IN THE SUPREME COURT OF MISSISSIPPI

CHERRI S. CASE — **APPELLANT**

VERSUS — **CAUSE NO. 2006-SA-01704**

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS) — **APPELLEE**

BRIEF OF THE APPELLEE

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PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS)

CERTIFICATE OF INTERESTED PARTIES

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

The Board of Trustees of the Public Employees' Retirement System

Honorable Mary Margaret Bowers, Counsel for Appellee

Honorable Jim Hood, Attorney General

Honorable W. Swan Yerger, Hinds County Circuit Court Judge

Honorable George S. Luter, Counsel for Appellant

Ms. Cherri S. Case, Appellant

Respectfully submitted,

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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 decision of the Circuit Court affirming the Order of the Board of Trustees of the Public Employees' Retirement System denying Ms. Case's claim for disability is based on substantial evidence and is neither arbitrary nor capricious.

II. The decision of the Circuit Court affirming the Order of the Board of Trustees of the Public Employees' Retirement System should not be reversed or remanded because the Retirement System is neither required to obtain evaluations or records not submitted by Ms. Case nor obtain Ms. Case's Social Security disability decision or file.

STATEMENT OF THE CASE

This matter involves an appeal filed by Cherri Case, wherein she seeks review of the Opinion and Order of the Circuit Court of the First Judicial District of Hinds County entered August 28, 2006. Following the Medical Board's denial of her application for disability, Ms. Case filed an appeal before the Disability Appeals Committee. Following hearing before the Disability Appeals Committee, the Board of Trustees of the Public Employees' Retirement System (PERS) adopted the Proposed Statement of Facts, Conclusions of Law and Recommendation of the Committee denying Ms. Case's request for the payment of a disability benefit as defined under Miss. Code Ann. Section 25-11-113 (Rev. 2006). Ms. Case aggrieved of the Board of Trustees' decision to deny disability benefits filed a notice of appeal in the Circuit Court pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006). The Circuit Court on August 28, 2006, determined that the decision of the Board of Trustees is supported by substantial evidence, is neither arbitrary nor capricious, is not beyond its authority to make and did not violate any statutory or constitutional right of Ms. Case and, thus, should be affirmed. Aggrieved of the Circuit Court's decision, Ms. Case has prosecuted an appeal before this Honorable Court.

STATEMENT OF THE FACTS[1]

After consideration of the sworn testimony and evidence before it, the PERS Board of Trustees concluded that Ms. Case does not qualify for the receipt of disability

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

benefits pursuant to Miss. Code Ann. Section 25-11-113. The Circuit Court agreed and, thus, affirmed the Order of the Board of Trustees entered April 22, 2002.

Ms. Case was employed with the Brookhaven School District. As the Disability Appeals Committee noted, she was required to perform primarily clerical duties "as a secretary, bookkeeper, and a file clerk and required to operate office equipment such as computers, telephones, adding machines, copiers and typewriters." (Vol. 2, P. 16)

Ms. Case began working with the School District in 1971, but quit work for a time in 1982 and drew out her retirement contributions. (Vol. 2, P. 32) At the time of her hearing, Ms. Case had accumulated 10.75 years of service credit with the State of Mississippi. (Vol. 2, P. 84) On October 18, 2001, PERS received Ms. Case's application for regular non-duty-related disability. (Vol. 2, P. 87)

On February 14, 2002, Ms. Case was placed on leave with pay from the School District pending an investigation of the high school's financial records. Ms. Case was terminated, effective February 21, 2002, from her position by Superintendent Sam Bounds of the Brookhaven School District. (Vol. 3, P. 457) In his letter to Ms. Case, Mr. Bounds stated the following:

> **I have determined that you falsified records** that were in your custody and control and part of your job responsibilities. Also you admitted that monies are missing that had been given to you as part of your job and were to be accounted for by you. Therefore, **it is no longer in the best interest of the district for you to occupy a position as an employee of the district.**
>
> **Based on your gross mismanagement, negligence in performance of your duty, falsifying financial records and not reporting missing funds, you are hereby terminated immediately.** (Vol. 3, P. 457)

Ms. Case attributes a substantial number of work days and work time lost as a result of her "uncontrollable hypertension," and in her direct testimony to the PERS Disability Appeals Committee stated her "main problem" was her blood pressure and heart problems. (Vol. 2, P. 31, 39) However, the Disability Appeals Committee noted that "Ms. Case alleges numerous medical conditions contributing to or serving as the underlying cause of her purported disability." (Vol. 2, P. 16)

Ms. Case asserted that her health began to decline in 1995. (Vol. 2, P. 31) Ms. Case stated that she has had high blood pressure "for a long time," but that in 1995 she began experiencing "heart fluttering." (Vol. 2, P. 31) Ms. Case stated that she would have to frequently discontinue her job duties because of chest pain and weakness episodes that she attributed to elevated blood pressure. (Vol. 2, P. 33) However, the Disability Appeals Committee found that the record did not contain any evidence to support Ms. Case's claim "of elevated blood pressures in the workplace, or that Ms. Case ever sought treatment by the school nurse, other than to rest, during these episodes where she could not attend to her job duties." (Vol. 2, P. 18) Furthermore, after reviewing sixty-five pages of medical records provided by Dr. Baxter P. Irby, Jr., M.D., Ms. Case's primary treating physician, the Disability Appeals Committee found "only a few instances where Ms. Case experienced abnormal blood pressure readings." (Vol. 2, P. 17)

Ms. Case also asserted that she was disabled because of atrial fibrillation. (Vol. 2, P. 33) The Disability Appeals Committee, however, determined that all records received from cardiologists, Dr. Stone and Dr. Mulholland, suggested that Ms. Case has "experienced rare episodes of a benign condition of rapid heart rate." (Vol. 2, P. 20) Furthermore, the Committee found that over a period of six years only minimal changes

have been made to Ms. Case's medical regimen, "often reporting she was in 'good control' of her cardiac symptoms. (Vol. 2, P. 20)

Ms. Case claimed that she experienced chronic pain from fibromyalgia. For this condition, Ms. Case has seen rheumatologists Dr. Philip Hensarling and Dr. Linda Rockhold. From the records submitted by Ms. Case, the Disability Appeals Committee found that she saw Dr. Hensarling from 1994-1995, that he prescribed only non-narcotic pain relievers and that virtually all of Ms. Case's lab studies were normal and within acceptable limits. (Vol. 2, P. 20) The Committee further found that Dr. Hensarling "makes no mention in any of his medical records provided that would suggest Ms. Case is disabled or has restrictions, limitations, or impairments." (Vol. 2, P. 21)

Ms. Case first saw Dr. Rockhold in 1995. The Committee noted that Dr. Rockhold has followed Ms. Case from 1995 until the present. On the PERS Form 7, in which the examining physician attests to the patient's impairments, limitations, and restrictions, Dr. Rockhold stated that Ms. Case has "no fibromyalgia related impairments." (Vol. 2, P. 103) Ms. Case also asserts she has experienced pain from arthritis. Again, however, Dr. Rockhold, her Rheumatologist, indicated no impairment from this problem. (Vol. 2, P. 103)

In March of 1999, Dr. Winston Capel performed a cervical fusion and discetomy on Ms. Case. As noted by the Committee, this surgical procedure was indicated by nerve impingement in the cervical spine which caused Ms. Case to experience pain in her right arm and hand. (Vol. 2, P. 21) This procedure was a success. Dr. Capel's final office note dated June 28, 1999, states Ms. Case is three months post operation and "reports no

significant right arm pain." Dr. Capel also indicated that Ms. Case could return to work on July 1, 1999. (Vol. 3, P. 381)

Dr. Irby, Ms. Case's primary treating physician, prescribed Effexor for "stress reaction with anxiety and depressive neurosis." (Vol. 3, P. 455) Ms. Case has not sought an evaluation for a psychiatric or psychological diagnosis.

On February 28, 2002, Ms. Case received an independent medical exam conducted by Dr. Jo Lynn Polk. (Vol. 2, P. 99) The results of this exam indicated that Ms. Case was "physically capable of performing the job of a secretary." (Vol. 2, P. 101) In her report, Dr. Polk further stated that Ms. Case's only restriction was "she cannot perform work activities overhead due to restrictions in active shoulder abduction and flexion." (Vol. 2, P. 101) Dr. Polk concluded that, in her opinion, "Ms. Case is currently able to work part time. Physical therapy, especially aquatic therapy, would increase her endurance to allow her to work full time." (Vol. 2, P. 101).

SUMMARY OF THE ARGUMENT

Before the Circuit Court and now before this Honorable Court, Ms. Case notes that PERS has the statutory authority to accept a determination of disability by the Social Security Administration. There is no obligation on the part of PERS to accept a determination from Social Security, particularly when the Board of Trustees has referred to the certification from the Medical Board. Further, there are noted differences between the manner in which Social Security determines whether an individual is disabled, and the method PERS uses to determine eligibility for entitlement to the receipt of a disability benefit.

Ms. Case also asserted before the Circuit Court and now this Court that the PERS Board violated her right to due process by not obtaining a psychiatric evaluation, as well as records regarding her cervical fusion. This is simply not the case. The law is clear that at the administrative level the burden is on Ms. Case to show that she meets the requirements for the receipt of a disability benefit.

The recommendation of the Disability Appeals Committee and Order of the PERS Board of Trustees are based on substantial evidence and are neither arbitrary nor capricious. The Board made its decision based on substantial evidence, PERS' Regulations, as well as the statutes defining disability under Mississippi law.

Although Ms. Case alleged numerous medical conditions contributing to her disability, she asserts that her most significant problems are hypertension and heart problems. The record, however, is devoid of any evidence that would support such a claim. Furthermore, the record does not show any evidence that Ms. Case suffered from any other medical problems to such a degree to constitute disability as defined under the statute. There is also evidence in the record that Ms. Case's termination was due to something other than her medical condition and may not have been voluntary.

Based on the evidence and the testimony elicited at the hearing appearing in the record, it is clear that the only decision the Board of Trustees could, and did make, was that Ms. Case does not meet the requirements for a disability benefit under PERS law. The Board's decision is, thus, supported by substantial evidence and is neither arbitrary nor capricious.

ARGUMENT

INTRODUCTION

The Public Employees' Retirement System of Mississippi (PERS) was established in 1953 to provide retirement and other benefits to covered employees of the state, and its political subdivisions and instrumentalities. Chapter 299, Mississippi Laws of 1952.

In addition to service retirement benefits, disability retirement benefits are provided for members who meet the statutory requirements for such benefits. There are two 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. Miss. Code Ann. Section 25-11-119 (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. Miss. Code Ann. Section 25-11-120.

Miss. Code Ann. Section 25-11-113(1)(a) which relates to disability retirement provides, in relevant part:

> Upon the application of a member or his employer, 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 on the first of the month following the date of filing such application on a disability retirement allowance, but in no event shall the disability retirement allowance commence before 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; however, the board of trustees may accept a disability medical determination from the Social Security Administration in lieu of a certification from the medical board.

The question before the PERS Medical Board, the Disability Appeals Committee and the PERS Board of Trustees was whether Ms. Case's claim meets the statutory requirements for receipt of a disability benefit. Miss. Code Ann. Section 25-11-113(1)(a) defines disability as:

> . . . 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.

The issue before the Circuit Court was whether the decision of the Board of Trustees is supported by substantial evidence and whether it is arbitrary or capricious.

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 not beyond the

authority of the Board to make; or (4) did not violate a statutory or constitutional right of Ms. Case. ***Brakefield v. Public Employees' Retirement*** System, 940 So. 2d 945, 947 (Miss. App. ***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, 350 (Miss. App. 2004); ***Public Employees' Retirement System v. Henderson,*** 867 So. 2d 262, 264 (Miss. 2004); ***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. ***Brakefield v. Public Employees' Retirement System***, 940 So. 2d at 948; ***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 350; ***Public Employees' Retirement System v. Dishmon,*** 797 So. 2d at 891; ***Melody Manor Convalescent Center v. Mississippi State Department of Health,*** 546 So. 2d 972, 974 (Miss. 1989); ***United Cement Company v. Safe Air for the Environment***, 558 So. 2d 840, 842 (Miss. 1990);) In ***Mississippi State Tax Commission v. Mississippi-Alabama State Fair,*** 222 So. 2d 664, 665 (Miss. 1969), the Mississippi Supreme 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.** [*Emphasis added*]

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." In the present case, the record reflects that Ms. Case has undergone medical evaluations, tests, and surgery. Several different physicians with the necessary medical training to review these reports have done so. 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 at 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, 902 (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. Case. ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1284; ***Public Employees' Retirement System v. Stamps***, 898 So. 2d at 673; ***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 [*Emphasis added*]

In ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 893, this Court stated that "the applicant for disability has the burden of proving to the Medical Board and to the Appeals Committee that he or she is in fact disabled". In ***Public Employees' Retirement System v. Henderson*** 867 So. 2d 262, 264 (Miss. App. 2004) 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." Clearly, the Circuit

Court recognized that PERS presented enough evidence and thorough analysis of such evidence to support its finding that Ms. Case is not disabled.

In the case of ***Public Employees' Retirement System v. Thomas***, 809 So. 2d 690 (Miss App. 2001), Justice Southwick in a dissenting opinion stated:

> The committee did not need nor was there any procedure to receive substantial evidence of *non-disability*. What is necessary is a reasoned, non-arbitrary decision that substantial evidence of disability had not been presented.

As recognized by the Circuit Court the recommendation of the Disability Appeals Committee is a well reasoned and non-arbitrary decision that the Order of the Board of Trustees is supported by substantial evidence.

The Order of the PERS Board of Trustees was supported by substantial evidence, and was neither arbitrary nor capricious. PERS was within its authority in making this determination, and was not in violation of Ms. Case's constitutional rights. Thus, the Order of the Circuit Court affirming the decision of the PERS Board of Trustees must be upheld.

I. THE DECISION OF THE CIRCUIT COURT AFFIRMING THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. CASE'S CLAIM FOR DISABILITY IS BASED ON SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

Substantial evidence "is that which affords a substantial basis of fact from which the fact in issue can be reasonably inferred." ***Johnston v. Public Employees' Retirement System***, 827 So. 2d 1, 3 (Miss. App. 2002); Also see: ***Brakefield v. Public Employees' Retirement System***, 940 So. 2d. at 948 ***Brinston v. Public Employees'' Retirement*** System, 827 So. 2d at 3; ***Davis v. Public Employees' Retirement System***, 750 So. 2d

1225, 1233 (Miss. 1999), ***Delta CMI v. Speck***, 586 So. 2d 768 (Miss. 1991) In ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1284 this Court noted that substantial evidence is "something more than a 'mere scintilla' or suspicion...[I]t has 'been defined by this Court as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion" The facts, as presented in the record before this Court, support the decision of the PERS Board of Trustees and the Circuit Court that Ms. Case is not entitled to the receipt of a disability benefit pursuant to Miss. Code Ann. Section 25-11-113.

"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 Honorable Court has defined arbitrary and capricious. "An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." ***Miss. State Dep't 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, upheld by the Circuit Court, is neither arbitrary nor capricious.

The evidence in the record before this Court shows that Ms. Case claimed that she was unable to perform her duties as a secretary for the Brookhaven School District. Ms. Case asserted numerous medical problems for her inability to perform these secretarial tasks. Among these medical problems are hypertension, arrhythmia,

fibromyalgia, arthritis in knees and arms, and depression and anxiety. (Vol. 2, Pp. 31, 42, 103, 130, 131) However, Ms. Case stated in her testimony before the PERS Disability Committee "the main reason that I cannot work is because I have a nearly uncontrollable high blood pressure." (Vol. 2, P. 39)

Using the records as provided by Ms. Case, the Disability Appeals Committee made the following summary of the medical findings:

> **Hypertension (high blood pressure)**
>
> **Ms. Case attributes a substantial number of work days and work time lost as a result of her 'uncontrollable hypertension,' and in her direct testimony to the PERS Disability Appeals Committee stated her 'main problem' was her blood pressure and heart problems.** Ms. Case stated that she would have to frequently discontinue her duties because of chest pain and weakness episodes that she attributed to elevated blood pressure. Braxter P. Irby, Jr., M.D., of Brookhaven, MS, has served as Ms. Case's primary care physician since 1995., for diagnoses including hypertension, paroxysmal atrial fibrillation, morbid obesity, osteoarthritis, fibromyalgia, and hiatal hernia. **On repeated visits to her primary care physician, and on visits to cardiology specialists, Ms. Case's blood pressure is clearly documented within acceptable levels. In fact, a detailed review of sixty-five pages of medical records supplied by Dr. Irby reveals only a few instances where Ms. Case experienced abnormal blood pressure readings.**
>
> **Of particular note, is the documentation surrounding Ms. Case's visit to the emergency department of King's Daughter's Hospital on August 29, 2001.** This appears to be shortly after her decision to seek medical disability, which is documented on Dr. Irbys' office notes of August 3, 2001, and her initiation of disability application in August of 2001. Apparently, Ms. Case had telephoned Dr. Irby's office that day (August 29, 2001) with complaints of elevated blood pressure and headache. **The nurse in Dr. Irby's office notes Ms. Case reported her blood pressure as elevated at 180/110, but from the medical record it appears Ms. Case was not seen by Dr. Irby or**

the nurse, but this information was reported to the nurse via telephone call. The nurse advised Ms. Case to seek care in the Emergency Department. **The ER record from later that day shows her blood pressure to be close to normal at 152/92**, her heart rate 92, and Dr. Chris Chauvin diagnoses a urinary tract infection. **Ms. Case reported to Dr. Irby's office the next day, where her blood pressure was normal at 140/94 and pulse 88.**

Ms. Case does in fact take several medications for hypertension, but **there is little evidence in the record to indicate that her blood pressure is 'uncontrolled' or that a requirement of numerous medications necessarily suggests disability, impairment, or restriction**. Ms. Case indicated in her testimony to the Appeals Board that she would experience high blood pressure at work, ostensibly because of stressful working conditions, but **there is no documentation in the records reviewed by PERS of elevated blood pressures in the work place**, or that Ms. Case sought treatment by the school nurse, etc., (other than to rest) during these episodes where she could not attend her job duties.

Arrythmia (irregular heart beat)

Ms. Case alleges a condition of intermittent atrial fibrillation, or episodes in which the upper chambers of the heart do not contract rhythmically. It appears that Ms. Case first experienced symptoms of this in January of 1995. She was evaluated in her local hospital and found to have an elevated heart rate, though this was felt to be paroxysmal or episodic. Dr. Irby, her primary physician, referred Ms. Case to Cardiology specialists Dr. David Mulholland and Dr. Harper Stone, of the Jackson Heart Clinic. Ms. Case saw Dr. Stone **in early 1995 and underwent an extensive cardiac evaluation, which, aside from the finding of paroxysmal atrial fibrillation, was normal. Ms. Case had a cardiolite scan to evaluate possible blockage of the coronary arteries, this was normal per Dr. Stone. Her EKG (electrocardiogram tracing) was normal**. Ms. Case also underwent **an echocardiogram** (ultrasound imaging) **of her heart and this was also normal. Dr. Stone indicates in a letter to Dr. Irby of 5/9/95 that her chest complaints are 'unlikely' to be cardiac in origin.** Dr. Stone advised Ms. Case to take an aspirin a day, and discharged her from his care. Ms. Case apparently

experienced another episode of intermittent atrial fibrillation in November of 1995, and Dr. Irby again consulted with Dr. Stone, who advised the option of starting a different medication to control her heart rate.

It appears that Ms. Case did well until May of 1997, when she again experienced an episode of rapid heart rate, and Dr. Irby transferred her to Dr. Stone's care at St. Dominic's Hospital in Jackson, MS. **Dr. Stone admitted her for observation and treatment**, and made changes to her medication regimen. **Of note is her admitting blood pressure, which was normal. A repeat echocardiogram was again essentially normal. Dr. David Mulholland assumed her care and noted in his discharge summary of May 8, 1997, that Ms. Case was in 'sinus rhythm' (normal) after initiating a new medicine (Tambocor) to control her heart rate.** Dr. Mulholland advised continuation of this medicine and offered alternative medications or eventually pacemaker placement if this therapy proved ineffective. Dr. Mulholland saw Ms. Case for a routine follow-up a month later and reported to Dr. Irby in his letter of June 11, 1997, that Ms. Case was doing well. **Dr. Mulholland saw her again in August of 1997, and notes her atrial fibrillation is controlled.** Ms. Case's blood pressure at that visit was mildly elevated at 140/100, but Dr. Mulholland made no recommendations for any medication change.

In January of 1998, Dr. Baxter Irby notes that Ms. Case experienced a brief episode of what he assumes to be atrial fibrillation, '3 or 4 days ago' but that Ms. Case 'converted spontaneously' [to normal heart rhythm]. Dr. Irby obtained **a Holter monitor test** for Ms. Case, (a recording all of her heart rate, cardiac rhythm, and tracings for a period of twenty-four hours). This **again was essentially normal except for the finding of 'frequent unifocal PVC's,' a benign finding of irregular heart beats, but not related to hypertension or atrial fibrillation.** Dr. Irby states in his note of January 12, 1998, that he will refer Ms. Case back to Dr. Mulholland 'if she continues to be symptomatic.'

It appears that Ms. Case remained asymptomatic, as Dr. Mulholland did not see Ms. Case again until March of 1999, but she was not referred by Dr. Irby. Dr. Mulholland was asked by Dr. Winston Capel, who was

evaluating Ms. Case for potential back surgery, for medical clearance prior to her operation. At that time, her blood pressure was 148/98, pulse 86, and her cardiogram was normal. Dr. Mulholland made no recommendations or changes in her regimen and advised her to return in six months.

Dr. Mulholland saw Ms. Case in August of 1999, and again in September 2000. In 2000, Dr. Mulholland prescribed the addition of Norvasc, a blood pressure medication, but made no other recommendations. Interestingly, **in his note of September 2000, Dr. Mulholland notes that Ms. Case was being treated for 'atrial flutter,' though this appears to be the first use of this terminology in Ms. Case's medical records. In December of 2000,** Dr. Irby orders **another Holter monitor test** for Ms. Case, **this again reveals sinus rhythm (normal) and is essentially normal overall.** Ms. Case returned to Dr. Mulholland approximately one year after her visit in 2000, and his brief office note indicates '**atrial flutter, good control with Tambocor.**' He makes no other changes in Ms. Case's regimen but provides a letter dated September 19, 2001, that Ms. Case is 'disabled' on the basis of 'severe nearly uncontrollable hypertension associated with an atrial arrhythmia, atrial flutter.'

Notwithstanding the letter of Dr. Mulholland, the Board finds little evidence that Ms. Case is disabled as a result of hypertension, or what appear to be rare and intermittent episodes of rapid heart rate. All records from Dr. Stone and Dr. Mulholland suggest that Ms. Case has experienced rare episodes of this benign condition of rapid heart rate, and over a period of six years made minimal changes to her medical regimen, often reporting she was in 'good control' of her cardiac symptoms.

Fibromyalgia:

Claimant states that she has chronic pain from fibromyalgia, and Dr. Irby, a Nephrologist, who appears to be serving as Ms. Case's primary physician, has referred her to a Rheumatologist, (arthritis specialist) Dr. Linda Rockhold, of Jackson, MS. Prior to seeing Dr. Rockhold in 1995, Ms. Case was followed by Dr. Phillip Hensarling, also a Rheumatologist in Jackson, from 1994-1995. Dr.

Hensarling diagnosed Ms. Case with 'fibromyalgia' and prescribed non-narcotic pain relievers. Virtually all of Ms. Case's lab studies from Dr. Hensarling were normal and within acceptable limits. **Dr. Hensarling has not provided a PERS Form 7, Statement of Examining Physician in support of any claimed impairment, limitation, or disability on behalf of Ms. Case. Dr. Hensarling makes no mention in any of his provided medical records provided that would suggest Ms. Case is disabled or has restrictions, limitations, or impairments.**

Dr. Rockhold has followed Ms. Case from 1995 until the present. **On PERS Form 7, in which the examining physician attests to the patient's impairments, limitations, and restrictions, Dr. Rockhold clearly states that Ms. Case has "no fibromyalgia related impairments," and lists no restrictions on her activities at work. Finally, the claimant specifically testified that her primary problem pertained to her blood pressure and heart complaints, as opposed to symptoms related to joint disease or fibromyalgia. Further, evidence indicates that the majority of Ms. Case's work days missed were attributed to her complaints she related to blood pressure or cardiac complaints.**

Arthritis in knees, arms.

Claimant has testified she has pain in knees from arthritis. However, Dr. Rockhold, her Rheumatologist, does not indicate any impairment from this problem, and most of the visits to Dr. Irby, Ms. Case's primary physician, are related to problems other than arthritis. Dr. Winston Capel performed a cervical fusion and discetomy in March of 1999 at Central Mississippi Medical Center (Methodist Medical Center). This surgical procedure was indicated for findings of a right C7 radiculopathy (nerve impingement in the cervical spine) which was causing Ms. Case's symptoms of pain in the right arm and hand. This condition is supported by the MRI report of Ms. Case's cervical spine, performed 2/15/99. Prior to undergoing this surgical procedure, Ms. Case was also examined by Dr. Mike Graeber, a Neurology specialist, for nerve conduction studies. The results of this testing were consistent with 'symtomatic acute right C7 radiculopathy with active degeneration.' Dr. Capel's final

> office note on June 28, 1999, states Ms. Case is three months post operation and 'reports no significant right arm pain.' **Dr. Capel cleared Ms. Case to return to work on July 1, 1999. It would therefore be concluded that Ms. Case's surgical intervention was considered successful, as Dr. Capel's notes indicate a normal post-operative course without apparent complication, and she was cleared to return to work without restrictions. There is no other evidence in the records to suggest that Ms. Case has subsequently sought the care of other providers for her cervical radiculopathy.**
>
> **The independent medical exam** conducted by Dr. Jo Lynn Polk on February 28, 2002 **revealed that Ms. Case had grossly normal sensation in her upper extremities, normal muscle tone, and normal hand coordination.** Dr. Polk recommended that Ms. Case limit overhead work activities due to restrictions in the range of motion in her shoulders, but found that Ms. Case is 'physically capable of performing the job of a secretary.'

Of notable importance is Dr. Polk's determination as to whether Ms. Case should work part-time or full-time. In her report, Dr. Polk stated, "Ms. Case is currently able to work part time. Physical therapy, especially aquatic therapy, would increase her endurance to allow her to work full time." Thus, Ms. Case's conditions are not permanently disabling.

The Committee's analysis continues as follows:

> **Depression and Anxiety.**
>
> Dr. Irby, Ms. Case's primary treatment physician, indicated that she has various psychiatric/psychological diagnoses; these include 'anxiety,''depressive neurosis,' and 'stress reaction.' Dr. Polk also found during her evaluation that Ms. Case exhibited a flat mental affect and that Dr. Irby had been treating her for depression and generalized anxiety disorder. **However, Dr. Polk did not find that Ms. Case had a disabling mental condition or disorder, and there are no records that Ms. Case has ever been evaluated by a psychiatrist or psychologist for said mental condition, or documented her degree of mental/psychiatric functioning with an objective and reproducible method. In fact, Dr. Irby her**

primary physician, and Ms. Case, in her claim for disability, have enumerated multiple medical problems (as discussed above) as the basis of her disability but ostensibly her alleged psychological disorder was (at least initially) a secondary diagnosis and not the primary reason for Ms. Case to seek disability.

Dr. Irby's letter of September 5, 2001, in support of Ms. Case's request for disability, lists intermittent atrial fibrillation, fibromyalgia syndrome, osteoarthritis, anxiety and depressive neurosis and hypertensive cardiovascular disease as her problems. However, Dr. Irby's letter of May 1, 2002, suggests the primary concern for Ms. Case is her 'stress reaction with anxiety and depressive neurosis.' Dr. Irby has recommended that Ms. Case receive an evaluation by a Psychiatrist or Clinical Psychologist, but states this has not been done because of Ms. Case's financial concerns. The PERS Disability Appeals Committee finds there is insufficient evidence supporting Ms. Case's claim of disability on the basis of anxiety or neuroses. The sum of the evidence for claimant's diagnosis of disabling anxiety or neurosis consists of Dr. Polk''s observation of her 'flat affect' during the evaluation, her documented use of commonly prescribed anti-depressant medications, and her treatment for this condition by Dr. Irby, a Nephrologist, albeit her primary physician. **The record clearly contains no evidence which would support Ms. Case's claim of disability on the basis of anxiety neuroses.** The PERS Disability Appeals Committee is sympathetic to Ms. Case's financial concerns, but does not feel an award of disability based on work-related stress and anxiety is appropriate where a claimant has never been evaluated or treated by a licensed Psychiatrist or Clinical Psychologist, even if the claimant asserts financial inability to seek care from these specialists.

With regard to other medical complaints experienced by Ms. Case (irritable bowel syndrome, gastro-esophageal reflux, obesity, etc.) the Committee feels these to be either lacking in documentation to rise to the level of demonstrating a limitation or restriction, or were not alleged by the claimant to be of substantial weight for consideration as the basis of a medical disability.

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*]

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

Moreover, PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. This is what the Committee did in its analysis of the medical documentation offered by Ms. Case in support of her claim. 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. Case's application and medical documents. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee composed of three physicians trained to review the medical reports submitted in support of Ms. Case'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 at 438.

It is well documented in the analysis of the medical evidence offered by Ms. Case that she is not entitled to disability benefits 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 and the law regarding disability, there was an overwhelming lack of evidence to support the award of a disability to Ms. Case.

The PERS Board of Trustees concluded, rightfully so, that Ms. Case, at the time of her termination, was not permanently disabled. The record contains medical documents which require medical expertise in analyzing. The Medical Board is comprised of three physicians and the Disability Appeals Committee at Ms. Case's hearing was made up of three different physicians. One of the physicians on the Disability Appeals Committee is also an attorney[2]. These individuals certainly have the ability to analyze the test results that are in the record as well as the ability to apply the law as written. After reviewing all of the evidence, the Committee found that the records submitted did not support Ms. Case's claim of disability.

Ms. Case refers to the statement of the School District's Finance Director that notes that Ms. Case cannot perform her job duties due to headaches, alertness, and heart irregularities. Again, she refers to a letter from the Principal of the school that Ms. Case has difficulty performing her job duties. As to the statement of Ms. Case's principal and the finance director regarding Ms. Cases' medical condition this Court in ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 894 found PERS argument to be convincing that "the opinion of a lay person should not be taken as conclusive evidence of disability".

The statement of Dr. Polk that Ms. Case can "currently" work part-time does not indicate that she is permanently and totally disabled. Dr. Polk stated:

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[2] Dr. Jospeh Blackston is listed in the Mississippi Bar Membership Directory.

> DISCUSSION: In my opinion, Ms. Case is physically capable of performing the job of a secretary. She cannot perform work activities overhead due to restrictions in active shoulder abduction and flexion. There is no objective medical evidence that Ms. Case is unable to work as a secretary because of her hypertension associated with an atrial arrhythmia. She has not had formal psychotherapy to address her depression and anxiety. Therefore, there is not enough medical evidence to support a disability based on her mental condition.
>
> Ms. Case is currently able to work part time. Physical therapy, especially aquatic therapy, would increase her endurance to allow her to work full time. (Vol. 2, P. 101)

Perhaps Ms. Case's employer would have accommodated her by allowing her to work part-time until she could secure the therapy that would enable her to return to full-time work.

Based on the aforementioned facts and precedent, the decision of the Board of Trustees is supported by substantial evidence and is neither arbitrary nor capricious as recognized by the Circuit Court.

II. THE DECISION OF THE CIRCUIT COURT AFFIRMING THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM SHOULD NOT BE REVERSED OR REMANDED BECAUSE THE RETIREMENT SYSTEM IS NEITHER REQUIRED TO OBTAIN EVALUATIONS OR RECORDS NOT SUBMITTED BY MS. CASE NOR OBTAIN MS. CASE'S SOCIAL SECURITY DISABILITY DECISION OR FILE.

Ms. Case asserts that PERS should have obtained a psychiatric evaluation and records regarding her cervical fusion. This argument fails, however, as it is clearly the member's burden to present evidence of disability to PERS. ***Public Employees' Retirement System v. Dishmon,*** 797 So. 2d at 893. As already noted, in ***Dishmon***, the Supreme Court stated that "the applicant for disability has the burden of proving to the

Medical Board and to the Appeals Committee that he or she is in fact disabled". *Id.* Ms. Case carried the burden of providing any and all records that were to be considered by the Medical Board then the Disability Appeals Committee and finally the Board of Trustees in making their determination. According to the record reviewed by the Disability Appeals Committee, Ms. Case has not undergone a psychiatric evaluation. One would assume that if Ms. Case believed a metal condition rendered her disabled she would have had records to support such claim. Had Ms. Case wanted PERS to consider such an evaluation she should have undergone one and submitted the report to PERS. She did not, however, and therefore PERS is under no obligation to obtain a psychiatric evaluation for her, especially where they do not believe such is warranted. If as she claims there was a report completed by a clinical psychologist for the Social Security Administration it was her burden to provide the report if she wanted it considered by the Disability Appeals Committee. If they felt that a psychiatric evaluation was necessary, the Committee had the authority to request one. Similarly, Ms. Case should have provided additional records regarding her cervical fusion if she wished for those records to be considered in the PERS determination. Obviously from the Committee's Recommendation, records from Dr. Capel were reviewed and it was noted that Ms. Case had undergone a cervical fusion. Ms. Case was represented by counsel at the hearing.

Ms. Case next contends that this Court should allow consideration of a favorable ruling from the Social Security Administration in support of her claim.

Miss. Code Ann. Section 25-11-113 provides that the PERS Board "**may** accept a disability medical determination from the Social Security Administration **in lieu of a certificate from the medical board**. 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. Moreover, the PERS Medical Board was not able to certify Ms. Case's claim of disability based on the medical evidence. The Committee considered all information submitted for the record and all the medical evidence elicited at the hearing. Thus, Ms. Case did not meet the criteria for permanent and total disability as required under PERS law. Ms. Case was able to, and did, appeal to the Disability Appeals Committee, pursuant to Section 25-11-120 and PERS regulation.

Moreover, there is no mandate under PERS law, and Appellant cites none, which would require PERS to *carte blanche* grant disability benefits because Social Security has entered a favorable decision granting disability benefits. In this case, the PERS Board of Trustees, as provided by statutory authority, received and accepted the certification of its own Medical Board. Clearly, the Legislature, when enacting the law governing PERS, did not see fit to require the PERS Board of Trustees to adopt the same standard that Social Security utilizes in determining entitlement to benefits, nor did it mandate that a decision by Social Security 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. Further, an administrative body, such as the PERS Board of Trustees, is given "[G]reat 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.

Although Social Security may classify a person as "disabled", that finding would not be determinative of the PERS Board finding. The law governing PERS provides that the Board may consider Social Security's finding, but it is not required to accept such finding *carte blanche.* The Appellant cannot cite authority whereby the PERS Board of Trustees is mandated to automatically accept a finding of the Social Security Administration. In fact, it is clear that the Legislature has addressed this issue and takes the position that the PERS Board of Trustees may accept certification from its own Medical Board, rather than Social Security's finding, in determining whether an individual meets the definition of disability under PERS law.

Moreover, this Court in ***Public Employees' Retirement System v. Stamps***, 898 So. 2d 664, 674 (Miss. 2005) stated, "As this court noted in ***Doyle v. Public Employees' Retirement System***, 808 So. 2d 902, 907 (Miss. 2002) 'PERS is not bound by any finding of the Social Security Administration."

As in all cases where a favorable ruling from the Social Security Administration is offered into the record, the Disability Appeals Committee takes the finding into consideration along with all other information and testimony offered in support of an application for disability benefits.

Ms. Case asserts that her due process right to a fair hearing was violated because the Disability Appeals Committee did not obtain all her medical records, did not order a psychiatric evaluation, and did not request a copy of the clinical psychologist's report as

requested by the Social Security Administration. Due process requires that a claimant in an administrative proceeding receive notice of the hearing and an opportunity to be heard. ***Booth v. Mississippi Employment Security Commission***, 588 So. 2d 422, 428 (Miss. 1991). The agency's findings of fact, if supported by substantial evidence and in the absence of fraud, are conclusive. *Id.* Miss. Code Ann. § 25-11-120 states: "In the case of disability appeals, the hearing officer shall have the authority to defer a decision in order to request a medical evaluation or test or additional existing medical records not previously furnished by the claimant." Although authority exists for the hearing officer "to request a medical evaluation or test or additional existing medical records not previously furnished by the claimant," such authority is purely discretionary. There is clearly no obligation on the part of the Committee to do so. Moreover, Ms. Case's due process right to a fair hearing was in no way violated by the Committee's failure to request additional records, evaluations, tests, or the clinical psychologist's report as requested by the Social Security Administration.

This case should not be remanded or reversed as several physicians reviewed Ms. Case's application and medical records. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee composed of three physicians trained to review the medical reports submitted in support of Ms. Case's claim. Moreover, PERS has the 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 v. Public Employees' Retirement System***, So. 2d at 949.

Again PERS, although not wanting to be redundant, cites to the case of ***Public Employees' Retirement System v. Cobb,*** 839 So. 2d at 609-610, wherein 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*]

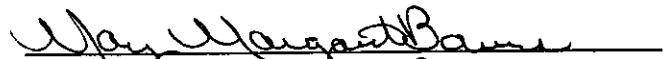
In this case, the PERS Board of Trustees concluded that Ms. Case is not permanently disabled as that term is defined under the law governing the administration of the Retirement System. Under the facts of this case and the record presently before this Court, it is clear that the action of the PERS Board of Trustees was entirely consistent with the requirements of Miss. Code Ann. Sections 25-11-113. In reviewing the decision of the administrative body, it must be kept in mind that an appellate court may not reweigh the evidence or substitute its judgment for that of the administrative agency. ***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 350; ***Public Employees' Retirement System v. Dishmon,*** 797 So. 2d at 891; ***Melody Manor Convalescent Center v. Mississippi State Department of Health,*** 546 So. 2d 972, 974 (Miss. 1989); ***United Cement Company v. Safe Air for the Environment,*** 558 So. 2d 840, 842 (Miss. 1990)

CONCLUSION

Based on the record before this court, the decision entered by PERS Board of Trustees and affirmed on appeal by the Circuit Court is clearly supported by substantial evidence and should not be reversed. Furthermore, this case should not be remanded because the burden of providing records which PERS is to consider in making its disability determination was clearly on Ms. Case. Further, PERS is not mandated to adopt a finding of disability by the Social Security Administration. The medical evidence does not support Ms. Case'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 and affirmed by the Circuit Court. 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. Case'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 PERS Board of Trustees respectfully requests this Honorable Court affirm the Order entered on August 28, 2006 by the Circuit Court.

Respectfully submitted on this the **13th** day of March, 2007

PUBLIC EMPLOYEES' RETIREMENT SYSTEM, APPELLEE

By: 

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CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that I have this day hand delivered or mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Response of Appellee to:

George S. Luter, Jr., Esquire
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Post Office Box 3656
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Honorable W. Swan Yerger
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

This the 13th day of March, 2007

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