

IN THE SUPREME COURT OF STATE OF MISSISSIPPI

No. 2008-SA-01230

EMMA HENLEY

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

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Appellant

Public Employees' Retirement System

Appellee

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Honorable Tomie T. Green

Trial Court Below

Hinds County Circuit Court Judge

First Judicial District



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APPELLANT

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

Pursuant to the Public Employees' Retirement System as defined and described in Mississippi Code Annotated § 25-11-101 et seq., as amended, does Emma Henley qualify for disability benefits when she has suffered an on-the-job back injury, diagnosed by her treating physician to be a "severe" ruptured lumbar disc with a "poor" prognosis for recovery, that has resulted in her permanent inability to perform her job duties as a correctional officer for the Mississippi Department of Corrections?

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition in Court Below

Emma Henley (Ms. Henley) applied for disability benefits through the Public Employees' Retirement System (PERS) on July 21, 2003. Transcript of Record at Volume 2, Pages 129-30. On March 29, 2004, Ms. Henley was denied PERS disability benefits based on a finding that there was insufficient objective evidence to support her claim that her medical condition prevented her from performing her duties as described of a Correctional Officer IV. *Id.* at 222. Ms. Henley timely appealed the adverse decision rendered by the PERS Medical Board denying her disability benefits. *Id.* at 218.

The Disability Appeals Hearing was conducted on May 14, 2004. *Id.* at 30-75. The PERS Disability Appeals Committee submitted its Proposed Statement of Facts, Conclusions of Law and Recommendations also on May 14, 2004, which contained a recommendation that Ms. Henley's request for Duty Related Disability Benefits be denied. *Id.* at 24-29. The PERS Board of Trustees issued an Order on June 22, 2004, adopting the recommendation of the Disability Appeals Committee denying disability benefits to Ms. Henley. *Id.* at 20.

Ms. Henley timely appealed the decision of the Board of Trustees of PERS on July 7, 2004, to the First Judicial District of the Circuit Court of Hinds County. *Id.* at 16. On February 28, 2008, the Hinds County Circuit Court issued its Memorandum Opinion and Order, affirming the decision of the Disability Appeals Committee. R. at Vol. 1, Pages 5-10. Ms. Henley filed her Notice of Appeal on March 20, 2008, appealing the Order of the Hinds County Circuit Court to the Mississippi Supreme Court. *Id.* at 11.

A. Statement of the Facts

Ms. Henley was employed as a Corrections Officer IV for almost twelve years with the Mississippi Department of Corrections (MDOC). *Id.* at 74. On December 20, 2001, Ms. Henley injured her back while attempting to open a Sallyport gate to allow a truck from a food distributing service to enter the compound. *Id.* at 152. During the struggle of trying to open the gate, Ms. Henley felt a sharp pain in her back. *Id.* Although her back pain persisted, Ms. Henley continued to work until the end of her shift. *Id.* at 37-38. Her duties that evening, however, mainly required her to sit and guard the gate. *Id.* The pain in her back worsened, and by the next day, the pain had extended into her hips and down both legs. *Id.* at 39. Ms. Henley first tried to self-treat the pain with pain relievers and Bengay, while continuing to report to work. *Id.* at 41. As the pain continued to worsen, Ms. Henley left work on January 2, 2002 and went to the emergency room at Greenwood LeFlore Hospital. *Id.* at 54 and 193. She was seen by Dr. Walter Moses, Jr., who diagnosed Ms. Henley with lumbar radiculopathy and suspected a herniated disc. *Id.* at 170. Ms. Henley was taken off of work at that time. *Id.* Additionally, Ms. Henley has no prior history of back or leg pain. *Id.* at 170 and 203.

Ms. Henley began treatment with Dr. William Anderson, III, at Greenwood Orthopaedic Clinic. On January 11, 2002, Dr. Anderson ordered Ms. Henley to undergo an MRI, which revealed a disc bulge and loss of disc hydration at L4-5 and L5-S1. *Id.* at 201. On March 11, 2002, Dr. Anderson released her to return to work on light duty, with restrictions that included only working a four-hour day; lifting/carrying up to 10 pounds; and no bending, pushing, pulling, twisting, kneeling, twisting, and climbing. *Id.* at 189-90. Ms. Henley continued to experience severe pain in her back, hips and both legs, although more significant in her left leg, and experienced great difficulty in getting around and performing her job duties. *Id.* at 44.

On May 1, 2002, Dr. Anderson took Ms. Henley off of work and prescribed her a TENS unit. *Id.* at 187-88. Ms. Henley returned to Dr. Anderson in even greater pain, and he finally referred her to a neurosurgeon on May 29, 2002. *Id.* at 184-85.

Ms. Henley was referred to Dr. Winston Capel, and was first evaluated by him on June 25, 2002. *Id.* at 203-04. Dr. Capel assessed Ms. Henley as having left L5 radiculopathy, low back pain, and disc degeneration at L4-5 and L5-1. *Id.* He prescribed Ms. Henley to undergo aquatic therapy and a course of epidural steroid injections and ordered that she undergo an EMG nerve conduction study. *Id.* Ms. Henley underwent an electromyography and nerve conduction study by Dr. Michael Graeber of Muschle and Nerve, P.A., on August 21, 2002. *Id.* at 206. Dr. Graeber found prominent pain to be present in Ms. Henley's lower back and left leg, but noted that there was no clear nerve lesion detected at that time. *Id.* On January 24, 2003, Ms. Henley underwent a provocative lumbar discography at L3-L4, L4-L5 and L5-S1. *Id.* at 198-200. On February 21, 2003, Dr. Capel recommended a combined anterior and posterior discectomy and fusion. *Id.* at 197.

On April 15, 2003, at the request of her workers' compensation carrier, Ms. Henley underwent an independent medical evaluation by Dr. Howard Holaday, who recommended against any surgical intervention, and particularly against the procedure suggested by Dr. Capel. *Id.* at 175-76. Dr. Holaday further opined that Ms. Henley had reached maximum medical improvement (MMI) and assigned her a 5 to 7% permanent impairment rating for the purposes of Ms. Henley's workers' compensation case. *Id.* He recommended conservative treatment with the occasional use of analgesics and limited her activities to include no lifting heavier than 20 to 25 pounds and no frequent stooping or bending. *Id.*

Ms. Henley submitted her Request for Limited Duty Assignment on May 21, 2003, requesting a position that required her to lift no more than 20 pounds, no bending, stooping or pulling, pursuant to the restrictions assigned to her by Dr. Holaday. *Id.* at 144. The request was disapproved on May 29, 2003. *Id.*

Dr. Anderson referred Ms. Henley to Chris Hill at Hill Rehab Services for a Functional Capacity Evaluation. *Id.* at 84-86. The evaluation was conducted on June 24 and June 26, 2003. *Id.* The results provided that Ms. 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.* Additionally, it was noted that she may be able to handle 10 pounds shoulder lift, at most, while in a sitting position. *Id.* Mr. Hill stated that Ms. Henley was unable to work at that time and that her prognosis for returning to work was “guarded at best.” *Id.*

Ms. Henley remained off of work throughout her treatment pursuant to the direction of her treating physician, Dr. Capel. She was terminated from her employment on June 27, 2003 pursuant to a Letter of Termination issue by the (MDOC). *Id.* at 137. The letter provided that Ms. Henley’s termination was based upon the findings that resulted from the MDOC Administrative Review Hearing held on May 21, 2003, which were:

“It has been determined that you have a disability, which prohibits you from performing the job related requirements and essential functions of your position. It has also been determined that there is not a reasonable accommodation which MDOC could make without causing an undue hardship to MDCC operations, that would allow you to perform the job-related functions of your position.” *Id.*

Ms. Henley’s application for PERS disability benefits was filed on July 21, 2003. *Id.* at 129-30. As part of the application, a Statement of Examining Physician was submitted by Dr. Anderson on September 3, 2003, who diagnosed Ms. Henley as having a ruptured lumbar disc,

which he described as “severe,” and that her prognosis for recovery was “poor.” *Id.* at 181. Dr. Anderson also stated he believed that Ms. Henley had reached MMI. *Id.* Dr. Capel submitted his Statement of Examining Physician on September 11, 2003, and also described Ms. Henley’s diagnoses as “severe.” *Id.* at 196. Dr. Capel, however, stated that he did not believe Ms. Henley to be at MMI and that it was undetermined as to when she would reach MMI. *Id.*

On January 5, 2004, pursuant to the direction of the PERS Medical Board, Ms. Henley underwent a Functional Capacity Evaluation by Charlene Tony, OTR, at Methodist Outpatient Rehabilitation; however, no determination of Ms. Henley’s abilities could be made at that time as the evaluation was not fully completed due to the significant pain that Ms. Henley experienced during the testing. *Id.* at 162-65. In fact, Ms. Henley cried throughout most of the manual testing. *Id.* Ms. Toney noted that she believed Ms. Henley was self-limited with her complaints of pain. *Id.* The PERS Medical Board then directed Ms. Henley to undergo an Independent Medical Examination (IME) with Dr. David Collipp of Southern Physical Medicine & Rehabilitation Associates. *Id.* at 158-60 and 224. The IME was performed on March 5, 2004, and Dr. Collipp made note of Ms. Henley’s expressions of pain during the examination but stated that he believed her complaints of pain to be dramatic and her participation to be poor. *Id.* at 160. Dr. Collipp stated that he believed that Ms. Henley had attempted to deceive him, and he went on to state that Ms. Henley could return to her regular occupation as a correctional officer. *Id.* Dr. Collipp also stated that Ms. Henley had been at MMI since February, 2002, and has been able to return to work, without restrictions, since that time at her regular job. *Id.* Oddly, though, that conclusion was totally unfounded at that time. In fact, in February, 2002, Ms. Henley was still under the treatment of Dr. Anderson only, and, at that time, he had ordered Ms. Henley to remain off of work for an undetermined amount of time. *Id.* at 191.

On March 29, 2004, Ms. Henley was denied PERS disability benefits based on a finding that there was insufficient objective evidence to support her claim that her medical condition prevented her from performing her duties as described of a Correctional Officer IV. *Id.* at 222.

During Ms. Henley's employment at MDOC, she never missed work on account of her back prior to her injury on December 30, 2001. *Id.* at 74. Since her injury, Ms. Henley's condition has progressively worsened. *Id.* Not only is she unable to work, but she also experiences great difficulty in performing daily tasks, such as driving, bathing, walking, cooking and cleaning. *Id.* at 75 and 48-49. A vocational evaluation performed on Ms. Henley on or around August 15, 2003, by David E. Stewart, a Senior Rehabilitation Specialist, revealed that Ms. Henley's range of access to occupations is severely restricted. *Id.* at 89-93.

SUMMARY OF THE ARGUMENT

The Public Employees' Retirement System of Mississippi wrongfully denied Emma Henley disability benefits. The adverse determination was not supported by substantial evidence contained in the record and is, therefore, arbitrary and capricious. To the contrary, the record reflects the medical evidence necessary to support a finding that Emma Henley is indeed permanently disabled, unable to perform the duties of her previous employment as a correctional officer, and is, thus, entitled to disability benefits, pursuant to Mississippi Code Annotated § 25-11-113, as amended.

ARGUMENT AND AUTHORITIES

An appellate review of the decision of an administrative agency applies the same standard of review that the circuit court is required to follow in its appellate capacity. *Pub. Employees' Ret. Sys. v. Wright*, 949 So. 2d 839, 842-43 (Miss. Ct. App. 2007). A reviewing court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts on appeal. *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 425 (Miss. 2000). The decision of an administrative agency should not be disturbed on appeal unless it "(1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional rights." *Pub. Employees' Ret. Sys. v. Dozier*, 995 So. 2d 136, 138 (Miss. Ct. App. 2008) (*quoting Marquez*, 774 So. 2d at 425)).

I. THE CIRCUIT COURT ERRED IN AFFIRMING THE BOARD OF TRUSTEES' DENIAL OF PERS DISABILITY BENEFITS TO MS. HENLEY AS THE RECORD LACKED SUBSTANTIAL EVIDENCE TO SUPPORT A DENIAL OF BENEFITS.

A state employee may be retired by the PERS board of trustees on a disability retirement allowance provided that the medical board, after an evaluation of medical evidence, certifies that the employee 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." Miss. Code Ann. §25-11-113(1)(a) (Rev. 2007). However, the board of trustees may accept a disability medical determination from the Social Security Administration in lieu of a certification from the medical board. *Id.* For the purposes of making a disability determination, the PERS medical board must apply the following definition of disability:

"[T]he 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." *Id.*

On appellate review, it is the Court's job to determine if the evidence presented supports PERS's denial of disability benefits. *Dozier*, 995 So. 2d at 138.

- A. The record lacks substantial evidence to support PERS's denial of disability benefits to Ms. Henley as it completely disregards the facts and evidence surrounding her medical condition.

An appellate court can disturb the decision of an administrative agency if the court finds that the decision is not supported by substantial evidence. *See Dozier*, 995 So. 2d at 138; and *Marquez*, 774 So. 2d at 425. The Mississippi Supreme Court has defined "substantial evidence" as "evidence which affords a substantial basis of fact from which the fact in 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)). An agency decision is "arbitrary" if "it is not done according to reason and judgment, but depending on the will alone." *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 "done without reason, in a whimsical manner, implying either a lack of understanding or of disregard for the surrounding facts and settled controlling principles." *Id.*

Although PERS is the finder of fact, its opinion is not conclusive, and PERS cannot choose to ignore uncontroverted evidence provided by the treating physician. *Id.* at 142 (*citing Dearman*, 846 So. 2d at 1018. "[T]he substantial evidence that is sufficient to withstand appellate scrutiny cannot be evidence contained within the confines of the [heads of the doctors sitting on the PERS medical board]. It must be evidence in the record." *Dozier*, 995 So. 2d at 142 (*quoting Pub. Employees' Ret. Sys. v. Thomas*, 809 So. 2d 690, 694 (Miss. Ct. App. 2001))). Ultimately, the opinion of the PERS medical board is not evidence in the record. *Dozier*, 995 So. 2d at 142.

The record in this case supports a determination contrary to the one reached by PERS. Ms. Henley's medical evidence reflects a disabling back injury. Over time, Ms. Henley's condition has progressively worsened, and by her own testimony, she is essentially crippled and unable to get around very well. The PERS Board of Trustees blindly adopted a recommendation made by the Disability Appeals Committee, which was based on contradictory and false statements. The denial of benefits to Ms. Henley is not supported by substantial evidence – at best, it is supported by twisted and false facts submitted by the Disability Appeals Committee.

1. The medical evidence in the record reveals that PERS's denial of disability benefits was not supported by substantial evidence.

In this case, the PERS medical board substituted its own opinion of whether or not Ms. Henley qualified for disability benefits for that of her treating physicians. PERS discounted the medical evidence contained in the record and came to its own conclusion regarding Ms. Henley's health. Her denial of benefits by PERS was not supported by substantial evidence in the record. PERS completely disregarded the surrounding facts of Ms. Henley's disabling medical condition.

In *Public Employees' Retirement System v. Dearman*, a teacher applied for PERS disability benefits after resigning because she was unable to perform her duties due to several physical ailments. 846 So. 2d at 1015. Her treating physician submitted a statement to PERS indicating that she was permanently disabled. *Id.* at 1016. Her application for disability benefits was denied. *Id.* She appealed to the Disability Appeals Committee and submitted additional medical evidence. *Id.* Pursuant to the recommendation of the Disability Appeals Committee, PERS denied her claim. *Id.* Ms. Dearman then appealed to the circuit court, which reversed PERS's decision. *Id.* On appeal, this Court affirmed the circuit court's finding that PERS's decision was not supported by substantial evidence and was, therefore, arbitrary and capricious

because the denial lacked evidentiary support in the record. *Id.* at 1019. In fact, the Court found that PERS had chosen to ignore the only evidence in the record from the examining physician, who submitted in his statement to PERS that Ms. Dearman was permanently disabled. *Id.* at 1018.

Likewise, in *Public Employees' Retirement System v. Dozier*, this Court affirmed the circuit court's judgment reversing the denial PERS disability benefits, wherein the Court found that there was a lack of substantial evidence in the record to support PERS's denial of disability benefits and was, therefore, arbitrary and capricious. 995 So. 2d at 141-42. In that case, two examining physicians submitted statements to PERS, both of whom determined that Ms. Dozier's medical condition prevented her from working. *Id.* at 141. Another examining physician submitted a statement to PERS, which provided that Ms. Dozier's medical condition impaired her ability to perform her previous job duties as a teacher. *Id.* The Court found that PERS had apparently disagreed with the physician's medical findings and had come to its own conclusion regarding Ms. Dozier's health. *Id.*

PERS has acted in a similar fashion with regard to Ms. Henley's claim. In their Statements of Examining Physicians submitted to PERS, both Dr. Capel and Dr. Anderson described Ms. Henley's diagnosis as "severe." R. at Vol. 2, Pages 181 and 196. Dr. Anderson described Ms. Henley's prognosis for recovery as "poor." *Id.* at 181. Dr. Holaday also classified Ms. Henley's diagnosis as "moderate to severe" in his Statement. *Id.* at 174. Ms. Henley has undergone two FCE's, one on June 26, 2003, which indicated Ms. Henley was unable to work, and the other on January 5, 2004, which was inconclusive due to the Ms. Henley's limitations on account of her pain. *See Id.* at 84-86 and 162-63.

Although Dr. Collipp's IME found Ms. Henley ready to return to work at her regular position as correctional officer, his findings are contradictory to every other medical practitioner who has examined Ms. Henley. Even Dr. Holaday found Ms. Henley to be permanently impaired and assigned her restrictions. *See Id.* at 176. Additionally, Dr. Collipp's findings are suspect in that he provided in the results of the IME that Ms. Henley had been at MMI since February, 2002, and had been able to return to work, without restrictions, since that time at her regular job. *Id.* at 160. However, in February, 2002, less than two months after her injury, Ms. Henley was under the care of Dr. Anderson, who ordered her to remain off of work for an undetermined amount of time. *Id.* at 191. In *Public Employees' Retirement System v. Winston*, the Court found that PERS's denial of disability benefits to a former teacher was arbitrary and capricious, even though a doctor who performed an IME determined that the teacher, whom he believed had attempted to deceive him, was able to perform light duty work. 919 So. 2d 106, 108 (Miss. Ct. App. 2005). Three doctors, who had treated the teacher more than once, stated that she was disabled and that her back pain prevented her from continuing with teaching. *Id.*

The medical evidence contained in the record clearly indicates that PERS's denial of disability benefits to Ms. Henley is not supported by substantial evidence. To the contrary, the medical evidence totally supports a finding that Ms. Henley is disabled and is unable to perform her duties as a correction officer.

2. The PERS Board of Trustees adopted the Disability Appeals Committee's recommendation to deny benefits, which was based on an analysis filled with contradictory and false statements.

The Disability Appeals Committee's Proposed Statement of Facts, Conclusions of Law and Recommendations, as approved and adopted by the PERS Board of Trustees, reflects a blatant disregard for the facts contained in the record. The Committee provided in its Statement

of Facts that Ms. Henley terminated her employment on June 27, 2003; however, the record clearly reflects that Ms. Henley was terminated by the MDOC on June 27, 2003, pursuant to a Letter of Termination. *See* R. at Vol. 2, Pages 21 and 136. The Committee went on to allege that according to Ms. Henley's Employer's Certification of Job Requirements, her employer believed she could perform her job and that Ms. Henley did not appear interest in returning to work. *Id.* at 21-22. This, too, is a blatant contradiction of the record. In fact, the Employer's Certification of Job Requirements provides that Ms. Henley was terminated prior to the completion of the form, which was on July 22, 2003. *Id.* at 133-34. Additionally, Section L provides that Ms. Henley had not been offered another job within the agency or any other agency covered by PERS. *Id.* at 134. This is probably why Section K provides that Ms. Henley did not appear to be motivated toward continuing current employment – MDOC had terminated her employment almost a month before. *Id.*

Additionally, in its Summary of the Medical Evidence contained in said Recommendation to the Board of Trustees, the Disability Appeals Committee misstated the medical evidence contained in the record. The Committee contended that Ms. Henley was not diagnosed with a bulging lumbar disc until May 1, 2002. *Id.* at 23. However, the Ms. Henley's MRI taken on January 11, 2002, ordered by Dr. Anderson revealed a lumbar disc bulge and loss of disc hydration at L4-5 and L5-S1. *Id.* at 201. Also, in its Analysis, the Committee stated that Dr. Anderson believed that Ms. Henley has a bad back sprain. *Id.* at 27. Dr. Anderson's records, however, reflect a diagnosis of a bulging lumbar disc following her MRI. *Id.* at 187.

The Disability Appeals Committee concluded that the most persuasive evidence was supported by Dr. Anderson, Dr. Holaday and Dr. Collipp. *Id.* at 28. The Committee completely disregards the medical evidence of Dr. Capel, who, at the time of the hearing, had treated Ms.

Henley for a period of 16 months. *See Id.* at 194-204. The Committee claimed to rely on the evidence provided by Dr. Anderson; however, it completely misstated his findings. At the time of her hearing, Dr. Anderson had treated Ms. Henley for a period of 20 months. *See Id.* 181-93. The Committee ironically rests its determination in large part on the reports of Dr. Collipp, who misstated Ms. Henley's medical history in his report, and of Dr. Holaday, both of whom examined Ms. Henley on only one occasion. *Id.* at 28; *see also Id.* at 175-76 and 158-60

Also troubling, is the Disability Appeals Committee's determination to reach its own conclusions with regard to Ms. Henley's health, despite the medical evidence provided by her examining physicians. In its Analysis, the Committee included its own medical findings: "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." *Id.* at 27. Dr. Anderson provided in his Statement of Examining Physician that Ms. Henley's diagnosis was a ruptured lumbar disc. *Id.* at 181. Dr. Capel provided in his Statement that Ms. Henley's diagnosis was degenerative disc disease lumbar with leg radiculopathy. *Id.* at 196.

This is precisely the type of conduct warned of in *Dozier*. PERS has disagreed with the physicians' medical findings and reached its own conclusions regarding Ms. Henley's medical condition. However, as stated in *Dearman*, PERS's opinion is not conclusive, and PERS cannot choose to ignore the evidence provided by treating physicians. 846 So. 2d at 1018. The opinion of the PERS medical board is not evidence in the record. *Dozier*, 995 So. 2d at 142.

It is apparent that the PERS Board of Trustees blindly approved and adopted the Disability Appeals Committee's Proposed Statement of Facts, Conclusions of Law and

Recommendations, which was filled with false and contradictory statements. The Board of Trustees' denial of benefits was unsupported by the requisite substantial evidence.

B. Notwithstanding the lack of substantial evidence to support PERS's denial of benefits, PERS failed to appropriately apply the definition of "disability."

The PERS medical board employs the definition of disability as 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 compensation. Miss. Code Ann. § 25-11-113(1)(a). After the medical board's evaluation of the medical evidence and certification that the state employee is permanently incapacitated for the further performance of duty, the board must apply the statutory definition of "disability." *Case*, 973 So. 2d at 311.

The MDOC terminated Ms. Henley on June 27, 2003, upon its determination 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 also determined that there was no reasonable accommodation that MDOC could make without causing an undue hardship on its operations and that would allow Ms. Henley to perform the job-related functions of her position. *Id.* These findings of the MDOC squarely meet the definition of disability as provided by state law. Additionally, the Employer's Certification of Job Requirements reflects that Ms. Henley was not offered another job within the MDOC agency or any other agency covered by PERS. *Id.* at 134.

CONCLUSION

The decision by PERS to deny Ms. Henley disability benefits was clearly not supported by substantial evidence in the record and is, therefore, arbitrary and capricious. The medical evidence contained therein supports a contradictory conclusion – that Ms. Henley is permanently disabled and is unable to perform her duties as a correctional officer. Accordingly she should be awarded PERS disability benefits. Thus, the Order of the Hinds County Circuit Court, First Judicial District, affirming the denial of benefits to Ms. Henley by PERS should be reversed.

Respectfully submitted, this the 11 day of February, 2009.

EMMA HENLEY, Appellant

BY:



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Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2008-SA-01230

EMMA HENLEY

APPELLANT

VS.

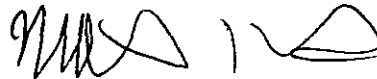
PUBLIC EMPLOYEES' RETIRMENT SYSTEM

APPELLEE

CERTIFICATE OF SERVICE AS TO FILING

I, Matthew Y. Harris, attorney for Appellant, do hereby certify that I have this day hand-delivered for filing the original and three (3) copies of the foregoing Brief of the Appellant to the Supreme Court Clerk, Ms. Betty Sephton, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201-1082.

THIS the 11 day of February, 2009.



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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2008-SA-01230

EMMA HENLEY

APPELLANT

VS.

PUBLIC EMPLOYEES' RETIRMENT SYSTEM

APPELLEE


CERTIFICATE OF SERVICE

I, Matthew Y. Harris, attorney for Appellant, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:


Honorable Tomie T. Green
Hinds County Circuit Court Judge, First Judicial District
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THIS the 11 day of February, 2009.



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