

NO. 2006-SA-01704

IN THE SUPREME COURT OF MISSISSIPPI

CHERRI S. CASE

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant would rely on such statement in her original brief.

STATEMENT OF THE FACTS

Appellant would rely on such statement in her original brief.

REPLY TO APPELLEE'S ARGUMENTS

- 1. Appellant Cherri Case would reply that the argument of Appall Public Employees' Retirement System fails to contradict the reports of her treating internist, cardiologist, and report of her principal that she is disabled and does not show substantial evidence to support their decision denying benefits.**

Numerous lay and medical testimony remain un rebutted that Case could no longer perform her duty as a secretary for the Brookhaven School District.

Brookhaven School District Finance Director Sandra Earnest on August 29, 2001 certified that Case could not perform her job stating " Current medical diagnosis causes muscle and joint pain, severe headaches, affects alertness and mental focus. heart irregularities, and high blood pressure. These disabilities prevent her from performing day to day duties." R 90, RE 3, Tab 2).

On September 5, 2001, treating internist Dr. Braxter P. Irby, Jr. reported that he first saw Case on March 3, 1995 with supraventricular tachycardia and atrial fibrillation with rapid response. He stated she "continues to have intermittent atrial fibrillation, fibromyalgia, syndrome, osteoarthritis, anxiety and depressive neurosis and hypertensive cardiovascular disease" and added her condition was "chronic and long term in nature and her prognosis is poor" and stated Case was "no longer able to perform her duties as a secretary on a full or part time basis" and it was his "...recommendation that this lady be allowed to retire as her condition merits long-term disability." (R 130, RE 4, Tab 3).

Jackson cardiologist Dr. David H. Mulholland reported on September 19, 2001 that Case was “disabled to work on the basis of severe nearly uncontrollable hypertension associated with atrial arrhythmia, atrial flutter.” He added “I believe that Cherri’s work activities probably contribute materially to the difficulty or controlling her hypertension. Severe hypertension of this magnitude is almost certain to lead to further medical problems such as congestive heart failure. (R 196, RE 4-A, Tab 4).

On October 25, 2001, Case’s principal, Roy A. Ballentine, wrote:

“It has been my experience with Cherri that she has difficulty fulfilling her job responsibilities in a reliable manner due to her multiple health problems. She is chronically fatigued, has heart palpitations, high blood pressure, migraines, fibromyalgia, and other health problems. These symptoms contribute to her extremely excessive absenteeism from work, sometimes for more than a week at a time. She is on the job about forty to fifty percent of the time. ...It is my opinion that she is not able to maintain the consistent, reliable schedule that is required for holding a job in any occupation, due to the frequency of her absences caused by her condition.”
(R 91, RE 5, Tab 5).

Even Dr. Polk, PERS’ medical examiner, after seeing Case for only fifteen minutes, stated Case had numerous medical problems but could work “part time” adding, “Physical therapy, would increase her endurance to allow her to work full time.” She added “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.” (R 101, RE 8, Tab 6).

On May 1, 2002, Dr. Irby again reported that Case was “now on Effexor for stress reaction with anxiety and depressive neurosis” and that he had “recommended she see a psychiatrist or a clinical psychologist for her depression...” adding “This lady is both physically and mentally unable to perform her duties due to the depressive neurosis, stress reaction, the fibromyalgia syndrome with joint pain. The stress of her work aggravates her atrial fibrillation and her depression. I feel strongly that she is disabled and would hope that you would

reconsider her situation before denying her disability.” (R 455, RE 9, Tab 7).

In rebuttal PERS references various times when Case’s either had a normal cardiac test or a normal blood pressure reading. However, such does not constitute substantial evidence required to uphold PERS’ denial. *Public Employees’ Retirement System v. Marquez*. 774 So. 2d 421 (Miss. 2001). A complete reading of her records and the reports of her internist and cardiologist remain unrebutted by any physician.

2. PERS’ response fails to recognize that Case has a due process right to a fair hearing by requiring PERS to obtain all of her records before making a decision in her case and particularly in light of *PERS v. Kelly Wright*.

Case would contend that her due process rights to a fair hearing were violated by the Committee’s failure to obtain all her medical records, failure to order a psychiatric evaluation, or at least request a copy of the evaluation of the clinical psychologist the Social Security Administration requested in its case which Case testified had been performed **only the prior week before the hearing.**

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: “...Administrative proceedings must be “conducted in a fair and impartial manner, free 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).

Case would argue that the Disability Appeals Committee violated her due process rights to a fair hearing when it failed to obtain or request the psychological report of an examination performed the week before at the instance of the Social Security Administration when such could have afforded Case the evidence to prove her disability. Instead, the Committee used the *absence*

of such information in their opinion as a basis for denying her claim stating:

“The PERS Disability Appeals Committee is sympathetic to the claimant’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.”

In reality, Case testified she had been evaluated by the fore mentioned psychologist, Dr. Martha M. D’Illio, the week before the hearing at the instance of the Social Security Administration. (R 60, RE 48, Tab 11). With the authority PERS has to order post hearing examinations, Case would assert they could have at least obtained Dr. Illio’s report and considered such rather than ignore Case’s testimony she had been evaluated by a psychologist and then falsely use such to deny her claim!

The federal courts have recognized the duty of administrative law judges in Social Security disability cases to obtain all relevant and available medical records.

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 non adversarial 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, of great importance to Case’s claims of pain were, presumably, the records of Dr. Winston Capel who performed a neck fusion on Case three years prior.

The Mississippi Court of Appeals on February 13, 2007 in *PERS v. Kelly Wright*, #2-005-CC-02188-COA, found that PERS violated Wright’s “procedural due process rights and the

concept of fundamental fairness” when it accepted new evidence without providing Wright the opportunity to rebut the evidence or supplement her own records. Case would argue the same due process violation occurred here when PERS did not obtain all of her medical records or give her an opportunity post hearing to obtain her records and in particular, the psychologist who saw her only a few days before her PERS hearing.

Case would alternatively further argue the court should *sua sponte* also find that such due process violation occurred when school officials were allowed to testify without any prior notification, after the hearing was concluded, that she was terminated for mishandling funds. (R 44-45, RE 56-57, Tab 11).

CONCLUSION

The Circuit Court should reverse and render the decision of PERS denying Case disability benefits or alternatively, reverse and remand her case for a new hearing with directions to obtain a psychiatric evaluation, records of her neurosurgeon, Dr. Winston Capel, and the psychological evaluation ordered by the Social Security Administration the week before her hearing.

Respectfully submitted,

CHERRI CASE, Appellant

BY


GEORGE S. LUTER, Her Attorney

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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Hinds County Circuit Court
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SO CERTIFIED this the 1st day of May, 2007.



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