

**IN THE SUPREME COURT OF MISSISSIPPI**

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

**APPELLANT**

**VERSUS**

**CAUSE NO. 2007-SA-01432**

**JOYCE T. DOZIER**

**APPELLEE**

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**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 Tomie Green, Hinds County Circuit Court Judge

Honorable George S. Luter, Counsel for Appellee

Honorable Thomas U. Reynolds, Esq. Co-Counsel for Appellee

Ms. Joyce Dozier, Appellee

Respectfully submitted,

  
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## **STATEMENT OF THE ISSUES**

The Circuit Court impermissibly reweighed the evidence and substituted its judgment for that of the Board of Trustees of the Public Employees' Retirement System as its Order denying Ms. Dozier's claim for disability is supported by substantial evidence and is neither arbitrary nor capricious.

## **STATEMENT OF THE CASE**

This matter involves an appeal filed by the Appellant, the Public Employees' Retirement System (PERS), wherein it seeks review of the Memorandum Opinion and Order entered by the Circuit Court of the First Judicial District of Hinds County, Mississippi on January 29, 2007. Following hearing before the Disability Appeals Committee, the Board of Trustees of the Public Employees' Retirement System adopted the Proposed Statement of Facts, Conclusions of Law and Recommendation of the Committee denying Ms. Dozier's request for the payment of benefits for a disability as defined under Miss. Code Ann. Section 25-11-113 (Supp. 2007). Ms. Dozier aggrieved of the Board's decision to deny disability benefits filed a notice of appeal in the Circuit Court pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006). The Circuit Court on January 29, 2007, determined that Ms. Dozier is entitled to a disability benefit pursuant to Section 25-11-113, hence this appeal.

## **STATEMENT OF THE FACTS<sup>1</sup>**

Ms. Dozier was employed as a school teacher with the Lee County Schools. (Vol. 2, Pp. 29, 66). At the time of her hearing before the Disability Appeals Committee she had twenty- three and one-fourth (23 ¼) years of service credit. (Vol. 2, P. 66) At the time of the hearing Ms. Dozier was on leave without pay (Vol. 2, P. 52)

Ms. Dozier taught the 9<sup>th</sup> through 12<sup>th</sup> grades in the School Work Program. She was responsible for finding jobs and supervising thirty (30) students. Her goal was to find employment for the students in an effort to keep them off welfare. She taught life skill classes. In order to accomplish her goal she had a kitchen in her classroom as well as equipment such as saws to build bookcases etc. (Vol. 2, P. 29) Because of the nature of her position, Ms. Dozier at times would have to go out into the field to talk to potential employers. (Vol. 2, P. 30)

In responding to questions as to why she could not return to work, Ms. Dozier testified that she simply has no strength. (Vol. 2., P. 35) At the time of the hearing she was forty-five (45) years of age and said that she is "just weak all over or just kind of". She is a diabetic and although she said her diabetes is difficult to regulate she is not on insulin but takes oral medication and watches her diet. (Vol. 2, P. 36) She testified that because of the diabetes her doctors recommended she lose 50 pounds, although she lost 70 pounds. (Vol. 2, P. 35) She testified that she at one time weighed 225 pounds. At the time of the hearing she weighed 174 pounds. (Vol. 2, P. 50) Since 1990 she claims to have suffered with problems of pancreatic. (Vol. 2, P. 37) She has undergone several

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<sup>1</sup> Reference to the record transcript is indicated by "V" for the volume number and "P." followed by the appropriate page number.

surgeries for cellulites of the abdomen. (Vol. 2, P. 33) She stated that she has had problems with her thyroid and that she also has blood pressure problems. (Vol. 2, P. 37)

The Medical Board first reviewed Ms. Dozier's record on May 30, 2003. The Medical Board's decision was deferred until additional medical information could be secured. On June 27, 2003, the additional medical information was reviewed and the Medical Board made the decision to secure an Independent Medical Evaluation. The case was again reviewed July 31, 2003 and deferred once again for a psychiatric evaluation. The Medical Board reviewed Ms. Dozier's claim with all of the additional information and on August 29, 2003 denied the application for disability benefits. (Vol. 2, Pp. 66, 168, 172, 174, 175, 177, 180, 185, 189, 191, 193)

After reviewing the medical documentation and testimony offered at the hearing, the Disability Appeals Committee recommended Ms. Dozier's application for disability be denied. The Board of Trustees adopted the recommendation of the Disability Appeals Committee by Order entered February 24, 2004.

Aggrieved of the decision of the Board of Trustees, Ms. Dozier has filed an appeal in this Court pursuant to Miss. Code Ann. § 25-11-120. (Rev. 2006).

### **SUMMARY OF THE ARGUMENT**

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. Dozier had to prove that her disability was the basis for her termination from employment. The record clearly supports the Order of the PERS Board of Trustees, which took into consideration all of the medical evidence offered by Ms. Dozier. The medical evidence, or lack thereof,

offered in support of her claim, as reviewed by the Disability Appeals Committee, clearly does not establish that Ms. Dozier meets the eligibility requirements for a disability benefit from the State of Mississippi.

The burden is on the member to prove he/she is in fact disabled as defined in Miss Code Ann. Section 25-11-113 (Supp. 2007). Based on the evidence provided by Ms. Dozier, the PERS decision to deny disability was based on substantial evidence.

Based on the evidence introduced into the record, it is clear that the only decision the PERS Board could make, and that should have been upheld by the Circuit Court, is that Ms. Dozier does not meet the requirements for the receipt of a disability benefit under PERS law. The Board's decision does not violate any statutory or constitutional right of Ms. Dozier and is based on substantial evidence and is neither arbitrary nor capricious. The Circuit Court impermissibly reweighed the evidence substituting its judgment for that of the administrative body.

## **ARGUMENT**

### **INTRODUCTION**

PERS was established in 1953 to provide retirement and other benefits to covered 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 (2) categories of disability benefits available to PERS members: (1) a regular disability



benefit payable to members who have at least four (4) years of creditable service and who become disabled for any reason, and (2) a hurt-on-the-job disability benefit, payable to members regardless of the number of years of creditable service, where the member becomes disabled due to an injury occurring in the line of duty. Miss. Code Ann. Sections 25-11-113 and 25-11-114 (Supp. 2007).

Applications for disability benefits are reviewed by the PERS Medical Board, which reviews and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. See: 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.

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 an evaluation of medical evidence that may or may not include an actual physical examination by the medical board, certifies that the member is mentally or physically incapacitated for the

further performance of duty, that the 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. Dozier'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 to deny disability benefits should be adopted as the decision of the Board. The Circuit Court erred in finding that the Board of Trustees' decision is not supported by substantial evidence, and, thus, is arbitrary and capacious.

### **STANDARD OF REVIEW**

Rule 5.03 of the Uniform Rules of Circuit Court Practice limits review by the 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. Dozier. *Brakefield v. Public Employees' Retirement System*, 940 So. 2d 945, 947 (Miss. App. 2006) *Public Employees' Retirement System v. Howard*, 905 So. 2d 1279, 1284 (Miss. 2005); *Public Employees' Retirement System v. Stamps*, 898 So. 2d 664, 673 (Miss. 2005); *Public Employees' Retirement System v. Smith*, 880 So. 2d 348, 350 (Miss. App. 2004); *Public Employees' Retirement System v. Henderson*, 867 So. 2d 262, 264 (Miss. 2004); *Public Employees' Retirement System v. Dishmon*, 797 So. 2d 888, 891 (Miss. 2001); *Byrd v. Public Employees' Retirement System*, 774 So. 2d 434,

437(Miss. 2000); *Brinston v. Public Employees' Retirement System*, 706 So. 2d 258, 259 (Miss. 1998).

A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. *Brakefield v. Public Employees' Retirement System*, 940 So. 2d at 948; *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1285; *Public Employees' Retirement System v. Stamps*, 898 So. 2d at 673; *Public Employees' Retirement System v. Smith*, 880 So. 2d at 350; *Purnell v. Public Employees' Retirement System*, 894 So. 2d 597,601 (Miss. App. 2004) *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1285; *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 891; *United Cement Company v. Safe Air for the Environment*, 558 So. 2d 840, 842 (Miss. 1990); *Melody Manor Convalescent Center v. Mississippi State Department of Health*, 546 So. 2d 972, 974 (Miss. 1989); Also see *Brakefield vs. Public Employees' Retirement System* 940 So. 2d 945 (Miss. App. 2006) In *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969), the Mississippi Supreme Court stated:

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

In *Public Employees' Retirement System v. Cobb*, 839 So. 2d 605, 609 (Miss. App., 2003) the Court noted: "[I]n administrative matters, the agency, not the reviewing

court, sits as finder of fact.” In this case, the Medical Board, Disability Appeals Committee and PERS Board of Trustees had the medical documentation submitted by Ms. Dozier in support of her claim. 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 at 1287 this Court reiterated that “it is for PERS, as the fact finder, to determine which evidence is more believable or carries the most weight.” The findings of fact by the PERS Board of Trustees must not be disturbed on appeal “where sustained by substantial evidence.” *City of Meridian v. Davidson*, 211 Miss. 683, 53 So. 2d 48, 57 (1951); *Harris v. Canton Separate Public School Board of Education*, 655 So. 2d 898, 902 (Miss. 1995). As stated 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. Dozier.** *Public Employees’ Retirement System v. Stamps*, 898 So. 2d at 673; *Public Employees’ Retirement System v. Howard*, 905 So. 2d at 1284; *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* the Court held:

**A reviewing court cannot substitute its judgment for that of the agency or reweigh the facts of the case. Chancery and Circuit Courts are held to the same standard as this Court when reviewing agency decisions. When we find the lower court has exceeded its authority in overturning an agency decision we will reverse and reinstate the decision. 674 So.2d at 1253 [Emphasis added]**

In *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 893 the Court stated that “**the applicant for disability has the burden of proving to the Medical Board and to the Appeals Committee that he or she is in fact disabled**”. (Emphasis added) Clearly, Ms. Dozier and not PERS, at the administrative level, had the burden of proving that she is indeed disabled. In *Public Employees' Retirement System v. Henderson* 867 So. 2d 262, 264 (Miss. App. 2004) the Court citing *Doyle v. Public Employees' Retirement System* 808 So. 2d 902, 905 (Miss 2002) noted that on appellate review the burden is on PERS:

**It is not this courts job to determine whether the claimant has presented enough evidence to prove she is disabled, but whether PERS has presented enough evidence to support its finding that the claimant is not disabled.**

The evidence offered by PERS is the thorough analysis of the claimant's documentation as found in the Appeals Committee's recommendation, finding of facts and analysis. The Order of the PERS Board of Trustees adopting the finding of the Disability Appeals Committee was supported by substantial evidence, was neither arbitrary nor capricious nor violated any statutory or constitutional right of Ms. Dozier

and, thus, the Order of the PERS Board of Trustees entered February 24, 2004 must be reinstated as the Circuit Court reweighed the evidence substituting its judgment for that of the administrative agency charged with the application of the statutes governing the disability program for the State of Mississippi.

## I.

**THE CIRCUIT COURT IMPERMISSIBLY REWEIGHED THE EVIDENCE AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM AS ITS ORDER DENYING MS. DOZIER'S CLAIM FOR DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.**

"Unless PERS' order was not supported by substantial evidence, or was arbitrary or capricious, the reviewing court should not disturb its conclusions." *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1284. This Court has defined arbitrary and capricious. "An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *Mississippi State Department of Health v. Natchez Community Hospital*, 743 So. 2d 973, 977 (Miss. 1999). "An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Id.* The record supports PERS' finding, thus, the action of the PERS Board of Trustees is neither arbitrary nor capricious.

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 an adequate basis of fact from which the fact at issue can be reasonably inferred. *Public Employees' Retirement*

*System v. Howard*, 905 So. 2d at 1285; *Johnston v. Public Employees' Retirement System*, 827 So. 2d 1,3 (Miss. App. 2002) *Davis v. Public Employees' Retirement System*, 750 So. 2d 1225, 1233 (Miss. 1999). Also see: *Brakefield vs. Public Employees' Retirement System* 940 So. 2d 945 (Miss. App. 2006) The facts, as presented in the record before this Court, support the decision of the PERS Board of Trustees that Ms. Dozier is not entitled to the receipt of a disability benefit pursuant to Miss. Code Ann. Section 25-11-113.

There is substantial evidence to support the Board's decision, and its actions are neither arbitrary nor capricious. The Board has the authority to make a decision relative to disability, and it did so within the confines of the laws of Mississippi and PERS Regulations.

This Court has further defined substantial evidence as evidence that is "more than a scintilla; it must do more than create a suspicion, especially where the proof must show bad faith." *Mississippi State Board of Examiners for Social Workers and Marriage and Family Therapists v. Anderson*, 757 So. 2d 1079, 1086 (Miss. App. 2000) (quoting *Mississippi Real Estate Commission v. Ryan*, 248 So. 2d 790, 794 (Miss. 1971) (citing 2 Am. Jur. 2d *Administrative Law* § 688 (1962))). Also see, *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1285. This Court, after reviewing the record, including the findings of the Disability Appeals Committee and, their thorough analysis of the medical documentation and testimony offered at hearing in comparison to the Opinion of the Circuit Court will see that there is "more than a scintilla" of evidence to support PERS' decision to deny disability benefits.

In *Public Employees' Retirement System v. Cobb*, 839 So. 2d at 609-610 the

Mississippi Court of Appeals stated:

The requirement of "substantial evidence" seems satisfied, however, in such instance by an appellate determination that the agency's conclusion that the claimant's evidence was so lacking or so unpersuasive that she failed to meet her burden appears a reasoned and unbiased evaluation of the evidence in the record. In that circumstance, in something of a paradox, the lack of evidence at the agency level becomes the substantial evidence on appellate review that suggests the necessity of affirming the agency's determination. [*Emphasis added*]

Ms. Dozier complained of weakness but there is no actual documentation of weakness or exercise tolerance. The Court relied on Dr. Morgan's report that Ms. Dozier was not able to work due to decreased body strength, however, when Ms. Dozier was evaluated by Dr. Gray for muscle weakness; there was inconsistent effort on Ms. Dozier's part, rendering the evaluation inclusive of weakness that potentially could result in disability. Further, Ms. Dozier complained of abdominal weakness, yet there is nothing to show that the abdominal wall was compromised during her surgery for cellulites. There is no documentation of muscle weakness. Further, there is no objective evidence or explanation for a lack of strength or energy.

The Circuit Court found that the reports indicate Ms. Dozier suffered from malignant hypertension. Such hypertension is severe hypertension that can cause acute organ damage such as renal failure, brain or heart swelling. What she appears to suffer from is uncontrolled hypertension treatable with medication. Although her treating physician Dr. Morgan writes in notes and opinions of severe hypertension, there is no objective documentation to support his opinions. The Disability Appeals Committee makes its recommendation based on objective evidence. While the opinions of treating



physicians are respected, they can not be relied upon solely. The Disability Appeals Committee is comprised of physicians and a nurse who have the ability to review the documentation. If the documentation does not support the statement of the treating physician such opinion is lessened. The Committee, although considering the reports, could not rely on them solely in making its determination. Although Ms. Dozier has hypertension it would not prevent her from working.

There is no doubt Ms. Dozier had a serious case of cellulitis and underwent surgery on several occasions for same. She was out of work for the condition, however, it appears that she has completely healed thus this is not an active problem that would prevent her from working. She has had several months of difficulty and was out of work, but, this does result in a permanent impairment that would render her disabled.

Dr. Richie states that she may have degenerative disk disease that could lead to further deterioration but he did not place any restrictions nor impairments ratings on her for this.

Ms. Dozier claimed that she had impairments from diabetes mellitus including "yo-yo" glucoses but there is no documentation in the record to support these allegations.

In this case it appears that the Circuit Court weighted the opinions of the treating physicians heavily. Yet the opinions are not supported by objective evidence, thus, it is clear the lower Court reweighed the evidence offered to support Ms. Dozier's claim.

Ms. Dozier also claimed that when she returned to work she became sick and passed out. There is no documentation to support this episode and no doctor's visit associated with the episode.

The Disability Appeals Committee recognized the complaints Ms. Dozier testified to at the hearing. The Committee in its Statement of Facts noted the following:

Ms. Dozier testified that on August 15, 2001, she was diagnosed with Diabetes and because of the Diabetes, she lost 70 pounds. Apparently, the skin overhang of the abdomen caused her to develop a Cellulitis on her abdomen along her old C-Section scar. Ms. Dozier explained that she had had four C-Section surgeries in the past. After being diagnosed with Cellulitis, Ms. Dozier took antibiotics for the Cellulitis, but the infection did not improve; and finally, she had to undergo a surgery on the infected site, called a debridement, on June 28, 2002. Post-operatively, either an infection developed or the debridement did not clean out all of the infection so she had to undergo an emergency debridement surgery at the same site on July 16, 2002. Ms. Dozier then had to have repairs to that site on July 19 and August 9, 2002, to close up the wound. **She testified that she has now had a total of eight surgeries on that site, but the wound has now healed.** She ended up missing 30 days of work in the 2001-02 school years because of her health problems. Ms. Dozier said that she did try to return to work on October 23, 2002, but she became light-headed and her voice began slurring and she was unable to work past 11 o'clock that same morning.

Ms. Dozier believes she can no longer work because she is weak and she passes out. **She said that her sugar is difficult to regulate although she has not been placed on insulin. She controls her blood sugar with diet and with an oral medication.** Ms. Dozier explained that she also has blood pressure problems and is on medications and even titrates Clonidine for elevated blood pressure readings. She has had Pancreatitis three times since 1990; her triglycerides are greater than 800, and she takes thyroid medication. She states that she had a bowel obstruction in September of 2003.

Dr. Kerry Morgan, a Cardiologist, is managing Ms. Dozier's Diabetes and her last HgbA1C was eight (8). Ms. Dozier had a CT on September 3, 2003, and it showed a blockage. (R. 16-17) *[Emphasis Added]*

The Committee then provides a thorough summary of the medical information contained in Ms. Dozier's file as follows:

Records from Cardiologist, Dr. Morgan, begin on June 10, 2002, and it was noted on that date that her blood pressure was elevated. Also noted in the history was that Ms. Dozier had lost 39 pounds after having been diagnosed with Diabetes. She was placed on Diovan and a stress test was scheduled.

Medical records from Baptist Memorial Hospital are also a part of the record. They being on June 20, 2002, and document that Ms. Dozier underwent a Cardiac Stress Test, which was interpreted as normal. No evidence of ischemic change was noted. Ms. Dozier was seen by Dr. Craig on June 28, 2002, for a chronic rash along the abdominal skin around the abdominal site. Then, on June 29, 2002, she was evaluated by Dr. Dey for Diabetes, hypertension and Hyperlipidemia, and Dr. Dey adjusted Ms. Dozier's medications. However, Ms. Dozier continued to have problems and developed an infection at the same site. On July 16, 2002, Ms. Dozier was taken back to surgery by Dr. Craig for Cellulitis for the abdominal wall, with possible abscess. A debridement was performed on July 19, 2002, but again there were problems so she was again taken back to surgery for partial closure of the wound with packing of iodoform strips. Ms. Dozier was discharged from the hospital the next day.

Another hospital admission occurred on August 9, 2002, for the same complaints of infection and swelling at the wound site. Ms. Dozier was again taken to surgery and antibiotics were instilled into the wound. It was noted that the cultures did, again, show an infection. Thereafter, November 21, 2002, a pseudobursa was removed in surgery. Ms. Dozier returned to Cardiologist, Dr. Morgan on December 10, 2002, feeling weak and suffering from nausea and diarrhea. She was referred to Dr. McKinnley.

We have a Statement of Examining Physician from Dr. Richey dated January 16, 2003, which states that Ms. Dozier has Degenerative Disc Disease of the Lumbar Spine and Lumbar Facet Syndrome, Migraine Headaches, Myofascial Syndrome and Lateral Epicondylitis. He wrote that her condition would likely deteriorate. The impairments listed by the doctor included decreased strength in the right hand and pain with lateral rotation and flexion of her lumbar spine.

Ms. Dozier returned to Dr. Morgan on February 14, 2003, with complaints of lack of energy, lack of appetite and a near-syncope dizziness. Her triglycerides were elevated so she was placed on cholesterol medications. Then, on March 12, 2003, Dr. Morgan increased the cholesterol medication. He also increased her blood

pressure medications and added a blood pressure medication, Clonidine. The Clonidine was ordered to be taken every two hours for a systolic blood pressure of greater than 160, or a diastolic pressure greater than 100. It also appears that the May 13, 2003, record states the same thing. It is not clear whether the Clonidine was ordered in March or May of 2003, or both. Ms. Dozier apparently returned to Dr. Morgan's office on May 16, 2003, or both. Ms. Dozier apparently returned to Dr. Morgan's office on May 16, 2003, but there is no office record in the file. What is in the file is an emergency room visit documenting that Ms. Dozier was sent to the hospital by Dr. Morgan for an elevated blood pressure reading. Ms. Dozier gave a history of having a renal tumor, of which Dr. Morgan was apparently unaware. A chest x-ray on May 16, 2003, showed no cardiopulmonary disease. The emergency room record is difficult to read but it appears that she was seen by Dr. Prather, the doctor on call for the emergency room, for Hypertension. Ms. Dozier was admitted overnight for observation. She underwent a cardiac evaluation on May 19, 2003, and the findings were that the ejection fraction of her heart was normal and mild mitral and tricuspid regurgitation was noted. The abdominal aortic and renal artery tests were normal, as were tests on both kidneys. An MRI of her head was normal.

Dr. Morgan wrote a letter on May 28, 2003, stating that because Ms. Dozier has medical problems including surgery and complications from surgery, Malignant Hypertension and Hypothyroidism, he feels she is unable to work and needs to be on disability. The last report we have from Dr. Morgan is dated June 25, 2003, at which time another MRI was ordered. On the two Statements of Examining Physician, Dr. Morgan wrote that Ms. Dozier has Cellulitis of the abdomen, Diabetes and uncontrollable severe Hypertension. He noted that she has deterioration of her abdominal muscles. He described limitations as the inability to stand or walk more than 30 minutes, decreased body strength and fainting. He noted she has had eight surgical procedures. He also noted that she was unable to work because of her uncontrollable Hypertension. (R. 17-19) [*Emphasis Added*]

The Committee then provides an all inclusive analysis of the medical documentation as followed:

Certainly, this is an interesting case, and it is clear that in 2002, Ms. Dozier had eight surgical procedures because of Cellulitis. Certainly Cellulitis is and can be serious as evidenced by the aggressive treatment of Dr. Richey, but **it should be noted that**

these procedures were only skin deep. Never did Dr. Richey penetrate the abdominal cavity. Fortunately, the Cellulitis infection was contained to the skin. This Committee can find no objective evidence or explanation for the claim that Ms. Dozier has no strength or energy. The diabetic medication that Ms. Dozier takes, Glucophage, does not cause Hypoglycemia. This Committee noted that Ms. Dozier was able to walk herself into the hearing room and stand and sit without apparent difficulty. **There is no documentation of uncontrolled Diabetes in this record. Glucose levels are not frequently documented in the record. The HgbA1C at a level of eight (8), shows fair control of the Diabetes, and does not support the claim of uncontrolled Diabetes.**

Again, with regard to the numerous surgeries documented in this record, this Committee would point out that the Cellulitis is a skin infection and in treating and repairing this condition, there is no requirement that the abdominal cavity be invaded. The surgeries were on the skin and the surgeries did not enter the abdominal cavity. There was one other surgery for a bowel obstruction, but with regard to that claim, Ms. Dozier has not produced sufficient proof that the obstruction was related to the Cellulitis. Again, the obstruction was inside the cavity wall. While the timing is suspicious to a lay person, it seems to be coincidental and probably related to the prior C-Section surgeries where the abdominal cavity was definitely invaded.

With regard to the blood pressure problem, obviously, Ms. Dozier has not received maximum treatment. **She does not have Malignant Hypertension because she does not have organ damage** (The definition of Malignant Hypertension requires organ damage to the kidneys or heart and that is not present according the tests on both the kidneys and the heart. See Dr. Morgan's test results) However, her blood pressure was 180/110 on June 10, 2002; 160/100 on December 10, 2002; 132/96 on February 14, 2003. Most of these are elevated blood pressures, but **the normal reading on February 14, 2003, shows that her blood pressure can be managed with the appropriate medications.** 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 are not given PRN. Other medications should be tried. Many blood pressure medications exist and they should be tried on a trial basis until a medication is found that will control Ms. Dozier's

hypertension. Again, this is not Malignant Hypertension and Clonidine should not be prescribed on a PRN basis. Nevertheless, we also note that fortunately, Ms. Dozier's heart is in good shape with an ejection fraction of around 60%. There seems to be no heart problems.

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. We therefore recommend that Ms. Dozier's request for disability be denied. (R. 20-22) [*Emphasis Added*]

What the Committee relied upon and the Board of Trustees adopted as their ruling is a well reasoned decision and analysis of the record presented by Ms. Dozier. The Circuit Court merely refers to the opinions of the treating physicians without commenting on the supporting medical documentation to support those statements. It appears the Circuit Court weighed the opinions of the treating physicians quite heavily even though the Court should not reweigh the evidence. It is clear when reading the thorough analyses of the information in the record in support of Ms. Dozier's claim and what the Committee based its recommendation on. The Committee notes the definition of malignant hypertension and then relates that Ms. Dozier does not have the condition. The Committee provides a lengthy explanation of why they came to this conclusion. What the Committee needed was objective evidence of disability, and, as noted in their findings, the evidence is insufficient to support Ms. Dozier's claim. As stated in *Public Employees' Retirement System v. Cobb*, 839 So. 2d at 609:

in something of a paradox, the lack of evidence at the agency level becomes the substantial evidence on appellate review that suggests the necessity of affirming the agency's determination.

PERS did not ignore the medical evidence in the file, but, rather analyzed what was submitted and found that the opinion of Dr. Easley, who evaluated Ms. Dozier for purposes of her claim before the Social Security Administration, and, Dr. Morgan, were insufficient to support her claim as there was no objective evidence to support those opinions. Moreover, the burden was on Ms. Dozier to prove she is in fact disabled and not on PERS to provide the evidence to support a claim of non-disability. As noted in *Public Employees' Retirement System v. Cobb*, 839 So. 2d at 609:

**Cobb, as the applicant, had the burden of proof to show affirmatively her right to compensation. Thompson v. Well-Lamont Corp.**, 362 So. 2d 638, 641 (Miss. 1978). It was not the obligation of her employing agency to affirmatively prove that she was, in fact, capable of performing her duties. In this situation, **the concept of "substantial evidence" supporting an agency decision has the potential to be somewhat confusing since it is, in fact, the absence of credible evidence presented on behalf of the party having the burden of proof on the issue that compels the denial of relief.** [Emphasis Added]

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

Moreover, it is PERS that has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. As noted in *Public Employees' Retirement v. Howard*, 905 So. 2d at 1287, "determining whether an individual is permanently disabled is better left to physicians, not Judges." Several physicians reviewed Ms. Dozier's application and medical documents. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee

trained to review the medical reports submitted in support of Ms. Dozier's claim. Further, it is within PERS discretion to determine which documents garner more weight than others. *Byrd v. Public Employees' Retirement System*, 774 So. 2d 434, 438 (Miss. 2000) Also see: *Brakefield vs. Public Employees' Retirement System* 940 So. 2d 945, (Miss. App. 2006)

It is well documented in the medical evidence presented, or lack thereof, by Ms. Dozier that she is not entitled to a disability benefit as defined by statute and PERS Regulations. The Disability Appeals Committee, as well as the Board of Trustees, as mandated by law, determines whether the claimant is unable "to perform the usual duties of employment."

Based on the record, there was an overwhelming lack of objective medical evidence to support the award of disability benefits. It is the burden of the claimant to prove he/she is in fact disabled. Again, "PERS has the responsibility of examining the assessments of medical personnel and determining which ones should be relied upon in making its decision." *Johnston v. Public Employees' Retirement System*, 827 So. 2d 1, 3 (Miss. App. 2002) citing *Byrd v. Public Employees' Retirement System*, 774 So. 2d at 438.

The PERS Board of Trustees concluded, rightfully so, that Ms. Dozier, at the time of her termination, was not permanently disabled as defined in Miss. Code Ann. § 25-11-113. The record contains medical documents which require medical expertise in analyzing. The Medical Board is comprised of three physicians and the Disability Appeals Committee is made up of two different physicians and a nurse. These individuals certainly have the ability to analyze the testing results that are in the record. Although



Ms. Dozier contends that no contrary view of the evidence was presented this statement is clearly refuted in the analysis offered in the Recommendation of the Disability Appeals Committee.

The decision of the Board of Trustees is supported by substantial evidence and must be reinstated. Clearly, the Circuit Court does not refute the statements made by the Committee in its recommendation making it clear the Circuit Court reweighed the evidence and substituted its judgment for that of the administrative agency charged with making the decision with regard to disability.

The decision of the Board of Trustees must be reinstated and the Opinion of the Circuit Court reversed as the Board's decision was based on substantial evidence, it was rendered within the authority of the Board and Ms. Dozier was provided a fair and impartial hearing and her constitutional rights were not violated.

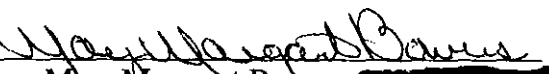
## CONCLUSION

Based on the record before this Court, it clearly supports the decision entered by the PERS Board of Trustees. It is within the administrative agency's discretion as to which medical reports garner more weight. The medical evidence does not support Ms Dozier's claim for disability benefits as set forth in the well reasoned and unbiased evaluation of the Disability Appeals Committee which was adopted by the Board of Trustees. The decision of the Circuit Court indicates that that Court impermissibly reweighed the evidence and substituted its judgment for that of PERS. The Order of the PERS Board of Trustees is supported by substantial evidence, is neither arbitrary nor capricious and was not entered in violation of either statutory or constitutional rights of Ms. Dozier. Ms. Dozier's claim does not meet the requirements for the receipt of a disability benefit under the laws governing the administration of the Public Employees' Retirement System. The burden was on Ms. Dozier to prove her claim for disability before the Disability Appeals Committee and was not on PERS to provide evidence of disability or non-disability.

The PERS Board of Trustees respectfully requests this Honorable Court reverse the Opinion and Order of the Circuit Court and reinstate the Order of the Board of Trustees of the public Employees' Retirement System entered on February 24, 2004.

Respectfully submitted this the 28<sup>th</sup> day of November 2007.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
APPELLANT

By:   
Mary Margaret Bowers  
Special Assistant Attorney General

**CERTIFICATE OF SERVICE**

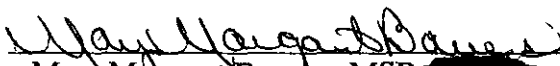
I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that a true and correct copy of the above and foregoing *Brief of Appellant* has been mailed, postage pre-paid, to:

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So certified, this the 28<sup>th</sup> day of November 2007.

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