IN THE SUPREME COURT OF MISSISSIPPI

KELLY WRIGHT — APPELLANT

VERSUS — CAUSE NO. 2008-SA-01738

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS) — APPELLEE

BRIEF OF THE APPELLEE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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CERTIFICATE OF INTERESTED PARTIES

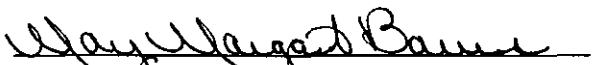
The undersigned counsel of record certifies that the following listed people have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

The Honorable William Coleman, Circuit Court Judge of Hinds County
The Board of Trustees of the Public Employees' Retirement
The Honorable Jim Hood, Mississippi Attorney General
Ms. Kelly Wright, Appellant

Attorney of Record for

The Public Employees' Retirement System

Respectfully submitted,



Mary Margaret Bowers, MSB 4197
Special Assistant Attorney General

STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE ISSUES

I. THE DOCTRINE OF THE LAW OF THE CASE DOES NOT REQUIRE STRICT ADHERENCE TO JUDGE KIDD'S DECISION.

II. THE CIRCUIT COURT PROPERLY FOUND THAT THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. WRIGHT'S CLAIM FOR DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND, IS THUS, NEITHER ARBITRARY NOR CAPRICIOUS.

III. THE STANDARD OF DISABILITY APPLIED IN THIS MATTER IS THAT WHICH IS REQUIRED BY STATUTE.

STATEMENT OF THE CASE

This matter involves an appeal filed by the Appellant, Kelly Wright, wherein she seeks review of the Opinion and Order entered by the Circuit Court on September 2, 2008. The Circuit Court upheld the decision of the Board of Trustees of the Mississippi Public Employees' Retirement System (hereinafter PERS) entered August 28, 2007. Ms. Wright sought the receipt of disability benefits from the Public Employees' Retirement System. System. Initially, the Medical Board reviewed Ms. Wright's application and deferred the matter for a medical evaluation. After receipt of the medical evaluation and review of the supporting documentation the Medical Board denied Ms. Wright's claim for disability benefits. Thereafter, she filed a Notice of Appeal of the Medical Board's decision and was granted a hearing before the Disability Appeals Committee, wherein testimony was elicited and evidence introduced. Ms. Wright did not appear at the hearing. Ms. Wright's mother, Nathaleen Farmer, appeared on behalf of her daughter. The Committee after reviewing the testimony and exhibits deferred making a decision until an additional evaluation could be obtained. Following the receipt of the evaluation, the Appeals Committee presented its recommendation to the Board of Trustees (hereinafter Board). The Board adopted the Proposed Statement of Facts, Conclusions of Law and Recommendation of the Disability Appeals Committee to deny Ms. Wright's request for the payment of disability benefits as defined under Miss. Code Ann. Section 25-11-113 (Supp. 2008).

Ms. Wright filed an appeal in the Circuit Court pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006). The Circuit Court reversed the decision of the Board of Trustees. PERS filed an appeal in the Supreme Court. The appeal was assigned to the

Court of Appeals. On February 13, 2007, the Court of Appeals reversed the finding of the Circuit Court and remanded the case to the Disability Appeals' Committee to provide Ms. Wright the opportunity to refute the independent medical evaluation of Dr. Webb and to provide supplemental evidence from her treating physician. A second hearing was held before the Disability Appeals Committee wherein, Ms. Farmer appeared on behalf of her daughter, Kelly Wright. Following the hearing and submission of evidence, the Disability Appeals Committee provided the Board its proposed Statement of Facts, Conclusions of Law and Recommendation wherein it recommended that Ms. Kelly Wright's application for disability benefits be denied. The Board adopted the recommendation and findings of the Committee. Ms. Wright filed her appeal in the Circuit Court of the First Judicial District of Hinds County.

Following submission of briefs the Circuit Court on September 26, 2008, entered its Opinion and Order finding that the decision of the Board was supported by substantial evidence and thus should be affirmed. Ms. Wright now appeals the decision of the Circuit Court to this Honorable Court.

STATEMENT OF THE FACTS [1]

Ms. Kelly Wright was employed in a position covered under the Public Employees' Retirement System (PERS) by the Mississippi State Department of Health. The position she held was that of a Registered Nurse II. At the time of her termination from employment in December 6, 2002, Ms. Wright was credited with 5.25 years of

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

service credit. Her application for non-duty related disability retirement was received September 17, 2002. (Vol, P. 365)

Ms. Wright's claim was reviewed by the Medical Board. Following the addition of a medical evaluation, as authorized by law, Ms. Wright's claim was denied. She appealed to the Disability Appeals Committee which provided Ms. Wright the opportunity to be heard on May 19, 2003. (Vol. 3, P. 264) Ms. Wright notified PERS that she would not attend the hearing on May 19th and that the matter should proceed without her. (Vol. 3, P. 318) Ms. Wright's mother, Nathaleen Farmer, appeared at the hearing on her daughter's behalf. (Vol. 3, P. 264)

Ms. Farmer testified that her daughter, Kelly Wright, was a single mother caring for a very young child. Ms. Farmer said Ms. Wright, thinking she was having a heart attack, went to the MEA Clinic for treatment in June 2000. Ms. Farmer explained that Ms. Wright was under stress at the work place. (Vol. 3, P. 273,274) It appeared that Ms. Wright was not having a heart attack, however, Dr. Margaret Powell, who also worked for the Health Department, gave Ms. Wright a prescription for Zoloft. (Vol. 3, P.274)

Ms. Wright, at some point, moved in with Ms. Farmer and Ms. Farmer cared for Ms. Wright's child. (Vol. 3, P. 276) Although Ms. Wright contended she was under a great deal of stress at work, she worked 8:00 to 5:00 and did not have to work weekends. According to Ms. Farmer, her daughter suffered a breakdown but was able to continue to work for another two years. (Vol. 3, P. 279) According to Ms. Farmer, the medication that her daughter is on does help but has caused her to gain a great deal of weight. Ms. Wright helps around the house, does little cooking and takes her daughter to school and picks up her daughter in the afternoons. (Vol. 3, P. 280)

On appeal to the Circuit Court the decision of the PERS Board to deny disability benefits was reversed by Judge Kidd on September 13, 2005. PERS filed an appeal in the Supreme Court which was assigned to the Court of Appeals. The Court of Appeals reversed the Circuit Court and remanded the case to the Disability Appeals' Committee to allow Ms. Wright the opportunity to refute Dr. Webb's report and provide supplemental evidence from her treating physician. (Vol 2, P. 44).

A second hearing was held June 8, 2007, before the Disability Appeals Committee. (Vol. 2 P. 45) Ms. Farmer appeared on behalf of Ms. Wright along with counsel.(Vol. 2, P. 45) Dr. Webb's report which was allegedly corrected by Ms. Farmer was introduced into evidence. (Vol. 2, P. 48)

The Disability Appeals Committee found the following in its summary of the medical evidence following the hearing on remand:

> Ms. Wright produced her medical records, beginning with the MEA record dated June 8, 2000. According to the chief complaint, Ms. Wright was complaining of dizziness, productive cough and drainage..... Her EKG was normal. Her main diagnosis was labrynthitis, bronchitis and chest pain. She was instructed to see someone for a heart evaluation.
>
> Ms. Wright did follow up at the Baptist Hospital Emergency Department of a stress test on June 9, 2000. She reported a chief complaint of chest pain, congestion and shortness of breath which was making her feel anxious. She also reported a lot of stress at work. The record states that no apparent distress was noted in Ms. Wright. **No heart problems were detected and she was discharged with cough medications.**
>
> Also during this time, Ms. Wright saw Dr. Covington, A Psychiatrist. The first appointment was on June 12, 2000, ... Ms. Wright **complained that her job was very stressful** and she had an excessive workload. After an evaluation, she was **diagnosed with Panic Disorder** with agoraphobia of recent onset. She was treated with medication. **She improved with the medication** and reported on June 27, that she needed to return to work. It looks

like by **August 7, 2000, that Ms. Wright was stable form a psychiatric point of view**. Ms. Wright told her doctor she was not letting her supervisor get on her nerves. The psychiatrist told her she needed to be assertive. Dr. Covington wrote that Ms. Wright was to continue her medications and that she did not need to return to him for three months. On November 6, 2000, Ms. Wright reported that she had **recently returned from vacation to Disney World. The doctor noted that her mood was improved and should return in three months.** The last report we have is dated February 5, 2001, and Ms. Wright was reporting more anxiety for the prior two to three weeks. Her Zoloft was increased. Again, she was told to return in three months.

It appears that Ms. Wright changed psychiatrists at this point and began seeing Dr. Bishop. The first appointment with Dr. Bishop was **in July of 2001, and Ms. Wright reported she was on the verge of a panic attack** due to her work situation. She reported she felt she was being unfairly overloaded. She had transferred to work at the Medical Mall which she reported was easier but she had just been told she would need to move again to a busier job and she got nervous and had a "full blown panic attack." **Her psychiatric evaluation showed normal affect, speech, good abstract ability, intellectual functioning.** She was diagnosed with adjustment disorder and possibly histrionic traits. **By August 6, 2001, though, it appears she was improved**. On November of 2001, Ms. Wright reported stress at work. She was continued on her medications. This is the last report from Dr. Bishop.

Dr. Gupta began seeing Ms. Wright on January 17, 2002, and she was diagnosed with Panic Disorder and possibly Generalized Anxiety Disorder and Depressive Disorder Not Otherwise Specified (NOS). **At that time, Dr. Gupta noted Ms. Wright to be in no distress.** She was oriented, cooperative, mood was euthymic, affect was appropriate. He attention span and concentration were fair. Her insight and judgment were fair. He increased her Zoloft and told her to continue with the Ativan. Dr. Gupta saw Ms. Wright every few weeks and managed her with medication through at least April 3, 2002. Medications included Zoloft, Ativan and Prozac. Dr. Gupta wrote **on March 20, 2002, that Ms. Wright was using very little Ativan and that she had not had any panic attacks** but she was worried she was going to be moved to a new clinic. On April 3, 2002, Dr. Gupta wrote that Ms. Wright's mental disorders are related to Fibromyalgia and that Ms. Wright was not able to handle work related stress. The file contains a letter from Dr. Gupta dated September 5, 2002, stating that Ms. Wright is his patient and she has the diagnosis of panic

disorder and depressive disorder, NOS, for which she was taking medications. **He wrote that she was not able to work in regular employment due to stress at work and was presently totally and "seems to be" permanently disabled due to her diagnoses. (There was no medical report that correlated with these dates or documented objective findings of theses diagnoses or opinions.)** ..... The next document in Dr. Gupta's file is a Statement of Examining Physician form 7 dated **October 29, 2002, stating that Ms. Wright had panic disorder and anxiety disorder and fibromyalgia and that she was permanently impaired but she had no restrictions.** And, there is one note from Dr. Hensarling dated October 10, 2002, on a prescription that Ms. Wright has fibromyalgia. Dr. Hensarling also has a clinic note with the same date showing that Ms. Wright presented to him with complaints of chronic neck and shoulder pain. She told the doctor she sleeps okay and was taking some time off from work. The doctor gave her a pamphlet on fibromyalgia and put her on Vioxx and a muscle relaxer. **All of her blood work and reported as normal.**

Ms. Wright underwent a neuropsychological examination by Dr. Manning on January 16, 2003, at the request of PERS. Dr. manning always does an excellent job with his testing. It is noted that Dr. Manning finds Ms. Wright has several diagnoses to include Depression, Anxiety, Panic Attacks, Agoraphobia, Social Phobia and Fibromyalgia and that **she has been under-treated.** "It is unfortunate that she apparently has not ever had the combination of pharmacological treatment and empirically based psychological treatment for those conditions, a combination that I think would give her the best opportunity for improvement and possibly given her a better opportunity to return to work." He recommended that empirically based psychological treatments might help. **(Also noted are the "corrections" made by Ms. Farmer, who is Ms. Wright's mother, on pages 119-122 of Dr. Manning's report. Ms. Farmer testified that she was not present during this evaluation.** She also testified that her corrections did not make a "big lot of difference." R. 41-42 of transcript, and **the corrections" while noted by this Committee do not change the findings and recommendations of Dr. Manning.)**

.....

An independent psychiatric evaluation was performed by Dr Webb on July 14, 2003. ..... She ended up seeing Dr. Gupta and reported that at the time of her exam by Dr. Webb, she was having panic attacks about every other day but that she

felt them coming on so she would take her Ativan and Prozac and they would go away. She reported being very pleased at this. Ms. Wright was seeing Dr. Gupta once a month. Ms. Wright also told Dr. Webb that **she had never needed a psychiatric hospitalization. ..... She said she was close with her mother and reported she was able to drive and drove herself to the appointment. She and her mother raise Ms. Wright's daughter. They go to church and Ms. Wright shared cooking duties with her mother. She also reported that she liked to read and liked to entertain her daughter by going to the movies. Then, Ms. Wright told Dr. Webb that she does not have full-blown panic attacks any longer. She reported the sensation of an attack coming but stated that the medication helped keep the attacks away.** After taking a history and performing a psychiatric evaluation, **Dr. Webb concluded that Ms. Wright does have Panic Disorder, but that it is in full remission as long as she takes her medication. She also has dependent personality traits and Fibromyalgia. He thought that because of the inefficiency, chaos, and difficulty on the job, Ms. Wright chose not to work rather than being too disabled to work. He noted that her panic disorder has been treated with medication quite successfully for the last six months and that her illness is not problematic or disabling. He concluded by saying that Ms. Wright's panic disorder is in full remission and not disabling and she has no psychiatric limitations or restrictions preventing her from performing her job as a nurse. He wrote that Ms. Wright's panic disorder is not permanent or totally incapacitating and not that severe and quite responsive to medication.** Ms. Wright apparently chose not to return to work because of the chaos and conflict she had with some of the personnel there. Her choice to leave employment was not due to her illness according to Dr. Webb's opinion. In fact, **returning to work would do Ms. Wright quite well,** in Dr. Webb's opinion.

In September and October, of 2003, Ms. Wright told Dr. Gupta she was better..... Dr. Gupta wrote on February 11, 2005, that Ms. Farmer had remarried and moved out leaving Ms. Wright with more responsibilities and causing problems..... But beginning in April and May of 2005, Dr. Gupta wrote that Ms. Wright was doing better. Ms. Wright did not go to counseling. So, on February 22, 2007, Dr. Gupta again wrote that his opinion is that Ms. Wright is disabled. At the time of this letter, Ms. Wright was taking less Prozac as at the beginning of this case.....(Vol. 2, Pp. 20-27)

Dr. Webb's report was corrected in the same manner as was Dr. Manning's report which was introduced at the first hearing. Neither physician corrected his own report, but, rather, Ms. Farmer corrected the reports by writing on them where she felt the physicians made incorrect statements (Vol. 2, P. 49, 57-58, 60) Ms. Farmer was not present with her daughter at the time of either evaluation. (Vol. 2, P. 60) It was Ms. Farmer's contention that Dr. Webb's diagnosis was incorrect. (Vol. 2, P. 63) Some of the corrections appear to be distorted. For instance, Ms. Farmer noted that Dr. Webb stated that Ms. Wright said that the panic attacks that she could feel coming on would go away with medication and that she "is very pleased". Ms. Farmer noted that no one would be pleased that they have a panic attack coming on. Actually, it appears that Dr. Webb was saying that Ms. Wright was pleased that the feeling that a panic attack was coming on was relieved with medication. She was not pleased that she could feel a panic attack coming on but was pleased that the feeling would go away with medication. (Vol. 2, P. 63-64) What Ms. Farmer was attempting to do by explaining what she believes were incorrect statements of Dr. Webb was to challenge his conclusion as to Ms. Wright's condition. (Vol. 2, P. 67)

SUMMARY OF THE ARGUMENT

The Doctrine of the Law of the Case is not applicable in this matter.

The decision of the PERS Board of Trustees is supported by substantial evidence. In order to qualify for a disability benefit under PERS law, Ms. Wright would have to prove that the condition upon which she bases her claim is disabling and that the disability was the direct cause of her withdrawal from state service. The record which contains contradictory medical reports clearly supports the Order of the PERS Board of

Trustees which took into consideration all of the medical evidence offered by Ms. Wright. The decision of the PERS Board of Trustees is supported by substantial evidence and is neither arbitrary nor capricious. The Circuit Court's decision finding that the Board's decision is supported by substantial evidence should be affirmed.

The standard of disability applied in this case is that standard required by the statues which govern the administration of the disability program.

The medical evidence and the proceedings at both hearings do not establish that Ms. Wright's ailments are permanently disabling as defined under Miss. Code Ann. Section 25-11-113(1)(a) (Supp. 2008) and therefore, she is not entitled to a disability benefit. The Order of the PERS Board of Trustees is premised on substantial evidence, is neither arbitrary nor capricious, and was entered within the Board's authority. The decision of the Circuit Court must be affirmed.

ARGUMENT

INTRODUCTION

PERS was established in 1953 to provide retirement and other benefits to covered employees of the state, its political subdivisions and instrumentalities. Chapter 299, Mississippi Laws of 1952.

In addition to service retirement benefits, disability benefits are provided for members who meet the statutory requirements for such benefits. There are two (2) categories of disability benefits available to PERS members: (1) a regular disability benefit payable to members who have at least four (4) years of creditable service and who become disabled for any reason, and (2) a hurt-on-the-job disability benefit, payable to

members regardless of the number of years of creditable service, where the member becomes disabled due to an injury occurring in the line of duty. Miss. Code Ann. Sections 25-11-113 and 25-11-114 (Supp. 2008)

Applications for disability benefits are reviewed by the PERS Medical Board, which arranges and passes upon all medical examinations for disability purposes and reports its conclusions and recommendations to the PERS Board of Trustees. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. Miss. Code Ann. Section 25-11-119(7) (Rev. 2006). Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the designated hearing officer of the PERS Board of Trustees, pursuant to Miss. Code Ann. Section 25-11-120 (Rev. 2006)

Disability, as defined under PERS law, Miss. Code Ann. Section 25-11-113, states in pertinent part:

> . . . the inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation or the incapacity to perform the duties of any employment covered by the Public Employees' Retirement System (Section 25-11-101 et seq.) that is actually offered and is within the same general territorial work area, without material reduction in compensation.

Section 25-11-113 further provides that:

> . . . in no event shall the disability retirement allowance begin before the termination of state service, provided that the medical board, after an evaluation of medical evidence that may or may not include an actual physical examination by the medical board, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that member should be retired . . .

The question before the PERS Disability Appeals Committee and the PERS Board of Trustees at both hearings was whether Ms. Wright's claim meets the statutory requirement for the receipt of a regular disability benefit.

The PERS Board of Trustees, following hearing on remand, concluded that the recommendation of the Disability Appeals Committee denying regular disability benefits should be adopted as the decision of the Board.

The decision of the Board was upheld by the Opinion and Order of the Circuit Court entered September 26, 2008.

STANDARD REVIEW

Rule 5.03 of the Uniform Rules of Circuit Court Practice limits review by the Circuit Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence; or (2) was arbitrary or capricious; or (3) was beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of Ms. Wright. ***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)***;Bakefield 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. App. 2003); ***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)

In ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d 891 this Court stated 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. Further, 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 351; ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 891 (Miss. 2001); ***United Cement Company v. Safe Air for the Environment***, 558 So. 2d 840, 842 (Miss. 1990); ***Melody Manor Convalescent Center v. Mississippi State Department of Health,*** 546 So. 2d 972, 974 (Miss. 1989) Also see: ***Public Employees' Retirement System v. Burt***, 919 So. 2d 1150, 1156 (Miss. App. 2005.) In ***Mississippi State Tax Commission v. Mississippi-Alabama State Fair,*** 222 So. 2d 664, 665 (Miss. 1969), 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.

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." Also See: ***Case v. Public Employees' Retirement System,*** 973 So. 2d 301,310 (Miss. App. 2008). In this case there are medical tests and evaluations that Ms. Wright has undergone. Several different physicians have reviewed the reports in the file and those introduced upon hearing following remand. The reviewing physicians have the medical training to read and assess those documents. The Court in ***Cobb*** went on to state: "That fact finding duty includes assessing the credibility of witnesses and determining the proper weight to give to a particular witness's testimony." On review by an appellate court it:

> is obligated to afford such determinations of credibility in the fact-finding process ***substantial deference*** when reviewing an administrative determination on appeal and the court exceeds its authority when it proceeds to re-evaluate the evidence and makes its own determination of the trustworthiness of some particular testimony. (*Emphasis added*) 839 So. 2d 609

In this case, the Disability Appeals Committee in a twenty (20) page Recommendation noted the inconsistencies between the various medical reports Ms. Wright offered to support her claim. (Vol. 2, P. 20-21) In ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1287, this Court reiterated that "it is for PERS, as the fact finder, to determine which evidence is more believable or carries the most weight." The findings of fact by the PERS Board of Trustees must not be disturbed on appeal "where sustained by substantial evidence." ***City of Meridian v. Davidson***, 211 Miss. 683, 53 So. 2d 48, 57 (1951); ***Harris v. Canton Separate Public School Board of Education,*** 655 So. 2d 898 (Miss. 1995) As stated by the 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. Wright ***Public Employees' Retirement***

System v. Howard, 905 So. 2d at 1284; ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 891 (Miss. 2001); ***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

Also see ***Public Employees Retirement System v. Stamps***, 898 So. 2d at 673.

In ***Public Employees' Retirement System v. Dishmon***, 797 So. 2d at 893, this Court stated that "the applicant for disability has the burden of providing to the Medical Board and to the Appeals Committee that he or she is in fact disabled." ***In Public Employees' Retirement System v. Henderson***, 867 So. 2d 262, 264 (Miss. App. 2003), 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." Also See: ***Public Employees' Retirement System v. Burt***, 919 So. 2d at 1156. The Disability Appeals Board considered the medical documentation available and gave consideration to Ms. Farmer's corrections to the reports of Drs. Manning and Webb. The Disability Appeals Committee provides a very comprehensive analysis of the medical

documentation in the record where it clearly explains why it arrived at the recommendation that Ms. Wright is not entitled to disability benefits.

The Order of the PERS Board of Trustees was supported by substantial evidence, was neither arbitrary nor capricious nor violated any statutory or constitutional right of Ms. Wright and, thus, was properly affirmed by the Circuit Court.

I.

THE DOCTRINE OF THE LAW OF THE CASE DOES NOT REQUIRE STRICT ADHERENCE TO JUDGE KIDD'S DECISION.

The Doctrine of the Law of the Case does not apply in this matter. Although on the first appeal to Circuit Court, Judge Kidd, ruled that the decision of PERS was not supported by substantial evidence, that decision was appealed to the Supreme Court and assigned to the Court of Appeals. PERS argued that the Circuit Court reweighed the evidence and substituted its judgment for that of the administrative body charged with making the determination of disability. The Court of Appeals **reversed** the finding of the Circuit Court and remanded the case to the Disability Appeals Committee to provide Ms. Wright the opportunity to refute the report of Dr. Webb and to provide supplemental evidence from her treating physicians. The Court of Appeals reversed the Circuit Court's decision not in part but totally.

In ***Mauck v. Columbus Hotel Company***, 741 So. 2d 259 (Miss. 1999), cited by the Appellant, the Court, determining that the Doctrine of the Law of the Case did not apply and citing from ***Goldsby v. State***, 240 Miss. 647, 664, 123 So. 2d 259 (Miss. 1960) stated:

> The doctrine is not a principle of substantive law but a good rule of practice and " '...is of special significance as applied to questions of law as distinguished from decisions on questions of fact.' "

The Doctrine does not apply as the Court of Appeals did not determine the issue as to whether there was substantial evidence to support the decision of PERS, but, rather held that Ms. Wright's right to due process was violated. The case was reversed and remanded to PERS to secure additional facts that were not allowed to be offered during Ms. Wright's first hearing, primarily being able to refute the evaluation of Dr. Webb.

Although Ms. Wright argues that the Court of Appeals did not disturb the legal rulings of Judge Kidd, his ruling was before the Court on appeal. PERS argued that the Circuit Court in the first decision reweighed the evidence substituting its decision for that of the administrative agency. The case was remanded for the specific purpose of allowing Ms. Wright the opportunity to introduce additional factual documentation. In ***Public Employees'' Retirement System v. Freeman***, 868 So. 2d 327 (Miss. 2004) this Court noted that there are exceptions to the law of the case doctrine. The Court said "These exceptions include 'material changes in evidence, pleadings or findings"'. citing ***Moeller v. Am. Guaranteed & Liab. Inc. Co.***, 812 So. 2d 953 (Miss. 2002).

The Circuit Court in its Order entered September 26, 2008, held that Ms. Wright introduced new evidence at the second hearing before the Disability Appeals refuting Dr. Webb's opinion, introducing new medical records and therefore "the Doctrine does not apply". (Vol. 1, P. 5) Ms. Farmer, who appeared on behalf of Ms. Wright at the hearing, presented what is a material change in the evidence. She was allowed to offer testimony and introduce the report of Dr. Webb to which she added her comments to statements he made that she felt were in error or false.

Ms. Wright contends that PERS had the opportunity to provide additional evidence to prove that Ms. Wright was not disabled. 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". It is and always has been the burden of the member at the administrative level to prove that he/she is disabled. It is not PERS duty to prove that the member is not disabled. 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]*

PERS did not relinquish any of its rights. The case, as already noted, was remanded for the sole purpose of allowing Ms. Wright to refute the report of Dr. Webb and to offer additional medical documentation from her physicians. At the hearing, the record from the first hearing was introduced and considered with the additional information allowed following remand. Having reviewed all of the information, the Committee then presented an entirely new Proposed Findings of Facts, Conclusion of Law and Recommendation to the Board of Trustees for its consideration.

This action of the Court of Appeals is somewhat analogous to the action of the Court in ***Dunn v. Dunn***, 695 So. 2d 1152 (Miss. 1977) wherein the Court determined that the law of the case was not entirely applicable where it had remanded a case to the lower

court to conduct a new hearing on the issue of child support. The Court noted that it did not decide the primary and controlling issue of the lower court. As here, the Court of Appeals remanded the case for a hearing before the Disability Appeals Committee and did not decide whether the lower court was in error for reversing the decision of PERS as the Court of Appeals reversed the lower court's decision in its entirety and provided the opportunity for a new hearing before the administrative body. In ***Continental Turpentine and Rosin Co. v Gulf Naval Stores Company,*** 244 Miss. 465, 142 So. 2d 200 (1962) this Court stated:

> It is also said in 3 Am.Jur., Appeal and Error, Sec. 985, p. 541, that: 'The decisions agree that as a general rule, when an appellate court passes upon a question and **remands** the cause for further proceedings, the question there settled becomes the 'law of he cause' upon a subsequent appeal, provided the same facts and issues which were determined in the previous appeal are involved in the second appeal. But **if the facts are different**, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings, or findings, a prior decision is not conclusive upon questions presented on the subsequent appeal***
>
> 'The doctrine of the law of the case has been frequently recognized as a harsh doctrine. Some courts have expressed their intention not to extend the application of the doctrine of the law of the case beyond the cases in which it has heretofore been held to apply. And in some jurisdictions the rule of the law of the case has been abolished, or at least modified by express statutory or constitutional provisions.'
>
> This Court said in the case of Brewer v. Browning, 115 Miss. 358, 76 So. 267, 519, L.R.A.1918F, 1185, that: "We do not think, however, that this rule (law of the case) is so fixed and binding upon the court that it may not depart from its former decision on a subsequent appeal if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results. Where the facts are the same, and where there has been no change of conditions or situations as that a change of decision would work wrong and injustice, the court may, on the subsequent appeal, correct its former decision ***.'

PERS was provided the opportunity to appeal the decision of the Circuit Court and did so. The issues raised on appeal have not been addressed as the Court found there was a due process violation. The Circuit Court's decision was reversed in its entirety and the case was remanded for a hearing. At the hearing the Court of Appeals informed the parties what documentation was to be admitted. The new evidence was admitted into evidence, testimony was taken and an entirely new Recommendation based on all of the evidence presented at the first hearing, including the evidence presented at the hearing following remand, was before the Circuit Court for a decision. The Circuit Court properly held that the law of the case doctrine does not apply.

II.

THE CIRCUIT COURT PROPERLY FOUND THAT THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. WRIGHT'S CLAIM FOR DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND, IS THUS, NEITHER ARBITRARY NOR CAPRICIOUS.

Upon close reading of the record before the Circuit Court and now presently before this Honorable Court, it is evident that the decision of the PERS Board of Trustees is based upon substantial evidence and, thus, must be upheld. Substantial evidence has been defined by this Court as evidence which affords a substantial basis of fact from which the fact at issue can be reasonably inferred. ***Davis v. Public Employees' Retirement System***, 750 So. 2d 1225, 1233 (Miss. 1999), ***Delta CMI v. Speck***, 586 So. 2d 768 (Miss. 1991) Also, in ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1285, this Court noted that substantial evidence is "something more than a 'mere

scintilla' or suspicion. (citation omitted) It has also "been defined by this Court as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion'". This Court, upon review of the record, will see that there is "more than a scintilla" of evidence to support PERS' decision. The facts, as presented in the record before this Court including the documentation admitted at the hearing following remand, support the decision of the PERS Board of Trustees that Ms. Wright is not entitled to the receipt of a disability benefit as defined in State law.

Miss. Code Ann. Section 25-11-113(1) (a) (Supp. 2008) sets forth the criteria to be used when a determination of disability is made:

> The inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation or the incapacity to perform the duties of any employment covered by the Public Employees' Retirement System (Section 25-11-101 et seq.) that is actually offered and is within the same general territorial work area, without material reduction in compensation. The employer shall be required to furnish the job description and duties of the member.

In ***Public Employees' Retirement System v. Cobb,*** So. 2d 605 at 839 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*)

It is clear that it is PERS which has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. As

noted in ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1287, "sorting through voluminous.....medical records, then determining whether an individual is permanently disabled is better left to physicians, not Judges." Also See: ***Public Employees' Retirement System v. Burt***, 919 So. 2d at 1156 Several physicians reviewed Ms. Wright's application and medical documents. 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. Wright's claim, just as in ***Public Employees' Retirement System v. Burt***, 919 So. 2d at 1156. The Appeals Court noted that:

> The three person Committee included two medical doctors who reviewed all of Burt's submitted medical records, actively questioned Burt at the hearing, and personally observed Burt during her testimony. The Committee's findings included detailed reasons explaining why they found that Burt's medical condition did not render her unable to continue her job as a licensed practical nurse. These findings were based on an analysis of Burt's medical records. We find that PERS' decision that Burt was not disabled to continue employment was based on substantial evidence. [2]

Moreover, it is within PERS discretion to determine which documents garner more weight than others. ***Byrd v. Public Employees' Retirement System***, 774 So. 2d at 438 Also see: ***Public Employees' Retirement System v. Howard***, 905 So. 2d 1279, 1287 (Miss. 2005)

It is well documented in the medical evidence presented, or lack thereof, by Ms. Wright that she is not disabled as defined by statute and PERS regulations. The Disability Appeals Committee, as well as, the Board of Trustees as mandated by law determines whether the claimant is unable "to perform the usual duties of employment." Based on

[2] In this case, Ms. Wright made the decision to allow the hearing to proceed with the testimony elicited from her mother, Ms. Farmer. Although Ms. Wright did not appear she submitted (7) seven detailed supplemental pages for consideration with her Notice of Appeal.

the medical record, there was an overwhelming lack of objective medical evidence to support the award of disability.

Again it is not the burden of the Retirement System to prove non-disability. It is the burden of the claimant to prove he/she is in fact disabled. The evidence in the record is contradictory and where it is "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, based on well documented medical evidence presented, or lack thereof, that Ms. Wright was not permanently disabled as defined by Miss. Code Ann. Section 25-11-113(1)(a).

Ms. Wright indicates that the Disability Appeals Committee, in light of the directive from the Court of Appeals, "continued to insist that PERS would consider records and evidence from near the time of termination". (Appellant's Brief Page 15) The disability has to be the direct cause of withdrawal from state service, thus, the Committee was trying to determine whether Ms. Wright was under a disability at the time she terminated employment. See: Miss. Code Ann. Section 25-11-113. The Committee did not refuse to consider all of the information offered at the second hearing. What the Committee was looking for was not whether Ms. Wright is disabled today but whether she suffered a disability in 2002, five years ago, when she terminated employment. They reviewed all the reports, including those offered following remand, to determine whether the doctors may relate to her condition as it existed at the time of her termination.

It is clear from the summary of the medical evidence and statement of facts that the Committee in its analysis considered all of the medical information offered by Ms. Wright including the reports of Dr. Manning and Dr. Webb that were corrected by Ms. Farmer. Ms. Wright notes that she submitted "corrections of errors, oversights and contradictions in the consultative report relied on by PERS". (Appellant's Brief at Page 15) Again, the report of Dr. Manning contains hand written notes that were placed there, not by any staff member from Dr. Manning's office, but, by Ms. Farmer. (Vol. 3, Pp. 129-136, 283) Ms. Farmer admitted that she was not present with her daughter, Ms. Wright, at the time of the evaluation with Dr. Manning. (Vol. 3, P. 284)

On remand Ms. Wright was given the opportunity to refute Dr. Webb's report. Rather than offer the evaluation of another physician criticizing Dr. Webb's report, again Ms. Farmer corrected the report. (Vol. 3, Pp. 121-127, Vol. 2, Pp. 48-50) Ms. Wright made the conscious decision not to appear at the hearing following remand and no statement from a physician stating that she should not appear was offered. (Vol. 2, P. 55) Ms. Farmer testified that she was not present in the meeting with Dr. Webb to hear what Ms. Wright told him. (Vol. 2, P. 60) Ms. Wright wrote to Dr. Webb concerning the corrections on his report. He stated as follows with regard to correcting his report:

> The corrections noted by Ms. Wright will be added to the medical record and are now part of the official medical record but do not replace my report. I dictated my report on the day of the evaluation so I stand by Ms. Wright's history to me as it is stated in my report.....
>
> **The corrections** are helpful and informative however they **do not change my summary or overall impression of Ms. Kelly Wright**. (Vol. 3, P.143)

The Committee in a very thorough analysis of the medical documentation comments on the reports of Drs. Manning and Webb as follows:

> **So, without persuasive evidence of disability, Ms. Wright was sent to be evaluated by Dr. Manning.** (Also a doctor that PERS requested an Independent Neuropsychological Exam.) Dr. Manning is excellent in the testing and evaluation of psychiatric patients. Dr. Manning performed his evaluation on January 16, 2003, just a few weeks after Ms. Wright had quit her job because of her "disability." Dr. Manning thought Ms. Wright had depression, agoraphobia, anxiety and panic disorder along with fibromyalgia **but the most important part of his report states that Ms. Wright would improve if her medications and treatments were optimized.** Doctors certainly do not like to criticize other doctors but the facts here are that **Dr. Manning believed that Ms. Wright had not been treated aggressively enough.** And this Committee agrees with him. In fact, this Committee questioned Ms. Farmer at the hearing about whether options had been considered by Dr. Gupta. We asked if other medications had been tried. They had not. Clearly, Ms. Wright's psychiatric therapy has not been aggressive. There are all kinds of medication combinations that are for the treatment of panic disorder and anxiety and depression. Yet, none of them were attempted.
>
> Apparently, however, Ms. Wright did improve according to Dr. Webb because, as of July of 2003, **Dr. Webb opined that Ms. Wright was stable from her panic attacks and as long as she continued to take her medications, she should be able to work as a nurse. (His opinions fell in line with Dr. Gupta's when he said Ms. Wright was controlling her symptoms with Ativan.)** He noted that some of her problem was her dependent personality and we agree with that. It was clear at the hearing of this matter that Ms. Wright was overly dependent on her mother. The best example of that was that her mother took over Ms. Wright's finances one week into the "illness" and sold Ms. Wright's house, moving Ms. Wright and her child in with her. Ms. Farmer agues that this conclusion is not correct. But, let it be known that rarely does this Committee see a situation where the claimant immediately gives up their independence as Ms. Wright did in this case. As the record reflects, **Ms. Farmer challenged the report of Dr. Webb.** Dr. Webb wrote on February 23, 2004 that he had received and reviewed the certified letter from Ms. Farmer and noted that **her corrections would be noted and made a part of his report but that her corrections do not replace his report.**

> **Dr. Webb wrote that he dictated his report on the day that he evaluated Ms. Wright and he therefore stands by the history he documented as the history proved to him by Ms. Wright.** He further stated that even though the corrections are informative and helpful, **they do not change his over impression of Ms. Wright or his summary.** We also know now since Ms. Farmer's testimony at the remand hearing that Ms. Farmer did not attend Ms. Wright's evaluation with Dr. Webb. (Vol. 2, Pp. 31-32)

The Committee also analyzed the medical documentation from Ms. Wright's other doctors as follows:

> We understand that Ms. Wright believes that her psychiatric **problems began in June of 2000**, when she went to the emergency room thinking she was having a heart attack. **Yet, the emergency room did not find evidence of a panic attack.** That note documents complaints of indigestion and burping. The record notes no evidence of anxiety. **She was worked up for heart problems and none were found. And, Ms. Wright was discharged with cough medication.** Possibly the emergency room did not correctly diagnose a panic attack. Anyway, Ms Wright apparently continued to feel stressed out and went to see Dr. Covington, a psychiatrist. She told him that things were very stressful at work and she had not been able to calm down for several days. At that point, Dr. Covington made **the diagnosis of Panic disorder. Ms. Wright was put on medication and did so well that she returned to work on June 27, 2000.** She reported to Dr. Covington that she was not letting her supervisor get on her nerves. Ms. Wright did well but on February 5, 2001 she told Dr. Covington she was feeling more anxious. He increased her medication. Apparently, then Dr. Covington left town and Ms. Wright continued to be able to work.
>
> Ms. Wright first went to see Dr. Bishop in July of 2001, and she reported that her job was very stressful. He thought she might have an adjustment disorder with possible histrionic traits. She told him that she had suffered a full blown panic attack because her work was so stressful. **He adjusted her medication, and Ms. Wright continued to work and even improved. By the way, Dr. Bishop found no overt signs of a psychiatric illness.** We carefully read his notes and Ms. Wright was functioning well when he saw her. Ms. Wright saw Dr. Bishop again **in November of 2001, and he wrote she was doing well and that was the last time Ms. Wright saw Dr. Bishop** because she had filed a Workers' Compensation claim apparently for emotional problems

and he told her he did not get involved in those kinds of cases. (Apparently, this claim was denied.)

Ms. Wright went to see Dr. Gupta in January of 2002, and he diagnosed Ms. Wright with panic disorder, depression and anxiety. He noted that she appeared well and noted no distress and she seemed to be adjusting to her environment. He wrote **in March of 2002 that Ms. Wright had not suffered a panic attack and was taking very little Ativan.** He wrote that Ms. Wright was worried that she would be transferred to a more stressful job. Less than one month later, on April 3, 2002, Dr. Gupta then wrote that Ms. Wright has fibromyalgia and that her psychiatric problems were related to that and that she was no longer able to handle the stress of work. **No new medication was prescribed. It does not appear that adjustment of medications, counseling or any other treatment was attempted before Dr. Gupta voiced his opinion that he thought Ms. Wright was disabled.** On September 9, 2002, (5 months later) Dr. Gupta also completed a Family Medical Leave form and at that point, we have a first entry (October 10, 2002) from Dr. Hensarling, the rheumatologist, that Ms. Wright has fibromyalgia. We note that at that time, Ms. Wright was complaining of neck and shoulder pain. **(No where is it documented the requisite 23 trigger point sites deemed necessary to make the diagnosis of fibromyalgia.) We also note that Ms. Wright also made complaints of joint pain which is not fibromyalgia. Fibromyalgia is a soft tissue illness. Anyway, it appears that when the early diagnosis was made, not only were no trigger points documented, there was also normal blood work for autoimmune diseases or inflammation which is generally the marker for a diagnosis of fibromyalgia and other auto-immune diseases. So there is no objective evidence of fibromyalgia at this point in time. Nevertheless, Ms. Wright quit work on December 6, 2002. So, at the time of termination, what the objective medical evidence reflects is that while Ms. Wright had a diagnosis of fibromyalgia that clearly was not supported by objective testing.** No trigger points were documented, and to a doctor, the lack of documentation means that it did not exist. And there was no positive blood test for any type of disease that rheumatologist look for. We also know that in a year and a half, Ms. Wright had seen three psychiatrists. She had done well. **There is no credible objective medical/psychiatric evidence that Ms. Wright was permanently and likely totally disabled at the time of her termination.** In fact, this Committee wonders, now aloud, whether Dr. Gupta was attempting to help Ms. Wright obtain her medical leave under the Medical Leave Act. Because clearly, his

records do not support permanent and total disability at that time. What we do note, again, is that Ms. Wright did not have medication trials. **Generally, when a patient is not doing well on particular medication, the medication is either adjusted or changed to another medication until one is found that will control the symptoms. Dr. Gupta never did this.** He never sent Ms. Wright for counseling while he knew or should have known that free counseling is available at the Region 8 Mental Health Center. And, he never had to admit her to the hospital. (Vol. 2, Pp.28-31)

Noting that the opinions of the doctors are contradictory the Committee found:

We recognize that there are several contrary opinions in this case. Yet, medicine is not a Situation where this Committee lines up the sides and counts how many doctors say the clamant is disabled and how many say she is not. If it were that easy, there would be no need for hearings or courts or the like. But medicine, while it involves science, is really an art. The outcomes are based on many variables such as the compliance of the patient, the medications and therapies, the doctor and his or her level of expertise. The doctor has to try different things until the patient is optimized. **So while we have Dr. Gupta saying that Ms. Wright is disabled, we have both Dr. Manning and Dr. Webb saying that Ms. Wright has not received adequate treatment for her illness and needs to be optimized.** We know that Dr. Gupta has seen Ms. Wright many times more than Dr. Manning and Dr. Webb but that does not change the fact that Ms. Wright's treatment has not been optimized. Generally, psychiatric problems are fluid in nature and obviously, the panic disorder from which Ms. Wright suffers is not disabling at all, when it is treated correctly. **Many people have panic disorder. It is not necessarily a disability. It is just a diagnosis. Panic disorder is a treatable condition.** And, Dr. Webb believes that going back to work would be good for Ms. Wright. We regularly find many inconsistencies in records, but these inconsistencies do not change the findings of these doctors. And, Dr. Manning and Dr. Webb agree that Ms. Wright's treatment has not been optimal. Ms. Wright has taken seven medications and had eight psychotherapists. **She told Dr. Gupta she controls her panic attacks with Ativan. She can drive, cook and apparently lives by herself again since her mother has remarried. (Her mother did not report this in her testimony.) A disability has to be total and "likely" permanent.** This committee does not see this evidence in the record before us. Dr. Gupta's office notes and his "treatment" do

> not support a permanent and total disability. There was no psychiatric hospitalization. There was very little medication adjustment. There was little psychotherapy even though Region 8 Mental health Center is free to those who cannot afford mental health care. (Ms. Wright should know this since she, in fact, worked for the health department.)
>
> Can we recommend disability when someone has not optimized their treatment? Ms. Wright is a registered nurse. She should understand that she needs to optimize her treatment. Ms. Farmer, a formidable witness and advocate for her daughter, surprised us because as diligent as she has been to bet her daughter disability benefits, she has not pursued other medical treatment with the same voracity.
>
> In this specific case, it is our recommendation that Ms. Wright's claim for disability be denied. We base this on the fact that Dr. Gupta's office notes do not document a permanent and total disability so likewise, we do not find his opinion persuasive. Further, the reports of Dr. Webb and Dr. Manning support the fact that Ms. Wright is not disabled. She merely has a diagnosis that needs to be treated appropriately. (Vol. 2, Pp. 33-34)

The Committee did not discount any of the information offered by Ms. Wright in support of her claim. The Committee provided a very thorough statement of facts as well as a thorough summary of the medical evidence. (Vol. 2, Pp. 17-27)

In this case not one, but two independent and separate committees, the Medical Board and the Disability Appeals Committee on two occasions, found that Ms. Wright was not entitled to disability benefits. These committees are made up of five (5) different doctors and one hearing officer. Thus, on the first occasion three (3) doctors reviewed Ms. Wright's record and determined she was not disabled and on the second and third occasion two (2) different doctors and a hearing officer, who is also an attorney and a nurse, reviewed Ms. Wright's record and determined that she was not disabled. Agency action will not be set aside as arbitrary or capricious if the action is rational, is based on

relevant factors and is within the agency's statutory authority to make. ***Harris v. United States***, 820 F. Supp. 1018, 1025 (N.D. Miss. 1992)

The Disability Appeals Committee presented a lengthy and well-reasoned recommendation to the Board of Trustees. The Committee in making its recommendation noted that there were several contrary opinions in the evidence. After noting that there existed several important discrepancies in the evidence, the Committee unanimously agreed that Ms. Wright failed to persuade them that her ailments satisfy the definition of disability.

Clearly, the Committee refuted the subjective evidence with its analysis of the objective evidence in the file. The Committee provided a thorough analysis of the medical documentation. As can be viewed in the Committee's recommendation, the members thoroughly considered all of the evidence before them. They did not discount any of the diagnosis given to Ms. Wright by her physicians. The question before the Committee was whether Ms. Wright's ailments render her unable 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 PERS; and was Ms. Wright mentally or physically incapacitated for the further performance of her job duties, that such incapacity is likely to be permanent and she should be retired. Miss. Code Ann. Section 25-11-113(1) (a) (Supp. 2008).

The Committee provided a "reasoned and unbiased evaluation of the evidence." It is not the duty of the Court to reweigh the evidence offered by Ms. Wright. According to ***Mississippi Public Service Commission v. Merchants Truck Line***, 598 So. 2d 778,

782 (Miss. 1992), "So long as substantial evidence exists, an agency's fact finding must be allowed to stand even though there might be room for disagreement on that issue."

The fact that an individual has been diagnosed with a certain condition and treated for an ailment does not mean that the condition is disabling. The severity of the condition is important in determining whether an individual is disabled as that term is defined under PERS' law.

Specific statutory law, Miss Code Ann. Sections 25-11-113 and 25-11-114, relate to disability retirement from the Public Employees' Retirement System. Further, PERS law and Regulations provide the manner in which disability cases proceed before its Board of Trustees.

As previously stated, the scope of review in cases such as this is to determine whether the decision of the PERS Board of Trustees is supported by substantial evidence. Ms. Wright is not entitled to the receipt of disability benefits pursuant to Miss. Code Ann. Section 25-11-113. Ms. Wright failed to provide the needed proof to establish that she is disabled. The medical documentation supports the finding of the PERS Board that Ms. Wright is capable of performing her work duties. It is not the role of the appellate court to re-weigh the evidence. ***Public Employees'' Retirement System v. Warner***, 983 So.2d 342,347 (Miss. App. 2008) Where there is substantial evidence to support the decision of PERS the reviewing Court must give the decision substantial deference. ***Case v. Public Employees' Retirement System,*** 973 So. 2d 301,311 (Miss. App. 2008) It is clear that the decision entered on August 28, 2007 by the Board of Trustees is indeed supported by substantial evidence and, thus, the decision of the Circuit Court must be affirmed.

There is substantial evidence to support the Board's decision, and its actions are neither arbitrary nor capricious. The Board has the authority to make a decision relative to a disability, and it did so within the confines of the laws of Mississippi and PERS Regulations. In order to conclude that the PERS Order is arbitrary or capricious, the Court would have had to conclude that the Board's ruling was "not done according to reason and judgment, but depending on the will alone." ***Public Employees' Retirement System v. Howard***, 905 So. 2d at 1285 This Court in ***Howard*** also noted "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. Again the records are inconsistent and in such case, PERS has a duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. In its analysis, the Disability Appeals Committee commented on the differing reports as it also brought those out in its finding of facts.

In ***Public Employees' Retirement System v. Howard,*** 905 So. 2d at 1287, this Court noted that: "PERS was presented with contradictory evidence in assessing Howard's disability status." The Court held that "it is for PERS, as the fact finder, to determine which evidence is more believable or carries the most weight." ***Id.*** It is further within PERS' discretion to determine which documents garner more weight than others as recognized by the Circuit Court . ***Byrd v. Public Employees' Retirement System,*** 774 So. 2d at 438

III.

THE STANDARD OF DISABILITY APPLIED IN THIS MATTER IS THAT WHICH IS REQUIRED BY STATUTE.

PERS disability, unlike Social Security disability, is job specific, thus, the Hearing Officer was correct in stating that the disability is one that prevents you from doing your job. It is true, as asserted by Ms. Wright, that the law provides that the employer can offer a disability applicant a job with lesser duties provided there is not a material reduction in compensation. Miss. Code Ann. Section 25-11-113(1) (a) provides the definition of disability as

> "the inability to perform the usual duties of employment of 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 Hearing Officer did not state that an individual had to be totally disabled from doing anything ever again. In fact, she said that the Committee was looking for a disability that would knock you out of your job.

Miss. Code Ann. Section 25-11-113 (1)(a) also states that the disability is one that is likely to be permanent. Section 25-11-113(1)(d) talks of the medical board's determination and the appeals process if it does not find that the member is "mentally or physically incapacitated for the future performance of duty" This indicates that the disability must be of a permanent nature. The fact that the Hearing Officer used the term "total" was to indicate that it is total as to the specific job duties the member is required to perform. Miss. Code Ann. Section 25-11-114(6)(8) uses the term likely to be

permanent and permanent and total disability interchangeably. For instance section (6) states in pertinent part:

> 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 the incapacity is likely to be permanent.....

And in the same section goes on to state:

> Permanent and total disability resulting from a cardiovascular, pulmonary or musculo-skeletal condition that was not a direct result of a traumatic event.....

Section (8) then states:

> In case of death or total and permanent disability under subsection (4) or subsection (6) of this section and before the board shall consider any application for a retirement allowance.....

The provisions regarding re-exam found in Section 25-11-113 apply equally to those approved under a regular disability as well as those under a hurt-on-the-job disability.

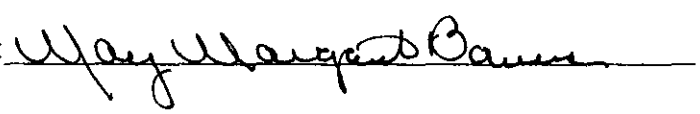
What is most important is that the Committee in its Conclusions of Law clearly applied the applicable law in making its recommendation. The Committee came to the conclusion that "Kelly Wright is not permanently disabled as that term is defined and held applicable herein, in order to qualify for disability benefits as provided under Mississippi Code of 1972, as amended, Sections 25-11-113 and 25-11-114". Clearly the Committee applied the law as it is written in making their recommendation to the Board of Trustees. The Circuit Court properly held that "the Committee and Board did apply the right standard of disability". The Circuit Court's ruling should be affirmed.

CONCLUSION

The Law of the Case Doctrine is not applicable to the case presently before this Court. The record supports the decision entered by the PERS Board of Trustees. 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 Ms. Wright. The Disability Appeals Committee in its Recommendation to the Board of Trustees clearly applied the standard in disability cases as found in the law governing the administration of the disability program. Therefore, the PERS Board of Trustees respectfully requests this Honorable Court uphold the Opinion and Order of the Circuit Court entered September 26, 2008, wherein the Order of the PERS Board of Trustees entered on August 28, 2007, was affirmed.

Respectfully submitted this the 2 day of April, 2009.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLEE

By: 

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Brief of Appellee has been mailed, postage pre-paid, to:

Judge William F. Coleman
Hinds County Circuit Court
P. O. Box 327
Jackson, MS 39205-0327

Ms. Kelly L. Wright
c/o Nathaleen Farmer
7 Rob Lane
Jackson, MS 39212

This, the 2 day of April, 2009.

Mary Margaret Bowers

[redacted]