IN THE SUPREME COURT OF MISSISSIPPI

LYNN LAUGHLIN	APPELLANT
VERSUS	CAUSE NO. 2008-SA-00341
PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS)	APPELLEE

BRIEF OF THE APPELLEE

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PUBLIC EMPLOYEES' RETIREMENT	**APPELLEE**

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 Appellee

Honorable Jim Hood, Attorney General

Honorable Tomie Green , Hinds County Circuit Court Judge

Honorable George S. Luter, Counsel for Appellant

Ms. Lynn Laughlin, Appellant

Respectfully submitted,

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STATEMENT OF THE CASE[1]

This matter involves an appeal filed by the Appellant, Lynn Laughlin, wherein she seeks review of the Memorandum Opinion and Order entered July 31, 2007, by the Circuit Court of Hinds County, Mississippi. The Circuit Court affirmed the Order of the Board of Trustees of the Public Employees' Retirement System (PERS). The PERS Board denied Ms. Laughlin's request for disability benefits. The Circuit Court did not err when it found that the Board of Trustees of PERS Order denying Ms. Laughlin's claim for disability is supported by substantial evidence and is neither arbitrary nor capricious.

STATEMENT OF THE FACTS

Ms. Laughlin was employed as a teacher with the Calhoun County Schools. (Vol. II, R. 109) She worked as a computer application teacher. (Vol. II, R. 52) According to Ms. Laughlin, her duties included monitoring the students, preparation, record keeping and disciplinary actions. (Vol. II, R. 53) She testified that she would arrive at school at 7:30 A. M. and arrive back home around 3:40 P.M. (Vol. II, R. 52-54.) At the time she terminated employment she had 10 ½ years of service credit. (Vol. II, R. 54) She resigned from her teaching position in April 2003. (Vol. II, R. 55)

Ms. Laughlin explained that she had undergone two neck surgeries and surgery for carpal tunnel in 1999. (Vol. II, R. 55, 83) She has suffered with TMJ since she was 30 years of age. (Vol. II, R. 84) She also testified that she has been diagnosed with having scoliosis which basically means that her back is not entirely straight. (Vol. II, R. 59) In 2000, she began to experience pain in her hip which was diagnosed as bursitis.

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

(Vol. II, R. 68) She testified that she has been having problems with stress since 1999 when she was diagnosed with fibromyalgia. (Vol. II, R. 72) During the hearing Dr. Meeks, a member of the Disability Appeals Committee asked Ms. Laughlin about the diagnosis of fibromyalgia as follows:

> Q. Seems like they made that diagnosis back then, but I don't recall seeing that they carried that forward.

In response Ms. Laughlin testified:

> A. Well, Dr. Field does not believe in fibromyalgia. He says there's no such thing.(Vol. II, R. 72)

According to Ms. Laughlin, Dr. Field is an orthopedic surgeon. (Vol. II, R. 72) Again, Dr. Meeks questioned Ms. Laughlin as follows:

> Q. Why did Dr. Field express that he thinks you do not have fibromyalgia?
>
> A. He doesn't believe in fibromyalgia.
>
> Q. Do you know why he thinks it doesn't exist?
>
> A. He doesn't want it to exist. He wants me to be on track.

The Disability Appeals Committee thoroughly reviewed the medical evidence in support of Ms. Laughlin's claim for disability as follows:

> Ms. Laughlin provided this Committee with a number of medical records, and some of the earliest are from Baptist Memorial Hospital dating back to **July 12, 1999. At that time, Ms. Laughlin was complaining of neck pain and a myelogram** showed a suggested herniated disc at C6-7 and CTs showed a central and right-sided disc protrusion at C6, along with a right disc plus osteophyte protrusion at C5. CT of the lumbar spine was normal. Dr. Snyder noted the tests and weakness on the right. He also **noted a prior neck surgery about ten years ago** by Dr. Neill in Jackson. **Dr. Snyder thought the pain was due to a possible recurrent disc herniation. He noted degenerative changes to the cervical region.** When she returned to Dr. Snyder on July 23, 1999, again the testing was noted, along with EMGs that Dr.

Snyder said **showed carpal tunnel syndrome**. Dr. Snyder performed a carpal tunnel release on the right side that very day.

Ms. Laughlin was also seeing Dr. Adams, her Rheumatologist, during the summer of 1999, and his records document the EMG studies that Dr. Adams states document carpal tunnel syndrome. **He diagnosed Ms. Laughlin with probable bilateral carpal tunnel syndrome, cervical spondylosis, TMJ and mild thoracolumbar scoliosis with bursistis of the hips and knees.**

Ms. Laughlin was readmitted to the hospital on **September 20, 1999**, with **complaints of cervical radiculopathy**. She underwent an anterior cervical diskectomy and fusion at C5-6 and C6-7, by Dr. Smith.

Ms. Laughlin **returned to Dr. Adams on May 8, 2000**, for her one year evaluation and she **complained of general arthralgias**. He **related the low back pain to the mild to moderate scoliosis** and injected her, in addition to placing her on Celebrex. When she returned on August 24, 2000, she continued to complain of a lot of pain. Dr. Adams increased her Vioxx. Then **on November 28, 2000**, Doctor Adams wrote that after an exhaustive review, **he thought her problems were soft tissue rheumatism**. He noted that Ms. Laughlin **seemed high strung and compulsive and encouraged behavior modifications**. Dr. Adams said **he tended to favor the diagnosis of fibromyalgia**. He suggested a pain clinic and concurred with her current medication regimen. He encouraged less stressful activity at work and that she do more aerobic exercise.

Ms. Laughlin returned on April 22, 2002, and Dr. Adams wrote that Ms. Laughlin was distraught over the pain in her lower extremities. He noted the pain tended to be worse at night and sometimes relieved with activity. She was referred to orthopedics for evaluation. On the Statement of Examining Physician, Dr. Adams wrote that **Ms. Laughlin has scoliosis, spondylosis and fibromyalgia and that her disability is manifest mainly by her level of pain.**

Ms. Laughlin **began seeing Dr. Field on April 30, 2002, with complaints of left knee pain**. She was **diagnosed with left trochanteric bursitis and left pes bursitis.** She was **placed on physical therapy and began improving**, according to the May 21, 2002, note. When she returned on June 11, 2002, she had complained of pain that sounded radicular so additional testing was requested.

On June 18, 2002, Ms. Laughlin had **another MRI** of the lumbar spine because of complaints of low back pain. **Mild scoliosis** was noted. At L4-5, **mild facet hypertrophic changes and a right paracentral bulge of the annulus were noted**. At L5-S1, **mild facet hypertrophic changes were noted that did not place significant impingement on the neural elements**. This was noted to be **consistent with osteoarthristis**. The radiologist noted that it would be doubtful that the findings would produce right L5 radicular symptoms. With these tests, Ms. Laughlin was referred to Dr. McGuire, a spine specialist.

Ms. Laughlin saw Dr. McGuire one time and he felt the problem was not a spine problem. He referred her for treatment of her back to Dr. Fields. There is a Statement of Examining Physician from Dr. McGuire dated May 5, 2003, noting that Ms. Laughlin has **mild greater trochanteric bursistis** and he noted a good prognosis. **He did not place any limitations on Ms. Laughlin but deferred to Dr. Field regarding that**.

Ms. Laughlin did return to Dr. Field and he began injections into the soft tissue of the hip. He also recommended she continue physical therapy. The next visit dated **September 24, 2002, noted that Ms. Laughlin was feeling better but that she had been non-compliant with the therapist**. Dr. Field cautioned Ms. Laughlin not to do too much at school and he agreed with her that she did not need to be teaching another class of fourth grade students. **On October 15, 2002**, Ms. Laughlin **reported doing real well**. Physical therapy was helping a lot. On November 12, 2002, Ms. Laughlin reported she was a little better but sore. Then on December 20, 2002, she reported she was not much better. Dr. Field wrote that all he had to offer was injections.

On January 17, 2003, Ms. Laughlin reported that she was hurting all over. Dr. Field scheduled a Functional Capacity Evaluation noting that Ms. Laughlin was not going to work any longer. The **FCE** was performed, which **showed normal range of motion, normal trunk mobility, normal strength testing of the cervical spine, and normal testing of the lower extremities**. According to the tester, Ms. Laughlin showed **signs of symptom magnification and the pain distribution appeared inconsistent with her overall appearance and presentation**. Ms. Laughlin reported she was being encouraged not to return back to her job as a teacher. Ms. Laughlin was **able to lift 25 pounds. The conclusion of the test was that Ms. Laughlin could return to the light to medium duty work force and that her job as a**

> **teacher fell in the category**. The February 14, 2003, note states that Ms. Laughlin was functioning at the light to medium level of work. The doctor noted that Ms. Laughlin was much better now that she was not teaching. Ms. Laughlin told Dr. Field that she could not handle the stress of teaching anymore and may get a job somewhere else. She was released on a PRN basis with pain medication. When she did return on March 24, 2003, she was referred for injections. Dr. Field wrote on his Statement of Examining Physician form that Ms. Laughlin has Left SI joint dysfunction, severe, and Left Pes Bursitis, mild, and has a fair prognosis for recovery. **He listed no impairments or restrictions. He noted that Ms. Laughlin self-limits with pain.**
>
> Records from Dr. Pace, a Gastroenterologist, were in the record and it is noted that Ms. Laughlin has Irritable Bowel Syndrome, constipation and fatigue but there are **no limitations**. Ms. Laughlin agreed at the hearing that she was not making claim for stomach problems.
>
> There are notes from **Dr. Hamblin** but this doctor's records are very difficult to read. **He does write that he does not feel qualified to make a determination regarding disability.**
>
> The Independent Medical Evaluation of Dr. Collipp is dated October 7, 2003, and according to his report, the appointment lasted 25 minutes. Dr. Collipp took a history from Ms. Laughlin, and performed a physical examination. He did note decreased cervical range of motion, on active range. **Dr. Collipp** stated that Ms. Laughlin explained her work to be heavy duty and he had her written job description. He **opined that she was physically able to perform her job as a computer teacher, based both upon the written description he had and based on her verbal description.** (Vol. II, R. 28-32)

The Committee before presenting its recommendation to the PERS Board analyzed the information and came to the following conclusion:

> First, this Committee considered the evidence provided by Dr. Adams, a Rheumatologist. Dr. Adams noted that he thought Ms. Laughlin has **fibromyalgia**. Now, **this diagnosis was not documented through the objective testing, but it is clear that this is** what Dr. Adams suspected. He noted that sometimes, Ms. Laughlin's pain was reduced with activity, which would be consistent with diagnosis of fibromyalgia. He further stated that Ms. Laughlin was high strung and compulsive and should reduce

her stress at work but increase her aerobic activity. **This Committee finds that Dr. Adams' recommendations are appropriate.** While there is some disagreement in the medical community regarding the diagnosis of fibromyalgia and whether there is such a thing, those who do believe the illness exists, recognize that it is probably a psychiatric illness, but at the least that fibromyalgia certainly has a psychiatric component, and reducing stress and increasing activity would help manage stress levels. The most typical symptoms are arthralgias all over the body and sometimes there are associated trigger points. But the pain is the most common complaint. **Nevertheless, there is nothing in the record from Dr. Adams that states Ms. Laughlin is medically disabled.**

Ms. Laughlin was followed by **Dr. Field** for a long time and she testified that he did not believe in fibromyalgia. But he did thoroughly look for orthopedic reasons for Ms. Laughlin's complaints of pain. He **found that she did not have a spine problem but what she does have is arthritis.** She **also** has a **mild to moderate scoliosis that may be causing some of the SI lumbar pain.** She has **no nerve root impingement** so surgery is not recommended. Ms. Laughlin also was diagnosed with a **bursitis** and that was believed to be causing the leg pain. He noted that she improved until December of 2002, at which time he was unsure that she would return to work. However, **after undergoing the Functional Capacity Evaluation, it was noted that Ms. Laughlin could perform the acts of her employment, and Dr. Field released Ms. Laughlin without limitations.** He last saw her in February of 2003, and Ms. Laughlin told him she could not handle the stress of teaching any longer.

Dr. Collipp performed an Independent Medical Exam and while counsel for Ms. Laughlin objected to the consideration of same, this Committee notes that Dr. Collipp is an expert is the field of disability and one of a few doctors in this field in the whole State of Mississippi. Ms. Laughlin testified that Dr. Collipp spent little time with her and even Dr. Collipp stated his appointment was for about 25 minutes. Nevertheless, **Dr. Collipp concluded that Ms. Laughlin was able to perform the job of computer teacher, no matter how she categorized the job.**

So, this leaves us with none of the physicians stating with any degree of medical certainty that Ms. Laughlin has a medical disability. The family doctor refuses to make an opinion, the gastrointestinal doctor found no disability. Dr. Adams wrote that Ms. Laughlin has scoliosis, spondylosis and fibromyalgia

> **and that her disability would be her level of pain. Pain, unfortunately cannot be measured objectively and without some type of objective evidence, this Committee does not have the latitude to award disability. Further, in the Functional Capacity Evaluation, the evaluator noted self-limiting behavior and symptom magnification and he noted Ms. Laughlin was being encouraged by her family not to return to work. Then during the evaluation, Ms. Laughlin was able to meet her job requirements.**
>
> **Dr. McGuire found no spine problems** at all, and he deferred opinions regarding disability to Dr. Field. Dr. Field noted great strides toward improvement until December of 2002, at which such time Ms. Laughlin told him she could not take the stress of everything. This Committee fully understands that the job of a teacher is stressful, but this is not a psychiatric claim as best as we can tell. We base this assumption on the fact that psychiatric treatment was not sought and is not contained in the record. This claim must be based on an objective medical condition or conditions that is disabling. **We note that Ms. Laughlin has mild to moderate scoliosis, which some arthritis in her back and bursitis in the hip, but again, no one has said she is disabled. They only say that she has pain. This Committee cannot award disability based on pain when there is symptom magnification and possibly some type of psychiatric component at play.** (Vol. II, R. 33-35)

After reviewing the medical documentation and testimony, the Disability Appeals Committee recommended Ms. Laughlin's application for disability be denied. The Board of Trustees adopted the Recommendation of the Disability Appeals Committee by Order entered April 20, 2004. Aggrieved of the decision of the Board of Trustees, Ms. Laughlin filed an appeal in the Circuit Court pursuant to Miss. Code Ann. § 25-11-120 (Rev. 2006). The Circuit Court upheld the decision of the Board of Trustees, hence this appeal.

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. Laughlin 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. Laughlin. The medical evidence does not establish that Ms. Laughlin's ailments are disabling as noted by the Circuit Court and therefore, she is not entitled to a disability benefit from the State of Mississippi.

Although Ms. Laughlin was approved by the Social Security Administration for the receipt of a disability benefit, PERS is not required, under the law governing its administration to accept the findings of Social Security.

Ms. Laughlin was provided a fair and impartial hearing. Her case should not be remanded to PERS for another hearing as she had the burden of providing all the medical documentation to support her case prior to the matter being considered by the Medical Board.

This case should not be remanded as her right to due process was not violated during the hearing and questioning of the disability analyst.

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 the Appellant, as recognized by the Circuit Court. This Court must affirm the Circuit Court's Memorandum Opinion and Order affirming the Order of the PERS Board of Trustees.

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 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. §§25-11-113 and 25-11-114 (Supp. 2007).

Applications for disability benefits are reviewed by the PERS Medical Board, which arranges and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. Miss. Code Ann. §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. §25-11-120 (Rev. 2006).

Disability, as defined under PERS law, Miss. Code Ann. §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.

§25-11-113 further provides that:

> . . . in no event shall the disability retirement allowance commence before the termination of the 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, the Disability Appeals Committee and the PERS Board of Trustees was whether Ms. Laughlin's claim meets the requirements 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 correctly found that the Board of Trustees' decision was supported by substantial evidence, and, thus, was not arbitrary nor capacious.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit and County Court Practice limits review by the Circuit 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. Laughlin. This standard is also applied by this Court when reviewing the decision of the Circuit Court. ***Public Employees' Retirement System v. Dean***, 983 So.2d 335, (Miss. App. 2008); ***Case v. Public Employees' Retirement System***, 973 So.2d 301, 310 (Miss. App. 2008); ***Brakefield v. Public Employees' Retirement System***, 940 So. 2d 945, 948 (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, 351 (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; ***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: ***Public Employees' Retirement System v. Burt***, 919 So. 2d 1150, 1156 (Miss. App. 2005). 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 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. Laughlin 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 609.

In ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1287, this Honorable Court reiterated that "it is for PERS, as 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 (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. Moreover, a rebuttable presumption exists in favor of PERS' decision, and the burden of proving to the contrary is on Ms. Laughlin. ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1284; ***Public Employees' Retirement System v. Stamps***, 898 So. 2d at 673; ***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 Supreme 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, this 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". In ***Public Employees' Retirement System v. Henderson***, 867 So. 2d 262, 264 (Miss. App. 2003), this Court citing ***Doyle v. Public Employees' Retirement System***, 808 So. 2d 902, 905

(Miss. 2002) noted: "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." Also See: ***Public Employees' Retirement System v. Burt***, 919 So. 2d 1150, 1156. (Miss. App. 2005)

The Circuit Court correctly held that 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. Laughlin and, thus, the Memorandum Opinion and Order of the Circuit Court entered August 2, 2007 must be affirmed.

I.

THE DECISION OF THE BOARD OF TRUSTEES DENYING MS. LAUGHLIN'S CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

"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 1279, 1284 (Miss. 2005). Upon close reading of the record presently before this Honorable Court, it is evident that the decision of the PERS Board of Trustees upheld by the Circuit Court 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." ***Brakefield v. Public Employees' Retirement System*** *940* So. 2d at 948; ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1285; ***Davis v. Public Employees' Retirement System,***

750 So. 2d 1225, 1233 (Miss. 1999). 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. Ct. 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, ***Howard***, 905 So. 2d at 1285. Upon review of the record, including the findings of the Disability Appeals Committee and its thorough analysis of the medical documentation and testimony offered at the hearing and the analysis of the medical evidence by the Circuit Court, this Court will see that there is "more than a scintilla" of evidence to support PERS' decision to deny disability benefits.

The Committee provided an extensive review of the documentation offered in support of Ms. Laughlin's claim as evidenced in its most thorough findings of fact. The Committee then went on to provide a thorough analysis of the evidence and testimony in the record and certainly provided the Board of Trustees, the Circuit Court and now this Honorable Court with a more than adequate basis for their recommendation that disability benefits be denied and their decision be upheld.

Ms. Laughlin finds the rationale and conclusions reached by PERS in denying her benefits to be insufficient. The Committee provided an extensive review of the documentation offered in support of Ms. Laughlin's claim as evidenced in its most thorough findings of fact. The Committee then went on to provide a thorough analysis of the evidence and testimony in the record and certainly provided the Board of Trustees,

the Circuit Court now this Honorable Court, with the basis for their recommendation that disability benefits be denied.

Counsel for Ms. Laughlin notes that she had surgery in 1999 and "continued to labor as a teacher for four more years." (Apellant's Brief at page 8). The fact that she was able to continue in her position for fours years after surgery refutes any contention that the surgery may have resulted in disability. The Committee took the surgeries into consideration as set forth in its summary of medical evidence.

Just as Ms. Laughlin comments on Dr. Adam's findings so did the Committee. Dr. Adams is a rheumatologist and the Committee after its summary of Ms. Laughlin's visits to Dr. Adams noted that he found she suffered from "scoliosis, spondylosis and fibromyalgia and that her disability is manifest mainly by her level of pain". (Vol. II, R. 29.) In its analysis of what Dr. Adams found Ms. Laughlin to be suffering from, the Committee concludes "there is nothing in the record from Dr. Adams that states Ms. Laughlin is medically disabled". (Vol. II, R. 33.) The Circuit Court also reviewed the records of Dr. Adams as noted in its opinion.

With regard to Dr. Field, the Committee found that Dr. Field determined Ms. Laughlin did not have a spine problem but does have arthritis. Again, they noted that Dr. Field found she has mild to moderate scoliosis. As noted by Ms. Laughlin she did have a Functional Capacity Evaluation (FCE) which is a procedure that measures your physical capabilities of performing certain tasks. The Committee stated that after the FCE "it was noted that she could perform the acts of her employment, and Dr. Field released Ms. Laughlin without limitations". (Vol. II, R. 34.) The Circuit Court references the FCE and quoted Mr. Brick's comments that Ms. Laughlin "actually is very mobile and agile."

PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. As noted in ***Howard***, "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." Several physicians reviewed Ms. Laughlin's application and medical documents. It is further 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) A*lso see*: ***Brakefield v. Public Employees' Retirement System,*** *940* So. 2d at 948 This is exactly what the Medical Board, Disability Appeals Committee and PERS Board of Trustees did in this case and as recognized by the Circuit Court.

Miss. Code Ann. § 25-11-113(1) (a) (Supp. 2007) sets forth the method by which the Medical Board is initially to determine if disability is present:

> 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. The employer shall be required to furnish the job description and duties of the member.

Following an appeal to the Disability Appeals Committee they reviewed the documentation provided by each of Ms. Laughlin's physicians in reaching their conclusion that she was not entitled to disability benefits as set forth under the laws governing the administration of the PERS' disability program.

It is well documented in the medical evidence presented by Ms. Laughlin, or lack thereof, that she is not disabled as that term is defined in the law governing the administration of the Retirement System. As the Court of Appeals stated in ***Purnell v. Public Employees' Retirement System***, 894 So. 2d 597, 602 (Miss. App. 2004) that although there was some evidence suggesting Ms. Purnell suffered from physical and mental difficulties "substantial evidence also suggested that there was no distinguished reason for pain or any notion of the permanence of Purnell's maladies".

The Disability Appeals Committee presented a lengthy and well-reasoned recommendation to the Board of Trustees. The Committee, in making its recommendation, did not make a hasty decision in determining that Ms. Laughlin was not qualified for disability benefits. Instead, the Committee evaluated all of the medical evidence made available to them and their decision was therefore supported by substantial evidence. The Committee does look for objective evidence to support a claim of disability. There has to be a disabling condition that causes pain.

Ms. Laughlin states that there are numerous federal decisions that state that disability can be based upon pain and cites solely to the case of ***Selders v. Sullivan***, 914 F. 2d 614 (5th Cir. 1990) This case has no application in this forum as it is a case involving a claim brought under the Social Security Administration. Ms. Laughlin states that because of the opinions of her physicians and "considering the award of social security" she is entitled to disability from the state. However, in order to receive a disability benefit from the State of Mississippi Ms. Laughlin would have to satisfy the requirements for disability under the statutory provisions governing the administration of the disability program offered by the State of Mississippi. Specific statutory law, Miss

Code Ann. §§ 25-11-113 and 25-11-114, relate to disability retirement from the Public Employees' Retirement System. Further, PERS Regulations provide the manner in which disability cases proceed before its Board of Trustees. In ***Public Employees' Retirement System v. Dishmon***, 797 So.2d 888, 895 (Miss. 2001) this Court stated, "There is no authority requiring PERS to substitute their opinion for that of the Social Security or the A.L.J." It is clear that there is no requirement that the same standards utilized by the Social Security Administration be applied to a claim for disability from the State of Mississippi

Ms. Laughlin refers to the statements from lay individuals regarding her claim for disability. However, in ***Public Employees' Retirement System v. Dishmon***, 797 So.2d at 894 the Court noted that "PERS convincingly argues that the opinion of a lay person should not be taken as conclusive evidence of disability."

Ms. Laughlin asks that this Court reverse the decision of the Circuit Court and order that benefits be paid with prejudgment interest. First, this position was not asserted before the administrative body, and, thus, can not be asserted here. A matter not raised at the lower level is waived for purposes of appeal. Although the decision of the Circuit Court should be affirmed, assuming arguendo it was not, Ms. Laughlin would only be entitled to her past due benefits and not prejudgment interest.

The matter before this Court is purely an appeal of the Circuit Court's decision to uphold an administrative decision and not a civil suit wherein a money judgment was entered which may call for the entry of prejudgment interest pursuant to statutory authority i.e. Miss. Code Ann. § 75-17-7 (Rev. 2000). Interest has never been allowed in any case similar to this wherein the basis for the appeal was whether the administrative

decision to terminate disability benefits was premised on substantial evidence. In a somewhat similar argument and request for an opinion, the office of the Attorney General has opined that "A county can pay interest only when it has been authorized by statute." The issue was whether interest was to be paid on contributions erroneously made to the Retirement System, which were refunded to the employee who was determined not to be entitled to membership in the System. MS AG Op., Stroud (November 1, 1989)

In a somewhat analogous case from another jurisdiction in Indiana in ***Department of Public Welfare v Chair Lance Service, Inc.***, 523 N.E. 2d 1373, 1379 (1988) the Court stated that the "State is not liable for interest on payments due unless it binds itself by contract or statute to pay interest." In ***Hollstein v. Contributory Retirement Appeal Board***, 710 N.E. 2d 1041, 1042 (1999) the issue was whether certain members of the Contributory Retirement Appeal Board were obligated to pay interest on pension contributions that were improperly deducted from the wages of certain employees of the school committee. The Court recognized that "A requirement to pay interest on excessive pension deductions should not be read into the statute where the Legislature did not provide for it". The Court found that there was neither statutory authority nor contractual basis to award interest.

There is no provision in the law governing the administration of the Mississippi Public Employees' Retirement System that provides for the payment of interest in such appeals. If interest were to be paid on cases such as this, legislative action would be necessary. This is not a civil lawsuit field against the Retirement System where monetary damages may be awarded, but is merely an appeal of an administrative decision. Miss. Code Ann. § 25-11-120 provides the manner in which an administrative decision of the

Board of Trustees can be appealed to Court. The issue before the Court is not the monetary extent of recovery, but, rather, whether the member is entitled to a disability benefit. In fact, the PEER Committee in its report #426 to the Legislature titled "A Review of the Public Employees' Retirement System's Disability Determination Process" dated November 13, 2001, found that the dollar amount of the benefit is irrelevant to a determination of disability. If the decision is made to award benefits the calculation as to the amount is made at the administrative level pursuant to statutory law. This is purely an appeal of an administrative decision. In ***Mills v. Jones' Estate***, 57 So.2d 496 (Miss. 1952) this Court, in a case where there was a motion to add interest on the judgment entered, noted that the lower Court did not enter a monetary judgment and that the judgment "simply adjudicated that the death was compensable without undertaking to fix the amount of such compensation. We cannot fix the amount here. That will be a matter for the Commission on remand." The case was originally before the Workers' Compensation Commission. The motion was overruled.

The legislature does not provide for the payment of interest in the laws governing the administration of the Retirement System. If individuals are allowed to collect interest on appeal to Court it would appear that they would appeal to also collect interest when awarded a benefit following an appeal before the Disability Appeals Committee. There is no statute which would entitle any member to receive interest even though they did not have to go through the entire appeals' process to secure a benefit and the Board of Trustees can not award interest without the statutory authority to do so.

Although this matter clearly does not fall within the parameter of the Employee Retirement Income Security Act of 1974 (ERISA) the case of ***Jackson v. Fortis Benefits***

Insurance Company, 245 F. 3d 748 (8th Cir. 2001) provides some guidance. In that case the United States Court of Appeals for the Eight District noted that ERISA does not provide for an award of interest on back payments. In the case, the plaintiffs alleging a breach of fiduciary duty and unjust enrichment sought interest on an award of back benefits under long term disability which payments were allegedly delayed for three years. The Court concluded that without a showing the plan had been breached there was no authority to pay interest, therfore although this Court must affirm the Memorandum Opinion and Order of the Circuit Court, if this Court does reverse the Circuit Court's Opinion, Ms. Laughlin would not be entitled to an award of prejudgment interest.

II.

THIS CASE SHOULD NOT BE REMANDED FOR A NEW HEARING AS MS. LAUGHLIN WAS NOT DENIED HER RIGHT TO DUE PROCESS WHEN HER SECOND REQUEST FOR A CONTINUANCE WAS DENIED.

On January 5, 2004, a letter was sent to counsel for Ms. Laughlin informing him that a hearing before the Disability Appeals Committee was scheduled for January 26, 2004. The letter stated:

> Failure to appear before the PERS Disability Appeals Committee at the appointed date and time without prior approval of the Executive Director will result in the claim for benefits being heard by the Disability Appeals Committee on the basis of the record provided and without benefit of testimony. **I will review any request for a change or delay in the hearing date received less than two (2) weeks prior to the scheduled hearing. It will then be determined whether just cause exists to grant the request. Such request must be in writing and directed to the Executive Director of the Public Employees' Retirement System.** If the request is rejected, the hearing will proceed as scheduled. (R. 234)

On January 8, 2004 a copy of the PERS exhibit, which included the medical documentation offered by Ms. Laughlin in support of her claim, was mailed to her

attorney. (Vol. II, R. 230) The same day counsel for Ms. Laughlin sent a letter asking for a continuance of the January 26 hearing. (Vol. II, R. 232)

The hearing was postponed and rescheduled for February 20, 2004. (Vol. II, R. 265) Counsel for Ms. Laughlin, who was in possession of the record file since January 9, 2004, requested a second continuance on the basis that he had not had ample time to review the medical documentation, the very same medical documentation on which his client based her claim for disability. On January 30, 2004, counsel for Ms. Laughlin was informed that the request for a second hearing was being denied. (Vol. II, R. 231)

PERS agrees that administrative hearings are to be conducted in a fair and impartial manner. ***Dean v. Public Employees' Retirement System***, 797 So.2d 830 (Miss. 2000) Ms. Laughlin's appeal was handled in a fair and impartial manner.

Most important is that it is the member who has the burden of proving that he/she is entitled to a benefit from the State of Mississippi. Ms. Laughlin should have had all the medical documentation to support her case filed prior to her application being reviewed by the PERS Medical Board. She contends that 42 days was insufficient to be certain all medical documentation was present. There is no requirement that PERS provide the member's own medical records introduced at the hearing to the member prior to the hearing. The exhibit relied on by the Medical Board and any additional information received prior to a hearing before the Disability Appeals Committee is sent as a matter of courtesy. Included with the medical documentation is the PERS staff summary sheet which summarizes the member's place of employment, years of service, dates the application was reviewed etc., and the member file containing the application, and member information. Ms. Laughlin should have been familiar with all of the information

herself. The member should be aware of his/her own medical file that he/she relies on in making an application for a disability benefit. In fact, if a member's application is denied by the Medical Board a letter is sent and enclosed with the letter is a list of the records reviewed by the Medical Board in making their decision. This letter and attached list of documents reviewed was sent to Ms. Laughlin November 3, 2003. (Vol. II, R. 240-242) Certainly there was ample time between November and February to determine what other records she might want to bring to the hearing.

Ms. Laughlin asserts that these 42 days were "woefully inadequate" because of the amount of time required to obtain medical records from physicians in modern practice. However, Ms. Laughlin does not assert what amount of time she would consider "adequate" to obtain medical records in modern medical practice. Also, Ms. Laughlin does not explain why there is a time delay in the "modern" medical practice in which these practices surely have access to fax and e-mail.

PERS Regulation 42 RULES OF HEARING PRACTICE AND PROCEDURE BEFORE THE BOARD OF TRUSTEES provides, "The Executive Director **shall** set a date and time for the hearing. Further, Section G (4) provides:

> Any request for a change or delay of a scheduled hearing must be made to the Executive Director in writing. All requests for changes or delays made prior to the scheduled hearing date shall be subject to the discretion of the Executive Director.

The Circuit Court's ruling should not be reversed and this case should not be remanded to PERS for a new hearing as Ms. Laughlin was afforded due process as her first continuance was granted and her attorney had ample time to review the packet sent to him which he and she should have been familiar with in this process.

III.

THIS CASE SHOULD NOT BE REMANDED FOR A NEW HEARING AS MS. LAUGHLIN WAS PROVIDED A FAIR HEARING IN SPITE OF THE COMMENT FROM THE EXECUTIVE DIRECTOR ADVISING THE ANALYST NOT TO ANSWER ONE OF MS. LAUGHLIN'S COUNSEL'S QUESTIONS.

Ms. Laughlin's attorney, during the hearing questioned the disability analyst as to the number of independent medical examinations performed by Dr. David Collipp during the last year. Dr. Collipp, who was a former member of the Medical Board, but was not at the time of his evaluation of Ms. Laughlin, did conduct an Independent Medical Evaluation of Ms. Laughlin. (Vol. II, R. 47-50) During cross-examination the analyst was asked how many independent medical evaluations Dr. Collipp had performed at PERS request during the past year. The Executive Director told the analyst not to answer the question. Regardless of the question and the Director's instructions the Hearing Officer pointed out the following:

> I think the record should reflect that she's already answered she is not aware of any. (Vol. II, R. 51)

In fact, the analyst had already informed Ms. Laughlin's counsel that as long as she had been an analyst she did not believe that Dr. Collipp had done any independent examinations. (Vol. II, R. 43) She was not asked how long she had been an analyst. The fact that the Director advised her not to answer the question did not result in an unfair hearing as even though counsel for Ms. Laughlin contends this is public information, the analyst did not know the answer to his question.

Although Ms. Laughlin contends the question regarding how many evaluations Dr. Collipp performed for PERS was relevant, there is nothing in her brief which explains why it was relevant. It appears that counsel somehow may have been attempting to

indicate that Dr. Collipp would not be impartial as he was a former member of the Medical Board. In a somewhat analogous case the issue of the Medical Board members performing evaluations and then sitting with the panel of the rest of the Medical Board was found not to be a violation of due process. In ***Dean v. Public Employees' Retirement System***, 797 So.2d 830 (Miss. 2000) the issue was whether Mr. Dean's statutory or constitutional rights were violated by the procedures then in place by PERS. One of the issues involved the fact that one of the Medical Board members evaluated Mr. Dean and then sat with the rest of the Medical Board in making a determination as to whether Mr. Dean was disabled. This Court held:

> **We find no violation of the governing statues on these facts, insofar as Dr. Vohra examined Dean and provided a diagnosis and recommendation, and then voted with his fellow members of the Medical Board in the initial administrative determination to deny Dean's application.** The legislature has given the PERS Board of Trustees the authority to designate a Medical Board. The Medical Board is then charged by statute to arrange for and pass upon all required medical examinations. The Medical Board is also under a statutory duty to investigate all essential statements and certificates in connection with an application for disability retirement, and to report in writing to the board of trustees its conclusions and recommendations upon all the matters referred to it. The relevant statutes reveal a clear legislative intent to balance individual claims and rights with the costs of investigating and administering these claims and rights. An agency's interpretation of its governing law is entitled to deference, unless its interpretation is repugnant to the plain meaning or the "best reading" of the statutes. (*citations omitted*)
>
> The PERS procedure for initial determination of Dean's claim is adequate insofar as it comports with the statutes.

Later in the hearing, counsel noted that the Executive Director had instructed the analyst not to answer one of his questions. The following transpired:

> Hearing Officer: Mr. Luter.

> Mr. Luter: I don't want to argue. I just want to put it on the record
>
> Hearing Officer: It's on the record. I heard Ms. Roberts testify, and I think what she told you was that she didn't know, and that wasn't good enough for you, but that's what she testified to, but it is on the record so everybody will see it. (Vol. II, R. 78)

Surely, if a member of the Medical Board can evaluate a claimant and then sit on the panel making the determination of disability, a former member of the Medical Board can conduct an independent examination. Ms. Laughlin cites Mississippi Rule of Evidence 616 for the contention that she had a due process right to a fair hearing that included asking legitimate and relevant questions regarding Dr. Collip. Ms. Roberts did answer the question that Ms. Laughlin's attorney asked her and had Ms. Laughlin's attorney's further line of questioning been relevant to the administrative hearing she would have instructed Ms. Roberts to answer.

Most important is the fact that although the Executive Director probably should not have advised a member of his staff during the hearing whether or not to answer a particular question, the question had already been answered and it was clear that the analyst did not know the answer to counsel's question.

CONCLUSION

The record clearly supports the decision entered by the Circuit Court affirming the Order of the PERS Board of Trustees. It is clear that Ms. Laughlin's case 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 case cited by Ms. Laughlin in support of her argument that PERS did not consider her pain is a case from

the federal forum addressing a claim for disability before the Social Security Administration and is not relevant in this forum. The Board considered all of the medical evidence including the award of disability by the Social Security Administration.

This case should not be reversed and remanded as Ms. Laughlin was not denied her right to a fair hearing. Counsel for Ms. Laughlin should have been aware of her medical file prior to the hearing and prior to PERS sending him the record copy that would be introduced by PERS. The claimant and her attorney should be familiar with the medical evidence prior to filing the appeal. Counsel had ample time to prepare for this administrative hearing and had already been granted one continuance when he asked for the second. PERS adhered to the law and Regulations in processing Ms. Laughlin's claim.

This case should not be remanded on the basis that the Executive Director instructed the analyst not to answer a question regarding the number of evaluations performed by Dr. Collipp. It was clear from the testimony that the analyst responded and did not know the answer to the question.

PERS asks that this Honorable Court affirm the Memorandum Opinion and Order entered by the Circuit Court on August 2, 2007, which affirmed the Order of the PERS' Board of Trustees entered April 20, 2004.

Respectfully submitted this the 21 day of August 2008.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLEE

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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 ***Brief of Appellee*** to:

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Honorable Tomie Green
Hinds County Circuit Judge
Post Office Box 327
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This the 21 day of August 2008.

Mary Margaret Bowers, MSB[redacted]
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