

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1998-CA-000864-WC

WILLIAM MOLLETT

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-006165

SPECIAL FUND;  
HONORABLE RONALD W. MAY,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and MILLER, Judges.

MILLER, JUDGE. William Mollett asks us to review an opinion of the Workers' Compensation Board (Board) rendered March 13, 1998. We affirm.

Mollett filed a workers' compensation claim, alleging total disability as the result of pneumoconiosis. He subsequently settled his claim against his employer, Raven Mining Company, and proceeded solely against the Special Fund (Fund). The administrative law judge (ALJ) found that Mollett, indeed, suffered from pneumoconiosis category I and that he would be entitled to an award of retraining incentive benefits (RIB). The ALJ noted, however, that Mollett had previously been compensated for RIB through a prior settlement agreement and, in any case,

the Fund would have no liability for said benefits. Mollett, dissatisfied with the ALJ's decision, pursued an appeal to the Board. The Board agreed with the ALJ's findings and affirmed the dismissal of the claim. This appeal follows.

Mollett contends that the ALJ committed reversible error by concluding that he was neither totally disabled nor suffering from pneumoconiosis category II. We disagree. In order to prevail, Mollett must prove that the evidence *compelled* a finding in his favor. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). One Dr. Matt Vuskovich evaluated Mollett and concluded that he suffered from category I pneumoconiosis. Mollett contends that Vuskovich's testimony should be totally disregarded by the ALJ because there was a five percent (5%) variance in the performance of certain spirometric studies performed by the doctor. Mollett argues that the only credible evidence was that from Drs. Ira Potter and W. F. Clark, who opined that Mollett suffered from category II pneumoconiosis. Regarding the variation of more than 5% in the spirometric studies performed by Dr. Vuskovich, the ALJ found as follows:

In testing for pulmonary function, one cannot fake good performance. If there is a 5% variance in the performance on spirometric studies, this tells us two things. First, plaintiff was not exerting maximum effort on all three studies. Secondly, plaintiff's breathing is at least as good as the highest performance figures would indicate. Although plaintiff's performance varied by more than 5% on the spirometric testing of Dr. Vuskovich, we know he can breath[e] at least as good as his highest performance figures which exceeded 80% of AMA Guidelines predicted values.

It is well established that the credibility of evidence is within the sole province of the fact finder. Id. The ALJ simply found more credible the medical conclusions of Dr. Vuskovich. As noted by the Board, so long as the studies are performed in accordance with AMA Guidelines and the physician does not declare the test invalid, it must be accepted as medically sound. See Newberg v. Garrett, Ky., 858 S.W.2d 181 (1993), and Fields v. Carbon River Coal Company, Ky. App., 920 S.W.2d 880 (1996). Hence, we are of the opinion that the ALJ did not err in finding that Mollett suffers from category I pneumoconiosis and is entitled to only RIB which he had previously been awarded.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE/FUND:

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