IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON — **APPELLANT**

VERSUS — **CAUSE NO. 2006-CC-00841**

APPELLEE

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS)

BRIEF OF THE APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The issues in this matter have been fully briefed, thus, the Appellee asserts that oral argument will not aid or assist the decisional process of this Court.

STATEMENT OF THE ISSUES

I.

THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. STEVISON'S CLAIM FOR DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

II.

THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. STEVISON'S CLAIM FOR DISABILITY SHOULD NOT BE REVERSED AND REMANDED AS THERE IS NO REQUIREMENT THAT THE RETIREMENT SYSTEM SECURE ADDITIONAL MEDICAL EVALUATIONS NOR IS IT OBLIGATED TO ACCEPT A DETERMINATION OF DISABILITY FROM THE SOCIAL SECURITY ADMINISTRATION.

STATEMENT OF THE CASE

This matter involves an appeal, filed by the Appellant, Sheryl Stevison, of the Opinion and Order entered by the Circuit Court of the First Judicial District of Hinds County, Mississippi on April 10, 2006. Ms. Stevison sought review by the Circuit Court of the Order entered by the Board of Trustees of the Public Employees' Retirement System (hereinafter "PERS Board") on August 26, 2003. The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny Ms. Stevison's request for the payment of disability benefits as defined under Miss. Code Ann. Section 25-11-113 (Rev. 2006). The Circuit Court upheld the Order of the Board of Trustees, hence this appeal.

STATEMENT OF THE FACTS [1]

Ms. Stevison was employed as a teacher's assistant with the Wayne County School District. At the time of her hearing before the Disability Appeals Committee she had eleven and one-half (11 ½) years of service credit. (Vol. 2, Pp. 31, 69) Ms. Stevison terminated employment July 31, 2002. (Vol. 2, Pp. 69, 73)

The problems giving rise to her application for disability began September 14, 2001. According to Ms. Stevison, her lower back and the area around her hips was hurting. She thought that she may have pulled a muscle the previous day while picking up heavy textbooks. (Vol. 2, Pp. 32, 37) The pain prompted her to visit a chiropractor. (Vol. 2, P. 32) Ms. Stevison testified that she visited numerous doctors trying to secure a diagnosis for the pain she was suffering. In fact, she said that she visited 15-16 doctors before getting a "true diagnosis". Dr. Daggett diagnosed her with Piriformis Syndrome. According to Ms. Stevison, after having a bone scan, "There wasn't any place that did not show up arthritis". (Vol. 2, P. 33)

Ms. Stevison was questioned whether she asked for accommodations in her job duties. She responded that she talked to the principal about her health, and, especially the assistant principal, who, according to Ms. Stevison, "didn't believe what I was going through". (Vol. 2, P. 39)

When asked whether she had seen a counselor or another mental health professional, Ms. Stevison said that she was given some names of books and was also told that she could get on a chat line for discussions regarding her arthritis. (Vol. 2, P. 41)

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[1] Reference to the record transcript is indicated by "Vol." followed by the appropriate volume number and "P" followed by the appropriate page number.

She had been on antidepressants and was told by Dr. Daggett that she had to keep trying various medications until she could find the one that helped. (Vol. 2, P. 41)

Prior to being diagnosed by Dr. Daggett, Ms. Stevison was seen by Dr. Myers who ran an EMG which did not show anything as being wrong. (Vol. 2, P. 44) She then went to see Dr. Weiss who thought she was suffering from a little bursitis around her hip. He advised her that she could possible have fibromyalgia and suggested that she go to a pain management clinic. Ms. Stevison refused to go without having a diagnoses for her condition. Dr. Weiss took x-rays that were alright and he informed her that there wasn't anything else that he could do for her. She then went to Dr. Tynes who referred her to Dr. Daggett. (Vol. 2, Pp. 44-45) She was diagnosed with Piriformis Syndrome[2] which she described as muscle contractions in the muscles and tendons around the sciatic nerve. (Vol. 2, P. 46) She had an EMG which was negative and was told there was no need to repeat the test. (Vol. 2, P. 47)

Dr. Duddleston noted to Ms. Stevison that there were no notes from Dr. Daggett and she responded that Dr. Daggett "doesn't do that". According to Ms. Stevison, Dr. Daggett said that he would tell her primary physician what he found. Dr. Duddleston referring to the information from Dr. Daggett, said:

> [t]here is very little documentation here. They may have sent all that they have, but they don't have very much that they sent. (Vol. 2, P. 55)

Again referring to Dr. Daggett's information, Dr. Duddleston commented:

> Okay. You know, we don't have an exam; **we don't have the diagnosis of Piriformis Syndrome or any other significant information in this record**, and it makes it problematic for us to

[2] "This is the most common cause of sciatic pain and is created when pressure is placed on the sciatic nerve by the Piriformis muscle" www.LosetheBackPain.com Sciatica Advisory

> understand the scope of what he was talking about. How many times have you seen Dr. Daggett, roughly? *[Emphasis Added]* (Vol. 2, P. 56)

In response Ms. Stevison said that she had seen Dr. Daggett three or four times. (Vol. 2, P. 56)

According to Ms. Stevison, the school would have extended her contract for the next school year. (Vol. 2, P. 57)

The Medical Board first reviewed Ms. Stevison's record and requested that a Functional Capacity Evaluation (FCE) be performed. The FCE measures your physical capabilities. The results of the FCE indicate that Ms. Stevison, at the time of her termination, was fully capable of performing the job duties of a teacher's assistant. (Vol. 2, Pp. 93-100) Prior to the Medical Board making a decision they requested additional medical documentation from Ms. Stevison's physicians and said that upon receipt of the information they would review the files and make a determination as to eligibility for disability benefits. (Vol. 2, P. 245) The Medical Board denied Ms. Stevison's claim and she filed an appeal before the Disability Appeals Committee.

After reviewing the medical documentation and testimony offered at the hearing, the Disability Appeals Committee recommended Ms. Stevison's application for disability be denied. The Board of Trustees adopted the recommendation of the Disability Appeals Committee by Order entered August 26, 2003. Aggrieved of the decision of the Board of Trustees, Ms. Stevison filed an appeal in the Circuit Court pursuant to Miss. Code Ann. § 25-11-120. (Rev. 2006). The Circuit Court, on April 10, 2006, entered its Opinion and Order upholding the decision of the PERS Board to deny disability benefits, thus, finding

that the Board's decision is supported by substantial evidence and is neither arbitrary nor capricious. Ms. Stevison now prosecutes her appeal before this Honorable Court.

SUMMARY OF THE ARGUMENT

The Order of the PERS Board of Trustees, as noted by the Circuit Court, is supported by substantial evidence. In order to qualify for a disability benefit under PERS law, Ms. Stevison would have to prove that her disability was the basis for her termination from employment. The record clearly supports the Order of the PERS Board of Trustees, which took into consideration all of the medical evidence offered by Ms. Stevison. The medical evidence, or lack thereof, offered in support of her claim, as reviewed by the Disability Appeals Committee, clearly does not establish that Ms. Stevison meets the eligibility requirement for a disability benefit from the State of Mississippi. Further, Ms. Stevison based her claim for disability on severe pain from arthritis, thus, an FCE was requested to determine her physical capabilities. This case should not be remanded as there is no requirement that the State secure additional evaluations to determine whether the member is disabled. The burden is on the member to prove he/she is in fact disabled as defined in Miss Code Ann. Section 25-11-113 (Rev. 2006). Based on the evidence provided by Ms. Stevison, the PERS decision to deny disability was based on substantial evidence.

This case should not be remanded in order to obtain the determination from the Social Security Administration. There is no requirement that PERS accept a determination from the Social Security Administration. The decision of the Circuit Court

affirming the decision of the Board of Trustees should be upheld. Ms. Stevison was provided a fair and impartial hearing. The Order of the PERS Board of Trustees is premised on substantial evidence and is neither arbitrary nor capricious, and was entered within the Board's authority. Based on the evidence introduced in the record, it is clear that the only decision the Board could make is that Ms. Stevison does not meet the requirements for disability under PERS law. The recommendation of the Disability Appeals Committee, adopted by Order of the PERS Board, and upheld by the Circuit Court in its Opinion and Order should be affirmed.

ARGUMENT

INTRODUCTION

PERS was established in 1953 to provide retirement and other benefits to covered employees of the state, its political subdivisions and instrumentalities. Chapter 299, Mississippi Laws of 1952.

In addition to service retirement benefits, disability benefits are provided for members who meet the statutory requirements for such benefits. There are two (2) categories of disability benefits available to PERS members: (1) a regular disability benefit payable to members who have at least four (4) years of creditable service and who become disabled for any reason, and (2) a hurt-on-the-job disability benefit, payable to members regardless of the number of years of creditable service, where the member becomes disabled due to an injury occurring in the line of duty. Miss. Code Ann. Sections 25-11-113 and 25-11-114 (Rev. 2006).

Applications for disability benefits are reviewed by the PERS Medical Board, which reviews and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. See: Miss. Code Ann. Section 25-11-119(7) (Rev. 2006) Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the designated hearing officer of the PERS Board of Trustees, pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006).

Disability, as defined under PERS law, Miss. Code Ann. Section 25-11-113, states in pertinent part:

> . . . the inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation or the incapacity to perform the duties of any employment covered by the Public Employees' Retirement System (Section 25-11-101 et seq.) that is actually offered and is within the same general territorial work area, without material reduction in compensation.

Section 25-11-113 further provides that:

> . . . in no event shall the disability retirement allowance commence before the termination of state service, provided that the medical board, after a medical examination, shall certify that the member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that the member should be retired . . .

The question before the PERS Medical Board and the PERS Board of Trustees was whether Ms. Stevison's claim meets the statutory requirement for the receipt of a disability benefit.

The PERS Board of Trustees concluded that the recommendation of the Disability Appeals Committee to deny disability benefits should be adopted as the decision of the Board. The Circuit Court determined that the decision of the Board is supported by substantial evidence, and, thus, affirmed the denial of disability benefits to Ms. Stevison.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit Court Practice limits review by this Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence; or (2) was arbitrary or capricious; or (3) was beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of Ms. Stevison. ***Public Employees' Retirement System v. Howard,*** 905 So. 2d 1279, 1284 (Miss. 2005); ***Public Employees' Retirement System v. Stamps***, 898 So. 2d 664, 673 (Miss. 2005); ***Public Employees' Retirement System v. Smith,*** 880 So. 2d 348, 351 (Miss. App. 2004); ***Public Employees' Retirement System v. Henderson,*** 867 So. 2d 262, 264 (Miss. App. 2003); ***Public Employees' Retirement System v. Dishmon,*** 797 So. 2d 888, 891 (Miss. 2001); ***Byrd v. Public Employees' Retirement System***, 774 So. 2d 434, 437(Miss. 2000); ***Brinston v. Public Employees' Retirement System,*** 706 So. 2d 258, 259 (Miss. 1998)

A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1285; ***Public Employees' Retirement System v. Stamps***, 898 So. 2d at 673; ***Public Employees' Retirement System v. Smith,*** 880 So. 2d at 351; ***Public Employees' Retirement System v. Dishmon,*** 797 So. 2d at 891; ***United***

Cement Company v. Safe Air for the Environment, 558 So. 2d 840, 842 (Miss. 1990); *Melody Manor Convalescent Center v. Mississippi State Department of Health*, 546 So. 2d 972, 974 (Miss. 1989) Also see: ***Public Employees' Retirement System v. Burt***, 919 So. 2d 1150, 1156 (Miss. App. 2005.) In ***Mississippi State Tax Commission v. Mississippi-Alabama State Fair***, 222 So. 2d 664, 665 (Miss. 1969), this Court stated:

> Our Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies and are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency.

In ***Public Employees' Retirement System v. Cobb***, 839 So. 2d 605, 609 (Miss. App., 2003) the Mississippi Court of Appeals noted: "[I]n administrative matters, the agency, not the reviewing court, sits as finder of fact." The Circuit Court obviously recognized that it is the agency that sits as finder of fact. In this case there are medical tests and evaluations that Ms. Stevison has undergone. Several different physicians have reviewed the reports in the file with the medical training to read and assess those documents. The Court in ***Cobb*** went on to state: "That fact finding duty includes assessing the credibility of witnesses and determining the proper weight to give to a particular witness's testimony." On review by an appellate court it:

> is obligated to afford such determinations of credibility in the fact-finding process ***substantial deference*** when reviewing an administrative determination on appeal and the **court exceeds its authority when it proceeds to re-evaluate the evidence and**

> **makes its own determination of the trustworthiness of some particular testimony.** (*Emphasis added*) 839 So. 2d 609

In ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1287, this Court reiterated that "it is for PERS, as the fact finder, to determine which evidence is more believable or carries the most weight." The findings of fact by the PERS Board of Trustees must not be disturbed on appeal, "where sustained by substantial evidence." ***City of Meridian v. Davidson***, 211 Miss. 683, 53 So. 2d 48, 57 (1951); ***Harris v. Canton Separate Public School Board of Education,*** 655 So. 2d 898 (Miss. 1995) As stated by this Court in ***Davidson*** "[t]he underlying and salient reasons for this safe and sane rule need not be repeated here." 53 So. 2d at 57. Moreover, a rebuttable presumption exists in favor of PERS' decision, and the burden of proving to the contrary is on Ms. Stevison. ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1284; ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 891; ***Brinston v. Public Employees' Retirement System***, 706 So. 2d at 259; ***Mississippi State Board of Accountancy v. Gray***, 674 So. 2d 1251, 1257 (Miss. 1996); ***Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors***, 621 So. 2d 1211, 1215 (Miss. 1993) Also see: ***Mississippi Hospital Association v. Heckler***, 701 F.2d 511, 516 (5th Cir. 1983). In ***Gray***, this Court held:

> A reviewing court cannot substitute its judgment for that of the agency or reweigh the facts of the case. Chancery and Circuit Courts are held to the same standard as this Court when reviewing agency decisions. When we find the lower court has exceeded its authority in overturning an agency decision we will reverse and reinstate the decision. 674 So. 2d at 1253

Also see ***Public Employees Retirement System v. Stamps***, 898 So. 2d at 673.

In ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 893, this Court stated that "the applicant for disability has the burden of providing to the Medical Board and to the Appeals Committee that he or she is in fact disabled". This certainly contradicts Ms. Stevison's position that PERS should have sought an independent medical and/or psychiatric evaluation. Clearly, Stevison, not PERS at the administrative level, had the burden of proving that she is indeed disabled. ***In Public Employees' Retirement System v. Henderson***, 867 So. 2d 262, 264 (Miss. App. 2003), the Court citing ***Doyle v. Public Employees' Retirement System***, 808 So. 2d 902, 905 (Miss. 2002) noted: "It is not this courts job to determine whether the claimant has presented enough evidence to prove she is disabled, but whether PERS has presented enough evidence to support its finding that the claimant is not disabled." Also See: ***Public Employees' Retirement System v. Burt***, 919 So. 2d at 1156. The Circuit Court is correct in its determination that PERS finding is based on substantial evidence.

The Order of the PERS Board of Trustees was supported by substantial evidence, was neither arbitrary nor capricious nor violated any statutory or constitutional right of Ms. Stevison and, thus, the Opinion and Order of the Circuit Court entered April 10, 2006, must be affirmed.

I.

THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. STEVISON'S CLAIM FOR DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

"Unless PERS' order was not supported by substantial evidence, or was arbitrary or capricious, the reviewing court should not disturb its conclusions." ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1284. This Court has defined arbitrary and capricious stating that "an administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." ***Mississippi State Department of Health v. Natchez Community Hospital,*** 743 So. 2d 973, 977 (Miss. 1999). "An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." ***Id.*** The record supports PERS' finding, thus, the action of the PERS Board of Trustees is neither arbitrary nor capricious.

Upon close reading of the record before this Honorable Court, it is evident that the decision of the PERS Board of Trustees is based upon substantial evidence. Substantial evidence has been defined as evidence which affords an adequate basis of fact from which the fact at issue can be reasonably inferred. ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1285; ***Johnston v. Public Employees' Retirement System***, 827 So. 2d 1,3 (Miss. App. 2002) ***Davis v. Public Employees' Retirement System***, 750 So. 2d 1225, 1233 (Miss. 1999). Also see: ***Brakefield vs. Public Employees' Retirement System*** 940 So. 2d 945, 948 (Miss. App. 2006) The facts, as presented in the record before this Court, support the decision of the PERS Board of Trustees that Ms. Stevison is not entitled to the receipt of a disability benefit pursuant to Miss. Code Ann. Section 25-11-113.

There is substantial evidence to support the Board's decision, and its actions are neither arbitrary nor capricious. The Board has the authority to make a decision relative

to disability, and it did so within the confines of the laws of Mississippi and PERS Regulations.

This Court has further defined substantial evidence as evidence that is "more than a scintilla; it must do more than create a suspicion, especially where the proof must show bad faith." ***Mississippi State Board of Examiners for Social Workers and Marriage and Family Therapists v. Anderson***, 757 So. 2d 1079, 1086 (Miss. Ct. App. 2000) (*quoting* ***Mississippi Real Estate Commission v. Ryan***, 248 So. 2d 790, 794 (Miss. 1971) (citing 2 Am. Jur. 2d *Administrative Law* § 688 (1962)). Also see, ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1285. This Court, after reviewing the record, including the findings of the Disability Appeals Committee, and, its thorough analysis of the medical documentation and testimony offered at hearing will see that there is "more than a scintilla" of evidence to support PERS' decision to deny disability benefits as was recognized by the Circuit Court.

In ***Public Employees' Retirement System v. Cobb,*** 839 So. 2d at 609-610 the Mississippi Court of Appeals stated:

> The requirement of "substantial evidence" seems satisfied, however, in such instance by an appellate determination that the **agency's conclusion that the claimant's evidence was so lacking or so unpersuasive that she failed to meet her burden appears a reasoned and unbiased evaluation of the evidence** in the record. In that circumstance, **in something of a paradox, the lack of evidence at the agency level becomes the substantial evidence on appellate review that suggests the necessity of affirming the agency's determination.** [*Emphasis added*]

Ms. Stevison contends that the proof is insufficient to support PERS' conclusion as there are no reports that contradict the reports of her treating physicians. The Disability

Appeals Committee recognized the complaints Ms. Stevison testified to at the hearing.

The Committee in its Statement of Facts noted the following:

> Ms. Stevison testified that on September 19, 2001, she came to school with pain in her left leg. The day before, she had carried many heavy textbooks. She waited until the following Monday and then she went to the chiropractor. She testified that she did not get any relief so she began to seek out a doctor to help her..... She testified that she did go to physical therapy for two months but it did not help and that the therapist told her she needed to see another doctor and look for another diagnosis. **She saw 15 to 16 doctors and finally Dr. Daggett diagnosed her with Piriforms Syndrome**.....
>
> Ms. Stevison told this Committee that **Dr. Daggett treated her with muscle relaxers, pain medication and stretches**.....
>
> **Ms. Stevison has never slept well**.....
>
> .....Ms. Stevison testified that **her assistant principal did not believe that she was really having medical problems..... She believes that her school would have offered her a contract for the next school year**, but Dr. Tynes told her she would have to take care of herself to get well. Ms. Stevison testified that she has not seen a psychiatrist. She has read books that Dr. Daggett gave her and she gets on line to chat. She testified that **if she needed a counselor, Dr. Daggett would refer her**.
>
> The oldest records in the file are from a clinic but they are difficult to read and they do not reflect the name of the examiner. Maybe these are records from Dr. Faust. The oldest is dated July 12, 1999, and it looks to deal with **a bladder infection**. She was **treated with antibiotics**. She also saw **Dr. Tynes**, another Family medicine practitioner during this time **for routine things**..... Dr. Tynes noted on October 21, 1999, that **her heart rate was a little elevated but regular** and that he did not believe the symptoms were the result of a drug reaction, noting that it was, however, possible. He thought that the problems were anxiety-related. In November, Dr. Tynes noted that Ms. Stevison had trouble sleeping when her husband was away and that she was having stress while at school. He mentioned counseling and began treating Ms. Stevison's anxiety and depression with medication.
>
> **In early 2000, chief complaints included a urinary tract infection, complaints of flu like symptoms, an aspiration**

episode, dizziness, and leg pain due to injection. Her gynecologist told her he thought she had **adhesions** and that that was the cause of her left-sided pain. Then, beginning in June of 2000, Ms. Stevison began complaining of **sharp pains under the right arm without associated trauma, abdominal pain**. She was seen by a Urologist and after tests, she was diagnosed with Chronic Cystitis. On November 3, 2000, Dr. Tynes again suggested that Ms. Stevison might have dysthymia and noted that she did not want to consider this as her problem.....

..... on January 18, 2002, Ms. Stevison saw Dr. Myers with the Arthritis Center for a Rheumatology evaluation. Dr. Myers thought that Ms. Stevison was experiencing sciatica, possibly from all of her abdominal surgeries. **Her MRI and EMG studies were interpreted as normal.** She saw her gynecologist who discontinued the estrogen replacement thinking that the pain was due to endometriosis that remained in her abdomen. On February 22, 2002, the primary doctor made the diagnosis of sacroiliacitis.

Rheumatologist, Dr. Weiss, saw Ms. Stevison four times in February and March of 2002, and he noted in his initial visit that Ms. Stevison's complaints began after her hysterectomy, and that **all of her work ups had been normal, including musculoskeletal complaints**.....

By April 12, 2002, Dr. Tynes was considering the diagnosis of Fibromyalgia with the outside chance of Lupus because most of **Ms. Stevison's tests were normal except a slight positive ANA**..... On the 18th, Dr. Tynes again noted that **Ms. Stevison was not very compliant with her medications and that she had several concerns including finances, empty nest and her self worth was tied up with her ability to do a good job**..... Over the summer, Ms. Stevison improved, but did have a few difficulties with her husband. That situation apparently improved and **Ms. Stevison did begin counseling**..... Over that summer, Ms. Stevison was **diagnosed with Sjogren's Syndrome, which is dryness of the mouth**. She noted on July 22, 2001, that she was going to proceed with disability and Dr. Tynes agreed. **She saw Dr. Tynes on August 19, 2002, and showed improvement with the steroid therapy**..... The last hand written report from her family physician is dated August 20, 2002, with complaints of ankle pain after a fall.

On September 10, 2002, Ms. Stevison reported joint pain and was immediately begun to wean from the steroids. On October 7, she was diagnosed with another fibromyalgia-related disease called

> Piraformas Syndrome that was causing the left sided leg pain..... There was a **bone imaging scan performed on December 18, 2002, which showed only diffuse degenerative and arthritic changes of the major joints**.....
>
> A Functional Capacity Evaluation was performed on March 13, 2003, and the examiner concluded that **Ms. Stevison can perform with in the light duty work demand category and that her performance on her exam was consistent**..... (Vol. 2, Pp. 18-22)

The Committee then provides a thorough analysis of the medical information contained in Ms. Stevison's file as follows:

> Has Ms. Stevison provided objective medical proof that she is disabled? **She has provided us with opinions of disability from Dr. Daggett and Dr. Tynes. But what are the objective bases for these opinions**, as medical doctors are typically not aware of the specifics required by statute, to make a determination of disability. We know that Ms. Stevison developed problems in September of 2001, after lifting textbooks. Her left hip developed a pain that she described as like lightening. She saw 15-16 doctors without relief. She had tests performed, including **MRIs and EMG studies that were completely normal. Subsequently, she had a bone scan that showed every single joint had arthritis.** This is very odd. Surprisingly, the MRI picked up none of the arthritis. General medical knowledge about arthritis is that it appears in one or more joints, usually bilaterally, but it would be quite unusual for all joints to light up with arthritis. Thus, a conclusion could be drawn, that the bone scan was inaccurate and therefore, unimpressive, especially in light of the fact that the MRI was normal.
>
> In addition, **we have no reports about the hip pain**, which according to Ms. Stevison, is how all of this began anyway. The electric-like pain that Ms. Stevison complains of is probably related to muscles and tendons and not hard structures like bones, joints, and discs. We note that at least one provider documented that all of the complaints Ms. Stevison described had "hysterical overtones." This Committee noted, as did the Rheumatolgist, that Ms. Stevison's sedimentation (SED) rate was slightly elevated, but okay. It certainly was not high.
>
> **Obviously, the opinions regarding inability to work are not supported by the records presented to us today**. This point is

evident not just through the medical records but also through what is not included in the record. **Ms. Stevison, by her own testimony, saw many physicians and most of them could not find an objective reason to support her complaints of pain. We assume, for that reason, we were not provided the records from those physicians.** May we assume that the other 10 plus doctors opined that no disability existed? It seems reasonable that we may. Only Dr. Daggett and Dr. Tynes find disability. **The records form the Rheumatologist, which seem to be the area of diagnosis, make no determination regarding disability.** If Ms. Stevison is disabled as a result of Fibromyalgia and the associated syndromes, wouldn't it seem logical that the Rheumatologist would render an opinion about this? **We believe that Dr. Weiss, the Rheumatologist, would have been in the best position to render an opinion of disability. He did not.....**

Lastly, we must consider how the Functional Capacity Evaluation plays into this claim. **The conclusions drawn from that evaluation are that Ms. Stevison is physically able to perform her job.** Also to consider along those lines is that **Ms. Stevison testified that she probably would have been offered a contract for the following school year.** In addition, of course, we have Ms. Walker who testified that Ms. Stevison looked ill to her. Objectively, it appears that Ms. Stevison could perform her job, based upon the testing and the school administrators agreed she could do her job if there was going to be a continued offering of employment. Ms. Walker had no way to objectively measure whether Ms. Stevison was ill. She merely was able to tell this Committee that Ms. Stevison looked ill.

These cases are always difficult, but the statute is clear that objective evidence is what is required to prove disability in this forum. We have considered the opinions of the two physicians stating that Ms. Stevison is disabled, and **maybe she is for Social Security purposes, but she does not have objective proof in the file that a disability exists.** In this forum, disability must be established by objective medical proof of same. This Committee has made a diligent search of this record looking for evidence to support Ms. Stevison's claim of disability and it is just not here. We have to assume that Ms. Stevison's physicians were acting as advocates for their patient and there is certainly nothing wrong with that, but the proof for disability is this case is measured objectively and the record is void of same.

We believe that Ms. Stevison loved her job and maybe when her father passed on she began needing some counseling. We certainly

> do not believe that some type of psychiatric evaluation would be detrimental in this matter, but a decision like that is solely up to Ms. Stevison. Nevertheless, we have no objective proof of any physical or psychiatric disability and since that is the case; we recommend that Ms. Stevison's request for disability benefits be denied. (Vol. 2, Pp. 22-25)

What the Committee relied upon and the Board of Trustees adopted as their ruling is a well reasoned decision and analysis of the record presented by Ms. Stevison. The Committee accurately noted that several physicians did not opine that Ms. Stevison is disabled, and, that although Dr. Daggett and Dr. Tynes were of the opinion that Ms. Stevison is disabled there are no objective reports to support such opinions. As stated in ***Public Employees' Retirement System v. Cobb***, 839 So. 2d at 609:

> in something of a paradox, the lack of evidence at the agency level becomes the substantial evidence on appellate review that suggests the necessity of affirming the agency's determination.

Ms. Stevison contends that this Court should not uphold the decision of the PERS Board on the basis that a medical examination was not sought by PERS. A Functional Capacity Evaluation was ordered by PERS. This evaluation tests the individual's physical capabilities. There is no requirement that PERS obtain an independent medical examination of any member applying for disability benefits. PERS did not ignore the medical evidence in the file, but, rather analyzed what was submitted and found nothing but a few opinions of disability with no objective evidence to support those opinions. Moreover, the burden was on Ms. Stevison to prove she is in fact disabled and not on PERS to provide the evidence to support a claim of disability. As noted in ***Public Employees' Retirement System v. Cobb***, 839 So. 2d at 609:

> Cobb, **as <u>the applicant, had the burden of proof to show affirmatively her right to compensation</u>**. ***Thompson v. Well-Lamont Corp.***, 362 So. 2d 638, 641 (Miss. 1978). It was not the

> obligation of her employing agency to affirmatively prove that she was, in fact, capable of performing her duties. In this situation, the concept of "substantial evidence" supporting an agency decision has the potential to be somewhat confusing since **it is, in fact, the absence of credible evidence presented on behalf of the party having the burden of proof on the issue that compels the denial of relief.**

The evidence offered by Ms. Stevison's in support of her claim was limited. The Committee provided a "reasoned and unbiased evaluation of the evidence." As in ***Cobb***, the lack of evidence offered by Ms. Stevison and the in-depth analysis by the Committee is the substantial evidence necessary to support the decision to deny Ms. Stevison's claim for disability benefits.

Moreover, it is PERS that has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. As noted in ***Public Employees' Retirement v. Howard,*** 905 So. 2d at 1287, "determining whether an individual is permanently disabled is better left to physicians, not Judges." Several physicians reviewed Ms. Stevinson's application and medical documents. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee composed of two physicians and a nurse trained to review the medical reports submitted in support of Ms. Stevinson's claim. Further, it is within PERS discretion to determine which documents garner more weight than others. ***Byrd v. Public Employees' Retirement System***, 774 So. 2d 434, 438 (Miss. 2000) Also see: ***Brakefield vs. Public Employees' Retirement System*** 940 So. 2d at 948.

It is well documented in the medical evidence presented, or lack thereof, by Ms. Stevison that she is not entitled to a disability benefit as defined by statute and PERS Regulations. The Disability Appeals Committee, as well as the Board of Trustees, as

mandated by law, determines whether the claimant is unable "to perform the usual duties of employment."

Based on the record, there was an overwhelming lack of objective medical evidence to support the award of disability benefits. It is the burden of the claimant to prove he/she is in fact disabled. Again, "PERS has the responsibility of examining the assessments of medical personnel and determining which ones should be relied upon in making its decision." ***Johnston v. Public Employees' Retirement System***, 827 So. 2d 1, 3 (Miss. App. 2002) citing ***Byrd v. Public Employees' Retirement System***, 774 So. 2d at 438.

The PERS Board of Trustees concluded, rightfully so, that Ms. Stevison, at the time of her termination, was not permanently disabled as defined in Miss. Code Ann. § 25-11-113. The record contains medical documents which require medical expertise in analyzing. The Medical Board is comprised of three physicians and the Disability Appeals Committee is made up of two different physicians and a nurse. These individuals certainly have the ability to analyze the testing results that are in the record. The cases cited by Ms. Stevison in support of her argument did not provide the in-depth analysis of the medical documentation offered by the member in support of his/her claim for disability benefits, as does the recommendation of the Disability Appeals Committee in this case.

The decision of the Board of Trustees is supported by substantial evidence and the Circuit Court's Opinion and Order affirming the Board's decision must be upheld on appeal.

II.

THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. STEVISON'S CLAIM FOR DISABILITY SHOULD NOT BE REVERSED AND REMANDED AS THERE IS NO REQUIREMENT THAT THE RETIREMENT SYSTEM SECURE ADDITIONAL MEDICAL EVALUATIONS NOR IS IT OBLIGATED TO ACCEPT A DETERMINATION OF DISABILITY FROM THE SOCIAL SECURITY ADMINISTRATION.

The Committee did not err because Ms. Stevison was not sent by PERS for a psychiatric evaluation or any other medical evaluation. The Committee recognized that she may have a need for counseling and were being helpful by suggesting that she can obtain this type of service from a county mental health system. Just because the Committee recognized that Ms. Stevison may need counseling, it is obvious from the analysis and recommendation that they did not believe that she could be permanently disabled from a psychiatric standpoint.

Sending this case to PERS for it to secure additional evaluations would set a precedent unsupported by the law governing the administration of this State's disability program. What Ms. Stevison ignores is that she had the burden of proving to the Medical Board, then the Disability Appeals Committee and Board of Trustees that she is in fact disabled. She did not pursue disability based on psychiatric problems. The Committee recognized that:

> We certainly do not believe that some type of psychiatric evaluation, would be detrimental in this matter, **but a decision like that is solely up to Ms. Stevison.**

We repeat the language from ***Public Employees' Retirement System v. Cobb***, 839 So. 2d at 609:

> Cobb, as the applicant, had the burden of proof to show affirmatively her right to compensation. ***Thompson v. Well-Lamont Corp.***, 362 So. 2d 638, 641 (Miss. 1978). It was not the obligation of her employing agency to affirmatively prove that she was, in fact, capable of performing her duties. In this situation, the concept of "substantial evidence" supporting an agency decision has the potential to be somewhat confusing since it is, in fact, the absence of credible evidence presented on behalf of the party having the burden of proof on the issue that compels the denial of relief. [*Emphasis added.*]

If this Court remands this matter to PERS it would in essence place the burden on PERS to prove disability or non-disability in direct contradiction to what the Court of Appeals and Mississippi Supreme Court have recognized being that the burden at the administrative level is on the claimant.

This case should also not be remanded to PERS for consideration of the Social Security determination. Although PERS has the authority to accept a determination from the Social Security Administration in lieu of the Medical Board's finding, it choose to accept the determination of the Medical Board which decision was then appealed to the Disability Appeals Committee. See: Miss. Code Ann. Sections 25-11-113(1) (a) and 25-11-120 (Rev. 2006) The Circuit Court correctly noted that "the Social Security Administration's finding that Mrs. Stevison was disabled is not outcome derivative in a PERS Hearing."

Specific statutory law, Miss. Code Ann. Sections 25-11-113 and 25-11-114 (Rev. 2006), relate to disability retirement from the Public Employees' Retirement System. Further, PERS Regulations provide the manner in which disability cases proceed before its Board of Trustees.

Ms. Stevison notes that she received a favorable ruling from the Social Security Administration. However, pursuant to Miss. Code Ann. Section 25-11-113, the

Legislature has provided that the PERS Board **may** accept a medical determination from the Social Security Administration in lieu of a certification from the PERS Medical Board. It is clear, in this case, that the PERS Board of Trustees, exercising its discretion as provided by law, did not accept Social Security's determination in lieu of its Medical Board's certification.

Moreover, the PERS Medical Board was not able to certify that Ms. Stevison's claim of disability, based on the medical evidence meets the criteria for permanent and total disability as required under PERS law. Thus, Ms. Stevison was able to, and did appeal to the Disability Appeals Committee, pursuant to Section 25-11-120 and PERS Regulation.

There is no mandate under PERS' law requiring PERS to *carte blanche* grant disability benefits because the Social Security Administration has made an award of benefits. Clearly, the Legislature, in enacting the PERS laws did not see fit to require the PERS Board to adopt the same standard as the Social Security Administration utilizes in determining entitlement to benefits, nor did it mandate that a decision by them serve as *res judicata* on the issue of disability by PERS.

There are differences between a finding of disability under Social Security and PERS. For instance, in order to qualify for a benefit from Social Security, you must have a disabling condition that is likely to last twelve (12) months. Under PERS law, the condition must be *permanently disabling*. Social Security utilizes a specific five (5) step process in determining whether a disability exists. PERS utilizes the specific laws which define disability for its member and the relevant regulations. As noted infra, an administrative body such as the PERS Board of Trustees, is given "Great deference" in

the "construction of its own rules and regulations and the statutes under which it operates." ***Melody Manor Convalescent Center v. Mississippi State Department of Health***, 546 So. 2d at 974.

In fact, during several past legislative sessions, bills were introduced which would have made it mandatory that PERS accept a finding of disability and award benefits upon a finding of disability by the Social Security Administration. Not one of the bills introduced made it out of committee.

Most important is this Court's ruling in ***Public Employees' Retirement System v. Stamps***, 898 So. 2d 664, 674 (Miss. 2005):

> As this Court noted in *Doyle v. Pub. Employees' Ret. Sys.*, 808 So. 2d 902, 907 (Miss. 2002) "**PERS is not bound by any finding of the Social Security Administration.**" [*Emphasis Added*]

The Disability Appeals Committee noted:

> We have considered the opinions of the two physicians stating that Ms. Stevison is disabled, and maybe she is for Social Security purposes, but she does not have objective proof in the file that a disability exists. In this forum, disability must be established by objective medical proof of same.

Having considered all of the evidence offered in support of her application for disability benefits from the State of Mississippi the Disability Appeals Committee determined there was insufficient objective medical proof to support Ms. Stevison's claim.

Ms. Stevison's claims that the Committee "used the absence of such information in their opinion as a basis for denying her claim". However, the use of the absence of evidence offered by the claimant to deny benefits has been supported by the Court of Appeals. The Committee did not claim that Ms. Stevison is disabled from a psychiatric standpoint but merely noted that she may benefit from counseling. Before proceeding to

hearing Ms. Stevison had the burden of providing all the medical documentation she had to support her claim before the Medical Board and then before the Disability Appeals Committee. Prior to the hearing, Ms. Stevison was notified that the Medical Board requested that she provide additional medical documentation from her physicians. (Vol. 2, P. 245) At the hearing PERS offers a composite exhibit consisting of Ms. Stevison's medical file. Part of that exhibit contains a letter informing Ms. Stevison that a list is enclosed which sets forth the documents reviewed by the PERS Medical Board. Before filing an appeal she is asked to review that list. (Vol. 2, Pp. 241-242) She was also informed that a copy of the medical records to be introduced would be mailed to her prior to the hearing. (Vol. 2, P. 239) At the hearing she was asked:

> Are there any documents that you have that are not in that file that you would like for us to consider?

Ms. Stevison did state that she had "an update of medication change" which was admitted into evidence with no objection. Ms. Stevison again has the responsibility of submitting all documentation in support of her claim as the burden is on Ms. Stevison to prove that she is indeed disabled. Moreover, as noted in ***Public Employees' Retirement System v. Cobb***, 839 So. 2d at 610: "The lack of evidence at the agency level becomes the substantial evidence on appellate review that suggests the necessity of affirming the agency's determination".

The decision of the Board of Trustees must be affirmed as its decision is based on substantial evidence, was rendered within the authority of the Board, Ms. Stevison was provided a fair and impartial hearing and her constitutional rights were not violated.

CONCLUSION

Based on the record before this Court, it clearly supports the decision entered by the PERS Board of Trustees which was upheld by the Circuit Court. It is within the administrative agency's discretion as to which medical reports garner more weight. The medical evidence does not support Ms. Stevison's claim for disability benefits as set forth in the well reasoned and unbiased evaluation of the Disability Appeals Committee which was adopted by the Board of Trustees. The Order of the PERS Board of Trustees is supported by substantial evidence, is neither arbitrary nor capricious and was not entered in violation of either statutory or constitutional rights of the Appellant. Ms. Stevison's claim does not meet the requirements for the receipt of a disability benefit under the laws governing the administration of the Public Employees' Retirement System. The burden was on Ms. Stevison to prove her claim for disability before the Disability Appeals Committee and was not on PERS to provide evidence of disability. This matter should not be remanded for PERS to obtain a psychiatric evaluation nor the reports offered to the Social Security Administration. PERS is not obligated to accept a determination from the Social Security Administration which has been recognized by the Courts in this State. It would set a precedent contrary to the statutory, as well as, case law if this case was remanded for PERS to have Ms. Stevison evaluated in order to secure evidence that might prove she is disabled. The Disability Appeals Committee recognized that Ms. Stevison might benefit from counseling, however, did not find that she may have a psychiatric disability or it could have deferred its decision and secured additional evaluations. The PERS Board of Trustees respectfully requests this Honorable Court affirm the Opinion and Order entered on April 10, 2006.

Respectfully submitted this the **4th** day of January 2007 .

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLANT

By: _____
Mary Margaret Bowers, MSB [redacted]
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that a true and correct copy of the above and foregoing ***Brief of Appellee*** has been mailed, postage pre-paid, to:

Honorable George S. Luter, Jr.
P. O. Box 3656
Jackson, MS 39207-3656

So certified, this the 4th day of January 2007.

Mary Margaret Bowers, MSB [redacted]
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that a true and correct copy of the above and foregoing ***Brief of Appellee*** has been mailed, postage pre-paid, to:

Honorable George S. Luter, Jr.
P. O. Box 3656
Jackson, MS 39207-3656

Honorable Bobby DeLaughter
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

So certified, this the 5th day of January 2007.

Mary Margaret Bowers, MSB [redacted]
Special Assistant Attorney General