NO. 2006-SA-00841

IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON

Appellant

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

Appellee

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge of this Court may evaluate possible disqualification or recusal.

1. Sheryl Stevison, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Hon. Bobby DeLaughter, Hinds County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER

George A. Luter

ATTORNEY FOR APPELLANT

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BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

The appellant, Sheryl Stevison, filed this Brief to urge the Circuit Court to reverse the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered August 26, 2003 which adopted the recommendations of the PERS Disability Appeals Committee which found:

> "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." (R 24, RE 74, Tab 12).

II.

STATEMENT OF THE ISSUES

1. **The decision of PERS' denying Stevison's disability retirement is not supported by substantial evidence because her disability is supported by reports of her treating physicians which are uncontradicted since PERS did not order a medical exam.**
2. **Alternatively, the decision of PERS should be reversed and remanded for PERS to obtain a psychiatric report due to PERS' failure order a psychiatric evaluation and to obtain and review any psychiatric records obtained in Stevison's Social Security case and obtain all medical records.**

III.

STATEMENT OF THE FACTS

Sheryl Stevison was employed as a teacher assistant for the Wayne County School District for 11.5 years. (R 69, RE 30. Tab 11). After suffering numerous health problems and missing 43.5 days during the 2001-2002 school year, Stevison applied for non duty related disability with PERS on August 26. 2002 after her last day of July 31, 2002. (R 72, RE 1, Tab 1). On the same day, school district business manager Doug Everitt certified that Stevison could not perform her job and had not been offered another job within the agency. (R 78-79, RE 4-5, Tab 2).

On January 18, 2002, Hattiesburg rheumatologist Dr. Beverly Myers saw Stevison upon referral from Dr. John Beaman and it was her impression she had left sciatica of undetermined etiology or possibly a nerve irritated intrapelvically. (R 214, RE 14, Tab 4).

On February 4, 2002, Stevison reported to Hattiesburg gynecologist Dr. John Holland she had back pain beginning three years ago but it worsened on September 14. 2001 when she picked up something and the pain got worse. (R 207, RE 9, Tab 3). Dr. Holland recommended pain management since she was unable to work, bend, or stoop. (R 207, RE 9, Tab 3).

On February 28, 2002, Hattiesburg rheumatologist Dr. David I. Weiss found Stevison to have left hip pain with possible radicular component with prominent left trochanteric bursitis. (R 198, RE 16, Tab 5). Dr. Weiss saw Stevison again on March 25, 2002, where he noted she had only transient improvement after physical therapy and found her to have "chronic low back/sacroiliac pain of unclear etiology. Low titer ANA without features of a connective tissue disease." (R 194). Stevison was given corticosteroids and given procedure for pain and discussed trial of NSAID therapy with Vioxx.

On August 23, 2002, Dr. Robert Daggett, on referral from treating family physician, Dr.

Tynes, found Stevison to have Sjogren's syndrome and muscle spasm of the piriformis muscle and was given a exercise program and muscle relaxant. (R 108). After returning on September 10, 2002, Daggett found her to have pain in the her joints, wrist and ankles and describes her pain as flu type symptoms with achiness all over. (R 109).

On October 7, 2002, family practitioner Dr. M. S. Tynes indicated on PERS form "Statement of Examining Physician" that Stevison had Sjogren's syndrome, fibromyalgia, piriformis syndrome with depression, with poor prognosis and had restrictions of "minimal physical activity". (R 203, Re 18, Tab 6).

On January 30, 2003, Dr. Tynes reported that Stevison has "Piriformis Syndrome with apparently permanent damage, fibromyalgia, Sjogren's Syndrome and osteoarthritis quite concerning from recent bone scan was "unable to do minimal walking and standing." Tynes added "I don't see how she would be able to perform this duty [teacher's assistant] due to her pain and fatigue plus her depression is also significant." (R 68, RE 29, Tab 10).

On March 13, 2003, HealthSouth Gulfport reported Stevison's Functional Capacity Evaluation results stating Stevison reported pain from 6 to 9 on a 10 scale and that she reported severe pain while performing the test while giving consistent effort but was limited to light work. The evaluation reported that Stevison had "tenderness, palpable spasm and multiple trigger points palpable throughout the suboccipital region, cervical paraspinals, upper trapezius muscles, rhomboids, gluteals, piriformis muscles, and lumbar paraspinal muscles." Further, the report indicated Stevison had "pain in all planes of cervical, lumbar, shoulder, elbow, wrist, hand, hip, knee, and ankle range of motion." (R 96, RE 22, Tab 7).

On April 4, 2003, Stevison was informed by letter from then PERS Executive Director Frank Ready that the PERS Medical Board had found "insufficient objective evidence" to support her application for disability retirement. (R 241, RE 26, Tab 8).

On April 23, 2003, Stevison filed her Notice of Appeal for a hearing before the PERS

Disability Appeals Committee. (R 65-66, RE 27-28, Tab 9).

Stevison was afforded a hearing before the PERS Disability Appeals Committee consisting of Sheila Jones, presiding, and Drs. William Nicholas and David Duddleston. (R 27-62, RE 31-66, Tab 11).

At her hearing, Stevison, who was not represented by counsel, testified that she worked as a teacher's assistant for eleven (11) years doing anything requested such as assisting with children, decorating bulletin boards, floats, running copies and planning kindergarten graduation. She testified on September 14, 2001 she came to school hurting in her lower back and hips and the pain got worse and after going to 15 or 16 physicians it was found she had Piriformis Syndrome and also Sjogren's Syndrome. (R 6-8, RE 32-34, Tab 11).

Under questioning by Dr. Duddleston, Stevison stated she subsequently did not sleep well and with the pain and lack of sleep she just could not do her job. (R 35-36, RE 39-40, Tab 11). She stated the Piriformis Syndrome prevented her from sitting or standing for long periods of time and that it involves pain like a "lightening strike." She stated her principal would not agree to give her less duties since "you had to do what you had to do." (R 39, RE 43, Tab 11). Stevison stated she had tried antidepressants such as Paxil, Celexa, and Lexapro, and also pain medication such as Lortab. (R 41-42, RE 45-46, Tab 11).

Stevison testified in response to Dr. Nicholas that her pain was real and that she was doing the best she could and if she could work she would be at the schoolhouse working. Stevison added that the Functional Capacity Evaluation order by PERS "liked to have killed me to go through everything they asked me to do" and that she was "laid up for three days." She added that her pain was all over her body, that she could not open a Coke bottle at home and the pain felt like "somebody has...shattered everything..." (R 52-54. RE 586-58, Tab 11).

Mary Ann Walker testified that she was a teacher and Stevison was her assistant and that the past year was a hard year for Stevison and that although she made accommodations for her

there were times when "she just was not able to cope." She stated Stevison loved her job, did anything requested, was very dedicated, and kept her room organized and was a leader and would be back with her if she "was physically able to do so." (R 58-61, RE 63-65, Tab 11).

On June 30, 2003, the PERS Disability Appeals Committee recommended denial of Stevison's application for disability retirement stating Stevison "should have been "evaluated for psychiatric care" and that "we were not provided the records from [other ten] other physicians" and that "Ms. Stevison's physicians were acting as advocates for their patient... but the proof for disability in this case is measured objectively and the record is void of same." The PERS Board of Trustees adopted such recommendation on August 26, 2003. (R 16, Re 76, Tab 12).

Stevison timely appealed to Circuit Court on September 22, 2003 and the Circuit Court affirmed the ruling of PERS on April 10, 2006. (R 9, RE 80, Tab 13).

SUMMARY OF THE ARGUMENT

The decision of PERS' denying Stevison's application for disability retirement is not supported by substantial evidence since two of her treating physicians gave opinions she was disabled, the Functional Capacity Evaluation report indicated Stevison suffered pain, and no examination was obtained by PERS indicating otherwise, thus no evidence exists in the record to uphold their decision.

Alternatively, PERS' decision should be reversed and remanded because they admitted they did not obtain all of her medical records and they admitted that Stevison "should have been "evaluated for psychiatric care" and that "we were not provided the records from [other ten] other physicians". A reading of the administrative law judge's decision in Stevison's Social Security disability case would reveal reports from two psychiatrists yet PERS chose not to use its statutory authority to obtain a psychiatric examination or all medical records.

IV.

ARGUMENT

1. **The decision of PERS' denying Stevison's disability retirement is not supported by substantial evidence because her disability is supported by reports of her treating physicians which are uncontradicted since PERS did not order a medical exam.**

The legal requirement of proving PERS disability is stated at Miss. Code Ann. 25-11-113(1)(a) which states:

> "...any active member in state service who has at least four (4) years of membership service credit may be retired by the Board of Trustees... provided the Medical Board, after 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 shall be retired."

Disability is defined in the same code section as the following:

> "...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."

Thus, Stevison only had to prove she had four years of service (which she met with 11.5 years of service) and that she was unable to perform her job as a teacher's assistant.

Stevison would contend that a review of the record will show that the objective opinions by Stevison's treating physicians clearly show she was disabled from her job. Additionally, the FCE ordered by PERS clearly showed that Stevison was suffering great pain.

First, Dr. M. S. Tynes on October 7, 2002, indicated on PERS form "Statement of Examining Physician" that Stevison had Sjogren's syndrome, fibromyalgia, piriformis syndrome

with depression, with poor prognosis and had restrictions of "minimal physical activity". (R 203, Re 18, Tab 6).

Dr. Tynes on January 30, 2003 again reported that Stevison has "Piriformis Syndrome with apparently permanent damage, fibromyalgia, Sjogren's Syndrome and osteoarthritis from a recent bone scan showed Stevison was "unable to do minimal walking and standing." Tynes added "I don't see how she would be able to perform this duty [teacher's assistant] due to her pain and fatigue plus her depression is also significant." (R 68, RE 29, Tab 10).

HealthSouth Gulfport reported Stevison's Functional Capacity Evaluation results stating Stevison reported pain from 6 to 9 on a 10 scale and that she reported severe pain while performing the test while giving consistent effort and was limited to light work. The evaluation reported that Stevison had "tenderness, palpable spasm and multiple trigger points palpable throughout the suboccipital region, cervical paraspinals, upper trapezius muscles, rhomboids, gluteals, piriformis muscles, and lumbar paraspinal muscles." Further, the report indicated Stevison had "pain in all planes of cervical, lumbar, shoulder, elbow, wrist, hand, hip, knee, and ankle range of motion." (R 96, RE 22, Tab 7).

Additionally, Stevison's treatment records show Hattiesburg rheumatologist Dr. Beverly Myers determined Stevison to have left sciatica of undetermined etiology or possibly a nerve irritated intrapelvically. (R 214, RE 14, Tab 4). Hattiesburg gynecologist Dr. John Holland found Stevison to have back pain beginning three years ago and recommended pain management since she was unable to work, bend, or stoop. (R 207, RE 9, Tab 3).

Hattiesburg rheumatologist Dr. David I. Weiss found Stevison to have left hip pain with possible radicular component with prominent left trochanteric bursitis. (R 198, RE 16, Tab 5) and further found her to have "chronic low back/sacroiliac pain of unclear etiology. Low titer ANA without features of a connective tissue disease." (R 194).

Meridian rheumatologist Dr. Robert Daggett found Stevison to have Sjogren's syndrome

and muscle spasm of the piriformis muscle and was given a exercise program and muscle relaxant. (R 108). After returning on September 10, 2002, Daggett found her to have pain in her joints, wrist and ankles and describes her pain as flu type symptoms with achiness all over. (R 109).

Further, the law is clear in Mississippi that the decision of an administrative agency must be undisturbed unless it is (1) not supported by substantial evidence, (2) is arbitrary and capricious, (3) is beyond the scope or power granted to the agency, (4) violates one's constitutional rights. *Public Employees' Retirement System v. Marquez,* 774 So. 2d 421 (Miss. 2001); *Fulce v. Public Employees' Retirement System,* 759 So. 2d 401, 404 (Miss. 2000); *Davis v. Public Employees' Retirement System,* 750 So. 2d 1225, 1229 (Miss. 1999).

Substantial evidence is "relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Marquez, supra.*

However, regardless of the foregoing PERS denied Stevison's application for disability retirement, stating:

> "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,[1] but she does not have objective proof in the file that a disability exists. In this forum, disability must be established by objective 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 (sic) this case is measured objectively and the record is void of same." (R 24, RE 74, Tab 12).

However, Stevison would argue that PERS has clearly failed to follow numerous decisions that state that disability cannot be denied in the face of the opinions of numerous treating physicians, particularly when PERS has failed to employ an independent medical examiner as it

[1] 42 United States Code 423(d) defines disability for Social Security disability as "(A) inability to engage in any substantial gainful activity by reason of any medically determinable impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months..."

did in Stevison's case.

In *Marquez, supra,* like Dishmon here, the Mississippi Supreme Court noted that

> "PERS put forth no controverting evidence in the face of various diagnoses made by various credible doctors. When medical evidence and testimony given by Marquez is contrasted with PERS' rationale for denial of benefits, the evidence supporting PERS' decision to deny benefits appears insubstantial." 74 So. 2d 421 at 429.

Further, the Mississippi Court of Appeals in *Public Employees' Retirement System v. Ocenious Thomas,* 809 So. 2d 690 (Miss. App. 2001) announced PERS was not entitled to reject evidence when no "contrary view of that evidence was offered", stating:

> "It is the view of this Court that there is a lack of substantial evidence to support PERS' decision. While PERS was entitled to be skeptical of Thomas' testimony or even differ with Dr. Crump's conclusion that Thomas is disabled, we find nothing in the record disputing or contradicting the evidence presented by Thomas. Therefore, we cannot find the substantial evidence upon which PERS could have relied. PERS would have been entitled to choose between different pieces of evidence or competing views on the same piece of evidence. However, it was not entitled to reject the only evidence presented when no contrary view of that evidence was offered, unless the offered evidence is so absurd or unbelievable that no reasonable person could believe it. " (at 696).

More recently, the Supreme Court on April 3, 2003 in *Public Employees' Retirement System v. Elsie Dearman,* 846 So. 2d 1014 (Miss. 2003) held:

> "PERS cannot choose to ignore the only evidence in the record from the examining physician, especially where it chose not to exercise its right to an independent evaluation under Miss. Code Ann. 25-11-113(1)(c)(Rev. 1999)."

The Court of Appeals later that year on December 2, 2003 in *Cauthen v. PERS,* 860 So. 2d 829 (Miss. App. 2003) noted such precedent stating:

> "Based on the fact that this Court is bound by the precedent of these decisions, we look to them for direction in identifying and dealing with the pivotal issues upon which this case must be

decided. The cases are *PERS v. Dearman,* 846 So. 2d 1014 (Miss. 2003), and *PERS v. Marquez,*. 774 So.2d 421 (Miss. 2000).

Then on January 6, 2004, the Court of Appeals in *PERS v. Finklea,* 862 So. 2d 569 (Miss.App.2004) stated :

> "While PERS may choose between contradictory medical evidence and may reject evidence it finds deficient, PERS may not, without explanation, deny disability benefits when faced with apparently substantial, objective medical evidence of disability."

Shortly thereafter, the Court of Appeals on July 24, 2004 in *PERS v. Kellum,* 878 So. 2d 1044 (Miss. App. 2004) relying on the Supreme Court's latest pronouncement in *Dearman, supra,* stated:

> In affirming the decision of the circuit court, this Court is informed by the cases of *Public Employees' Retirement System v. Dearman,*846 So. 2d 1014 (Miss. 2003) and *Public Employees' Retirement System v. Marquez,* 774 So. 2d 421 (Miss. 2000). *See also Cauthen v. Pub. Employees; Ret. Sys.,* 860 So.2d 829 (Miss. App. 2003).
>
> In *Marquez,* the claimant suffered from multiple illnesses including fibromyalgia and chronic fatigue syndrome. *Marquez,* 774 So. 2d at 423. PERS found that there was insufficient objective medical evidence that Marquez's medical problems rendered her permanently disabled from her job as a school teacher. *Id.* at 428-29. Marquez submitted medical records tending to confirm her health problems. *Id.* at 427. The supreme court observed that medical records are considered objective, not subjective, evidence of disability. *Id.* at 427. The supreme court found that PERS's conclusion was not substantiated by the record because PERS did not adequately explain why it rejected the objective medical evidence of Marquez's disability. *Id.* at 429.
>
> In *Dearman,* the court more clearly articulated that medical evidence of disability provided by an examining physician is objective evidence that must be afforded elevated respect by PERS. *Dearman,* 846 So. at 1018. Dearman claimed that various health conditions rendered her disabled from her job as a teacher. *Id.* at 1016. Dearman's

> treating physician found her permanently disabled as a result of her medical condition and recommended she cease work. *Id.* at 1015. PERS found that Dearman had failed to prove disability. *Id.* at 1016. The supreme court found that the PERS's order was not supported by substantial evidence because the record was "devoid of any evidence that Dearman was not disabled." *Id.* at 1018. The court stated that the opinions of the physicians on the Medical Board and the Disability Appeals Committee are not conclusive, and that "PERS cannot choose to ignore the only evidence in the record from the examining physician, especially where it chose not to exercise its right to an independent medical evaluation under Miss. Code Ann. 25-11-113(1)(c)." *Id.*

In Stevison's case, like the case in *Dearman*, PERS never chose to exercise its right to an independent medical examination. Further, Dishmon's longtime treating physician, Dr. Tynes, who had followed her course of health and prescribed her treatment for several years, gave at least two reports, filled out the PERS provided "Statement of Examining Physician" in all of which he gave his well documented opinion that Stevison had physical problems and was unable to perform her job and was disabled.

After a review of the above medical evidence, Stevison would contend the decision of PERS---which is based on **no** independent medical examination---cannot contain substantial evidence when based upon the dictates of *Marquez* or *Dearman, supra.*

Further, the Supreme Court in *Public Employees' Retirement System v. Robert Ann Shurden*, 802 So. 2d 258 (Miss. 2002) noted that the receipt of disability benefits to deserving claimants should not be unnecessarily out of reach:

> "PERS should not stray from its purpose of Miss. Code Ann 25-11-113, to compensate disabled employees that have not met the 25 year criteria, in denying benefits nor set the bar so high that this purpose is frustrated."

Stevison would assert that the opinion of PERS is not supported by substantial evidence since it is arbitrary and capricious and is based only on the opinions of the Disability Appeals

Committee that the opinions of Stevison's treating physicians that she was disabled should not be believed because they "were acting as advocates for their patient" and because the Committee members believe the "proof for disability is (sic) this case is measured objectively and the record is void of same." (R 24, RE 74, Tab 12). Rather as stated by the Supreme Court in *Marguez, supra,:*

> "If medical diagnoses by licensed physicians are to be
> labeled "subjective" evidence of medical ailments,
> it is unclear what PERS would consider to be "objective evidence."
> (774 So. 2d at 427).

Stevison would assert that she has put forth credible medical diagnoses by licensed medical specialists in the State of Mississippi and did so while representing herself. PERS failed to send her to a physician of their choice, opting for an FCE which proved that Stevison was suffering great pain associated with her numerous medical problems. Substantial evidence is nowhere to be found in this record to uphold PERS' decision. Apparently, PERS wants to dismiss the opinions of credible physicians regarding Stevison and just say "the proof for disability is measured objectively and the record is void of same." However, such reasoning has been expressly condemned in *Thomas, supra,* which stated:

> "The substantial evidence that is sufficient to withstand
> appellate scrutiny cannot be evidence contained within
> the confines of the doctors' heads." (694 So. 2d at 694).

Stevison would contend substantial evidence does not support PERS' denial of her application for disability retirement and thus the Circuit Court should reverse and render their decision and order benefits paid.

2. Alternatively, the decision of PERS should be reversed and remanded for PERS to obtain a psychiatric report due to PERS' failure order a psychiatric evaluation and to obtain and review any psychiatric records obtained in Stevison's Social Security case and obtain all medical records.

Effective July 1, 2002, after the passage of House Bill 1148, the PERS Disability Appeals Committee was given the "authority to defer a decision in order to request a medical evaluation or test or **additional medical records not previously furnished by the claimant.**" Miss. Code Ann. 25-11-120. Further, PERS is given authority to accept a finding of disability by the Social Security Administration in lieu of a finding of disability by the PERS Medical Board. Miss. Code Ann. 25-11-113(1)(a).

In its recommendation, the Disability Appeals Committee noted that Stevision, who was then unrepresented,[2] had seen many physicians and admitted that of "10-plus doctors" they did not have any medical records regarding Stevison (then unrepresented by counsel) stating:

> "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. Stevision, 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, 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 seem reasonable that we may."** (R 23, RE 73, Tab 12).

Further, the Disability Appeals Committee obviously recognized that Stevison potentially had a psychiatric disorder but declined to investigate it further, stating:

> "Furthermore, it seems to this Committee that a major component is being overlooked, and that is the psychiatric component. This woman should have been evaluated for psychiatric care." (R 23, RE 74, Tab 12).

[2]Stevison would assert that PERS procures the medical records for claimants. PERS utilizes Form 7 for physicians to fill out. *See footnote 2 regarding such forms in* Freeman v. PERS, 822 So. 2d 274 (Miss. 2002) at 280.

Even further, Committee member Dr. David Duddleston apparently thought Stevison might have a psychiatric impairment, asking:

> "Q. Okay. Have you seen a counselor or other mental health professional, mental health clinic, psychiatrist?"

When Stevison said she had not, Duddleston cavalierly suggested she go to the County Mental Health Clinic, rather than the Committee order a psychiatric exam, adding:

> "Q. One other thing. There's a county mental health system in the state that will allow you to have counseling and psychiatric care if you need it, and they do that for everyone, and they do that on a sliding scale based on your income..." (R 42, RE 46, Tab 11).

Stevison would contend that her due process rights to a fair hearing were violated by the Committee's failure to obtain all of her medical records, failure to order a psychiatric evaluation, particularly when the Social Security Administration in its decision utilized reports from at least two physicians who found her to suffering "major depression" and a "mood disorder".[3]

The Mississippi Supreme Court in *Dean v. Public Employees' Retirement System*, 797 So. 2d 830 (Miss. 2000) stated that "Administrative hearings should be conducted in a fair and impartial manner, free from any suspicion or prejudice or unfairness. *McFadden,* 735 So. 2d at 158." *See also Burns v. Public Employees' Retirement System,* 748 So. 2d 181 (Miss. App. 1999) which states: "Both the United States and Mississippi Constitutions guarantee the right to due process of law before an administrative agency. U.S. Const. amend XIV; Miss. Const. art. 3, sect. 14. Administrative proceedings must be "conducted in a fair and impartial manner, free

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[3] See copy of decision of Administrative Law Judge K. M. Latshaw of the Hattiesburg, Mississippi Office of Hearings and Appeals of the Social Security Administration entered April 29, 2004 finding Stevison to be disabled beginning May 31, 2002. Contained therein are reference to reports by Dr. Andrew Bishop, a Jackson psychiatrist who found Stevison to suffer "major depression" and Dr. Shannon Johnson who found Stevison to have "mood disorder" and a "global functioning score of 60 which is considered moderate symptoms". The foregoing facts meet the criteria for judicial notice since they are not subject to reasonable dispute, being both generally know within the territorial jurisdiction of the Board of Trustees of PERS and of this Court and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, *Poole v. Poole,* 701 So 2d 813 (Miss. 1997).

from any just suspicion or prejudice, unfairness, fraud or oppression." *Mississippi State Bd. of Health v. Johnson,* 197 Miss. 417, 19 So. 2d 445, 447 (1944).

Rather, the Disability Appeals Committee, instead of using its statutory authority to obtain relevant psychiatric evidence or even all of Stevison's medical records, violated her due process rights to a fair hearing when the Committee used the *absence* of such information in their opinion as a basis for *denying* her claim, finding that "It seems reasonable that we may" assume that the "10 plus" physicians' medical records supported their decision finding Stevison not disabled even though they never sought to review such records!

Further, there is ample precedent that PERS has exercised its statutory authority in the past to order a medical examination for psychiatric or psychological issues. In *Cauthen v. Public Employees' Retirement System,* 860 So. 2d 829 (Miss. App. 2003) the Court noted:

> "The Disability Appeals Committee concluded that its ability to properly decide Cauthen's petition would be benefitted by an independent neuropsychological evaluation to be performed by Dr. Edward Manning. The report of Dr. Manning dealt exclusively with Cauthen's mental abilities and emotion condition."

Thus, why didn't PERS do the same for Stevison that it did for Cauthen? Why, when PERS believed a "major component is being overlooked" that being "the psychiatric component" didn't PERS do what it said should have been done and like they did in *Cauthen, supra,* and have Stevison psychiatrically evaluated or at least obtain all of her records so they could review them for a psychiatric disorder? Stevison would assert that PERS cannot sit back, opine that she likely has a psychiatric illness and then use the fact that none of her physicians (who did treat her for depression) **referred her** to a psychiatrist as a reason to deny her claim.

Administrative Law Judges in the Social Security Administration, like the Disability Appeals Committee in PERS, have authority to insure that all medical records are obtained, particularly when the claimant, like Stevison here, is unrepresented.

In *Madrid v. Barnhart*, 447 F. 3d 788 (10th Cir. 2006) the claimant's case was reversed and remanded due to the ALJ's failure to obtain all medical records:

> "Nevertheless, because a social security disability hearing is a nonadversarial proceeding, the ALJ is "responsible in every case 'to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.'" [Citations omitted]
>
> "Generally, this means that the "ALJ has the duty to ... obtain [ ] pertinent, available medical records which come to is attention during the course of the hearing." *Carter v. Chater*, 73 F 3d. 1019, 1022 (10th Cir. 1996). Moreover, the ALJ's "duty is heightened" when a claimant, like Mr. Madrid, appears before the ALJ without counsel."[4]

Stevison, who was unrepresented by counsel at her hearing, would alternatively urge the Court reverse and remand her case to PERS for a fair hearing for PERS to obtain all of her medical records, order any psychiatric examination it may need, and the psychiatric records contained in her Social Security disability case.

CONCLUSION

The Circuit Court should reverse and render the decision of PERS denying Stevison disability benefits or alternatively, reverse and remand her case for a new hearing.

Respectfully submitted,

Sheryl Stevison, Appellant

BY: George A. Luter

GEORGE S. LUTER, Her Attorney

[4] One major difference between PERS disability and SSA disability is that PERS disability claimants, if they have left PERS covered employment may not reapply for disability retirement unless they reenter such employment whereas SSA claimants may reapply immediately, but with a new onset date of disability, if they possess adequate number of quarters of employment coverage. *See* Miss. Code Ann. 25-11-113 (1)(a).

CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellant, hereby certify that I have hand delivered a copy of the foregoing Brief of Appellant to the following:

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SO CERTIFIED this the 11th day of October, 2006.

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