

NO. 2006-SA-01704

IN THE SUPREME COURT OF MISSISSIPPI

CHERRI S. CASE

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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 Justices of this Court may evaluate possible disqualification or recusal.

1. Cherri S. Case, 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;
6. Dr. Joseph Blackston, Presiding Hearing Officer of the Disability Appeals Committee of the Public Employees' Retirement System of Mississippi, and
7. Hon. W. Swan Yerger, Hinds County Circuit Court.

Respectfully submitted,

GEORGE S. LUTER



ATTORNEY FOR APPELLANT

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BRIEF OF APPELLANT

I

STATEMENT OF THE CASE

The appellant, Cherri Case, files this Brief to urge the Supreme Court to reverse the order of the Hinds County Circuit Court which, on August 28, 2006, affirmed the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered April 22, 2002 which adopted the recommendation of the PERS Disability Appeals Committee.

The Disability Appeals Committee found "...the 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." (R 23, RE 70 Tab 12).

II

STATEMENT OF THE ISSUES

1. **The decision of PERS' denying Case's application for disability retirement is not supported by substantial evidence because Case's medical disability is supported by reports of her treating internist, cardiologist, the report of her principal, and the Committee erroneously relied on the report of their examining psychiatrist, Dr. Jo Lynn Polk, who stated Case could only work "part time."**
2. **Alternatively, the decision of PERS should be reversed and remanded for PERS to obtain a psychiatric report due to PERS' failure to order a psychiatric evaluation, to obtain the records regarding her cervical fusion, and to obtain Case's Social Security disability decision and review the psychological report obtained in that case a week before**

her PERS hearing to afford Case due process.

III.

STATEMENT OF THE FACTS

Cherri Case was employed as a secretary for the Brookhaven School District for 10.75 years. R 84, RE 12, Tab 10). After suffering numerous health problems, Case applied for disability retirement on September 28, 2001. (R 87, RE 1, Tab 1).

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, fibromyalgias 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 of 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).

On February 28, 2002, Dr. Jo Lynn Polk, independent medical examiner for PERS, reported that Case had numerous medical problems but could work "part time" adding, "Physical therapy, would increase her endurance to allow her to work part 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 April 10, 2002, Case was informed by PERS Executive Director Frank Ready that the PERS Medical Board had determined that "there was insufficient objective evidence to support the claim that your medical condition prevents you from performing your duties as described of a Secretary." (R 447, RE 9-A, Tab 8).

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).

On May 1, 2002, Case filed her Notice of Appeal for a hearing before the PERS Disability Appeals Committee. (R 76, RE 10, Tab 9).

Case was afforded a hearing before the PERS Disability Appeals Committee consisting of Drs. Joseph Blackston, presiding, David Duddleston, and William Nicholas on July 29, 2002. (R 25, RE 13, Tab 11). Case was then represented at the hearing by attorney Michael Taylor of Brookhaven, Mississippi.

At the hearing, Case testified she was terminated from the school district on February 21, 2002, but had not worked since January 18, 2002. She stated her health began to decline in 1995 when she started having high blood pressure and heart fluttering and that she had chronic hypertension for years. (R 31, RE 19, Tab 11). She added that she tried to work and had done so for 29 years, having quit earlier in 1982 when she drew her retirement funds out. (R 32, RE 20, Tab 11). She testified since 1995 that she had probably only worked 50 percent of the time.” (R 32, RE 20, Tab 11). She added the high blood pressure makes her “feel bad. I feel so bad I can’t do my job that’s expected of me. It gives me headaches. I feel weak. When I rise up, I get dizzy, and if I have to- jobs that I have to do, I just can’t do them the way they need to be done because I feel so bad. My blood pressure makes me feel so bad.” (R 39, RE 27, Tab 11).

Case testified she had also had a cervical fusion three years before performed by Dr. [Winston] Capel [Jackson neurosurgeon] and that her neck hurts and pain radiates down her arms and shoulders.” R 56, RE 44, Tab 11).

On cross examination, PERS attorney Margo Bowers only asked Case if she had applied for Social Security disability and Case stated she had but “They’re still in the process of getting all the information together.”¹ R 57, Re 45, Tab 11).

On examination by her attorney, Case testified she had a lot of pain from her neck surgery and that Dr. Irby had put her on several medications for depression and that the Social Security

¹ Case was subsequently approved for Social Security Disability in late 2002 with the benefits beginning June 2003 after the statutory five month waiting period. (RE 78, Tab 14).

Administration had sent her for a psychological evaluation to a Dr. D'Ilio in Columbia² the Thursday before her PERS hearing. (R 60, RE 48, Tab 11). She stated her depression seemed to getting worse. (R 61, RE 49, Tab 11).

Case further testified that Dr. Jo Lynn Polk's exam lasted only fifteen minutes and that she did not take her blood pressure. (R 63, RE 51, Tab 11).

Case's husband briefly testified that his wife was in "pretty constant pain" and "She's in the bed a lot, and this blood pressure problem, it's either quit work or die." R 66, RE 54, Tab 11).

After the record was closed, the Committee allowed school district financial director Susan Quinn to testify that Case was placed on administrative leave regarding certain school funds but such investigation that had not been completed. (R 70, RE 58, Tab 11),

On July 29, 2002, the PERS Disability Appeals Committee recommended that Case's application for disability retirement be denied 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." (R70, RE 23, Tab 12).

The PERS Board of Trustees entered its order adopting such recommendation on April 22, 2002. (R 14, RE 72, Tab 13).

Case timely appealed to Circuit Court on May 22, 2003 after her prior attorney received a copy of such recommendation and order of the PERS Board of Trustees on April 22, 2003. (R 10, RE 73, Tab 14). The record in this case was filed by PERS with the Hinds County Circuit Clerk on June 10, 2005. On July 20, 2006, the Appellant filed a Motion to Supplement the record with her Social Security disability notification. (RE 76, Tab 14).

² Apparently, Case was referring to Martha M. D'Ilio, Ph.D. of Columbia Psychological Services, P.A. located in Petal, MS 39465

On August 28, 2006, the Hinds County Circuit Court, in a brief order without discussion, affirmed the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS"). (R 15, RE 83, Tab 14).

Case timely appealed to the Mississippi Supreme Court. (R 16, RE 84, Tab 14).

SUMMARY OF THE ARGUMENT

The decision of PERS' denying Case's application for disability retirement is not supported by substantial evidence because Case's medical disability is supported by reports of her treating internist, cardiologist, the report of her principal, and even the report of their examining physiatrist, Dr. Jo Lynn Polk, who stated Case could only work "part time."

Alternatively, PERS' decision should be reversed and remanded because they did not obtain all of Case's medical records, her Social Security disability decision, or a psychiatric evaluation particularly when Case testified she had been send by a clinical psychologist the prior week at the direction of the Social Security Administration, particularly since and PERS has statutory authority to obtain such information after a hearing.

IV.

ARGUMENT

1. The decision of PERS' denying Case's application for disability retirement is not supported by substantial evidence because Case's medical disability is supported by reports of her treating internist, cardiologist, the report of her principal, and the Committee erroneously relied on the report of their examining physiatrist, Dr. Jo Lynn Polk, who stated Case could only work "part time."

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.”

Numerous lay and medical testimony support Case’s contention that she 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).

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).

Additionally, the circuit court is "charged with the duty to review the record to determine whether there is substantial evidence...to reach a conclusion, a Circuit Court must look at the full record before it... while the Circuit Court performs limited appellate review, it is not relegated to wearing blinders." *Mississippi State Board of Examiners. v. Anderson*, 757 So. 2d 1079, 1084 (Miss. App. 2000).

Case has put forth the strong opinions of two longtime treating specialists, Drs. Irby and Mulholland, the lay opinions of her principal and school finance director, and the testimony of both herself and her husband that she could not perform her job as a secretary. The only contradictory evidence is the report of Dr. Polk who stated---not that Case could return to her old job full time---but that she could work "**part time**" and that 'physical therapy...would increase her endurance to allow her to work full time'---presumably at some point in the future, although Polk admitted "there is not enough evidence to support a disability based on her mental condition" ---presumably because PERS never ordered such an evaluation.

Case would contend that PERS' decision denying her application for disability retirement was arbitrary and capricious and not supported by substantial evidence and that this Court should reverse and render the order of the Hinds County Circuit Court affirming PERS and order benefits retirement benefits to be awarded to Case.

2. Alternatively, the decision of PERS should be reversed and remanded for PERS to obtain a psychiatric report due to PERS' failure to order a psychiatric evaluation, to obtain the records regarding her cervical fusion, and to obtain Case's Social Security disability decision and review the psychological report obtained in that case a week before

her PERS hearing to afford Case due process.

After the passage of House Bill 1148 in 2002, 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).

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: “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 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!

Further, there is ample precedent that PERS has exercised its statutory authority in the past to order an 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.”

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.

If the Supreme Court does not reverse and render this case and order disability benefits to Case it should, alternatively, reverse and remand this case and order PERS to obtain a psychiatric evaluation of Case, her records from Dr. Capel, and the report of Dr. Illio, the clinical psychologist, who examined Case a week before her PERS hearing for the Social Security Administration.

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
GEORGE S. LUTER, Her Attorney

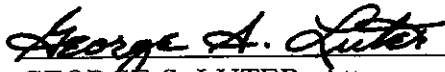
CERTIFICATE OF SERVICE

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:

Hon. W. Swan Yerger
Hinds County Circuit Court
Hinds County Circuit Courthouse
Jackson, MS 39201

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Public Employees' Retirement System
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SO CERTIFIED this the 27th day of December, 2006.



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