IN THE SUPREME COURT OF MISSISSIPPI

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

VERSUS

CAUSE NO. 2007-SA-00101

ARLENE WARNER — **APPELLEE**

BRIEF OF THE APPELLANT

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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 Appellant

Honorable Jim Hood, Attorney General

Honorable W. Swan Yerger, Hinds County Circuit Court Judge

Honorable Willie Abston, Counsel for Appellee

Ms. Arlene Warner, Appellee

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE ISSUES

1) THIS APPEAL SHOULD BE DISMISSED AND THE ORDER OF THE CIRCUIT COURT DENYING THE APPELLANT'S MOTION TO DISMISS SHOULD BE REVERSED ON THE BASIS THAT MS. WARNER DID NOT FILE THE REQUIRED BRIEF IN THE CIRCUIT COURT IN COMPLIANCE WITH RULE 28 OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE.

2) THE ORDER GRANTING DISABILITY BENEFITS TO MS. WARNER SHOULD BE REVERSED ON THE BASIS THAT THE CIRCUIT COURT IMPERMISSIBLY REWEIGHED THE FACTS AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE ADMINISTRATIVE AGENCY.

3) THE CIRCUIT COURT'S GRANT OF DISABILITY BENEFITS TO MS. WARNER SHOULD BE REVERSED BECAUSE THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

STATEMENT OF THE CASE

This matter involves an appeal filed by the Appellant, Public Employees' Retirement System, wherein it seeks review of the Order entered by the Circuit Court of the First Judicial District of Hinds County (hereinafter "Circuit Court") on December 6, 2006. The Circuit Court reversed the Board of Trustees' of the Public Employees' Retirement System (hereinafter "Board") Order on April 20, 2004, denying Ms. Arlene Warner's request for payment of disability benefits as defined under Miss. Code Ann. Section 25-11-113 (Rev. 2006).

STATEMENT OF THE FACTS[1]

Ms. Warner was employed as a secretary with the Natchez-Adams Schools. (V.2, R. 75) She testified that her duties included data entry, keeping attendance records, grades and demographic information. (V. 2, R. 31) At the time Ms. Warner was terminated from employment, May 17, 2003, she had 7.25 years of service credit. Ms. Warner applied for non duty related disability. (V. 2, R. 75) Ms. Warner claims that the pain and numbness in her hands and the medications that she takes render her unable to perform her job duties. (V. 2, R. 32)

Ms. Warner testified that the busiest part of her day was in the morning. (V. 2, R. 31) Most of her work involved typing, writing, filing, and filling out reports which included attendance reports. (V. 2, R. 32) Mr. Long, Director of Personnel, testified that Ms. Warner spent 60% of her time typing. (V. 2, R. 53) It appears from the testimony

[1] Reference to the Record is indicated by "V." followed by the volume number and "R." followed by the appropriate page number.

that in an effort to accommodate Ms. Warner she was transferred to the High School where she served as a receptionist. (V. 2, R. 55)

There is no dispute that Ms. Warner suffered from carpal tunnel syndrome and that she had surgery for the problem. In in-depth questioning by Dr. Duddleston, a member of the Appeals Committee, he asked and noted the following with regard to the medical records submitted in support of her claim:

Q. And I'll let you address those things, but I'm going to tell you what I have observed in your records.

A. Okay.

Q. You saw Dr. Brantley and, I believe, Dr. Brantley referred you to Dr. McCloud?

A. Yes, sir.

Q. And then you were seeing Dr. McCloud regularly?

A. Yes, sir, which he was doing the shots in my neck.

Q. And then on our page 18, the last day that Dr. McCloud saw you, you were apparently doing better. You were still complaining of pain. **He said that he could not find any evidence that you were having significant ongoing dystrophy, which is the pain complex that you had. You had good range of motion. You were able to make a fist. He said that he couldn't find anything to suggest an ongoing dystrophy, and that most of this had resolved.** He then said basically to resolve the issue that he was going to send you for a bone scan if you still had this syndrome that we call reflex sympathetic dystrophy, and if that was negative, **then he was planning to let you go back to work without any restrictions.** That was May 28 of '03, and before that time you had been seeing him very regularly.

A. Yes, I would go in and he would put me to sleep and do the procedure. That was it.

Q. It looks like he was seeing you every couple of weeks?

A. Every two weeks.

Q. And you were doing fine with that.

A. I don't mean to interrupt. He wasn't listening to me when I was explaining to him what I was doing. He felt I was doing okay, but he wasn't living with the pain.

Q. I understand that, but as I mentioned, the Medical Board only had this, and this is were we had to start also, okay.

A. Yes, sir.

Q. **And what I see is that as soon as he said he was going to let you go back to work without any restrictions, you quit him and went somewhere else.**

A. No, I didn't.

Q. I'm just telling you what we observe. And then your started seeing Dr. Feldman, and we didn't have any records from Dr. Feldman, and still don't have any records from Dr. Feldman, okay. **So at this moment here, last spring, it looks like you were ready to go, okay. And go back to work and that your hands were functioning well enough, according to Dr. McCloud who had been seeing you every couple of weeks, that things were okay.** All right. And then Dr. Brantley's notes indicate that your reason to change was health problems with your husband which kept you from making appointments, but you had been making appointments regularly up until this point. I'm just telling you what I observe.

A. Yeah.

Q. Then Dr. Brantley has been seeing you, but this was more recent than what Dr. Brantley had seen you. He sent you to Hand Occupational Therapy Clinic to help assess your impairment rating, and that's where we got the impairment rating. **And then Dr. McCloud saw you after that impairment rating and was ready to send you back to work, okay. And then no more records.** Then we have Dr. Collipp, who did your examination, and Dr. Collipp has a fairly condensed report. He is to the point on the report, and gives us other information, page 14 of our records. And basically I'm going to paraphrase my understanding of his report. Basically he examined your hands and found that you were wearing some wrists restraints, and that **you were easily able to take off the wrists restraints, which required some grip strength, and he was watching you do this. He watched you take them off with no problem. And then when he tested your hand for strength, he got a one out of five, which is barely moving, which is less strength than what you demonstrated taking off your wrists braces. Then he observed an anatomical difference with your hand than what your doctors had said were wrong with your hand.** Let me ask you a question at this point. What is your understanding of what the doctors told you is wrong with your hands?

A. **My understanding is that there is permanent nerve damage.**

Q. **And to which nerve?**

A. I'm not sure.

Q. **The nerve that they did the release on?**

A. **Yes, sir.**

Q. **The reason I bring that up is that that nerve does not feed your little fingers. Yet you had symptoms on those little fingers, and you shouldn't have.** The little fingers should be normal if it's the nerve. I know that all you know is that it hurts, and I understand that, and I understand that you're not an expert on anatomy.

A. Yes, sir.

Q. **But the nerve that they've been working on doesn't feed the little fingers, and that's important to us in understanding what is wrong, okay and to try to see if what we know the anatomy says matches what you're telling us, okay.** Obviously there are other reasons that your little fingers can hurt, but it did not match. **The strength did not match, the sensation did not match, the way things should have been. ALL THESE THINGS ARE CONTRADICTORY TO YOUR CLAIM, OKAY.** (V. 2, R. 38-42) *(Emphasis Added.)*

Dr. Duddleston pointed out at the hearing that the medical records in the file were contradictory to Ms. Warner's claim. Ms. Warner also testified that she suffers from depression that leaves her with no desire to do anything, however, she was not receiving any form of counseling nor had she been to a psychiatrist nor mental health center for treatment. (V. 2, R. 46-47).

Dr. Nicholas also explained to Ms. Warner what information the Committee was looking for in the file and what the records reflect. He asked:

Q. Have you had an EMG or a study of your wrist area?

A. Yes, sir.

Q. Not since the one by Dr. Tawari?

A. No, sir.

Q. Were you ever told about that report as to what it showed?

A. No, sir.

Q. **We try to look at as much objective evidence as possible, and with your type of problem although you feel very uncomfortable and your hands are a real issue to you, the EMG and nerve conduction tests is the most objective way we can look at that.**

A. Yes, sir.

Q. **And the report of that study done by Dr. Tawari in March of '03 showed very little at all with regard to nerve damage.** He said there was no evidence of large fiber polyneuropathy; no evidence of noncompressive mononeuritis multiplex. So at that time, how were you when that was done?

A. He didn't complete it because I was afraid of needles. I have this phobia about needles, and he just did part of the exam. He didn't complete it.

Q. **I don't think he would have made those comments unless he had evidence.** (V. 2, R. 49-50) *(Emphasis Added.)*

Other than the medications that Ms. Warner takes she was not receiving any additional treatment. (V. 2, R. 62) Following review by the Medical Board an Independent Medical Evaluation was requested. Ms. Warner was evaluated by Dr. David Collipp. Dr. Collipp found the following on the physical examination:

> This patient is a well-developed, well-nourished, middle-aged African-American female in mild distress upon my entering the room. She is in tears, and states that she is distraught for her 3-year saga of inability to work. She explains that she has worked her entire life, and that she is upset that she is unable to return to gainful employment. Her gait pattern is normal. She is wearing bilateral WHOs, and she is asked to check with Dr. Feldman regarding their wear, with a history of RSD. She demonstrates good functional use of bilateral hands with doffing and donning the WHOs, and with manipulation of her paperwork file of her medical car, which includes normal leafing through papers, without clumsiness, or obvious sensory loss. She does not attend abnormally to her hand function when using her upper limbs, and looks away when distracted, without loss of function in both hands.

> She descries numbness of both hands, all fingers and all surfaces of her hands from the wrist distally, more on the hypothenar and thenar eminences than in the middle of her hands. All fingers but especially the thumb and little finger are numb, on the right greater than the left side. Passively she has normal bilateral upper limb and cervical ROM. Actively she lacks ROM at bilateral wrists with flexion and extension lacking 30 degrees each. She provides 1/5 power in bilateral grip, interossei, and wrist flexion and extension, and thumb movements. Biceps and triceps are at 3/5, with deltoid at 5/5. Infraspinatus and Speeds (alternate Biceps) tests are 4/5. She has no wasting, and no atrophy. No erythema, no skin or nail changes, and no hair loss. Her skin is not thickened, or thinning. She has normal distal pulses. Her scar tissue was flexible, and without abnormal outcome. Well healed. (R. 93-94).

In concluding that Ms. Warner is capable of performing the duties of her position Dr. Collipp found:

> Bilateral Carpal Tunnel Syndrome, with treatment for CRPS, and complaints of ongoing pain and disability. Her PPI has been reviewed, and **this examiner disagrees with the PPI from Dr. Brantley. The focus of this IME is not the PPI, or MMI (which she has reached quite some time ago), and is instead whether she can perform her normal job of data entry.** Her behavior and subjective complaints will likewise receive no further attention, other than to say that she aptly demonstrated a secondary gain pattern.
>
> **She is capable of performing data entry,** and could start back gradually, with an increase in work duties every two weeks. She could be at full regular duty within 8 weeks in this fashion. **Her CTS release allows her to return to her previous duties, and should prevent further problems with her previous CTS, as she no longer has a carpal tunnel per se.** (V. 2, R. 94) *(Emphasis Added)*

Ms. Warner was referred to Dr. McCloud, a pain specialist, by Dr. Brantley. (V. 2, R. 120) Dr. McCloud in office notes states that he was going to schedule her for a bone scan, however, stated:

> **I can find no evidence of any ongoing problems** and have some concern about the ongoing continued pain. If we can find nothing on the triple-phase bone scan again I am going to declare her at MMI

and return her to work without restrictions. (V. 2, R. 98)(*Emphasis Added)*

After examining the evidence and the testimony presented at the hearing, the Disability Appeals Committee presented its recommendation to the PERS Board of Trustees that Ms. Warner does not qualify for the receipt of disability benefits from the State of Mississippi. The Board agreed with the Disability Committee's findings and on April 20, 2004, denied Ms. Warner's claim for disability.

On May 14, 2004, Ms. Warner filed her subsequent appeal of the Board's determination in the Circuit Court of the First Judicial District of Hinds County. On September 2, 2004, the record pertaining to the instant case was filed with the court. This began the 40-day tolling period for Ms. Warner to file her brief in support of her appeal. On October, 7, 2004, Ms. Warner, through her counsel, filed a document titled, "Arlene Warner's Appeal and Response to the Board of Trustees of the Public Employees' Retirement System's Proposed Statement of Facts, Conclusions of Law and Recommendation." On October 26, 2004, PERS filed a Motion to Dismiss on the basis of Ms. Warner's failure to file a brief in a timely manner. On December 6, 2006, the Circuit Court issued an Opinion and Order that denied PERS' Motion to Dismiss and reversed the Board's determination to deny Ms. Warner's request for disability benefits, hence this appeal.

SUMMARY OF THE ARGUMENT

PERS filed a Motion to Dismiss for failure to adhere to the Mississippi Rules of Appellate Procedure. Ms. Warner submitted a proposed recommendation instead of a brief in compliance with the Court Rules. As such this Court should find that the Circuit

Court erred in denying PERS' Motion to Dismiss and this case should be summarily dismissed.

The Order of the PERS Board of Trustees is supported by substantial evidence. In order to qualify for a disability benefit under PERS law, Ms. Warner would have to prove that the conditions upon which she bases her claim are disabling and that the disability was the direct cause of her withdrawal from state service. The record clearly supports the Order of the PERS Board of Trustees, which took into consideration all of the medical evidence offered by Ms. Warner. The medical evidence does not establish that Ms. Warner's ailments are disabling and therefore, she is not entitled to a disability benefit from the State of Mississippi. The Circuit Court reweighed the evidence in order to reverse the agency's determination. This is impermissible under the appropriate standard of review and is an error worthy of reversal.

Ms. Warner was provided with a fair and impartial hearing. The Order of the PERS Board of Trustees is premised on substantial evidence and is neither arbitrary nor capricious, was entered within the Board's authority, and was not rendered in violation of any constitutional or statutory right of Ms. Warner.

ARGUMENT

INTRODUCTION

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

In addition to service retirement benefits, disability benefits are provided for members who meet the statutory requirements for such benefits. There are two categories of disability benefits available to PERS members: (1) a regular disability benefit payable to members who have at least four 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 arranges and passes upon all medical examinations for disability purposes and report its conclusions and recommendations to the PERS Board of Trustees. The PERS Medical Board is composed of physicians appointed by PERS Board of Trustees. Miss Code Ann. Section 25-11-119 (7) (Rev 2006) Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the designated hearing officer of the PERS Board of Trustees, pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006).

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

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

Section 25-11-113 further provides that:

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

The question before the PERS Medical Board and the PERS Board of Trustees was whether Ms. Warner's claim meets the statutory requirement for the receipt of a disability benefit. The PERS Board of Trustees concluded that the recommendation of the Disability Appeals Committee denying regular disability benefits should be adopted as the decision of the Board. Ms. Warner appealed the decision to the Circuit Court and the decision of the Board was reversed. This appeal stems from the Circuit Court's decision to vacate the agency's determination.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit Court Practice limits review by this Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence; or (2) was arbitrary or capricious; or (3) was beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of Ms. Warner. ***Flowers v. Public Employees' Retirement System,*** 952 So.2d 972 (Miss.App. 2006) ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279 (Miss. 2005);

Public Employees' Retirement System v. Smith, 880 So.2d 438, 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); ***Sprouse v. Mississippi Employment Security Commission***, 639 So.2d 901 (Miss. 1994)

A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. ***Flowers v. Public Employees' Retirement System,*** 952 So.2d 972 (Miss.App. 2006) ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279 (Miss. 2005); ***Public Employees' Retirement System v. Smith,*** 880 So.2d 438, 350 (Miss. App. 2004); ***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.

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 this case there are medical tests and evaluations that Ms. Warner has undergone. Several different physicians have reviewed the reports in the file with the medical training to read and assess those documents. The Court in ***Cobb*** went on to state: "That fact finding duty includes assessing the credibility of witnesses and determining the proper weight to give to a particular witness's testimony." On review by an appellate court it:

> is obligated to afford such determinations of credibility in the fact-finding process ***substantial deference*** when reviewing an administrative determination on appeal and the court exceeds its authority when it proceeds to re-evaluate the evidence and makes its own determination of the trustworthiness of some particular testimony. (*Emphasis Added*) 839 So.2d at 609

In ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279, 1290 (Miss. 2005) the Court reiterated that "it was the sole province of PERS, not the circuit court, to determine which evidence to believe and which evidence should be given greater 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 the Mississippi Supreme 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. Warner. ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279 (Miss. 2005); ***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

Moreover, in the case of ***Public Employees' Retirement System v. Thomas***, 809 So.2d 690 (Miss 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.

In ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 893 this Court stated that "the applicant for disability has the burden of providing to the Medical Board and to the Appeals Committee that he or she is in fact disabled".

The Order of the PERS Board of Trustees was supported by substantial evidence, was neither arbitrary nor capricious nor violated any statutory or constitutional right of Ms. Warner and, thus, the Order of the PERS Board of Trustees entered February 24, 2004, must be affirmed and the Order of the Circuit Court entered December 6, 2006, must be reversed.

I. THIS APPEAL SHOULD BE DISMISSED AND THE ORDER OF THE CIRCUIT COURT DENYING THE APPELLANT'S MOTION TO DISMISS SHOULD BE REVERSED ON THE BASIS THAT MS. WARNER DID NOT FILE THE REQUIRED BRIEF IN THE CIRCUIT COURT IN COMPLIANCE WITH RULE 28 OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE.

The Appellee, Ms. Warner, failed to comply with the Uniform Rules of Circuit and County Court Practice and the Appellate Rules of Procedure by filing a response to the recommendation of the Disability Appeals Committee rather than a brief. Rule 5.06 of the uniform Circuit and County Rules provides:

> Briefs filed in an appeal on the record **must conform** to the practice in the Supreme Court.

This rule clearly indicates that it is mandatory for parties to file briefs that are in accordance with Rule 28 of the Rules of Appellate Procedure. This Court and its subordinate courts have not explicitly addressed when compliance with these rules is attained or produced a definitive test for when dismissal is deemed appropriate. However, several state and federal courts, as well as numerous secondary sources have discussed the effect of non-compliant briefs on the subsequent proceedings and the courts' actions in response to them.

Rule 28 of the Mississippi Rules of Appellate Procedure is based on Fed. R. App. P. 28. **Miss. R. App. P. 28** Cmt 1 (2006). When federal courts rule on the construction or application of federal procedural rules that are textually similar or identical to state procedural rules, the state courts should use these rulings as persuasive guidelines when they do not directly conflict with an express state objective or policy. In ***Moore v. FDIC***, the Fifth Circuit dismissed the case because of the lack of compliance with Rule 28 in the structure and text of the brief. ***Moore v. FDIC***, 993 F.2d 106 (5th Cir. 1993). The Court

found that because the brief filed "contains only conclusions without reference to the record" that it was insufficient and the case was summarily dismissed. ***Id*** at 106. In the instant case, the Appellee's document is also void of references to the record and is absent of any legal theories or grounds on which her contentions should be accepted other than a reweighing of the medical testimony.

The Ninth Circuit also has dismissed cases due to defects in the form of the brief. The Ninth Circuit said "the rules of practice and procedure were not whimsically created by judges who derive some sort of pleasure from the policing functions that the existence of such local rules necessarily entails." ***In re O'Brien***, 312 F.3d 1135, 1137 (9th Cir. 2002). The ***O'Brien*** Court also stated that "an enormous amount of time is wasted when attorneys fail to provide proper briefs and excerpts of record that should have supplied the court with the materials relevant to the appeal." ***Id*** at 1137. The Ninth Circuit's concern with efficiency resulting from compliance was also expressed in ***N/S Corporation v. Liberty Mutual Insurance Company***, 127 F.3d 1145 (9th Cir. 1997).

In ***Duchow v. Whalen***, 872 S.W.2d 692 (Tenn. App. 1993), the Tennessee Court of Appeals found that an "egregious" failure to comply with the requirements of the Rules of Appellate Procedure warranted a dismissal of the appeal. The court cited non-compliance in the form of the brief, such as paper size and covers, as well as the content of the brief for the justification of a dismissal.

The content of the brief in ***Duchow*** was deemed insufficient because it did not comply with the sections of the rules that required a table of contents, statement of the issues, statement of the case, statement of the facts and an argument. In the instant case, the Appellee's document is printed on standard size loose leaf paper with no binding or

cover. The document is also identical to the dismissed brief in ***Duchow*** in that it does not contain the required headings. Perhaps more importantly, not only are the headings absent but the content that would follow the vital headings is also absent. There is nothing in the document that would resemble or could be considered analogous to a statement of the issues, table of contents, or an argument. The Appellee did title one section of the document "analysis." However, it is illogical to assume that this fulfills the argument requirement of a brief. There is no statutory authority or case law cited in this section to support a contention nor are there any contentions made by the Appellee. The Appellee simply restates the evidence, places emphasis in certain places, and concludes by asking the court to find favorably for them by reweighing the testimony presented.

In a recent publication on Florida Appellate Practice, the Florida Bar Association addressed several issues regarding the duties of attorneys. Heading V, sub-section 2.5 of the section entitled, "Professional Responsibility of Appellate Advocates" states,

> ...appellate procedural rules are important for two overarching reasons. One reason is that rules ensure fairness and orderliness. They ensure fairness by providing litigants with a level playing field. They ensure orderliness by providing courts with a means for the efficient administration of crowded dockets. Second, they establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions.

Professional Responsibility of Appellate Advocates, The Florida Bar Association, Elligett Jr., Raymond T., Scheb, John M. (2006).

In the instant case, the Circuit Court refused to grant the Appellant's Motion to Dismiss by finding the dismissal to be an act left to the court's discretion. The Appellant does not dispute that this dismissal is in essence discretionary however, the duty of counsel to follow the procedural rules is mandatory. By adopting the Circuit Court's decision to allow Ms. Warner's filed document to serve as her brief, this Court would be

sanctioning patent violations of the rules of procedure that are vital to the uniformity and efficiency of the appellate process.

The Appellee submitted a document of unprecedented form and title that more closely resembles a pleading and later tried to label it as an appellate brief once the procedural timing defect was brought to light by the Appellant. The Appellant was obviously unable to recognize this document as a brief which led to its timely Motion to Dismiss on October 10, 2004. A knowledge of the governing rules of procedure and strict attention to these rules is the essence of the professional duty that is required from all officers of the court that wish to prosecute an appeal. Allowing the Appellee's document to be accepted as a brief would be ignoring the rules of form that govern the appeals process, as well as any professional responsibility that is bestowed upon officers of the court and substituting them for judicial convenience. The Ninth Circuit said "the FRAP ...are not optional suggestions...but rules that... are entitled to respect and command compliance," as such, the Mississippi Rules of Appellate Procedure should be given the same amount of respect from those subject to their scope and this Court should command compliance. ***O'Brien*** 312 F.3d at 1135.

II. THE ORDER GRANTING DISABILITY BENEFITS TO MS. WARNER SHOULD BE REVERSED ON THE BASIS THAT THE CIRCUIT COURT IMPERMISSIBLY REWEIGHED THE FACTS AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE ADMINISTRATIVE AGENCY.

Should this Court find that the Circuit Court was correct in denying PERS Motion to Dismiss, PERS would show that this Court should then find that the Circuit Court did not properly apply the applicable standard of review when reweighing the facts and

testimony of the instant case. A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. ***Public Employees' Retirement System v. Smith,*** 880 So2d 438, 350 (Miss. App. 2004); ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279 (Miss. 2005); ***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), this Court stated:

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

In Public Employees' Retirement System v. Cobb, 839 So.2d 605, 609 (Miss. App., 2003) the Mississippi Court of Appeals noted: "[I]n administrative matters, the agency, not the reviewing court, sits as finder of fact." In this case there are medical tests and evaluations that Ms. Warner has undergone. Several different physicians have reviewed the reports in the file with the medical training to read and assess those documents. PERS should be the party that then weighs what significance to give to the multiple physicians' opinions. 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 1279 (Miss. 2005); this Court said, "it was the sole province of PERS, not the circuit court, to determine which evidence to believe and which evidence should be given greater 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.

In the instant case, the only support that the Circuit Court gives for its decision to reverse is the impairment ratings assigned to Ms. Warner by Dr. Brantley for the benefit of her Workers' Compensation claim. The Circuit Court has gone beyond the proper standard of review by placing more significance on Dr. Brantley's singular act of assigning impairment ratings to Ms. Warner than the Board deemed it warranted. The Board does not act without judicial review but as an agency it is given the proper authority to make decisions such as weighing testimony and the Circuit Court circumvented this authority by making its own determination regarding what testimony was given the most weight. By rejecting the evaluations of several doctors and focusing

on the impairment ratings assigned by only one doctor, the Circuit Court has reweighed the testimony and chosen what evaluations are to be accepted. In ***Public Employees' Retirement System v. Howard,*** 905 So. 2d 1279, 1290 (Miss. 2005), this Court stated, "Although contradictory evidence was presented, it was the sole province of PERS, not the circuit court, to determine which evidence to believe and which evidence should be given greater weight."

The decision of the Circuit Court to reweigh the facts and testimony in the instant case is reversible error and the findings and determinations made by the Board should be used when this Court reviews the Board's final decision. As noted in ***Howard***, "Sorting through voluminous and contradictory medical records, then determining whether an individual is permanently disabled is better left to physicians, not Judges. This is the idea behind the creation and expansion of administrative agencies." 905 So.2d at 1287

The Circuit Court cites Ms. Warner's impairment ratings as the only medical support for its decision to reverse PERS' denial of disability benefits. The Circuit Court has taken upon itself to give more credence to one doctor's opinion over others and decide that Ms. Warner's condition is disabling. Instead of reweighing all of the evidence as indicative of a de novo standard, courts are charged with a more restrictive standard of review when reviewing an agency's determination. Because the Circuit Court has impermissibly reweighed the evidence and decidedly applied an improper standard of review, PERS asks this court to reverse the findings of the Circuit Court.

III. THE CIRCUIT COURT'S GRANT OF DISABILITY BENEFITS TO MS. WARNER SHOULD BE REVERSED BECAUSE THE ORDER OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

Should this Court agree with the Circuit Court's Order denying the Appellant's Motion to Dismiss PERS would show that upon close reading of the record before this Honorable Court, it is evident that the decision of the PERS Board of Trustees is based upon substantial evidence. Substantial evidence has been defined as evidence which affords a substantial basis of fact from which the fact at issue can be reasonably inferred. ***Davis v. Public Employees' Retirement System***, 750 So.2d 1225, 1233 (Miss. 1999), ***Delta CMI v. Speck***, 586 So.2d 768 (Miss. 1991), ***Public Employees' Retirement System v. Howard,*** 905 So.2d 1279 (Miss. 2005).

The objective evidence presented before the Disability Appeals Committee and subsequently the Board of Trustees clearly presents a substantial basis of fact for Ms. Warner to be denied disability benefits. On April 4, 2001, Ms. Warner first saw Dr. Fairbanks regarding her carpal tunnel. (V. 2, R.134) Dr. Fairbanks decided to perform a bilateral carpal tunnel release on April 27, 2001, in order to help alleviate what seemed to be bilateral carpal tunnel syndrome. *Id.* Ms. Warner returned to Dr. Fairbanks on July 9, 2001, to receive post-operative care and to be evaluated for impairment ratings. Dr. Fairbanks noted in his report that "she seems to be doing fairly well" and that "her hand exam is within normal limits to inspection, palpation and motion." *Id.* Dr. Fairbanks concluded that Ms. Warner was considered to "have 0% impairment" at that time and that

she should return to work because it would "ultimately help the patient get better quicker." (V. 2, R 134-135)

On May 9, 2002, Ms. Warner visited Dr. Brantley who concluded that she was experiencing axonal loss and recommended additional surgery to relieve this problem. (V. 2, R. 128) On June 5, 2002, Ms. Warner underwent surgery to help improve her carpal tunnel syndrome. (V. 2, R. 126) After several return visits for check-ups, suture removal, and minor procedures, Dr. Brantley informed Ms. Warner on September 30, 2002, that she could return to regular duty at work. (V. 2, R. 122) Ms. Warner returned to Dr. Brantley on November 21, 2002, who reaffirmed that Ms. Warner could return to daily work. (V. 2, R. 121)

The last day Ms. Warner attended her job was February 2003. (V. 2, R. 55) On February 17, 2003, Dr. Brantley again saw Ms. Warner. In his notes from this visit Dr. Brantley states, "I do not have any good explanation for it (her pain)." (V. 2, R 120) Dr. Brantley and Dr. Fairbanks had treated Ms. Warner for nearly two years preceding her decision to stop attending her job. Both of these medical professionals treated her and ultimately released her to perform daily work. At no point during this time period did either doctor tell Ms. Warner that she was disabled or incapable of returning to work once her recovery from surgery was completed.

On March 5, 2003, Ms. Warner began seeing Dr. McCloud, a pain specialist. At this time Dr. McCloud performed a left stellate ganglion block in hopes of alleviating Ms. Warner's pain associated with her carpal tunnel. (V. 2, R. 111) On April 3, 2003, Ms. Warner had a functional capacity evaluation performed by Maureen Hardy PT MS CHT. (V. 2, R. 117) Ms. Hardy recorded her findings from this evaluation and subsequently

sent them to Dr. Brantley for her review. Dr. Brantley then forwarded this evaluation to the appropriate parties handling Ms. Warner's Worker's Compensation claim. (V. 2, R. 116) At no point in the functional capacity evaluation or Dr. Brantley's accompanying letter is there a mention of Ms. Warner being disabled. Actually, Dr. McCloud stated in her report on May 28, 2003, that "I can find no evidence of any ongoing problems....If we can find nothing on the triple-phase bone scan again I am going to declare her at MMI and return her to work without restrictions." (V. 2, R. 98)

On September 25, 2003, Ms. Warner saw Dr. Collipp for an independent medical examination. Dr. Collipp disagreed in his report with the impairment ratings from the functional capacity evaluation and properly identified the issue of whether Ms. Warner was able to perform her job. (V. 2, R. 94) Dr. Collipp states that "she is capable of performing data entry, and could start back gradually, with an increase in work duties every two weeks." *Id.*

Ms. Warner has seen several doctors and specialists throughout her continuing ailment and disability claim. The medical records and evaluations are against a determination that she is permanently disabled. Dr. Collipp, Dr. McCloud, Dr. Fairbanks and Dr. Brantley have all released Ms. Warner to perform her regular work duty. The only evidence that supports the Circuit Court's decision and Ms. Warner's claim is a functional capacity evaluation performed by a physical therapist. However, this evaluation does not refer to Ms. Warner as disabled and Dr. Brantley's letter is also absent of such a label. Certainly had Dr. Brantley deemed this evaluation to be conclusive evidence, as the Circuit Court deems it, of Ms. Warner's disability, he would have taken the opportunity to express such an opinion in his written letter regarding her

Worker's Compensation claim that accompanied the evaluation. However, this omission itself is not the conclusive evidence that the Committee relied upon when making their determination. The substantial nature of the evidence when viewed in its entirety is unmistakably against a finding for disability benefits.

The duty of the Disability Appeals Committee is not to create a checklist of doctors that find for or against disability benefits when making their decisions. Rather, the Committee evaluates the submitted medical records as a singular body of work and makes their expert determination based on the picture painted by the medical records as a whole. The opinion written by the Committee and the Board's affirmance of that opinion is indicative of a thought out evaluation of the medical records presented and not a simple balancing of how many doctors have ultimately decided for or against a disability diagnosis. The Committee of medical professionals is not required to request additional evidence that controverts the testimony and documentation submitted by the member. Instead, the panel is charged with the responsibility of making an expert determination upon viewing the record in its entirety and speaking with the member at his/her hearing. This process allows the Committee to obtain a clear picture of the member's ailments and view the objective evidence presented as one compilation of data. Hence, the decision submitted by the Appeals Committee and adopted by the Board of Trustees is supported by substantial evidence and should not be considered arbitrary nor capricious.

CONCLUSION

The Circuit Court erred in accepting the Appellee's document as a brief that sufficiently complied with the governing rules. The document submitted by the Appellee was of unprecedented form and title. It lacked not only the appropriate styling and headings but, it also lacked the appropriate substance. The Rules of Appellate Procedure were written and are enforced for numerous important reasons, however none of those reasons are served by allowing the Appellee's document to be considered a timely proper brief. Substituting judicial economy for a policy of strict compliance to rules of procedure would have wide-ranging negative effects on this Court and its subordinate courts' administration of the rules of procedure.

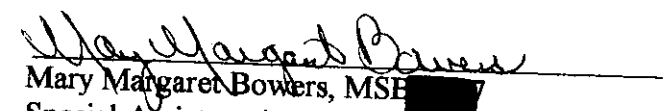
The record before this Court, clearly supports the decision of the Board of Trustees to deny Ms. Warner disability benefits. The Board of Trustees was within its discretion as an administrative agency when it determined what weight to give the medical reports. The Circuit Court has improperly reweighed the testimony in this case and has not applied the proper standard of review. The medical evidence in this case does not support Ms. Warner's claim for disability benefits. The evaluation and decision of the Disability Appeals Committee and the subsequent adoption by the Board of Trustees was well reasoned and supported by substantial evidence. Because the Order of the Board of Trustees was supported by substantial evidence, it is neither arbitrary nor capricious. Ms. Warner's constitutional and statutory rights were considered and upheld in every facet of her claim and appeal but, Ms. Warner's claim does not meet the necessary requirements for her to receive disability benefits under the laws governing the

Public Employees' Retirement System. The burden was on Ms. Warner to prove her claim disability and the administrative agency has exercised its expertise in determining that she has failed to meet that burden.

The PERS Board of Trustees respectfully requests this Honorable Court reverse the Circuit Court's Opinion and Order and summarily dismiss this matter on the basis of its overwhelming procedural defects. In the alternative, the Board of Trustees requests this Honorable Court reverse the Opinion and Order entered by the Circuit Court on December 6, 2006.

Respectfully submitted on this the 22nd day of June 2007.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM, APPELLANT

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:

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Honorable Winston Kidd
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This the 22nd day of June, 2007

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