

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMMA HENLEY

PLAINTIFF/APPELLANT

VS.

CASE NO.: 2008-TS-01230

PUBLIC EMPLOYEES RETIREMENT SYSTEM

DEFENDANT/APPELLEE

PLAINTIFF'S REPLY BRIEF

COMES NOW, Plaintiff Emma Henley, and files this her Reply Brief in Support of her Appeal, and would submit to this Court the following:

STATEMENT OF THE CASE

Emma Henley applied for disability through the Public Employees' Retirement System (PERS) on July 21, 2003. Transcript of Record at Volume 2, Pages 129-130. She was denied PERS disability benefits because the PERS Medical Board held there was insufficient objective evidence to support her claim that her medical condition prevented her from performing her previous employment duties. Id. at 222. Ms. Henley appealed that decision. Id. at 218. The PERS Board of Trustees also found in favor of the PERS Medical Board, adopting their recommendation and denying disability benefits to Ms. Henley. Id. at 20. Henley then appealed that decision to the Circuit Court of Hinds County which affirmed the decision of the Disability Appeals Committee. Id. at 16; R. at Vol. 1, Pages 5-10. At that time, Ms. Henley filed her Notice of Appeal to the Mississippi Supreme Court. R. at Vol. 1, Page 11.

STATEMENT OF THE FACTS

Henley was employed as a Corrections Officer for nearly twelve years with the Mississippi Department of Corrections (MDOC). Id. at 74. On December 20, 2001, Henley injured her back at work. Id. at 152. She continued to work her shift that day even though the pain in her back became worse as the night went on. Id. at 37-38. By the next day, she felt pain into her hips and down both legs. Id. at 39. She tried to treat the injury with pain relievers and sore muscle cream and continue to work. Id. at 41. The pain continued to worsen and within a few weeks, Henley was forced to leave work and seek emergency treatment at Greenwood LeFlore Hospital. Id. at 54 and 193. She had no prior history of back or leg pain and was diagnosed with lumbar radiculopathy and a herniated disk was suspected. Id. at 170. Henley was taken off work at that time. Id.

Several of the doctors Henley saw found significant damage to her back. First, Dr. Walter Moses, Jr. who saw her at the emergency room, Dr. William Anderson, III, and then Dr. Winston Capel. Dr. Moses diagnosed the injury. Id. Dr. Anderson ordered an MRI which revealed a disc bulge and loss of disc hydration at L4-5 and L5-S1. Id. at 201.

Henley was released and returned to work on March 11, 2002, but she continued to have severe pain in her back, hips, and both legs and had great difficulty performing her job duties. Id. at 189-90 and 44. On May 1, 2002, Dr. Anderson took Henley back off work and prescribed a TENS unit which did not help. Id. at 187-188. When she returned in even greater pain, he referred her to a neurosurgeon, Dr. Winston Capel. Id. at 203-204.

Dr. Capel diagnosed left L5 radiculopathy, low back pain, and disc degeneration at L4-5 and L5-1. Id. He prescribed aquatic therapy, epidural steroid injections and ordered an EMG

nerve conduction study. Id. Dr. Michael Graeber performed the study and found Henley to have prominent pain in her lower back and left leg. Id. at 206. She then underwent a provocative lumbar discography at L3-L4, L4-L5 and L4-S1 after which Dr. Capel recommended a combined anterior and posterior diskectomy and fusion. Id. at 197-200.

At the request of her workers' compensation carrier, Henley underwent an independent medical evaluation by Dr. Howard Holaday. Id. at 175-76. Holaday recommended against the surgical intervention suggested by Dr. Capel, found Henley to have reached MMI with minimal impairment, and recommended conservative treatment with minimal restrictions. Id. Henley submitted a Request for Limited Duty Assignment, requesting a position that met her restrictions. Id. at 144. The request was denied. Id.

Dr. Anderson referred Henley to Hill Rehab Services for a FCE which provided that Henley was unable to stand and/or walk without a major LLE limp and that she was disqualified for any material handling while in a standing/walking posture. Id. at 84-86. Chris Hill gave her even stricter limitations and held that she was unable to work at that time and that her prognosis for returning to work was "guarded at best." Id.

Henley remained off of work while she received treatment directed by her treating physician Dr. Capel. Id. She was terminated from her employment on June 27, 2003 pursuant to a Letter of Termination issued by the MDOC. Id. at 137. That letter provided Henley's termination was based upon the findings that resulted from the MDOC Administrative Review Hearing held on May 21, 2003 on the grounds that Henley had a disability prohibiting her from performing her job and that MDOC could not make any reasonable accommodations without undue hardship to the MDCC. Id.

Henley then applied for PERS disability benefits on July 21, 2003. *Id.* at 129-30. Part of that application included a Statement of Examining Physician submitted by Dr. Anderson, diagnosing Henley with a ruptured lumbar disc, described as “severe” and that prognosis for recovery was “poor.” *Id.* at 181. Dr. Capel also submitted a Statement of Examining Physician describing Henley’s condition as “severe.” *Id.* at 196. There was some dispute between the physicians as to whether Henley had reached MMI. *Id.*

Henley then underwent a FCE ordered by the PERS Medical Board, performed by Charlene Tony, OTR. *Id.* at 162-65. There was no determination of Henley’s abilities at that time because the evaluation could not be completed due to the severe pain that Henley was experiencing. *Id.* In fact, she cried throughout most of the manual testing. *Id.* The PERS Medical Board then directed Henley to undergo an IME with Dr. David Collipp who made note of Henley’s expressions of pain, but did not credit them as being truthful. *Id.* at 158-60. In fact, Collipp stated Henley was deceiving him, was already past MMI, and could return to work with no restrictions. *Id.* This was in direct contradiction to Henley’s treating physician, Dr. Anderson, who had ordered Henley to remain off work for an undetermined time. *Id.* at 191.

Apparently, based on Dr. Collipp’s unfounded diagnosis, Henley was denied PERS disability benefits based on a finding that there was insufficient objective evidence to support the claim that she was unable to perform her duties as a Correctional Officer IV due to her medical condition. *Id.* at 222.

Even though PERS has attempted to say that Henley’s condition was pre-existing, she never missed work because of back pain prior to her injury on December 30, 2001. *Id.* at 74. Her condition has progressively worsened since the injury so that, not only is she unable to work,

but she also experiences great difficulty in performing daily tasks. Id. at 75 and 48-49. On August 15, 2003, Henley underwent a vocational evaluation by David E. Stewart, a Senior Rehabilitation Specialist, that revealed Henley's range of access to occupations is severely restricted. Id. at 89-93.

SUMMARY OF THE ARGUMENT

PERS wrongfully denied Henley disability benefits. Their adverse determination is arbitrary and capricious because it was not supported by substantial evidence contained in the record. The record reflects medical evidence necessary to support a finding that Henley is indeed permanently disabled and unable to perform the duties of her previous employment. She is entitled to disability benefits pursuant to the Mississippi Code.

The record clearly shows that Henley's condition upon which she bases her claims was the result of an on-the-job injury resulting in a disability that was the direct cause of her withdrawal from state service. The Appellee claims that it has taken all of the medical evidence offered by Henley into consideration and that it does not establish a disability. This is blatantly incorrect.

The Board's decision was not based on substantial evidence considering they never personally examined or treated Henley. They only considered the opinions of the people they sent Henley to see rather than Henley's own treating physicians who had seen her multiple times. It is only logical that medical personnel who had only seen Henley on one occasion and were employed by PERS would give an opinion in favor of PERS. The opinions of Henley's treating physicians should have been given greater weight. Instead, they were completely disregarded.

ARGUMENT

An administrative agency's decision must be supported by substantial evidence, cannot be arbitrary or capricious, must be within the scope or power granted to the agency, and cannot violate one's constitutional rights. *Pub. Employees' Ret. Sys. v. Dozier*, 995 So.2d 136, 138 (Miss. Ct. App.2008)(Quoting *Pub. Employees' Ret. Sys. v. Marquez*, 774 So.2d 421, 425 (Miss. 2000)).

1. The Circuit Court Erred In Affirming The Board Of Trustees' Denial Of Pers Disability Benefits to Henley As The Board's Decision Was Not Supported By Substantial Evidence and Was Arbitrary and Capricious.

The following definition is used by the Public Employees' Retirement System Medical Board in determining disability.

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 is within the same general territorial area, without material reduction in compensation. Miss. Code Ann. 25-11-113(1)(a) (Rev. 2007).

Under this definition, the Circuit Court should have found that the evidence did not support PERS's denial of disability benefits.

The Mississippi Supreme Court has defined "substantial evidence" as "evidence which affords a substantial basis of fact from which the issue can be reasonably inferred. *Dozier*, 995 So.2d at 138 (Quoting *Pub. Employees' Ret. Sys. v. Dearman*, 846 So.2d 1014, 1016 (Miss. 2003)). If an agency's decision "is not done according to reason and judgment, but depending on will alone," it is arbitrary. *Case v. Pub. Employees' Ret. Sys.*, 973 So.2d 301, 311 (Miss. Ct. App. 2008) (Quoting *Miss. State Dept. of Health v. Natchez Comty. Hosp.*, 743 So.2d 973, 977

(Miss. 1999)). A capricious decision is one that is made “without reason, in a whimsical manner, implying either a lack of understanding or of disregard for the surrounding facts and settled controlling principles.” *Id.*

PERS cannot choose to ignore uncontroverted evidence provided by the treating physician *Id.* Substantial evidence sufficient to withstand appellate scrutiny cannot be evidence contained purely within the medical board. It must be evidence in the record. *Dozier*, 995 So.2d at 142. The mere opinion of the PERS medical board is not evidence in the record. *Id.*

The record in this case shows that Henley’s back injury was disabling. Over time, Henley’s condition has continued to worsen. She is completely disabled. The PERS Board of Trustees merely adopted the recommendation of the Disability Appeals Committee. That recommendation was not supported by any substantial evidence, and is, instead, based upon incorrect facts submitted by the Disability Appeals Committee.

A. The decision by the PERS Board of Trustees was not supported by substantial evidence.

The medical board substituted its own opinion that Henley was not qualified for disability benefits. PERS ignored and disregarded the medical evidence in the record and instead stated its own conclusion concerning Henley’s disability. There was not substantial evidence in the record to support this decision.

Yet again, *Dearman* is analogous to the case *sub judice* and should be used to reverse the findings of the Circuit Court because PERS’s decision was not supported by substantial evidence and was arbitrary and capricious. PERS in this case has done the exact same thing that PERS did in the *Dearman* case by ignoring the evidence in the record by the examining physician who in

Dearman and Henley's case found the Plaintiff to be permanently disabled.

Both Dr. Capel and Dr. Anderson described Henley's diagnoses as "severe." Dr. Anderson described her prognosis as "poor." Dr. Holaday's diagnosis was "moderate to severe." Two separate FCEs indicated Henley would be unable to work and a third was inconclusive on account of Henley's pain.

Dr. Collipp's findings are contradictory to every other medical practitioner who has examined Henley. Even Dr. Holaday found Henley permanently impaired with restrictions. Collipp's findings should be treated the same as the Court treated the findings in *Public Employees' Retirement System v. Winston* where the doctor who did the IME found a teacher to be able to perform light duty work because he believed the teacher was deceiving him. 919 So.2d 106, 108 (miss. Ct. App. 2005). Three doctors who had all treated the teacher more than once stated that she was disabled and that her back pain prevented her from continuing to work. *Id.*

The medical evidence in the record shows that PERS's denial of disability benefits is arbitrary and capricious and is not in any way supported by substantial evidence. The medical evidence by the physicians who have actual seen and treated Henley support a finding that she is completely and permanently disabled and is unable to continue her duties as a correction officer.

B. The PERS Board of Trustees adopted a recommendation by the Disability Appeals Committee that was incorrect.

The Disability Appeals Committee submitted a Proposed Statement of Facts, Conclusions of Law and Recommendations which was approved and adopted by the PERS Board of Trustees. The recommendation was inaccurate. The statement provided that Henley terminated her

employment when in fact she was fired on June 27, 2003, as shown in the Letter of Termination. R. at Vol. 2, Pages 21 and 136. The Committee also stated that Henley did not appear interested in returning to work even though she would be able to perform her work according to the Employer's Certification of Job Requirement. *Id.* at 21-22. In fact, the Certification provides that Henley was terminated prior to the completion of the form which occurred on July 22, 2003. *Id.* at 133-134. It is difficult to understand how Henley could appear motivated toward continuing her current employment when MDOC had terminated that employment nearly a month before that statement was made. *Id.* at 134.

The Committee also mis-stated various medical facts as well. They stated that Henley was not diagnosed with a bulging lumbar disc until May 1, 2002. However, Henley's January 11, 2002 MRI, ordered by Dr. Anderson, revealed a lumbar disc bulge and loss of disc hydration. *Id.* at 201. The Committee stated that Dr. Anderson believed Henley simply had a back sprain. Instead, Anderson's records reflect a diagnosis of a bulging disc following the MRI. *Id.* at 187.

The Committee completely disregarded the medical evidence of Dr. Capel, who, at the time of the hearing, had treated Henley for 16 months. *Id.* at 194-204. The Committee claimed to have relied on evidence provided by Dr. Anderson, but they completely misstated his findings. The Committee did, however, rely strongly upon the medical reports of Dr. Collipp and Dr. Holaday. Neither of these doctors had examined Henley more than one time. *Id.* at 28; 175-76; and 158-160.

The Committee included its own medical findings even though none of the doctors on the Committee ever examined Henley personally. The Committee is not allowed to disagree with the physicians' medical findings and reach its own conclusions. By placing its own conclusions in

the recommendation, the Committee is in fact, attempting to make its opinion evidence in the record. This is absolutely not allowed. *Dozier*, 995 So.2d at 142. The Board of Trustees blindly approved and adopted the Committee's recommendation, and the denial of benefits is unsupported by any substantial evidence.

2. PERS Failed To Apply The Appropriate Definition Of "Disability."

The Appellee seems to ignore the fact that the definition of disability is provided and required by statute. The medical board must use disability to mean the inability to perform the usual duties of employment as the employer may assign without material reduction in compensation or the incapacity to perform the duties of any employment covered by PERS that is actually offered to the employee and is within the same general territorial area without material reduction in compensation. Miss. Code Ann. 25-11-113 (1)(a).

The MDOC fired Henley on June 27, 2003, upon determining that she had a disability that prohibited her from performing the job-related requirements and essential functions of her position as a correctional officer. R. at Vol. 2, Page 136. The MDOC, itself, determined that there was no reasonable accommodation that MDOC could make, without imposing an undue hardship upon itself, that would allow Henley to perform the requirements of her job. *Id.* MDOC's findings clearly meet the definition of disability provided by state law. The Employer's Certification of Job Requirements shows that Henley was never offered another job with MDOC or any other agency covered by PERS. *Id.* at 134.

CONCLUSION

PERS decision to deny Henley disability benefits was arbitrary and capricious as it was not supported by substantial evidence in the record. Therefore, the Order of the Hinds County

Circuit Court affirming the denial of benefits to Henley should be reversed with a decision in favor of disability rendered.

Respectfully submitted, this the 13th day of May, 2009.

EMMA HENLEY

BY: 

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CERTIFICATE OF SERVICE

I, Matthew Y. Harris, Attorney for Plaintiffs, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

**MARY MARGARET BOWERS
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SO CERTIFIED, this the 13th day of May, 2009.


MATTHEW Y. HARRIS