

IN THE SUPREME COURT OF MISSISSIPPI

KELLY L. WRIGHT

APPELLANT

VERSUS

CAUSE NO. 2008-SA-01738

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI**

APPELLEE

**On Appeal From the Decision
of the Hinds County Circuit Court**

Dated September 26, 2008

REPLY TO APPELLEE'S BRIEF

**Kelly L. Wright
7 Rob Lane
Jackson, Mississippi 39212
601-918-6485
601-346-6290
Appellant**

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REPLY TO APPELLEE'S BRIEF

I would like to reply to the Appellee's Brief as follows:

DR. MANNING'S REPORT: (Vol. II, Pgs. 389-394)

Concerning Dr. Manning's evaluation of Ms. Wright, he noted "It is unfortunate that she apparently has not ever had the combination of pharmacological treatment and empirically based psychological treatment"

This statement is incorrect. It is our understanding that "empirically based psychological treatment" means talk therapy or psychotherapy. Ms. Wright has had talk therapy in combination with medications.

Please also note that Dr. Manning found several diagnoses to include Depression, Anxiety, Panic Attacks, Agoraphobia, Social Phobia and FIBROMYALGIA.

DR. WEBB'S REPORT: (Vol. II, Pgs. 121-125)

Dr. Webb stated Ms. Wright filed a Worker's Compensation Claim in 2001 over a problem with her supervisor. This is not true. The Worker's Compensation Claim was because of her illnesses which Ms. Wright felt were caused or at least exacerbated by her heavy workload at work. The claim was denied and Ms. Wright did not appeal after realizing her genetics were probably the main contributing factor to her illnesses. On Page 31 of Appellant's Record Excerpts, the Disability Appeals Committee states correctly that Ms. Wright's workman's compensation case was for emotional problems or in other words, mental health issues, which is true.

DR. WEBB'S REPORT: (Pgs. 121-125)

Dr. Webb also stated Ms. Wright apparently chose not to work because of chaos and conflict she had with some of the personnel there. This is not true. Ms. Wright did have a lot of stress at work due to the workload, however, Ms. Wright always received good performance reviews and there is nothing in this Record which shows she had problems with the personnel at the Health Department.

The Social Security Administration approved Ms. Wright's disability on the first application without the help of an attorney. This was effective on the date of termination from work which shows Ms. Wright was disabled in the Fall of 2002.

The Social Security Administration has strict guidelines to determine disability which is in direct contrast to PERS which has no written guidelines or criteria. *Mississippi Code Annotated Section 25-11-113(1)(a)* states "..... the Board of Trustees may accept a disability medical determination from the Social Security Administration in lieu of a certification from the Medical Board."

We realize this does not say "must" accept, but if PERS "may" accept the Social Security Administration's determination of disability, same should be given considerable weight as substantial evidence.

Substantial evidence is defined as "that which provides an adequate basis of fact from which the fact in issue can be reasonably inferred." *PERS V. DISHMAN*, 797 So. 2nd at 892 (Miss.2001). Dr. Webb's report and his conclusion are not based on any facts. The two items in his report where the facts can be checked have proven him to be totally wrong, i.e. his statement that there were no

medication changes and no psychotherapy.

PAGE 30 OF APPELLEE'S BRIEF:

PERS stated Dr. Webb's report and Dr. Manning's report support the fact that Ms. Wright is not disabled.

Nothing could be further from the truth. The Court of Appeals has already reviewed Dr. Manning's and Dr. Webb's reports and said that PERS relied solely on Dr. Webb's report (Appellant's Record Excerpts, Page 8). THAT MEANS DR. MANNING'S REPORT DID NOT AGREE WITH DR. WEBB'S REPORT..

PAGE 28 OF APPELLEE'S BRIEF:

Concerning PERS' assertion that there is no evidence of fibromyalgia, we submit the following. PERS said there was no documentation of classic trigger points.

We have pointed out in two Briefs that there are four notations in Dr. Kenneth Hensarling's office notes of "classic trigger point patterns". (Vol. II, Page 213, 220, 223, 225). However, PERS continues to say there are no notations.

Also PERS states Ms. Wright's bloodwork was normal, so she had no objective testing which showed fibromyalgia. They also state bloodwork showed no inflammation which is generally the marker for a diagnosis of fibromyalgia.

Either the doctors and nurse on the Disability Appeals Committee are not knowledgeable about fibromyalgia or they are trying to mislead the Court.

We have been advised by Dr. James K. Hensarling, Rheumatologist, that THERE ARE NO MARKERS IN BLOODWORK FOR FIBROMYALGIA.

Therefore, Ms. Wright's bloodwork was consistent with what it should be for fibromyalgia. Also, Dr. Manning and Dr. Webb, PERS' own consultants have diagnosed Ms. Wright with Fibromyalgia. See Page 4 of Dr. Webb's report where he writes: **AXIS III – FIBROMYALGIA, increased cholesterol.**

PAGES 29 & 30 OF APPELLEE'S BRIEF:

PERS states that Dr. Gupta's office notes do not convince them that Ms. Wright is disabled. A doctor's office notes are just that – notes for the doctor. They show dates of treatment and medication changes but are not meant every date of treatment to reflect his overall opinion on the overall condition of the patient. Dr. Gupta has advised Ms. Wright that his Opinion Letters are meant for that purpose and they very directly and clearly state Ms. Wright is totally and permanently disabled. That is a fact.

Page 34 of Appellee's Brief:

PERS states that **"..PERS DISABILITY, UNLIKE SOCIAL SECURITY, IS JOB-SPECIFIC, thus, the Hearing Officer was correct in stating that the Disability is one that prevents you from doing your job." In PERS own words above, Ms. Wright has furnished absolute proof of disability with one piece of evidence.** According to the law, the letter from the MS Board of Nursing (Vol.II, P. 147), denying Ms. Wright's nursing license due to illness should be all that is needed to award Ms. Wright's disability benefits, however, she has provided numerous other pieces of substantial evidence. Without a license Ms. Wright definitely cannot perform the job of a registered nurse which was her job.

The Mississippi Board of Nursing would not renew Ms. Wright's license even in an inactive status due to her illnesses. The PERS' Disability Appeals Committee chooses to ignore this FACT. Ms. Wright could in no way continue working as a Nurse without a license. It would appear that this one fact would persuade the Committee that Ms. Wright is disabled but they continue to refuse to accept the evidence and proceed according to their will alone.

Please see Exhibit A attached hereto – excerpt from Mississippi Board of Nursing – Laws, Rules & Regulations – which states any person practicing Nursing must have a license and also cannot practice while taking mind altering drugs – this would include antidepressants and ativan. Also, no one can practice nursing with an emotional disability.

. We do not understand why PERS would deny disability benefits when another state agency – the MS Board of Nursing- says that Ms. Wright is disabled and will not renew her license. Therefore, we can only conclude that the PERS Disability Appeals Committee is making decisions based on their will alone which makes their decision arbitrary . .

“An administrative agency's decision is arbitrary when it is not done according to reasoned judgment but depending on the will alone.”

PERS V. MARQUEZ, 774 So.2nd 421,425 (Miss.2000).

On page 28, Appellee's Brief, the Disability Appeals Committee said on April 3, 2002, Dr. Gupta said Ms. Wright was disabled. The

correct date is April 3, 2003. This is a significant error.

On page 28 of Appellee's Brief, the Disability Appeals Committee says they wonder, now aloud, whether Dr. Gupta said Ms. Wright was disabled to help her receive family medical leave. There are two doctors on the Disability Appeals Committee and they should know you do not have to say a patient is totally and permanently disabled to receive leave under the Family Medical Leave Act. Also, the law is not based on "wondering out loud" but on facts. Also in the same paragraph, the Disability Appeals Committee said Dr. Gupta did not change Ms. Wright's medication and she had no counseling. These statements are totally untrue and this has been so stated in the prior Court of Appeals Order (Appellant's Record Excerpts, Page 3).

On Page 30 of Appellant's Record Excerpts, last paragraph, the Disability Appeals Committee states Ms. Wright voluntarily quit her job and was not motivated to return to work.

This is another falsehood. Dr. Gupta took Ms. Wright off work under the Family Medical Leave Act. See page 28, Appellee's Brief, where the Disability Appeals Committee "wonders aloud" whether Dr. Gupta was trying to help her get medical leave.

On Page 26 of Appellee's Brief, the Disability Appeals Committee is knowingly misrepresenting Dr. Manning's report. Dr. Manning apparently was not aware that Ms. Wright was receiving medication and counseling – or talk therapy but no where in his report did he say Ms. Wright was not being treated

aggressively enough. He also did not say Ms. Wright would improve if her medications and treatments were optimized. Here again, we have the Disability Appeals Committee trying to sway the Court with falsehoods and misrepresentations.

On Page 30, Appellee's Brief, PERS states this case was reviewed by five different Doctors and a Hearing Officer. This is a misleading statement and since PERS opened the door on this matter, we would like to respond to it. Actually, the Disability Appeals Committee consists of two doctors and a Hearing Officer who is an attorney and the same two doctors and one attorney who heard this matter in 2007 are the very same ones who heard it in 2003- a Dr. David Bankston, Dr. Frank Duddleston and attorney, Sheila Jones. They stated during the hearing, they were private contractors and paid to sit on the Disability Appeals Committee. It appears to us if they are paid fees similar to PERS' other consultants – i.e., Dr. Webb was paid \$1500.00 for about one hour's work -,and these people stay on The Disability Appeals Committee for years on end, this would constitute a conflict of interest, and at the very least it is unethical.

On Page 26, Appellee's Brief, the Disability Appeals Committee says that Ms. Wright's problem is being overly dependent on her mother. Nothing could be further from the truth. The reason Ms. Farmer took over as she did was because Ms. Wright was having severe health problems and had a three year old child and no one else to help her. Ms. Farmer is the one who saw what horrible condition her daughter was in at this time – unable to catch her breath, crying, vomiting, thinking she was dying, etc. The medical records do not reveal what bad shape Ms. Wright

was in. The doctors at the MEA Clinic and the Baptist Hospital did miss the fact that Ms. Wright was having a severe panic attack. Dr. Covington, Psychiatrist, on the other hand took one look at Ms. Wright and said, "You are having a panic attack." Ms. Wright was totally flat on her back for 2 – 2 1/2 weeks so she had to have help.

Ms. Wright left home at age 17 and never asked her mother for help until June, 2000, at the age of 38. She put herself through Nursing School. To say she was dependent on her mother is completely false and not based on any fact.

Ms. Farmer is not a health professional but she could tell her daughter was in dire circumstances. Ms. Farmer has been dealing with mental health issues on a 24/7 basis for 40 years, and with mental health professionals. She had two sons born completely blind and severely and profoundly retarded, with other problems to include but not limited to: epilepsy, autism, seizures, intermittent explosive disorder, plus her own problems with anxiety and depression. She is well qualified to determine whether her daughter was in severe distress. I would also like to clarify the fact that Ms. Wright's house was not sold within one week of her breakdown, but within one week, after it was listed with a realtor, which was about 2-1/2 months after Ms. Wright's breakdown. Ms. Farmer could see Ms. Wright was going to need a lot of help for a long time.

Also, Ms. Wright would not have been able to go through this appeals process without the help of her Mother (who has her Power of Attorney in this matter). Her Mother has supported her emotionally, physically, and financially during this time plus caring for Ms. Wright's daughter. We wonder how many state

employees have to give up on receiving their benefits due them because they have no one able to help them..

We also wonder how any reasonable doctor or lawyer would say that an inconsistent report from one doctor who only spent about 40 minutes with a patient could possibly outweigh opinions of two treating physicians who have treated Ms. Wright for more than six years now, the opinion of Dr. Manning (PERS' own consultant – which supports disability), the Social Security Administration, the Mississippi Board of Nursing, and Circuit Court Judge Winston Kidd.

On Page 35 of Appellant's Record Excerpts, the Disability Appeals Committee says: "We regularly find many inconsistencies in records, but these inconsistencies do not change the findings of these doctors." - referring to PERS' own consultants – Drs. Manning and Webb. However, on Page 36 of Appellant's Record Excerpts, the Disability Appeals Committee says: ".....Dr. Gupta's office notes do not document a permanent and total disability so likewise, we do not find his opinion persuasive."

It appears that PERS only accepts opinions of their own consultants. You cannot have it both ways. You cannot disregard inconsistencies in Dr. Webb's findings and place a different standard on Dr. Gupta's findings. It is not right to accept Dr. Webb's findings (from a 40 minute interview that he was paid \$1500.00 for), when his report contains false statements and contradictions and not accept Dr. Gupta's and Dr. Hensarling's findings (who have each treated Ms. Wright going into seven years now), because you do not like the way they write their "office

notes”.

On Page 29 of Appellee’s Brief, the Disability Appeals Committee says Dr. Manning and Dr. Webb say Ms. Wright’s treatment has not been adequate and needs to be optimized. This is completely untrue. Dr. Manning apparently did not know Ms. Wright was receiving medication in concert with talk therapy but Dr. Webb states on P.5 of his report (Vol.II, P. 121-125), “Ms. Wright does suffer with panic disorder but it is in full remission with the prozac and ativan and she is doing quite well” and she has had “.....adequate medical treatment.” Does this sound like Dr. Webb said Ms. Wright’s treatment needs to be optimized? ABSOLUTELY NOT. This is the complete opposite of what the Disability Appeals Committee said. Here again, we have PERS completely telling falsehoods and distorting the truth.

Please also review Dr. Webb’s Update Note, (Vol.II, Page 143,) wherein he alludes to the fact that another interview might be in order after Ms. Farmer pointed out the errors in his report. The Disability Appeals Committee would not agree to this. We wonder why the Disability Appeals Committee would not agree to another interview with Dr. Webb? In this Update Note Dr. Webb calls into question his own judgment after Ms. Farmer pointed out his mistakes to him as allowed under The HIPAA Law. WITH DR. WEBB’S OPINION IN QUESTION, WHAT EVIDENCE DOES PERS HAVE TO DISALLOW BENEFITS?

The Court of Appeals stated that the Disability Appeals Committee relied on Dr. Webb’s report alone to deny benefits. (Appellant’s Record Excerpts, Page 8), The Court of Appeals also stated Dr. Manning’s report supported disability benefits

but he did not state whether he felt the disability was “likely to be permanent.”

Our question is this: Since the Disability Appeals Committee had already paid Dr. Manning \$1500.00 for his report, why didn't they ask him to clarify his position in this matter. Why pay Dr. Webb another \$1500.00 for another report? This is very suspicious and it appears that the Disability Appeals Committee does not want any follow-up with any doctor. We cannot find any facts that the Disability Appeals Committee relied on in their decision to deny benefits to Ms. Wright – only falsehoods, misrepresentations, and in their own words, “wondering aloud”.

Since the Disability Appeals Committee's decision was not based on facts, it was not based on substantial evidence, and is therefore arbitrary and capricious.

We also do not understand how two Circuit Court Judges could arrive at two completely different conclusions from the same evidence. The Doctrine of the Law provides that “whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, as long as there is a similarity of facts.” Mauck v. Columbus Hotel Co., 741 So.2d 259,266-67 (Miss.1999). Circuit Court Judge William Coleman said the doctrine of the law did not apply because additional evidence was added to the record.

We ask this question: “If nothing is added to the evidence, why would you continue litigating the same case?” We feel he is wrong and the doctrine of the law does apply because the same case is between the same parties and the facts are similar.

The only evidence added to the Record only further substantiates Circuit Court Judge Winston Kidd's ruling, therefore the doctrine of the law does apply and Judge Kidd's ruling should be upheld.

CONCLUSION

We have two treating physicians, Dr. Gupta and Dr. Hensarling, both Specialists in their fields who state Ms. Wright is totally and permanently disabled. We have the Social Security Administration, as well as the Mississippi State Board of Nursing, who say Ms. Wright is disabled. We have PERS own consultant, Dr. Edward Manning, Psychologist, whose report supports disability. Dr. Manning and Dr. Mark Webb, both PERS' consultants, as well as Drs. Gupta and Hensarling have all diagnosed Ms. Wright with fibromyalgia, as well as many forms of mental illnesses.

Judge Winston Kidd determined after an objective review of the evidence that Ms. Wright was totally and permanently disabled and should be awarded retirement benefits.

Judge Coleman did not state that he made an objective review of the evidence.

Judge Coleman states that he must accept PERS' evaluation of the evidence. We disagree with Judge Coleman.

If the Court has to accept PERS' conclusions regardless of the evidence provided by Ms. Wright, there would be no reason to have an appeals process.

Judge Coleman did not state that he made an objective review of the evidence. On the other hand, Judge Kidd did state he made an objective review of the evidence and he concluded that Ms. Wright was entitled to disability benefits.

For the foregoing reasons, and other reasons set forth herein and in Appellant's Brief, the decisions of Judge William Coleman of the Hinds County Circuit Court and the Public Employees' Retirement System of Mississippi are arbitrary and capricious and should be reversed and disability benefits should be awarded to Ms. Kelly Wright.

Respectfully submitted this the 9th day of April,
2009.

Kelly L. Wright
KELLY L. WRIGHT


CERTIFICATE OF SERVICE

I, Kelly L. Wright, Appellant, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Reply to Appellee's Brief to:

Honorable Judge William F. Coleman
Hinds County Circuit Judge
First Judicial District
PO Box 327
Jackson, MS 39205-0327

Mary Margaret Bower, Esq.
Public Employees Retirement System of Mississippi
429 Mississippi Street
Jackson, MS 39201

So certified this the 9th day of April, 2009.



KELLY L. WRIGHT,
APPELLANT



Mississippi Board of Nursing - Laws, Rules & Regulations -

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Nursing Practice Law (Statute)

In order to safeguard life and health, any person practicing or offering practice as a registered nurse or licensed practical nurse in Mississippi for compensation shall hereafter be required to submit evidence of qualifications to practice and shall be licensed or hold the privilege to practice as stated in the Nursing Practice Law. (eff. February 9, 2004)

Rules and Regulations

The authority of the Mississippi Board of Nursing is to promulgate rules and regulations for the licensure of registered nurses and licensed practical nurses. (eff. February 9, 2004)

Note: To download the entire document, click on the link below.

[Nursing Practice Law - Rules and Regulations \(pdf - 229kb\)](#)

Exhibit "A" - Page 1 of 2

CHAPTER II. DENIAL, REVOCATION, SUSPENSION OF LICENSE

- 1.1 The Board shall have power to deny, revoke, suspend, or refuse to renew any license or permit to practice nursing issued by the Board or applied for in accordance with the provision of this act, including the power to fine said individual, upon proof that such person has violated the provisions of Chapter 15 as more specifically defined in Section 73-15-29.
- 1.2 Unprofessional conduct shall include but not be limited to the following:
 - a. Practicing the profession fraudulently;
 - b. Practicing nursing beyond the authorized scope of the license or directing others to practice beyond their authorized scope;
 - c. Failing to take appropriate action in safeguarding the patient from incompetent health care practice;
 - d. Altering patient or health facility records;
 - e. Practicing the profession while under the influence of alcohol or other mood altering substances; *i.e., prescription drugs, alcohol, anti-depressants.*
 - f. Practicing the profession while the ability to practice is impaired by physical or emotional disability.
 - g. Misappropriation of drugs, supplies or equipment;
 - h. Practicing nursing in this state without a current active Mississippi license or permit or while the license or permit is revoked.
 - i. Permitting, aiding or abetting an unlicensed person to perform activities requiring a license;
 - j. Assuming duties and responsibilities in the practice of nursing when competency has not been maintained;
 - k. Violating confidentiality of information or knowledge concerning the patient;
 - l. Willful alteration of medications;
 - m. Obtaining or attempting to obtain controlled substances by unauthorized means;
 - n. Forging a prescription for medication/drugs;
 - o. Passing or attempting to pass a forged prescription;
 - p. Selling or attempting to sell a controlled substance;
 - q. Possessing, obtaining, furnishing or administering drugs to any person, including self, except as legally directed;
 - r. Failure to report to the Board facts known regarding incompetent or illegal practice of any RN or LPN. Excluded from this requirement is the reporting of chemically dependent nurses who have sought and complied with treatment for chemical dependency provided that no other provision of the Nursing Practice Law and Rules and Regulations has been violated;
 - s. Practicing in an expanded role without certification by the Board; and
 - t. Failure to adhere to the standards of practice for nurses in the expanded role.

CHAPTER III. PRACTICE OF NURSING

1. Functions of the Registered Nurse

- 1.1 The RN shall be responsible and accountable for:
 - a. Making decisions that are based upon knowledge, competency, experience and the use of the nursing process;
 - b. Knowledge of and compliance with the laws and regulations governing the practice of nursing in Mississippi;
 - c. Practicing within the scope of practice as established by the Board and according to generally accepted standards of practice.
- 1.2 The RN shall be held accountable for the quality of nursing care given to patients. This includes:
 - a. Providing for nursing leadership in the planning for and provision of nursing care to patients for whom responsibility has been accepted;
 - b. Giving individualized nursing care and respecting the right of the patient according to the needs or assigning these functions to assistants in accordance with the preparation or qualifications,