IN THE SUPREME COURT OF MISSISSIPPI

EMMA HENLEY	**APPELLANT**
VERSUS	**CAUSE NO. 2008-SA-01230**
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 T. Green , Hinds County Circuit Court Judge

Honorable Matthew Y. Harris, Counsel for Appellant

Ms. Emma Henley, Appellant

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE ISSUES

I. The Circuit Court did not err in finding that the decision of the Public Employees' Retirement System denying disability benefits is supported by substantial evidence.

II. The decision of the Board of Trustees of the Public Employees' Retirement System denying Ms. Henley's claim for disability properly applies the definition of "disability" as provided for in the laws governing the administration of the disability program.

STATEMENT OF THE CASE

This matter involves an appeal filed by the Appellant, Emma Henley, wherein she seeks review of the Memorandum Opinion and Order entered by the Circuit Court February 2008. The Circuit Court upheld the decision of the Board of Trustees of the Public Employees' Retirement System (hereinafter PERS Board) entered June 22, 2004. The Board adopted the findings and recommendation of the Disability Appeals Committee to deny Ms. Henley's request for the payment of hurt-on-the-job disability benefits as defined under Miss. Code Ann. Sections 25-11-113 and 25-11-114 (Supp. 2008). Pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006) Ms. Henley filed an appeal in the Circuit Court. The Circuit Court entered its Memorandum Opinion and Order affirming the Order of the PERS Board of Trustees finding that the decision of the PERS Board was neither arbitrary nor capricious.

STATEMENT OF THE FACTS[1]

After consideration of the sworn testimony and evidence before it, the PERS Board of Trustees concluded that Ms. Henley does not qualify for the receipt of a hurt-on-the-job disability benefit pursuant to Miss. Code Ann. Sections 25-11-113 and 25-11-114. The Circuit Court agreed with the decision of the PERS Board and affirmed its Order denying disability benefits.

Ms. Henley was employed with the Mississippi Department of Corrections as a Correctional Officer IV. At the time of the hearing Ms. Henley had accumulated 11.25

[1] Reference to the transcript record is indicated by "V." for the volume and "P." followed by the appropriate page number.

years of service credit. (Vol. 2, P. 125) Ms. Henley alleged that she sustained an accident on December 30, 2001, which resulted in a disability. She testified that she was attempting to open a Sallie-Port gate going into one of the compounds at the prison when she felt a sharp pain in the lower part of her back. (Vol. 2, Pp. 35, 61) The incident occurred between 6:00 and 6:30 P.M.; however, Ms. Henley was able to continue to work the remainder of the night until midnight. (Vol. 2, P. 37) The incident took place on Sunday, and Ms. Henley returned to work on Monday. (Vol. 2. P. 39) It was not until several days later that Ms. Henley went to the emergency room. (Vol. 2, P. 45) Ms. Henley testified that prior to the incident she had pre-existing medical problems with restrictions for her employment. She was not able to work more than eight (8) hours nor climb, thus, she could not do tower duty. (Vol. 2, P. 50) She was off work for a period of time after January 2, 2002 and returned to light duty work on March 11. She worked on light duty for approximately six (6) weeks working four hours a day. (Vol. 2, P. 42, 43)

Ms. Henley had conflicting reports on how to deal with the medical problems she claimed. Dr. Capel suggested that she have surgery on her back while Dr. Holaday did not recommend surgery. (Vol. 2, P. 52) Dr. Holaday in office notes states:

> **RADIOGRAPHIC EVALUATION:** The patient's MRI scan of the lumbar spine from Greenwood Leflore Hospital dated 1-11-02 was reviewed. There are **minor degenerative changes including mild bulging of the intervertebral disc at L4-5 and L5-S1**. The AP diameter of the spinal canal appears adequate and the neural foramina do not appear significantly compromised on the axial or parasagittal images. The alignment of the lumbar vertebrae is satisfactory. Also available for review is the patient's lumbar discogram and post discogram CT scan.
>
> **IMPRESSION:**
> 1. Chronic and intermittent low back pain with occasional radiation into the lower extremity, left greater than right.

2. **No objective focal deficit on current exam. No objective evidence of radiculopathy by the EMG Nerve conduction study.**
3. **Minor degenerative changes by MRI.**

RECOMMENDATIONS: This patient describes persistent low back and occasional bilateral lower extremity pain following an on-the-job injury. **The distribution of her pain and paresthesias do not fit a dermatomal pattern. There is no objective evidence of radiculopathy on exam or by EMG nerve conduction study**. Her MRI scan demonstrates minor degenerative changes but no evidence of significant herniated intervertebral disc or of neural impingement. There is no evidence of malalignment of the vertebral column or of significant instability. For these reasons, **I believe that the patient's changes of obtaining significant relief with any surgical intervention are small. I do not believe that provocative discography is adequate to justify the extensive surgical procedure suggested in this patient's case**..... I believe that this patient has reached maximum medical improvement and I believe that she will have a 5-7% permanent impairment as a result of her injury. (Vol.2, Pp.175-176)

The record is conflicting as to Ms. Henley's termination from employment. Ms. Johnson, the representative for the employer attending the hearing, testified that generally when someone is on medical leave for a year they are dismissed. (Vol. 2, Pp. 64-65) She, however, stated that she did not have first hand knowledge as to why Ms. Henley was terminated. It was pointed out by the Hearing Officer that the form completed by Barbara Holloway, Deputy Warden, noted that Ms. Henley was terminated for reasons other than medical reasons and that it was her opinion she could perform her work, however, it was also her opinion that Ms. Henley was not motivated toward continuing employment. (Vol. 2, Pp. 65, 136-137) A hearing was held relative to Ms. Henley termination and her attorney stated that he attended the hearing with her for the purpose of finding out what the Warden was going to do and whether her job was going to remain open. He claimed that she was terminated due to a disability. There is a termination letter in the record.

(Vol. 2., P. 136) However, there were no physicians present at the hearing. (Vol. 2, Pp. 71, 73)

The Hearing Officer relayed to Ms. Henley and her attorney that under the statute governing the administration of the disability program there must be a trauma or accident. She then stated "another problem in the record is that most of the record states the problem is degenerative, and that would not be duty related". (Vol. 2, P. 66) The Hearing Officer also informed the parties that "[S]ometimes degenerative disease can cause a ruptured disk. The diskogram is fairly controversial". (Vol. 2,P. 67)

During questioning the following was noted by Dr. Meeks, a member of the Disability Appeals Committee:

> Q. What kind of impression did you get from Dr. Anderson and Dr. Capel as to why you were having so much trouble with back pain. They did that nerve conduction test on your leg – remember the test where they stick the needles. Do you remember that kind of test you had done?
>
> A. Yes, sir.
>
> Q. And **that didn't show any nerve damage in your leg, and the MRI of your back didn't show any significant – it showed a little bulge, but a lot of people who don't have back pain have bulges along their disks there.** Did they explain to you why they thought you were having this much trouble with your back and legs?
>
> A. **I got ruptured disks.**
>
> Q. **Well, it didn't really show a ruptured disk on that MRI.** It didn't show up that way, a ruptured disk. You know, where there is actually a break in it. (Vol. 2, P. 51) [*Emphasis Added*]

It appears that Dr. Anderson in response to a questionnaire from INTRCORP noted that Ms. Henley's current diagnosis is "degenerative disc disease L 4-5 & L 5-5". (Vol. 2, P. 103) Reports from the radiology department of the Greenwood LeFlore

Hospital in January 2002 indicate that Ms. Henley at the L4-5 has minimal left lateral disc bulge. (Vol. 2, P. 124)

Dr. Collipp performed an independent medical evaluation in March 2004 and concluded that "Ms. Henley may return to her regular occupation with the state". (Vol. 2, Pp. 158-160)

A Functional Capacity Evaluation which measures an individual's physical capabilities, done in January 2004, concluded as follows:

> RECOMMENDATIONS: This patient was quite difficult to evaluate as she was very focused on her pain. There seemed to be a great deal of pain amplification, although this is not to suggest that her pain is not genuine, but that she may tend to overreact to her symptoms. It is felt that the patient is capable of much more than she demonstrated, however, was simply self-limited with complaints of pain. At this time, no determination can be made on abilities as minimal testing was performed. (Vol. 2, P.. 163)

The Disability Appeals Committee did an extensive review of the medical evidence and summarized it as follows:

> Ms. Henley was seen by Dr. Anderson in the emergency room on January 5, 2002, **and it was thought that she had suffered a back strain**. She was again seen on January 16, 2002, by Dr. Anderson who again wrote that he **did not believe Ms. Henley suffered a ruptured disc and he referred to the MRI**. She was seen with some improvement on January 23, 2002, February 6 and 23, 2002. She was taken off of work for a period of time and returned to modified work on March 11, 2002, after she told Dr. Anderson she was improving. Apparently, however, she continued to complain of pain and was provided with a TENS unit on May 1, 2002, and that is also the date that she was **diagnosed with a bulging lumbar disc**. She was again taken off of work. On May 29, 2002, Dr. Anderson noted that Ms. Henley was continuing to get worse from the drive to and from work. At that point, she was referred to a neurosurgeon.
>
> Ms. Henley first saw Dr. Capel on June 25, 2002, for complaints of low back pain, left leg and left hip pain. She reported to Dr. Capel that she injured her back while pulling on a gate at work in

December 2001. **An MRI was ordered and Doctor Capel interpreted it as showing degeneration without collapse at the L4-5 and L5-S1 discs.** He also noted a far lateral left L5-S1 disc herniation producing foraminal stenosis at that segment. **Conservative treatment was recommended** along with additional testing. **Yet, the MRI report dated January 11, 2002, (p. 39S, 32, 41 & 60 of the record), showed only a disc bulge with minimal mass effect on the anterior aspect of the thecal sac.** On August 21, 2002, **Ms. Henley underwent an Electromyography and nerve conduction study by Dr. Graeber which was interpreted as normal.** Dr. Graeber wrote that Ms. Henley has prominent pain in her low back and left leg but **no clear nerve lesion was detected.**

On January 24, 2003, Dr. Lassiter, a Pain Management specialist performed a discography and noted L4-5 discography causing back pain only and discography at L5-S1, reproduction of pain was both low back and left leg pain of which Ms. Henley had before complained. **Following the discogram, Dr. Capel recommended anterior/posterior L4-5/L5-S1 fusion with exploration of the left nerve root.** Ms. Henley underwent an Independent Medical Evaluation by **Dr. Holaday** on April 15, 2003, and **he opined that Ms. Henley has chronic and intermittent low back pain with occasional radiation into the lower extremity, left greater than right. There was no objective focal deficit on current exam and no objective evidence of radiculopathy by the EMG nerve conduction study.** He also noted **minor degenerative changes by MRI.** Dr. Holaday noted that **while Ms. Henley had complained of pain following an on the job injury, her pain did not follow a dermatomal pattern and there was no objective evidence of radiculopathy on exam or by EMG. The MRI noted only minor degenerative changes. Dr. Holaday** wrote that he **did not believe that discography was adequate to justify back surgery.** He recommended conservative treatment and limited her lifting to 20-25 pounds. He assigned a 5% to 7% impairment for the purposes of the Workers' Compensation case. He also wrote on his Statement of Examining Physician form that Ms. Henley was not to perform frequent bending or stooping.

Ms. Henley returned to Dr. Anderson on June 2, 2003, and he noted that surgery had been recommended by Dr. Capel but a second opinion did not recommend surgery, so the surgery had been cancelled. Ms. Henley was seeing Dr. Anderson for a Functional Capacities Evaluation. On September 3, 2003, Ms. Henley returned to Dr. Anderson who noted that she continued to complain of back and leg pain, but that she had decided not to have

surgery. She continued to take her oral medications. Dr. Anderson noted on his Statement of Examining Physician, that Ms. Henley's prognosis for recovery was poor. He wrote that she has a ruptured disc, but he did not outline limitations or restrictions.

On June 24 and 26, 2003, Ms. Henley **underwent a Functional Capacity Evaluation** and the tester wrote that throughout the exam, Ms. Henley attempted to maintain the sciatic neural tension slack about the left lower extremity. The test was not completed because of pain, but the tester believed her alleged pain and dysfunction was in proportion to her general movement patterns and **did not appear to show symptom magnification**. He believed Ms. Henley to have a mechanical lumbar discogenic lesion and that she was unable to work and her condition was guarded.

A Vocational Rehabilitation Report No. 1 was created on August 15, 2003, by a Mr. David Stewart, an expert in Vocational Rehabilitation. Mr. Stewart concluded that Ms. Henley did not have well developed transferable skills and that her range or access to occupations is severely constricted. He wrote that she had significant loss of wage earning capacity. Vocational Rehabilitation Report No. 2 related several job opportunities of which Ms. Henley had followed up.

A Functional Capacity Evaluation was performed on January 7, 2004, and during that testing, it was noted that Ms. Henley was very focused on her pain and there **seemed to be a great deal of pain amplification**, possibly noting that Ms. Henley overreacted to her symptoms. The tester noted that Ms. Henley failed 5/5 of the hand tests showing lack of effort. She believed Ms. Henley was capable of performing more than she had demonstrated but was self limiting because of her complaints of pain. Thereafter on March 5, 2004, Ms. Henley was evaluated by Dr. Collipp, an expert in the field of Disability Medicine. He noted that **her history reflected no documented neurological deficit and complaints of disability outweigh her physical abnormalities. The EMG and MRI were effectively normal. Dr. Capel's neurological exam was normal even though he diagnosed L5 radiculitis. And discograms are not recognized as reliable by many in the medical community**.

On physical exam, Dr. Collipp found that Ms. Henley had normal range of motion of her lower extremities and her low back. He noted that she did not apply full power in testing and complained of pain. She had normal reflexes and her ambulation was not

associated with her behavior. **Dr. Collipp concluded that there was overwhelming inconsistencies with Ms. Henley's complaints and exam and her participation was poor. He believed she was attempting to deceive him. He wrote that she was able to return to work without restriction.** (Vol. 2, Pp. 23-25) [*Emphasis Added.*]

SUMMARY OF THE ARGUMENT

The Disability Appeals Committee provided a thorough summary of the medical evidence and detailed analysis before concluding that Ms. Henley has not satisfied her burden of proving that she is disabled as the result of a hurt-on-the-job injury. The Order of the PERS Board of Trustees is supported by substantial evidence. In order to qualify for a disability benefit under the PERS law, Ms. Henley would have to prove that the condition upon which she bases her claim was the result of an on-the-job injury that resulted in a disability, and was the direct cause of her withdrawal from state service. The record clearly supports the Order of the PERS Board of Trustees, affirmed by the Circuit Court, which took into consideration all of the medical evidence offered by Ms. Henley. The medical evidence does not establish that Ms. Henley's ailments are disabling or the result of an on-the-job injury and therefore, she is not entitled to disability as determined by the Circuit Court.

The recommendation of the Disability Appeals Committee and Order of the PERS Board of Trustees were correctly determined by the Circuit Court to be supported by substantial evidence and is neither arbitrary nor capricious. The Board made its decision based on substantial evidence, PERS' Regulations, as well as the relevant statutes defining disability under Mississippi law. Based on the evidence and the testimony

elicited at the hearing appearing in the record, it is clear that the only decision the Board of Trustees could, and which was upheld by the Circuit Court, was that Ms. Henley does not meet the requirements for a hurt-on-the-job disability benefit under PERS law.

ARGUMENT

INTRODUCTION

The Public Employees' Retirement System of Mississippi (PERS) was established in 1953 to provide retirement and other benefits to covered employees of the state, and its political subdivisions and instrumentalities. Chapter 299, Mississippi Laws of 1952.

In addition to service retirement benefits, disability retirement 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. Sections 25-11-113 and 25-11-114 (Supp. 2008).

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. Miss. Code Ann. Section 25-11-119 (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. Miss. Code Ann. Section 25-11-120.

Disability, as defined under PERS law, Miss. Code Ann. Section 25-11-113(1)(a), is:

> . . . 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(1)(a) 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 such incapacity is likely to be permanent, and that the member should be retired. . .

The question before the PERS Medical Board and the PERS Board of Trustees was whether Ms. Henley's claim meets the statutory requirements for the receipt of a hurt-on-the-job disability benefit. The statutory requirements for hurt-on-the-job disability benefits are set forth in Section 25-11-114(6):

> Regardless of the number of years of creditable service, upon the application of a member or employer, **any active member who becomes disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty**, provided that the medical board or other designated governmental agency after a medical examination certifies that the member is mentally or physically incapacitated for the further performance of duty and such incapacity is likely to be permanent, may be retired by the board of trustees on the first of the month following the date of filing the application but in no event shall the retirement allowance commence before the termination of state service. The retirement allowance shall equal the allowance on disability retirement as provided in Section 25-

> 11-113 but shall not be less than fifty percent (50%) of average compensation.
>
> Permanent and total disability resulting from a cardiovascular, pulmonary or musculo-skeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability. A mental disability based exclusively on employment duties occurring on an ongoing basis shall be deemed an ordinary disability [*Emphasis Added*].

The PERS Board of Trustees adopted the recommendation of the Disability Appeals Committee to deny disability benefits. The Order of the Board was properly affirmed by the Circuit Court.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit Court Practice limits review by this Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence; or (2) was arbitrary or capricious; or (3) was beyond the authority of the Board to make; or (4) did not violate a statutory or constitutional right of Ms. Henley. ***Public Employees' Retirement System v. Dean***, 983 So.2d 335, 339(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).

This Honorable Court stated in ***Public Employees Retirement System v. Dishmon***, 797 So.2d at 891 that there is a rebuttable presumption in favor of a PERS ruling. Also See: ***Brinston v. Public Employees' Retirement System***, 706 So.2d at 259. A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. ***Public Employees' Retirement System v. 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; ***Melody Manor Convalescent Center v. Mississippi State Department of Health,*** 546 So. 2d 972, 974 (Miss. 1989); ***United Cement Company v. Safe Air for the Environment***, 558 So. 2d 840, 842 (Miss. 1990); Also see: ***Brakefield v. Public Employees' Retirement System***, 940 So. 2d at 948. In ***Mississippi State Tax Commission v. Mississippi-Alabama State Fair,*** 222 So. 2d 664, 665 (Miss. 1969), this Court stated:

> Our Constitution does not permit **the judiciary of this state to retry de novo matters on appeal from administrative agencies and are not permitted to make administrative decisions and perform the functions of an administrative agency.** Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. **The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency.** [*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." It is difficult to comprehend how Ms. Henley can argue that the Disability Appeals Committee disregarded the record facts in light of the detailed summary of the medical evidence presented in the Committee's recommendation. Several different physicians with the necessary medical training to review these reports have done so. 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, the 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 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. Henley. ***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*** this Court held:

> **A reviewing court cannot substitute its judgment for that of the agency or reweigh the facts of the case.** Chancery and Circuit Courts are held to the same standard as this Court when reviewing agency decisions. When we find the lower court has exceeded its authority in overturning an agency decision we will reverse and reinstate the decision. 674 So.2d at 1253 [*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. 2004) the 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." Clearly, PERS has presented enough evidence to support its finding that Ms. Henley is not disabled.

The Order of the PERS Board of Trustees was supported by substantial evidence, and was neither arbitrary nor capricious. PERS was within its authority in making this determination, and was not in violation of Ms. Henley's constitutional rights. Thus, the Circuit Court in its Memorandum and Opinion properly affirmed the Order of the PERS Board of Trustees entered June 22, 2004 and the Lower Court's decision should be affirmed on appeal.

I.

THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE DECISION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING 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 at 1284. Upon close reading of the record presently before this Honorable Court, it is evident that the decision of the PERS Board of Trustees, affirmed 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, 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. Henley's claim as evidenced in its most thorough analysis. 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, and the Circuit Court and now this Honorable Court with a more than adequate basis for their recommendation that disability benefits be denied and the Order of the Board of Trustees adopting the recommendation of the Disability Appeals Committee be upheld.

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*]

After a thorough review of the medical records and testimony, the Committee found no proof warranting a disability benefit. Contrary to Ms. Henley's argument that the Medical Board substituted its opinion for that of her treating physician she did have the opportunity to appeal the denial of benefits by the Medical Board to the Disability Appeals Committee. The Committee in its analysis found:

> Disability is defined as the medical incapacity for further performance of duty that is likely to be permanent and the employee should be retired. Miss. Code Ann. Section 25-11-113

(1972, as amended), also, Regulation 45A, PERS Board of Trustees, Administration of PERS Disability Benefits. **Ms. Henley has the burden** of persuading this Committee that she has suffered a duty related disability and **to establish that, she must show that she has an objective medical disability that has resulted in an occupational disability, and further that the medical condition be the result of an accident or trauma that occurred while Ms. Henley was on the job.**

This Committee certainly enjoyed meeting Ms. Henley but would like it to be reflected that Ms. Henley sat for a one hour hearing without the least bit of observable problem, yet she complains that she is not able to work, sit or stand for long periods of time. So, to evaluate the evidence that Ms. Henley and her attorney have provided this Committee, it is helpful to go through the highlights before us today. Apparently, something did happen on December 30, 2001, that caused Ms. Henley to begin complaining of back pain. **It is obvious from the objective evidence that there was no disc herniation as Ms. Henley underwent an MRI on January 11, 2002, which showed only degenerative changes with a minimal disc bulge, and certainly no impingement at L5-S1. A disc bulge is not the same thing as a ruptured disc. A ruptured disc actually is a tear or bursting of the disc that can be caused by trauma or degeneration, but a bulge is caused by degeneration.** Ms. Henley, as determined by the most accurate test on the market today, had a disc bulge, due to degeneration. Disc bulges can cause back pain in some people, but not radicular pain.

Nevertheless, Ms. Henley continued to complain of back and left leg pain, even after several types of conservative treatment so Dr. Anderson referred her to a neurosurgeon, Dr. Capel. **Doctor Capel's records show that he found no radicular pain on physical exam but he contradicts himself in his assessment that a ruptured disc is present and that Ms. Henley has radicular pain. Dr. Anderson, on the other hand, does not believe Ms. Henley has radicular pain, but has a bad back sprain. And Dr. Holaday can find nothing objective wrong with Ms. Henley and certainly nothing he would try to correct with surgery.**

And the record is replete with a variety of comments about Ms. Henley's gate and whether her leg problem is the result of back problems, or symptom magnification or whether it is just her natural gate. **The evidence from an objective standpoint is clear that Ms. Henley does not have radiculopathy so the leg problem, if any would be due to something else.**

> **The record contains two Functional Capacity Evaluations that come to different conclusions.** Although, both are clear that Ms. Henley did not complete her testing because **she complained of pain, the pain did not follow dermatomes like they should with a ruptured disc.** Also in the record is a Vocational Evaluation, but those evaluations do not address the issues before us today as we must determine whether objective proof exists to support disability and the measure assuming there is objective proof is whether Ms. Henley can return to the same job. Other jobs and the job market are not issues in this forum.
>
> After looking at all of the evidence, **it appears to this Committee that the most persuasive evidence is supported by Dr. Anderson, Dr. Holaday and Dr. Collipp, all who refer to the MRI of January 2002, and the Nerve Conductions Study,** conducted about the same time **which did not document anything objectively wrong with Ms. Henley that would be the result of an accident on the job. The only physician that found otherwise was Dr. Capel, and even he contradicted himself when his notes are carefully read.** As Dr. Holaday wrote, the consensus of the medical community is that when a discography is the only evidence of a ruptured disc and the need for surgery, then the risk of surgery would outweigh the potential results, because discography has not been proven as reliable.
>
> **This Committee finds that there is no persuasive medical evidence that Ms. Henley is disabled and that the records contain overwhelming inconsistencies in testing and symptomatology.** We therefore are not persuaded that Ms. Henley suffers from a disability that would entitle her to benefits in the PERS forum. We therefore recommend that her request for Duty Related Disability be denied. (Vol 2. Pp. 26-28) [*Emphasis Added*]

This thorough analysis of the medical documentation refutes Ms. Henley's allegation that PERS disregarded the evidence in the record. PERS looks for objective medical evidence to support a claim for disability. Ms. Henley cites the case of ***Public Employees' Retirement System v. Thomas***, 809 So. 2d 690 (Miss. App. 2001) for the proposition that it cannot reject the only evidence presented when no contrary view of the evidence is presented. In the ***Thomas*** case the Recommendation of the Disability

Appeals Committee, unlike the Recommendation in the instant case, merely recited the facts, summarized the testimony and then concluded that there was "insufficient objective to support Mr. Thomas' claim that he is permanently mentally or physically incapacitated from performing his job as a school teacher". (Exhibit One) This is the same in the recommendations in the cases of ***Marquez v. Public Employees' Retirement System***, 774 So. 2d 421 (Miss. 2000) (Exhibit Two) and ***Public Employees' Retirement System v. Dearman***, 846 So. 2d 1014 (Miss. 2003) (Exhibit Three) cited by Ms. Henley

In the instant case the Committee provided a thorough analysis of the medical documentation offered by Ms. Henley in support of her claim. The contrary view of the evidence offered is found within the medical records themselves.

The Committee is comprised of two physicians and a nurse/attorney who are clearly trained to review the medical documentation offered in support of Ms. Henley's claim. According to the Committee Dr. Capel noted that the results of an MRI showed degeneration without collapse at the L4-5 and L5-S1 discs". He recommended conservative treatment. An MRI dated January 11, 2002 "showed only a disc bulge". Dr. Graeber interpreted the nerve conduction study and electromyography as normal.

The evidence was contradictory as to whether Ms. Henley needed surgery. During the testing for a functional capacity examination it appeared that Ms. Henley exemplified a great deal of pain amplification. With regard to the diagnosis of a bulging lumbar disc the radiologist noted January 111, 2002 that there was a "minimal left lateral disc bulge" while Dr. Anderson reporting on Ms. Henley's return to work status noted her diagnosis as "bulging lumbar disc" dated May 1, 2002. It appears the Committee was correct in noting that the first date of her diagnosis with a bulging lumbar disc was May 1, 2002 and

again they correctly noted that the MRI report dated January 11, 2002 showed only a disc bulge with minimal mass.

Ms. Henley notes that one of her physicians noted that her prognosis was poor. The Circuit Court found that "[W]hile her doctor has stated that her prognosis for recovery is poor, this is not sufficient evidence for the purposes of establishing disability".

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

Moreover, Miss. Code Ann. § 25-11-114(6) provides in pertinent part: "Permanent and total disability resulting from a **cardiovascular, pulmonary** or **musculo-skeletal condition** which was **not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability**." [*Emphasis Added*] When requested to interpret this statute, the Mississippi Attorney General in MS AG Op. Walker (March 1994), 1994 WL 117329 (Miss. AG) responded with the following:

> In response to your questions, in order to qualify for line of duty disability benefits, a member's disability must be a direct result of an accident or traumatic event occurring in the performance of duty. While unable to locate a Mississippi statute or case defining the term "**traumatic event**", it has been defined by the court of another jurisdiction as **an event in which a worker involuntarily meets with a physical object or some other external matter and the worker is a victim of a great rush of power that he himself did not bring into motion. This definition was held not to include physical injuries resulting from a slip and fall accident and physical conditions resulting from an excessive work effort**. See Kane v. Board of Trustees, 498 A.2d 1252 (N.J. 1985).

> The New Jersey statute at issue in Kane did not include the term 'accident', which is included in section 25-11-114. **The term 'accident' is defined in Black's Law Dictionary as a befalling; an event that takes place without one's foresight or expectation; chance; contingency; often, an undersigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as to die by an accident.** [*Emphasis Added*]

This case must not be reversed as several physicians reviewed Ms. Henley's application and medical records. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee composed of two physicians and a nurse trained to review the medical reports submitted in support of Ms. Henley's claim. 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. The "weight given to the statement of a personal physician is determined by PERS, and it is not for the courts to reweigh the facts". ***Public Employees' Retirement System v. Stamps***, 898 So.2d at 674; ***Byrd v. Public Employees' Retirement System***, 774 So.2d at 438 As noted in ***Public Employees' Retirement System v. Howard,*** 905 So.2d at 1288, "determining whether an individual is permanently disabled is better left to physicians, not Judges." Several physicians reviewed Ms. Henley's application and medical documentation.

Clearly, the evidence indicates that the problem Ms. Henley has with her back is the result of degenerative changes and was not the result of an accident or traumatic event.

It is well documented in the medical evidence presented by Ms. Henley that she is not entitled to hurt-on-the-job disability benefits 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. Following a determination of disability it must then be determined whether the claimant sustained a hurt-on-the-job injury resulting in the disability.

Based on the record and the law regarding hurt-on-the-job disability, there was an overwhelming lack of evidence to support the award of disability. It is the burden of the claimant to prove she is in fact disabled as the result of an on-the-job injury. The disability Ms. Henley contends that she now suffers from was not the direct result of a trauma or an accident sustained on the job. The problems she is having are most likely the result of an underlying condition, degeneration that was aggravated by an on-the-job injury. Moreover, as previously mentioned, Miss. Code Ann. Section 25-11-114(6) provides that "Permanent and total disability resulting from a ....musculo-skeletal condition that was not the result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability". Musculosketal is defined as relating to muscles and the skeleton. Stedman's Medical Dictionary, 25th Edition 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. Henley, as of her date of termination, was not permanently disabled as the result of an on the job injury as defined in Miss. Code Ann. § 25-11-114. 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 as well as the ability to apply the law as written.

This Honorable 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. As argued the decision of the PERS Board of Trustees is supported by substantial evidence, and, thus is neither arbitrary nor capricious.

In this case the Disability Appeals Committee noted that "the records contain overwhelming inconsistencies in testing and symptomatology". (Vol. 2, P.28) In ***Public Employees' Retirement System v. Howard***, 905 So.2d at 1287 the Court noted that "it is for PERS , as the fact finder, to determine which evidence is more believable and carries the most weight". The Court then commenting on evidence that is contradictory stated:

> Sorting through voluminous and contradictory medical records, then determining whether an individual is permanently disabled is better left to physicians, not judges. This is the idea behind the creation and expansion of administrative agencies. "The existence within government of discrete areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the *raison d'etre* of the administrative agency." (Citation omitted) "Because of their expertise and the faith we vest in it, we limit our scope of judicial review."(Citation omitted) ("The agency that works with a statute frequently, if not daily, that sees it in ... relation to other law in the field, necessarily develops a level of insight and expertise likely beyond our ken. When such agencies speak, courts listen.") (Citation omitted) ("We also recognize that the board has a certain amount of experties [sic] in its field and has

> a reasonable latitude in the exercise of sound judgment in its performance of its specialized function.").
>
> 905 So.2d at 1287-1288 Also see. ***Public Employees' Retirement System v. Smith***, 880 So. 2d 348, 352 (Miss.App. 2004)

In ***Public Employees' Retirement System v. Smith***, 880 So. 2d 348 (Miss App. 2004) Smith sought hurt-on-the-job disability benefits from the Public Employees' Retirement System. Smith was employed as a laundry worker at the Mississippi State Hospital in Whitfield, Mississippi where he claimed he was injured while lifting laundry and he felt a sharp pain in his back and reported this to his supervisor. The Court noted that Smith had a significant history of multiple back injuries, accidents and medical treatment. In this case Ms. Henley testified that she was working with certain restrictions from pre-existing medical problems where she was unable to climb, thus, could not perform tower duty. The ***Smith*** Court found there was substantial evidence to support PERS' finding that Smith's disability was not the direct result of the incident at the State Hospital. This Court stated:

> PERS, through its medical doctors, was in a far better position to evaluate Smith's medical history and the evidence presented to decide whether there was a direct causal connection between Smith's disability and the incident on November 11, 1992, at the State Hospital.

This case should conclude in the same manner as did the ***Smith*** case. Ms. Henley has failed to meet her burden of proving that she suffers from a disabling condition as a result of an on-the-job injury entitling her to hurt-on-the-job disability benefits under Miss. Code Ann. §25-11-114. The decision of the Board of Trustees, is supported by

substantial evidence thus, the Circuit Court's decision affirming the Board's Order must be upheld on this appeal.

II.

THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. HENLEY'S CLAIM FOR DISABILITY PROPERLY APPLIES THE DEFINITION OF "DISABILITY" AS PROVIDED FOR IN THE LAWS GOVERNING THE ADMINISTRATION OF THE DISABILITY PROGRAM.

The Circuit Court and PERS have applied the same definition of disability as provided for in statute. Ms. Henley contends that because the Department of Corrections in a letter to Ms. Henley terminated her employment on their determination that she has a disability and the fact that there were no reasonable accommodations that could be made for her "the MDOC squarely meet the definition of disability as provided by state law". There is no authority granting the employer the ability to make a determination as to whether a claimant meets the statutory definition of disability for a benefit from PERS. Clearly Miss. Code Ann. Section 25-11-113 provides at the initial administrative level that a disability benefit may be provided "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".

In determining whether a disability exists the following definition is applied:

Disability, as defined under PERS law, Miss. Code Ann. Section 25-11-113, is:

> . . . 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 question before the PERS Medical Board and the PERS Board of Trustees was whether Ms. Henley's claim meets the statutory requirements for receipt of a hurt-on-the-job disability benefit. The statutory requirements for hurt-on-the-job disability benefits are set forth in Section 25-11-114(6):

> Regardless of the number of years of creditable service upon the application of a member or employer, **any active member who becomes disabled as a direct result of an accident or traumatic event resulting in a physical injury occurring in the line of performance of duty**, provided that the medical board or other designated governmental agency after a medical examination certifies that the member is mentally or physically incapacitated for the further performance of duty and such incapacity is likely to be permanent, may be retired by the board of trustees on the first of the month following the date of filing the application, but in no event shall the retirement allowance commence before the termination of state service. The retirement allowance shall equal the allowance on disability retirement as provided in Section 25-11-113 but shall not be less than fifty percent (50%) of average compensation.
>
> Permanent and total disability resulting from a cardiovascular, pulmonary or musculo-skeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability. [*Emphasis Added*].

As noted above Ms. Henley is not entitled to the receipt for any disability benefit from the State. As to the statements from the Department of Corrections this Court in ***Public Employees' Retirement System v. Dishmon*** 797 So.2d at 894 stated:

> PERS convincingly argues that **the opinion of a lay person should not be taken as conclusive evidence of disability**. The Committee consisted of at least two medical doctors who were able to directly observe Dishmon and question her as to her maladies. **There is a rebuttable presumption in favor of the action of an administrative agency, and the burden of proof is on the one challenging its action.** Dishmon had her opportunity to prove to the board that her condition was a permanent disability and apparently failed in her efforts. [*Emphasis added*]

The PERS Board of Trustees adopted the recommendation of the Disability Appeals Committee to deny disability benefits and its Order was properly affirmed by the Circuit Court.

CONCLUSION

Based on the record before this Court, the decision entered by the Circuit Court affirming the Order of the PERS Board of Trustees is clearly supported by substantial evidence and is neither arbitrary or capricious and, thus, must be affirmed. The Disability Appeals Committee wrote a thorough summary of the medical documentation and a comprehensive analysis of that information in making its recommendation to deny Ms. Henley's claim for hurt-on-the-job disability benefits.

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 the Appellant. Ms. Henley'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 PERS Board of Trustees respectfully requests this Honorable Court affirm the Memorandum Opinion and Order of the Circuit Court entered February 28, 2008, denying hurt-on-the-job disability benefits to Ms. Henley.

Respectfully submitted on this the **26** day of March 2009.

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 Response of Appellee to:

Honorable Matthew Y. Harris
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Honorable Tomie Green
Hinds County Circuit Court Judge
First Judicial District
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This the **26** day of March 2009.

MARY MARGARET BOWERS, MS[redacted]
SPECIAL ASSISTANT ATTORNEY GENERAL