ entered the Opinion, Award, and Order which reads as follows:

INTRODUCTION

The plaintiff, Malcolm E. Kimbler, filed his claim against the defendant-employer, ICG Hazard Land, LLC, alleging he became affected by Coal Workers' Pneumoconiosis with his last date of exposure being October 9, 2009. He was sixty-two (62) years old at the time of his last exposure and had thirty-three (33) years of exposure.

The plaintiff filed the x-ray interpretation of Dr. Matthew A. Vuskovich read as Category 2/2. Subsequently, the employer had an x-ray read by Dr. Alexander Poulos read as negative or Category 0. Pursuant to KRS 342.316, the Commissioner of the Department of Workers' Compensation had the plaintiff evaluated by Dr. Sanjay Chavda. As part of his exam, the x-ray was read by Dr. Crum as Category 1/1. Dr. Chavda furnished a report indicating plaintiff does have a diagnosis of pneumoconiosis based on the x-ray evidence of Category 1/1 and normal pulmonary function studies with a pre-bronchodilator function of FVC 95% predicted values, FEV1 105% predicted values. Dr. Chavda found the plaintiff's disease is the result of exposure to coal dust in the severance or processing of coal, however, any pulmonary impairment is not.

The defendant-employer filed certain documents titled "Pneumoconiosis Prevalence Among Working Coal Miners Examined in Federal Chest Radiograph Surveillance Programs - United States 1996-2002", "Pneumoconiosis and Advanced Occupational Lung Disease Among Surface Coal Miners - 16 States, 2010-2011", and "Advanced Pneumoconiosis Among Working Underground Coal Miners -

Eastern Kentucky and Southwestern Virginia, 2006". The Administrative Law Judge has reviewed those documents, but finds they are not dispositive of whether this particular claimant has contracted pneumoconiosis.

A Benefit Review Conference was conducted at which time all issues were stipulated except existence of the disease. Since the pulmonary function studies were above 80% or normal, the only issue before the Administrative Law Judge is the existence of the disease and the tier of benefits to which the plaintiff is entitled.

EXISTENCE OF DISEASE

Although the report of Dr. Chavda is not entitled to presumptive weight pursuant to KRS 342.315(2) since it was not performed by a University Evaluator, the Administrative Law Judge finds the report of Dr. Chavda to be the most persuasive. Dr. Chavda was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Vuskovich was selected by the plaintiff and Dr. Poulos was selected by the employer. The Administrative Law Judge has considered all of the evidence in accordance with Magic Coal v. Fox, 19 SW 3d 88 (Ky. 2000). The Administrative Law Judge chooses to rely on and is persuaded by the opinion of Dr. Chavda who was independently selected by the Commissioner of the Department of Workers' Claims.

It is further found the plaintiff has established the presence of x-ray evidence of coal workers' pneumoconiosis Category 1/1, however, the pulmonary function studies were above 80% and the plaintiff will only

be entitled to a Retraining Incentive Benefit pursuant to KRS 342.732(1)(a)1.

However, the plaintiff only has a ninth grade education and he could receive benefits pursuant to KRS 342.732(1)(a)3 for a period up to 17 weeks while pursuing a GED. Also, since the plaintiff was sixty-two (62) years old at the time of his last exposure he does have the option pursuant to KRS 342.732(1)(a)7 to elect to receive, in lieu of Retraining Incentive Benefits, a 25% disability rating from the date of last exposure until he reaches sixty-five (65) years of age.

AWARD AND ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff, Malcolm E. Kimbler, shall recover of Defendant Employer, North Star Mining, and/or its insurance carrier, the sum of \$520.72 per week for Retraining Incentive Benefits for a period not to exceed 104 weeks. These benefits shall be paid only while Plaintiff is enrolled and actively and successfully participating as a full-time student taking the equivalent of 12 or more credit hours per week in a training or education program approved under the regulations. If Plaintiff becomes a part-time student taking not less than the equivalent of six nor more than 11 credit hours per week in a bona fide training or education program approved under the regulations, the weekly income benefits shall be \$260.36 per week for a period not to exceed 208 weeks.
2. Defendant Employer shall also pay, directly to the institution conducting the training or education program,

instruction, tuition, and material costs not to exceed \$5,000.00.

3. If Plaintiff successfully completes a *bona fide* training or education program approved under the regulations, Defendant Employer shall pay to Plaintiff the sum of \$5,000.00 for completion of a program that requires a course of study of not less than 12 months no more than 18 months, or the sum of \$10,000.00 for completion of a program that requires a course of study of more than 18 months.
4. The Plaintiff is also entitled to benefits pursuant to KRS 342.732(1)(a)3 in the amount of \$520.72 for a period not to exceed 17 weeks while Plaintiff is actively and successfully pursuing a GED in accordance with Administrative Regulations promulgated by the Executive Director.
5. In lieu of the Retraining Incentive Benefits award, the Plaintiff may elect to receive a 25% disability rating from the date of his last exposure until he reaches sixty-five (65) years of age in the amount of \$130.18 per week with a 12% interest on all past due and unpaid installments.
6. Plaintiff shall further recover of Defendant Employer, and/or its insurance carrier, for the cure and relief from the effects of the occupational disease such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.
7. All Motions for Approval of Attorney's Fees shall be filed within 30 days of the date this decision becomes final.

On March 16, 2015, North Star filed a motion seeking permission to file a position statement and its position statement. On that same date, North Star filed a Motion for Submission of Late Evidence requesting it be permitted to file the reports of Dr. Ralph Shipley and Dr. Christopher Meyer. North Star also filed a Notice of Filing of Dr. Shipley's report dated February 11, 2015, regarding his interpretation of the October 16, 2014, x-ray film and a Notice of Filing of Dr. Meyer's report dated March 5, 2015, regarding his interpretation of the October 16, 2014, x-ray film. In his report, Dr. Meyer found no radiographic findings of CWP. However, Dr. Shipley's report is not attached to the Notice of Filing concerning his report. In its Motion For Submission of Late Evidence, North Star represented Dr. Shipley's report was misfiled and North Star's counsel discovered it on March 12, 2015. With respect to Dr. Meyer's report, it indicated the report was provided to North Star on March 13, 2015.

On March 26, 2015, North Star filed a "Motion For Relief From Opinion, Award and Order and/or Petition for Reconsideration." It asserted newly discovered evidence indicates Dr. Crum's opinion is not credible and this evidence only became available on March 24, 2015. North Star represented that on February 9, 2015, its counsel

issued an open records request to the DWC for all reports provided by physicians in connection with examinations ordered by the DWC pursuant to KRS 342.316. North Star's counsel represented subsequent communications with counsel and counsel for the DWC identified reports already in counsel's possession. However, on March 24, 2015, those reports not in North Star's possession were issued and certified by the Commissioner. North Star attached a copy of the certified information. North Star represented its counsel diligently attempted to obtain the records provided by the DWC but was unable to do so prior to the ALJ's March 11, 2015, decision. It represented this information constituted newly discovered evidence.

North Star also asserted the certified copies provided by the DWC along with the reports already in its counsel's possession reveal there were thirty-four x-ray readings performed by Dr. Crum in 2014 pursuant to a request by the DWC and of those x-ray readings, twenty-nine resulted in an opinion that pneumoconiosis was present. Thus, Dr. Crum had concluded pneumoconiosis was present in 85.29% of the x-rays he read. North Star cited to the article it introduced which revealed for the year 2006, in Eastern Kentucky and Southwestern Virginia, "less than 5% of underground coal miners with twenty-five or more years

of coal mine employment developed pneumoconiosis of Category or greater." It noted the other article revealed from 1996 to 2002, 2,257 coal miners were examined and forty-six or 2% tested positive for CWP. Therefore, it maintained Dr. Crum's diagnosis is statistically incredible and cannot be believed. It argued Dr. Crum has proven to have a clear bias toward a diagnosis of pneumoconiosis. Thus, Dr. Crum's opinions cannot constitute substantial evidence forming the basis for an award of benefits.

In the absence of vacating his decision, North Star sought to have the ALJ take judicial notice of Dr. Crum's diagnosis rate. Relative to its petition for reconsideration, North Star asserted:

- a. North Star was provided with x-ray evidence by Dr. Shipley and Dr. Meyer, which was only made available on March 12 and March 13, 2015.
- b. North Star moved for submission of late evidence on March 13, 2015. At that time, North Star had not received the March 11, 2015 opinion.
- c. No ruling has been provided to North Star regarding that motion.
- d. In light of Dr. Crum's diagnosis rate, North Star's new evidence from Drs. Shipley and Meyer is critically relevant to the issue of pneumoconiosis.

North Star also asserted that in order to receive RIB benefits the claimant must have both pneumoconiosis as

proven by x-ray examination and spirometric values above 80%. It contended this implies a pulmonary impairment is a condition to receiving RIB benefits. However, in the present case Dr. Chavda opined no pulmonary impairment was caused by pneumoconiosis. Therefore, it requested an order vacating the ALJ's March 11, 2015, decision.

On May 22, 2015, the ALJ overruled the motion for submission of late evidence. The ALJ noted the December 15, 2014, BRC Order set the proof time for the parties, stated a hearing was waived, and the claim was to be submitted on the record. The ALJ noted North Star's proof time expired on approximately February 15, 2015, and the motion to submit late evidence was not filed until five days after the ALJ's March 11, 2015, decision. The ALJ stated the late evidence would not change his original opinion. He also stated there was a conflict in the medical evidence with or without the late evidence and he was persuaded by the opinion of Dr. Chavda, who was selected by the Commissioner.

The ALJ also overruled the petition for reconsideration reasoning as follows:

The statistical analysis of readings by Dr. Crum does not change the original opinion and findings of the Administrative Law Judge. The studies cited by defendant do not take

into account that Dr. Crum is reading x-rays of individuals who have already filed a claim based on x-ray evidence of pneumoconiosis and at least one if not more "B" readers have already read an x-ray of the worker as positive or the claim would not have been filed. Additionally, the Administrative Law Judge would note that the studies required agreement between two (2) readers. Who the two (2) readers were, would obviously affect the results of any study. Dr. Chavda was selected by the Commissioner of the Department of Workers' Claims. He has the x-ray read by Dr. Crum, a radiologist and "B" reader. Quite simply, the Administrative [sic] Law Judge chose to rely upon the report of Dr. Chavda since he was independently selected by the Commissioner rather than counsel for one of the parties. The Administrative Law Judge has no control over the selection of the facility or physician selected to do the KRS 342.216 exam. All the physicians of record have essentially the same qualification and the Administrative Law Judge was persuaded to accept the opinion of the physician independently selected by the Commissioner.

Concerning its first argument, North Star argues granting preferential weight to a non-university evaluator regardless of the entity scheduling the evaluation is arbitrary and "a violation of equal protection and due process." It contends compelling evidence establishes Dr. Crum is biased in favor of the diagnosis of clinical pneumoconiosis. Therefore, Dr. Chavda's opinion, which relied on Dr. Crum's reading of the x-ray, should have been

given less weight than the interpretation of other physicians. It asserts the ALJ's decision reveals he adopted the opinions of Dr. Chavda solely because he was chosen by the DWC. However, since Dr. Chavda's opinion is not afforded presumptive weight, North Star argues the ALJ's decision is arbitrary. North Star contends the ALJ should exercise his discretion when weighing the relative strength of the medical evidence in the case and not base his decision upon the party or governmental agency scheduling the evaluation.

North Star notes Dr. Chavda is a physician with the Muhlenberg Community Hospital and is unaffiliated with a university. North Star takes issue with Dr. Chavda's reliance upon Dr. Crum's interpretation of Kimbler's October 16, 2014, x-ray. North Star asserts that unlike Dr. Chavda, Dr. Crum did not contract with the DWC but is a "physician sub-contractor for Dr. Chavda," who does not interpret the x-ray. North Star argues the contract between the DWC and Dr. Chavda cannot convert his evaluation into a university evaluation thereby affording Dr. Chavda's opinions presumptive weight.

Concerning its second argument, North Star again asserts the opinion regarding the presence of CWP based on an interpretation of the x-ray film is not the opinion of

Dr. Chavda, but rather the opinion of Dr. Crum. It notes Dr. Chavda relied upon Dr. Crum, a radiologist, to diagnose pneumoconiosis. Therefore, Dr. Chavda's opinion regarding the presence of pneumoconiosis cannot be considered credible. As argued in its petition for reconsideration, North Star argues since Dr. Crum interpreted twenty-nine of the thirty-four x-ray readings as revealing pneumoconiosis, his diagnosis cannot be believed. It again cites to the articles it filed in the record and the documents obtained from the DWC regarding the claims in which Dr. Crum interpreted x-ray films. North Star argues Dr. Crum has a proven clear bias in diagnosing pneumoconiosis, and as a result his opinion cannot be considered substantial evidence as the basis for an award of benefits.

North Star contends the remaining evidence when properly weighed compels a dismissal of the claim. It notes Dr. Vuskovich is a B reader but not a board certified radiologist and he reviewed the oldest x-ray. It posits pneumoconiosis is a progressive disease which should indicate a greater presence on subsequent x-rays. However, the highest qualified physicians, Drs. Shipley and Meyer, board certified radiologists and B readers, both interpreted the recent film of October 16, 2014, as negative. In addition, Dr. Poulos interpreted the April

17, 2012, x-ray film as negative. North Star asserts Drs. Shipley, Meyer, and Poulos are better informed than Dr. Vuskovich since they are specially trained to examine radiological films for the presence of CWP. In addition, the absence of advanced disease on these films call into question Dr. Vuskovich's earlier diagnosis. North Star asserts since the opinions of Drs. Crum and Chavda cannot constitute substantial evidence, the best evidence in the record establishes Kimbler does not suffer from CWP.

In its third argument, North Star argues as follows:

Constitutional challenges to an administrative decision are reserved for the Courts of Justice. There are separate, sufficient reasons for a remand to the ALJ. However, for purposes of appeal, only, Petitioner reserves the right to address whether the ALJ's decision violated due process and equal protection.

Kimbler, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable

persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the

findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in the argument the ALJ's reliance upon Dr. Chavda is arbitrary. In relying upon the opinions of Dr. Chavda, the ALJ specifically acknowledged Dr. Chavda's report was not entitled to presumptive weight since he is not a university evaluator. However, he relied upon Dr. Chavda's opinions because he was an independent expert witness. This finding by the ALJ is accurate. The fact that Dr. Chavda was requested by the DWC to conduct an evaluation and supply a report does not prevent the ALJ from relying upon his opinions. Significantly, there was no objection to the report of Dr. Chavda which included the report of Dr. Crum pertaining to his interpretation of Kimbler's October 16, 2014, x-ray. As noted earlier, the ALJ has the sole discretion to determine the quality and character of the evidence. Here, the ALJ chose to rely

upon Dr. Chavda's opinion which was based in part on the opinions of Dr. Crum. As this is solely within the ALJ's discretion, this Board has no authority to disturb his reliance upon the opinions of Dr. Chavda in determining Kimbler suffers from CWP as a result of his exposure to coal dust in the severance or processing of coal while in the employ of North Star.

In light of the ALJ's initial statement that he could not and thus did not give Dr. Chavda's opinions presumptive weight, North Star's argument Dr. Chavda's opinions and findings are somehow unreliable has no basis. This is especially true since North Star did not object to the admission of Dr. Chavda's report which included the report of Dr. Crum regarding his interpretation of Kimbler's x-ray. Further, the fact Dr. Crum may not have contracted with the DWC does not cause his report to be less than reliable nor does it prevent Dr. Chavda from relying upon the contents of Dr. Crum's report in forming his opinion Kimbler has CWP.⁴ This is especially true since there was no objection to the appointment of Dr. Chavda pursuant to KRS 342.315 and KRS 342.316 and the admission of his and Dr. Crum's report into evidence. Since Dr.

⁴ The record is silent as to whether Dr. Crum has a contractual relationship with the DWC.

Chavda's report constitutes substantial evidence supporting the ALJ's determination Kimbler has CWP and the award of RIB benefits, we may not disturb the award.

Similarly, we find no merit in North Star's argument that Dr. Crum's bias in favor of diagnosing pneumoconiosis invalidates Dr. Chavda's opinion. We first observe the articles filed by North Star in and of themselves have no probative value on the issue to be resolved by the ALJ. One of the articles relates to pneumoconiosis and advanced occupational lung disease among surface coal miners. It does not apply to Kimbler as the unrebutted proof establishes he worked over thirty years entirely in underground mines. The report on its face demonstrates it is irrelevant to the issue before the ALJ. Further, the other article relating to the prevalence of pneumoconiosis between 1996 and 2002 without further explanation is not germane to the issue as it involves a study performed seven years prior to Kimbler's last exposure to coal dust. Thus, without some testimony from an expert linking one or both articles to Kimbler's employment history and likelihood of contracting CWP, the articles have no probative value relative to the determination of whether Kimbler has CWP.

North Star's argument that Dr. Crum is biased is misleading and is not supported by the record. We point out the certified information from the DWC which North Star attached to its petition for reconsideration was not evidence to be considered by the ALJ. The fact North Star attached this information to its Motion For Relief From Opinion and Award and/or Petition for Reconsideration does not cause it to be evidence in this claim. Notably, North Star did not request the certified information from DWC be admitted into evidence. The evidence offered by North Star to be considered by the ALJ was that evidence filed in the record on or before February 13, 2015.⁵ Notably, North Star does not argue the ALJ committed an abuse of discretion in refusing to consider the certified information from the DWC. North Star's reliance upon this information on appeal which is not in evidence is improper.

Although North Star does not raise the issue on appeal, we choose to address its assertion in its petition for reconsideration that somehow this information obtained from the DWC is newly discovered evidence. In Turner v. Bluegrass Tire Co., Inc., 331 S.W.3d 605, 609 (Ky. 2010)

⁵ Pursuant to the December 15, 2014, BRC Order, North Star had up to and including this date to file the evidence it would rely on in resisting Kimbler's claim.

the Supreme Court defined newly discovered evidence as follows:

As used in KRS 342.125(1), "newly-discovered evidence" refers to evidence existing at the time of the initial proceeding that the moving party did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceeding. [footnote omitted] Moreover, the evidence must not be merely cumulative or impeaching but must be material and, if introduced at reopening, probably result in a different outcome. [footnote omitted]

This information which was attached to the petition for reconsideration, at best, does nothing more than impeach the credibility of Dr. Crum, and would not "probably result in a different outcome." Id. Assuming, *arguendo*, this information had been admitted into evidence, it only goes to the weight to be afforded Dr. Crum's opinions and not the admissibility of his opinions. Thus, North Star's reliance upon the information it obtained from the DWC is misplaced, and its continuous reference in its brief of this material as evidence is improper.

North Star's representation in its brief regarding the opinions of Drs. Shipley and Meyer is also improper. North Star attempted to introduce the reports of the doctors approximately one month after its time to

introduce evidence had expired and the ALJ denied North Star's motion to admit the reports. Further, Dr. Shipley's report was not attached to North Star's Notice of Filing in which it represented it had attached his medical report. Dr. Shipley's report is not physically in the record. Although Dr. Meyer's report is in the record, the ALJ correctly excluded it from evidence as it was not timely filed. Significantly, North Star does not argue the ALJ erred in excluding the reports of both doctors. Therefore, as the reports of Drs. Shipley and Meyer are not in evidence, any argument pertaining to these reports is without merit.

As is his prerogative, the ALJ chose not to rely upon the opinions of Drs. Vuskovich and Poulos, and this Board has no authority to disturb his decision as to the weight to be afforded those opinions. As noted earlier, Dr. Chavda's report which included the report of Dr. Crum was introduced as evidence and considered by the ALJ without objection. Since Dr. Chavda's opinion constitutes substantial evidence, this Board has no authority to disturb the ALJ's decision on appeal. Special Fund v. Francis, supra.

Finally, since North Star does not provide an argument in support of its assertion the ALJ's decision

"violated due process and equal protection," we will not disturb the ALJ's decision on the basis of this alleged error.

Accordingly, the March 11, 2015, Opinion, Award, and Order and the May 22, 2015, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON TIGHE ESTES
300 E MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON GRETCHEN GULLETT
128 SHOPPERS PATH
PRESTONSBURG KY 41653

ADMINISTRATIVE LAW JUDGE:

HON R ROLAND CASE
107 COAL HOLLOW RD STE 100
PIKEVILLE KY 41501