# IN THE SUPREME COURT OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

*Appellant*

VS.

JOYCE DOZIER

*Appellee*

## APPELLEE'S BRIEF

*ORAL ARGUMENT REQUESTED*

**GEORGE S. LUTER**
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Telephone: (601) 948-0021
Facsimile: (601) 354-5548
GEOLAW1502@AOL.COM
[redacted]

**THOMAS U. REYNOLDS**
*CO-COUNSEL*
Post Office Drawer 220
Charleston, Mississippi 38921
Telephone: (662) 647-3203
MSB#5307

***Attorneys for Appellee***

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

VS.

No. 2007-SA-01432

JOYCE DOZIER

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. Joyce Dozier, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Hon. Tomie T. Green, Hinds County Circuit Judge.

Respectfully submitted,

**GEORGE S. LUTER**

George A. Luter

**ATTORNEY FOR APPELLEE**

**CASES**



**OTHER AUTHORITIES**

## STATEMENT REGARDING ORAL ARGUMENT

The appellee Joyce Dozier requests that oral argument be granted since such would be helpful to the Court in explaining her medical conditions and treating physicians' opinions.

## STATEMENT OF THE CASE

The appellee, Joyce Dozier, file this Brief to urge the Court to affirm the order of the Hinds County Circuit Court reversing the action of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered February 24, 2004 which adopted the recommendation of the PERS Disability Appeals Committee which stated: "This is a difficult case and Ms. Dozier has been through an ordeal, but the objective evidence presented to this Committee is insufficient to support disability. This Committee makes no rendering with regard to anything but whether sufficient objective evidence is in the record that would establish disability as defined by the statute. The opinions of Dr. Morgan and Dr. Easley do not establish disability. We look to the objective findings." (R 22, RE 65, Tab 11).

## II.

## STATEMENT OF THE ISSUES

**1. The decision of the Hinds County Circuit Court finding the decision of PERS not supported by substantial evidence should be affirmed since Dozier's treating cardiologist stated she is disabled due to malignant hypertension and other medical problems and even PERS' examining physicians state they will defer to Dr. Morgan regarding disability due to malignant hypertension and other medical problems.**

Joyce Dozier was employed as a teacher and school bus driver for the Lee County School District for 23.25 years. (R 66, RE 23, Tab 6). After suffering numerous health problems, Dozier applied for disability retirement on January 15, 2003. (R 70, RE 1, Tab 1).

Lee County School District Superintendent Johnny K. Green certified on January 13, 2003 that while Dozier appeared motivated toward continuing her employment, she was unable to report to work, she had not been offered another job without material reduction in compensation, and that she had missed ninety-one (91) days of work from August 7, 2002 until January 13, 2003. (R 75, RE 2, Tab 2).

On January 16, 2003, treating physician Southhaven pain specialist Dr. Steve Richey reported on PERS' Statement of Examining Physician that Dozier had "lumbar DDD-severe, lumbar facet syndrome, migraine HA, myofascial syndrome, chronic lateral epidondylitis" and that "her condition will likely deteriorate" and gave as impairments "decreased strength in right hand, pain with lateral rotation and flexion of her lumbar spine." (R 125, RE 3, Tab 3).

On January 21, 2003, treating internist and cardiologist Dr. Kerry Morgan reported on PERS' Statement of Examining Physician that Dozier had "cellulitis of abdomen-severe", diabetes, high blood pressure-uncontrollable/severe, deterioration of abdomen/abdominal muscles, due to cellulitis, that she had been hospitalized four times in the past year at North Mississippi Medical Center in Tupelo, and her impairments were "decreased body strength due to cellulitis of abdomen, inability to stand or walk over 30 minutes, fainting" as to permanent partial impairments were "patient has had 8 surgical incisions separating surgical walls" and restrictions and reasons for restrictions were "unable to work due to decreased body strength due to cellulitis of abdomen, uncontrollable high blood pressure." (R 90, Re 4, Tab 4).

let in the low back...consistent with spondyloisthesis...Subjective sensory loss is noted in the left arm and leg." Dr. Gray added Dozier "apparently suffers from multiple medical problems including hypertension, hyperllipidemia and adult onset diabetes mellitus." She recommended evaluation for her depression, stated that Dozier "did not appear to meet criteria for PERS for disability based on her physical complaints of low back pain and Fibromyalgia" but stated "I would defer the Malignant Hypertension to an internist." (R 85, Re 8, Tab 5).

On August 14, 2003, PERS' medical examiner Jackson psychiatrist Dr. Mark P. McLain reported "Ms. Dozier is not disabled due to psychiatric illness" but *like Dr. Gray* added "I will defer to others in this case regarding disability related to non-psychiatric medical history as it relates to her pending application for disability benefits." (R 82, RE 11, Tab 6).

On September 5, 2003, PERS Executive Director Frank Ready wrote Dozier that "it has been 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 Teacher." (R 168, RE 12, Tab 7).

On October 14. 2003, Dozier filed her Notice of Appeal requesting a hearing before the Disability Appeals Committee. (R 60, RE 13, Tab 8).

The Disability Appeals Committee, consisting of presiding Hearing Officer Sheila Jones and Drs. Joseph Blackston and Mark Meeks , afforded Dozier a hearing on December 5, 2003, with Dozier then being represented by Jackson attorney James L. McCafferty. (R 24, RE 24, Tab 10).

Joyce Dozier testified that she taught grades 9-12 in the School Work Program and that she taught life skill classes until 12:30 p.m. and then went out on the field to Tupelo businesses

[illegible] further testified that she would go out into the field and personally

Dozier testified she last worked May 23, 2002 due to a lot of medical problems which began after being diagnosed with diabetes in August 2001 and suffered surgery for cellulitis and scar tissue and took 30 sick days that year. (R33-35, RE 33-35, Tab 10). She testified she had no strength and stayed in bed most of them time because her diabetes was hard to regulate along with high blood pressure, and peritonitis. (R 37-39, RE 37-39, Tab 10). She reported that she attempted to go back to work on October 23, 2002 but was unable to stay the entire day due to passing out. (R 39, RE 39, Tab 10).

Dozier further testified that she was diagnosed with fibromyalgia about five years earlier by a Dr. Housley, a rheumatologist. (R 48, RE 25, Tab 10). She also testified that she had a hysterectomy in 1990 after ovarian cancer and that she took numerous medications daily including Clonindine, Diovan and Clarazem. (R 27, RE 50, Tab 10).

Dozier testified she had applied for Social Security disability and her case was still pending but she had been examined by a Dr. Easley, a family practitioner , who told her he was going to recommend that she be found disabled by the Social Security Administration. (R 31, RE 54, Tab 10).

On February 24, 2004 the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered its order which adopted the recommendation of the PERS Disability Appeals Committee which stated "This is a difficult case and Ms. Dozier has been through an ordeal, but the objective evidence presented to this Committee is insufficient to support disability. This Committee makes no rendering with regard to anything but whether sufficient objective evidence is in the record that would establish disability as defined by the statute. The opinions of Dr. Morgan and Dr. Easley do not establish disability. We look to the objective findings." (R 22, RE 65, Tab 11).

file her amended Notice of Appeal on Dec...

PERS filed the record with the Hinds County Circuit Clerk's office on July 22, 2005.

## SUMMARY OF THE ARGUMENT

The decision of the Hinds County Circuit Court should be affirmed because PERS' decision is not supported by substantial evidence because Dozier's medical disability is supported by the opinions of Dr. Easley, a family practitioner, Dr. Morgan, an internist-cardiologist, and Dr. Richey, a pain specialist and the examining physicians of PERS stated they deferred to Dozier's physicians for opinions as to her malignant high blood pressure.

## ARGUMENT

**1. The decision of the Hinds County Circuit Court finding the decision of PERS not supported by substantial evidence should be affirmed since Dozier's treating cardiologist stated she is disabled due to malignant hypertension and other medical problems and even PERS' examining physicians state they will defer to Dr. Morgan regarding disability due to malignant hypertension and other medical problems.**

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 ... employment covered by the Public Employees' Retirement

Contrary to the unfounded opinions asserted in the recommendation of the Disability Appeals Committee, substantial lay and medical evidence support Dozier's contention that she could not longer perform her duties as a teacher and school bus driver.

Consider:

Lee County School District Superintendent Johnny K. Green certified on January 13, 2003 that while Dozier appeared motivated toward continuing her employment, she was unable to report to work, she had not been offered another job without material reduction in compensation, and that she had missed ninety-one (91) days of work from August 7, 2002 until January 13, 2003. (R 75, RE 2, Tab 2).

Treating Southhaven pain specialist Dr. Steve Richey reported on PERS' Statement of Examining Physician that Dozier had "lumbar DDD-severe, lumbar facet syndrome, migraine HA, myofascial syndrome, chronic lateral epidondylitis" and that "her condition will likely deteriorate" and gave as impairments "decreased strength in right hand, pain with lateral rotation and flexion of her lumbar spine." (R 125, RE 3, Tab 3).

Treating internist and cardiologist Dr. Kerry Morgan reported on PERS' Statement of Examining Physician that Dozier had "cellulitis of abdomen-severe", diabetes, high blood pressure-uncontrollable/severe, deterioration of abdomen/abdominal muscles, due to cellulitis, that she had been hospitalized four times in the past year at North Mississippi Medical Center in Tupelo, and her impairments were "decreased body strength due to cellulitis of abdomen, inability to stand or walk over 30 minutes, fainting" and as to permanent partial impairments were "patient has had 8 surgical incisions separating surgical walls" and restrictions and reasons for restrictions were "unable to work due to decreased body strength due to cellulitis of abdomen, uncontrollable high blood pressure." (R 90, Re 4, Tab 4).

Hypertension"

"non-psychiatric medical history to Dozier's internist and cardiologist Dr. Morgan! (Dr. Gray: "I would defer the Malignant Hypertension to an internist." (R 85, Re 8, Tab 5; Dr. McLain: "I will defer to others in this case regarding disability related to non-psychiatric medical history as it relates to her pending application for disability benefits." (R 82, RE 11, Tab 6).

However, despite the fact that Dozier put forth two treating specialists who said she was disabled[1] and the statement by PERS' own physicians that they would defer to Dozier's treating physicians, PERS chose to ignore Dozier's overwhelming evidence by deciding that treating internist and cardiologist Dr. Kerry Morgan was not treating Dozier correctly :

> "Also of note is that while Dr. Morgan has prescribed the blood pressure medicine Clonidine to be taken when Ms. Dozier's blood pressure is outside certain parameters; standard practices are that Clonidine is contraindicated for the PRN (as needed) treatment of hypertension. As a general rule, blood pressure medications exist and they should not be given PRN (as needed) treatment for hypertension...Again this is not Malignant Hypertension and Clonidine should not be prescribed on a PRN basis." [2] (R 22, RE 65, Tab 11).

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*

[1] Actually, three specialists, since Dozier brought a report of Dr. Steve Easley, a medical examiner for the Social Security Administration who also reported Dozier was unable to work after a examination at his office.

[2] In his post hearing letter to "Sheila Jones of Frank Ready" dated March 9, 2004, cardiologist Dr. Kerry Morgan responded to the Committee assertion that the use of Clonidan was contraindicated stating: "While clonidine is not used routinely to control blood pressure as a PRN drug, it does however safely help with her anxiety as well as lowering her blood pressure. It can be very effective in a patient such as Ms. Dozier. Clonidine is used more and [illegible] since procardia is now contraindicated due to the increased risk of CVA...I do not understand

Additionally, the circuit court is "charged ...

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).

Dozier has put forth the strong opinions of her two longtime treating specialists, Drs. Richey and Morgan, the opinion of the Social Security disability examiner, Dr. Steve Easley, and the lay opinion of School District Superintendent Johnny K. Green. Even PERS' own hand picked experts, Dr. Laura Gray and psychiatrist Dr. Mark McLain stated they would defer opinions regarding Dozier's "Malignant Hypertension" and "non-psychiatric medical history to Dozier's internist and cardiologist Dr. Morgan! (Dr. Gray: "I would defer the Malignant Hypertension to an internist." (R 85, Re 8, Tab 5; Dr. McLain: "I will defer to others in this case regarding disability related to non-psychiatric medical history as it relates to her pending application for disability benefits." (R 82, RE 11, Tab 6).

However, Dozier would argue that PERS has clearly failed to follow numerous decisions that state that disability cannot be denied in the face of the opinions of numerous treating physicians, particularly when the experts PERS employed did not indicate that Dozier was not disabled in regard to her malignant hypertension but both indicated they would *defer* on that condition to Dr. Morgan, Dozier's longtime treating cardiologist.

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

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

*Ocenous Thomas,* 809 So. 2d 690 (Miss. App.

evidence when no "contrary view of that evidence was offered", stating:

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

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

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

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

> "Based on the fact that this Court is bound by the precedent of these decisions, we look to them for direction in identifying and dealing with the pivotal issues upon which this case must be decided. The cases are *PERS v. Dearman,* 846 So. 2d 1014 (Miss. 2003), and *PERS v. Marquez,*. 774 So. 2d 421 (Miss. 2000).

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

> "While PERS may choose between contradictory medical evidence

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

> In affirming the decision of the circuit court, this Court is informed by the cases of *Public Employees' Retirement System v. Dearman,*846 So. 2d 1014 (Miss. 2003) and *Public Employees' Retirement System v. Marquez,* 774 So. 2d 421 (Miss. 2000). *See also Cauthen v. Pub. Employees; Ret. Sys.,* 860 So. 2d 829 (Miss. App. 2003).
>
> In *Marquez,* the claimant suffered from multiple illnesses including fibromyalgia and chronic fatigue syndrome. *Marquez,* 774 So. 2d at 423. PERS found that there was insufficient objective medical evidence that Marquez's medical problems rendered her permanently disabled from her job as a school teacher. *Id.* at 428-29. Marquez submitted medical records tending to confirm her health problems. *Id.* at 427. The supreme court observed that medical records are considered objective, not subjective, evidence of disability. *Id.* at 427. The supreme court found that PERS' conclusion was not substantiated by the record because PERS did not adequately explain why it rejected the objective medical evidence of Marquez's disability. *Id.* at 429.
>
> In *Dearman,* the court more clearly articulated that medical evidence of disability provided by an examining physician is objective evidence that must be afforded elevated respect by PERS. *Dearman,* 846 So. at 1018. Dearman claimed that various health conditions rendered her disabled from her job as a teacher. *Id.* at 1016. Dearman's treating physician found her permanently disabled as a result of her medical condition and recommended she cease work. *Id.* at 1015. PERS found that Dearman had failed to prove disability. *Id.* at 1016. The supreme court found that the PERS' order was not supported by substantial evidence because the record was "devoid of any evidence that Dearman was not disabled." *Id.* at 1018. The court stated that the opinions of the physicians on the Medical Board and the Disability Appeals Committee are not conclusive, and that "PERS cannot choose

In Dozier's case, PERS chose to exercise its right to not one, but two independent medical examinations---both of whom said they deferred to Dr. Morgan the effect of Dozier's malignant hypertension.

Dozier would assert that the opinion of PERS is not supported by substantial evidence since it is arbitrary and capricious and is based only on the opinion of the Disability Appeals Committee that the opinion of Dozer's treating physician, Dr. Kerry Morgan is incorrect.

Apparently, PERS wants to dismiss the opinions of credible physicians regarding Dozier and just do whatever they want regardless of the medical evidence as they stated in their recommendation:

> " This Committee make no rendering with regard to anything but whether sufficient objective evidence is in the record that would establish disability as defined by the statute. The opinions of Dr. Morgan and Dr. Easley do not establish disability. We look to the objective findings." (R 22, RE 65, Tab 11).

As to what constitutes 'objective findings' the Committee fails to say. However the Supreme Court has stated that 'medical diagnoses by licensed physicians, like Drs. Easley, Richey, and Morgan are not to be labeled 'subjective evidence as stated by the Supreme Court in *Marguez, supra,:*

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

Moreover, the apparent reasoning by PERS that they just don't believe the opinions of Dozier's treating physician has been expressly condemned in *Thomas, supra,* which stated:

> "The substantial evidence that is sufficient to withstand appellate scrutiny cannot be evidence contained within

physicians, like Dozier's. In 2005, the Court of Appeals in *PERS v. Gladys Winston,* 919 So. 2d 106 (Miss. App. 2005), the Court affirming the Circuit Court's reversal stating:

> "We agree for the following reasons. The evidence in this case was based on medical opinions from four different doctors, three of whom saw Winston on more than one occasion."

In 2006, the Court of Appeals again reversed PERS in *PERS v. Donald Bishop*, No. 2005-CC-00931-COA, (Miss. App. 2006) when Bishop presented evidence from numerous treating physicians of disability----including the same *Dr. Laura Gray* that PERS employed as a independent medical examiner of Dozier and who stated she would defer to Dozier's internist as to whether her malignant hypertension was disabling.

Again, in 2007. the Court of Appeals again reversed PERS in *Sheila Howard v. PERS, No.* 2005-CC-02186-COA, (Miss. App. 2007) noting "...objective diagnoses made by Howard's treating physicians and the fact that not one of the many doctors who examined Howard, including the independent medical examiner, Dr. Jones, contracted Dr. Blanchard's diagnosis..." Dozier would also content that she put forth objective diagnoses by her treating physicians and that PERS' independent medical examiners stated they would defer to the opinions of Dozier's treating internist.

The Court of Appeals in *PERS v. Sara McClure,* No. 2005-CC-02189-COA, (Miss. App. 2007) again reversed PERS noting the opinion of her longtime treating physician, Dr. Charles Nause, noting PERS "failed to provide any contradictory testimony to that of her physician who treated her for over ten years." Dozier would assert that same: that PERS also failed to provide any contradictory testimony to that of her longtime treating physician, Dr. Kerry Morgan, particularly when PERS' own experts said they would defer to his medical

2006-SA-00841-COA, (Miss. App. 2007) and dismissed PERS' assertion that Stevison's treating physicians "...were acting as advocates for their patient..." finding that there was "...substantial, uncontradicted evidence of disability." Dozier would state substantial and uncontradicted evidence of disability exists in her case.

Finally, the Supreme Court in *Public Employees' Retirement System v. Robert Ann Shurden*, 802 So. 2d 258 (Miss. 2002) noted that the receipt of disability benefits to deserving claimants---particularly one like Dozier who had just short of 25 years of service with **23.25** years should not be unnecessarily out of reach:

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

Dozer would contend the Hinds County Circuit Court correctly found substantial evidence did not support PERS' denial of her application for disability retirement in view of the overwhelming opinions of her physicians that she is disabled particularly in light of the deference given PERS' own physicians to Dr. Morgan's opinion and this Court should affirm that decision.

## CONCLUSION

The Court should affirm the Circuit Court's reversal and rendering the decision of PERS denying Dozier disability benefits and remand to the Circuit Court for imposition of prejudgment interest.

Respectfully submitted,

JOYCE DOZIER, Appellee

BY: George S. Luter

GEORGE S. LUTER, Her Attorney

I, George S. Luter, attorney for Appellant, [illegible]

copy of the foregoing Brief of Appellant to the following:

Hon. Tomie Green
Hind County Circuit Judge
Hinds County Circuit Courthouse
Jackson, MS 39201

Margo Bowers, Esq.
Public Employees' Retirement System
429 Mississippi Street
Jackson, MS 39201-1005

SO CERTIFIED this the 16th day of January, 2008.

George S. Luter

GEORGE S. LUTER, Attorney for Appellee

GEORGE S. LUTER
Attorney for Appellee
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Telephone: (601) 948-0021
Facsimile: (601) 948-0093
GEOLAW1502@AOL.COM
[redacted]