KELLY L. WRIGHT APPELLANT

VERSUS CASE NO. 2008 01738

PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI APPELLEE

ON APPEAL FROM THE DECISION OF THE

HINDS COUNTY CIRCUIT COURT

DATED SEPTEMBER 26, 2008

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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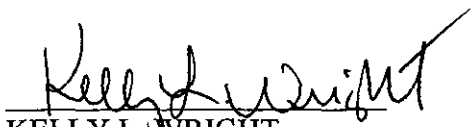
The undersigned Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualification or recusal.

1. Ms. Kelly L. Wright (Appellant)
2. Ms. Nathaleen N. Farmer (Mother of Appellant)
3. Public Employee's Retirement System (Appellee)
4. Margaret Bowers, Esq. (Attorney for Appellee)
5. Dr. Mark Webb (Hired by Appellee), and
6. Dr. Edward Manning (Hired by Appellee)



KELLY L. WRIGHT,
APPELLANT

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

I. **WHETHER THE DOCTRINE OF THE LAW OF THE CASE REQUIRES STRICT ADHERENCE TO JUDGE KIDD'S DECISION.**

II. **THE CIRCUIT COURT ERRED IN DETERMINING THAT MS. WRIGHT DID NOT PRESENT SUBSTANTIAL EVIDENCE OF DISABILITY AND THAT THE DECISION OF THE BOARD OF TRUSTEES WAS NOT ARBITARY AND CAPRICIOUS.**

III. **WHETHER THE STANDARD OF DISABILITY APPLIED IN THE APPELLANT'S CASE WAS MORE STRINGENT THAN THE STANDARD REQUIRED BY STATUTE.**

STATEMENT OF THE APPLICABLE LAW

The Public Employees Retirement System (herein PERS) is a state agency which provides retirement and disability income to state employees. Miss. Code Ann. Section 25-11-113 (Rev.2003). Miss. Code Ann. Section 25-11-113(1)(a) provides the legal requirement for a finding of disability in this case. It states as follows:

> Upon the application of a member or his employer, any active member in State service who has at least four (4) years of membership service credit may be retired by the board of trustees...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, shall certify that the member is mentally or physically incapacitated for the further performance of duty, that....such incapacity is likely to be permanent, and that the member should be retired: however, the board of trustees may accept a disability medical determination from the Social Security Administration in lieu of a certification from the medical board.

PERS must apply the following statutory definition of disability in making its disability determination.

> For the purposes of disability determination, the medical board shall apply the following definition of disability: the inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation, or the incapacity to perform the duties of any employment covered by [PERS] that is actually offered and is within the same general territorial work area, without material reduction in compensation. Id.

STANDARD OF REVIEW

The Uniform Rules of Circuit Court Practice, Rule 5.03, limits review by this Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence: or (2) was arbitrary of capricious; or (3) was beyond the agency's scope or powers: or (4) violative of the constitutional or statutory rights of the aggrieved party. *Doyle v. Public Employees Retirement System*, 808 So.2d 902(Miss. 2002); *Howard* v. *PERS*, 2007 MSCA 2005-CC-02186-05107; *Mississippi State Bd. Of Public Accountancy v. Gray,* 674 So.2d 1251, 1253 (Miss. 1996)(citing *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So.2d 901, 902 (Miss. 1994).

The Mississippi Supreme Court has held that appellate courts may not reweigh the facts of the case or substitute its own judgment for that of the agency. *Public Employees' Ret. Sys. v. Marquez*, 774 So.2d 421, 425 (Miss. 2000). However, the Supreme Court has held that it is within this Court's power to reverse a PERS decision if that decision was not supported by substantial evidence and that "Substantial evidence means something more than a 'mere scintilla' or suspicion." *Marquez* at 425. Substantial evidence has been defined as "such evidence as reasonable minds might accept as adequate to support a conclusion." *Delta CMI v.*

and capricious." *Marquez* at 430. "An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *Marquez* at 430 (Miss. 2000). "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.*

STATEMENT OF FACTS

Ms. Kelly Wright is 46 years old and was employed by the Mississippi Department of Health as a Registered Nurse II at the Hinds County Health Department. V. II, p. 369. She earned 5.25 years of service credit and applied under the provisions of Miss. Code Ann. Sect. 25-11-113 for non-duty related disability retirement. V. II, p.368. Her claim was denied by the PERS Medical Board and she appealed to the Disability Appeals Committee. Id.

On June 8, 2000, Kelly began to experience symptoms of heart attack, such as chest pain, shortness of breath, and fear of dying. V. II, p. 273. These symptoms began while she was at work at the Mississippi Department of Health and continued after work. Id. She believed she was having a heart attack. Id. Kelly's mother, Ms. Nathaleen Farmer, took her to MEA Clinic that same day, June 8, 2000, Id., and then to Mississippi Baptist Medical Center on June 9, 2000, for evaluation of chest pain. V. II, p. 275. Prior to this, Kelly had experienced two or three months of feeling so tired and fatigued that she could not get up in the mornings. V. II, p. 273. On June 12, 2000, Dr. Frank Covington, a psychiatrist, treated Kelly for dizziness,

Covington that her job was very stressful. Id. At this time, he prescribed 50 mg of Zoloft along with Ativan to be taken two to three times a day for anxiety. V. II , p. 425. Dr. Covington diagnosed her with Panic Disorder with agoraphobia at the time of this examination. V. II, p. 424. After three weeks Kelly was able to return to work. V. II, p. 275. Dr. Covington treated Kelly again June 19, 2000; June 27, 2000; Aug. 7, 2000; Nov. 6, 2000; and on Feb. 5, 2001(V. II, pp. 415-419) for follow-up. Because of extreme anxiety, Kelly was unable to perform the everyday functions of life and soon sold her home and moved in with her mother. V. II, p. 276 and 384. Kelly was able to continue working through September, 2002, due to her mother's help with childcare, cooking, cleaning, shopping and other necessary duties. V. II, p. 276. After Dr. Covington moved out of state, Kelly began seeing Dr. Andrew Bishop, a psychiatrist, on July 16, 2001, and reported to him that she was on the verge of a panic attack with feelings of depression as well as anxiousness. V. II, p. 409. Dr. Bishop diagnosed Adjustment Disorder with anxious features and increased her Zoloft to 100 mg and continued daily Ativan. V. II, p. 412-3. Kelly saw Dr. Bishop again on Aug. 6, 2001; Sept. 5, 2001; and Nov. 9, 2001. V. II, p. 406-408. When Kelly filed a Worker's Compensation claim Dr. Bishop dismissed her as a patient because he did not handle such claims. Her claim was denied and she did not appeal. V. II, p. 282.

Kelly then sought treatment from Dr. Krishan K. Gupta, a psychiatrist, beginning Jan. 17, 2002. V. II, p. 346. In his initial evaluation he noted that she had come for "continuation of management of panic disorder," and that she had

tired, decreased energy level, and change in interests and hobbies. Id. Dr. Gupta diagnosed Panic Disorder and needed more study to rule out Anxiety Disorder and Depressive Disorder NOS, also noting she might benefit from supportive and cognitive behavior therapy. V. II, p. 347.

Office visits were repeated with Dr. Gupta on Feb. 13, 2002, March 20, 2002, May 9, 2002, June 18, 2002, Aug. 27, 2002, Sept. 24, 2002, Oct. 4, 2002, Oct. 22, 2002, Oct. 29, 2002, Nov. 26, 2002, Jan. 2, 2003, Feb. 4, 2003, March 4, 2003, March 27,2003, and April 3, 2003, all with documented office visit notes. V. II, pp. 328-347. On Oct. 22, 2002, Kelly met with a licensed social worker at Dr. Gupta's office and completed an assessment which revealed a family history of depression and schizophrenia. V. II, p. 336. By this date, Dr. Gupta had once again doubled the Zoloft dosage to 200 mg. and had continued the Ativan daily as needed. Id. On Sept. 5, 2002, Dr. Gupta, wrote that Kelly's diagnosis was Panic Disorder and Depressive Disorder NOS, and he stated that "She is not able to work in a regular employment due to stress at work. At present, she is totally and seems to be permanently disabled due to the above diagnoses." V. II, p. 401. As her attending physician, Dr. Gupta completed a Certification for Family Medical Leave Act, stating that she has panic attacks which lead to depression, she was unable to perform her work, the condition began in June 2000, and the duration was "life long (most probably)", with prescription medication and psychotherapy provided under a regimen of continuing treatment required under his supervision. V. II, p. 403-404. On March 6, 2003, Dr. Gupta completed a Physician Statement for Aetna stating that

being treated with Prozac and Ativan, as well as psychotherapy. V. II, p. 322-3.

On Oct. 10, 2002, Kelly was diagnosed with fibromyalgia after extensive lab work by Dr. James K. Hensarling, a rheumatologist, who prescribed Vioxx initially, and later, Klonopin and Mobic. V. II, p. 349-356 and 316. On Jan. 21, 2003, Kelly was notified that she was found to be permanently and totally disabled by the Social Security Administration, retroactive to Sept. 13, 2002. V. II, p. 387. On April 21, 2003, she was notified by Aetna that she had been found to be totally and permanently disabled and now qualified for long term disability benefits. V. II, p. 319.

On January 16, 2003, PERS sent Kelly to a Medical Evaluation with Dr. Edward Manning, a psychologist of their choice. V. II, p. 389-394. The PERS referral letter, gave Dr. Manning an erroneous standard of disability, stating that disability is defined as incapacity that "must be permanent and total. The determination of disability must be based on objective medical evidence." [1]

The above listed definition, which created a higher standard for a finding of disability, was relied upon by Dr. Manning, rather than the statutory definition, thereby making it more likely that Dr. Manning would have found Ms. Wright disabled under the statutory definition, had it been applied. Instead, he reported that different treatment might "possibly give her a better opportunity to return to work" V. II, p. 135.

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[1] A copy of Dr. Manning's letter is attached hereto as Exhibit "1". Said letter was erroneously omitted by PERS from the current record, in spite of assurances at the hearing on June 8, 2007, that all evidence from the first hearing record would be included. See statement of the PERS attorney, Margaret Bowers regarding "introduction of everything." V. I, p. 51, lines 19 - 21.

instability. . . indications of persistent and perhaps debilitating anxious symptoms. . psychomotor retardation. . . symptoms of suspiciousness . . . features of social phobia . . . features of dysthemic disorder . . . possibility exists for episodic exacerbation and/or experience of major depressive disorder." After noting the diagnoses of Dr. Gupta, Dr. Manning stated that Ms. Wright's "self report and general clinical interview, participation in a structured clinical interview and completion of a series of personality measures are certainly all consistent with the above noted diagnoses." V. II, p. 394.

On May 19, 2003, a hearing was held at which the Kelly's mother testified on her behalf. V. II, p. 264. Kelly was unable to testify at the hearing due to fearful anxiety that another panic attack would be induced if she attended. V. I, p. 55.

Ms. Wright disputed certain statements in Dr. Manning's report and PERS permitted her to enter them into the record when the first hearing was held on May 19, 2003. V. II, p. 264. At the conclusion of the hearing, PERS adjourned until August 4, 2003, when it reopened the hearing file to admit a new consulting report from Dr. Mark Webb, a psychiatrist, who had examined Ms. Webb at their request on July 14, 2003. V. II, p. 121-125. Ms. Wright was denied an opportunity to attend the resumption of the hearing or to challenge the opinion of the new consultant.

Dr. Webb's single visit with Ms. Wright led him to conclude that she "does suffer with panic disorder but is in full remission with Prozac and Ativan and she is doing quite well. V. II, p. 125. Dr. Webb did not have all of the medical records available to him and the definition of disability he was given by PERS was not

PERS ruled that Ms. Wright was not disabled and filed its analysis and conclusions on the same day as the resumption of the hearing, Aug. 4, 2003. V. II, p.251. Ms. Wright appealed, and on Sept. 14, 2005, the Circuit Court reversed the PERS decision, finding there was no substantial evidence to support their decision. PERS then appealed and on Feb. 13, 2007, the Court of Appeals reversed and remanded the case to allow Ms. Wright to challenge the opinion of Dr. Webb and to "provide supplemental evidence from her treating physicians." V. II, p. 242. Ms. Wright did this through her counsel at a second hearing held on June 8, 2007, with her mother once again speaking for her. V. I, p. 45. The DAC recommended on the same day that disability benefits be denied, V. I, p. 16, and that decision was adopted by the Board of Trustees on Aug. 28, 2007. V. I, p. 15.

The evidence which the Court of Appeals had specifically authorized for the second hearing consisted of eight new documents of Ms. Wright's continuing disability and no new evidence of contradiction. V. II, p. 117. Most significant were the treatment records of Dr. Gupta and Dr. Hensarling, culminating in new statements of disability, with each reporting five years of continuous treatment of Panic Disorder, Depressive Disorder NOS and fibromyalgia with chronic pain. V. II, p. 148; V. II, p. 210.

SUMMARY OF ARGUMENT

I.

The Substantial Evidence Test is a technical, legal definition to be applied by an appellate court to the body of evidence submitted as support for the decision of

Judge, Hinds County, Mississippi, determined that the denial of Ms. Wright's application for non-duty related disability by PERS was not based on substantial evidence, and thus was arbitrary and capricious. Judge Kidd's opinion and order awarded benefits to Ms. Wright. *PERS v. Kelly Wright,* 949 So.2d 839, 842 (Ms.Ct.App. 2007).

II.

After remand by the Court of Appeals to correct due process violations and to permit new evidence of Ms. Wright's disability to be submitted, *PERS v. Kelly Wright,* 949 So.2d 839, 844 (Ms.Ct.App. 2007), the new evidence was not contradicted nor was new evidence presented by PERS to support its continuing decision to deny benefits. Instead, PERS simply continued to dispute the same evidence of disability as well as compelling new evidence from treating physicians, and once again PERS denied that Ms. Wright's condition was disabling.

Having failed to present new evidence PERS has now waived its opportunity to challenge the original finding of Judge Kidd and the Doctrine of the Law of the Case forecloses re-litigation of that issue, requiring adherence to Judge Kidd's opinion and order that PERS' denial of benefits to Ms. Wright was not based on substantial evidence. Id. at 842 and V. II, pages 251-255.

On June 8, 2007, a second hearing was held by the Disability Appeals Committee pursuant to the Court of Appeals remand. Additional evidence was received from Kelly Wright's mother, Ms. Nathaleen N. Farmer, as well as the medical records of continuing treatment by Ms. Wright's psychiatrist, Dr. Gupta (V.

11 counseling sessions with a social worker) and her rheumatologist, Dr. James Kenneth Hensarling (V.11.p.210-241) (treatment records for fibromyalgia include two opinion letters of disability and 15 office visit treatments with four visits noting the classic trigger point pattern of fibromyalgia.

The additional evidence was unchallenged and it clearly supported Ms. Wright's claim that she has been disabled since leaving work and that her disability was continuing. The new evidence of numerous medication changes and psychotherapy sessions fully contradicted the report of Dr. Webb, on which PERS conclusions were based. With the report of Dr. Webb discredited from new evidence and also evidence that was already in the Record, PERS' denial of benefits had no substantial evidence upon which to rely.

111.

PERS applied a narrower definition of disability in this case than is permitted by statute. Instead of mental or physicial incapacity for the "further performance of duty", that is "likely to be permanent", PERS has chosen to substitute "must be permanent and total"disability. See Exhibits 1 and 2 attached hereto, letters to Dr. Manning and Dr. Webb in which PERS used their erroneous definition when soliciting the opinions of Dr. Manning and Dr. Webb. The more flexible definition of the statute recognizes that "the inability to perform the usual duties of employment, or the incapacity to perform such lesser duties, if any ..." is the true statutory definition and requirement for the receipt of disability benefits , authorized by the legislature without

would have led conclusively to a finding of disability for Ms. Wright.

ARGUMENT

I. WHETHER THE DOCTRINE OF THE LAW OF THE CASE REQUIRES STRICT ADHERENCE TO JUDGE KIDD'S DECISION.

The Honorable Winston L. Kidd, Circuit Court Judge, **ruled previously that PERS failed to provide substantial evidence to support its decision that Ms. Wright was not disabled.** *PERS v. Kelly Wright,* 949 So.2d 839, 844 (Ms.Ct.App. 2007) (Emphasis added) and V. II, p. 251-255. The Mississippi Court of Appeals held that "Because Wright suffered a violation of her Fifth and Fourteenth Amendment right to procedural due process, this Court reverses the finding of the circuit court and remands the case to PERS' Disability Appeals Committee." *Wright* at 844. The Court of Appeals found a constitutional violation and did not find fault with Judge Kidd's ruling on the existing evidence. That rule of law is now binding on PERS because of its failure to introduce additional evidence of non-disability at the remand hearing. With no additional evidence from PERS to consider, the prior ruling remains unchallenged, uncontradicted and becomes the law of the case.

The doctrine 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). The doctrine is not a principle of substantive law but a good rule of practice. *Goldsby v. State*, 123 So.2d 429 (Miss.

The remand by the Mississippi Court of Appeals, was made to correct due process violations regarding PERS' denying Ms. Wright the opportunity to submit new treatment records and to contest the opinion of Dr. Webb, a medical examiner hired by PERS after the conclusion of the first hearing. The Court of Appeals decision did not disturb the legal rulings of Judge Kidd on substantial evidence and arbitrary and capricious decision making. Judge Kidd reversed the first PERS denial of disability and found that:

> ". . . it is clear from the record that Ms. Wright continues to struggle with her medical condition despite countless treatment. Claimant submitted a sufficient showing that she is no longer able to perform her job. Conversely, PERS' finding was not based on substantial evidence. The Disability Appeals Board did not consider or disregarded the medical documentation available. The nursing profession is critical to the safety and well-being of the citizens of this State and Claimant's incapacity could endanger her life and the lives of her patients.
>
> The Court having made an objective review of the record finds that PERS' decision was not supported by substantial evidence and was therefore arbitrary and capricious."

(V. II, p. 254)

The Supreme Court has held that when the PERS decision is not supported by substantial evidence, the deference paid to an agency decision is rebutted. *PERS v. Marquez*, 774 So.2d 421, 425 (Miss. 2000).

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. Dishmon*, 797 So.2d at 892 (Miss. 2001). The application of the legal definition of the substantial evidence requirement then is a legal rule of the prior decision, not a factual ruling,

before the agency. The ruling then becomes the law of the case and cannot now be challenged.

Here, as in *PERS v. Freeman*, 868 So.2d 327 (Miss. 2004), the Law of the Case Doctrine proscribes any further litigation on Judge Kidd's ruling that PERS' decision was not supported by substantial evidence and is arbitrary and capricious. The doctrine was described in *Freeman* at page 330:

> The doctrine of the law of the case is similar to former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. 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, so long as there is a similarity of facts. This principle expresses the practice of court generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.
>
> Id.

We have acknowledged elsewhere that the Circuit Court cannot re-weigh the evidence or substitute its fact finding for that of the agency. The duty of the Court, however, is to apply the law to the facts found by the agency, and reverse the agency decision if it does not meet its legal burden requiring there to be substantial evidence. Such a finding then leads to the legal conclusion that the decision was arbitrary and capricious as explained herein above.

The Doctrine of the Law of the Case would not have applied, had PERS availed itself of its several opportunities after remand to introduce additional evidence to support its decision. It did not do so, however, knowing that it had the right to do so, and having voluntarily surrendered or relinquished those

examination and that Board might well have asked for additional independent medical examinations as they are entitled to do under the statute. But PERS did not take advantage of that opportunity. The Disability Appeals Committee could have sent Ms. Wright to another independent medical examination on its own initiative, especially after seeing the extensive new treatment records from Dr. Gupta and Dr. Hensarling, but it did not. PERS could also asked Dr. Webb to re-evaluate Ms. Wright, in light of the new evidence and the corrections of certain errors in his previous report. Dr. Webb seemed to request just such an opportunity to reexamine Ms. Wright in his note to the Committee (V.II, p. 143) after receiving notice of the many inaccuracies Ms. Wright set forth in her affidavit. (V.II,p.145-6) Counsel for Ms. Wright also requested such a reexamination, but it was rejected. (V.1,p.81-2)

Thus, the opportunity to introduce additional evidence of non-disability, and the opportunity to provide substantial evidence to support its decision, were waived. PERS is now barred from re-litigating the legal rulings of Judge Kidd on substantial evidence and the arbitrary and capricious denial of disability by the agency.

II THE CIRCUIT COURT ERRED IN DETERMINING THAT MS. WRIGHT DID NOT PRESENT SUBSTANTIAL EVIDENCE OF DISABILITY AND THAT THE DECISION OF THE BOARD OF TRUSTEES WAS NOT ARBITRARY AND CAPRICIOUS.

f. The new evidence of disability submitted by Ms. Wright confirms the earlier diagnoses of her treating physicians and proves disability which is "likely to be permanent" as required by Miss. Code Ann. Section 25-11-113(1)(a).

The remand by the Court of appeals required PERS to allow Ms. Wright an opportunity to challenge evidence PERS had obtained after its first hearing and also to submit any additional medical evidence she might have that would be relevant to her claim. After submitting her rebuttal and after submitting voluminous new medical treatment records, it is ever more clear that Ms. Wright's struggle continues, her treatment has become exhaustive, and her showing that she cannot perform her prior job duties more than ever is painfully apparent.

After the submission of additional treatment records and after corrections of errors, oversights and contradictions in the consultative report relied on by PERS, Ms. Wright's disability claim is now more reliably documented than ever, and the PERS decision, as a consequence becomes much less substantial and far more arbitrary and capricious. Yet even in light of the directive of the Court of Appeals, Ms. Sheila Jones, the hearing officer on the Disability Appeals Committee, continued to insist that PERS would consider records and evidence from near the time of termination. "Wait, we're getting off track. Are you talking about 2003 at the time of her termination because that's what we are here about. Not about today." (V. I, p. 33). "I'm just saying that we are interested in what's going on right around that time of termination because that gives us the best light of whether a disability

that is going to knock you out of your job forever. ***That's what we are looking for.***" (V. I, page 39). Counsel for Ms. Wright objected to the standard announced by Ms. Jones. Id.

The opportunity provided by the remand to respond to the consultant hired by PERS and to submit new medical evidence of her own has been a welcome one. It has allowed Ms. Wright to further demonstrate the true extent of her disability and the many and varied therapies undertaken. Judge Kidd's conclusion that she "continues to struggle with her medical condition despite countless treatment," (V. II, p. 254) was never more truly spoken. Ms. Wright's disabling condition comes from a combination of panic disorder, depressive disorder, fibromyalgia with chronic pain, and the manner in which they exacerbate each other. (V. II, p. 325)(V. II, p. 212).

Reviewing for a moment the basic elements of the record before Judge Kidd, we find, of course, (1) the opinion of Dr. Gupta and the record of 16 visits and 22 pages of office notes and opinion letters (V. II, p. 325-347); (2) the opinion of Dr. Hensarling of disabling fibromyalgia (V. II, p. 224); (3) the award letter by the Social Security Administration finding Ms. Wright to be permanently and totally disabled (V. II, p. 387); (4) the finding of disability by Aetna Insurance (V. II, p. 319); and, (5) the denial of license renewal by the Mississippi Nursing Board based on her disability (V. II, p. 147). These five issues constitute substantial evidence but in addition, we must consider the "new" definitions used by the DAC referenced in the above paragraph and in the letter to Dr. Manning. See Exhibit "1" attached hereto.

refuses to give any weight to the continuing treatment records of Dr. Gupta and Dr. Hensarling, after over three additional years of treatment by each. (V. I, p. 28). Dr. Gupta's newly admitted records consist of approximately sixty-one (61) pages of continuing medical treatment evidence, comprising the treatment notes on forty-six (46) office sessions, most of which include one-on-one psychotherapy, and eleven counseling sessions with licensed social workers. (V. II, p. 148-209) Also submitted are Dr. Gupta's billing records showing psychotherapy sessions, Ms. Wrights pharmacy records showing seven medication changes over the course of her treatment, (V. II, p. 141-2) and an updated, detailed opinion letter dated Feb. 22, 2007, stating that Ms. Wright has been disabled from returning to her former duties for the entire period of his treatment. (V. II, p.149)

Dr. Hensarling's newly admitted records cover the period from October 10, 2002 to February 26, 2007, and they included at least fifteen office visits with thirty-one pages of treatment notes. Thus, Ms. Wright has produced an extensive record of objective medical evidence of disability.

The manner in which the Supreme Court has dealt with similar cases is extremely helpful. In *Marquez*, supra, the claimant suffered from multiple illnesses including fibromyalgia and chronic fatigue syndrome. Id. at 423. PERS found that there was insufficient objective evidence that Marquez's medical problems rendered her permanently disabled from her job as a school teacher. Id. at 428-9. Marquez submitted medical records tending to confirm her health problems. Id. at 427. The Supreme Court observed that medical records are considered objective, not

PERS conclusion was not substantiated by the record because PERS did not put forth any evidence to controvert Marquez' claim that she was disabled. Neither did PERS explain adequately why it rejected the objective medical evidence of disability. Id. at 429.

There are also several new cases relevant to this claim.

In *Thomas v. PERS*, (June 26, 2007) another fibromyalgia case, the claimant had been a child Enforcement Officer at DHS. She had a sedentary job, but it was highly stressful. A spinal fusion and back pain led to a diagnosis of fibromyalgia. The Court of Appeals stated that "PERS merely makes the vague statement that there is a 'lack of objective medical evidence' to substantiate Thomas's disability claim." The Court goes on to point out that Thomas's treating physician, ". . .diagnosed her with 'severe atypical fibromyalgia.'" PERS ignored the finding of the treating physician however, and relied instead on an FCE [Functional Capacity Exam] to deny disability. The Court of Appeals saw it differently, rejecting PERS primary finding : "The Committee opined that 'fibromyalgia, if that is what Ms. Thomas has, is treated with exercise and psychiatric therapy and is not a disability in and of itself.'" Id. The Court of Appeals found that "PERS presents no contradicting evidence in the record that Thomas may not be disabled or have fibromyalgia." In concluding, the Court of Appeals found that "PERS' rationale of a lack of 'objective medical evidence' in support of its denial is insufficient." Id.

Perhaps the most recent case from the Court of Appeals, *Stevison v. PERS*, (Oct. 16, 2007) discussed the claim of a sufferer from fibromyalgia and depression,

had continued treatment for those conditions after her resignation. It also noted that "contrary to the finding of PERS, Stevison did submit the opinion of her treating rheumatologist . . . That she suffered from perforims syndrome and fibromyalgia. She was receiving treatment for these conditions . . . for depression.. . .and that due to her pain , fatigue, and significant depression, Stevison was disabled from performing the job of teacher's assistant." *Id.* PERS conclusion had been simply that there was no objective medical evidence because fibromyalgia had an unexplored psychiatric component. Especially relevant to Ms. Wright's claim was the ruling that "Section 25-11-113(1) provides for the payment of disability benefits to an employee who is mentally or physically incapacitated for the further performance of duty. Therefore, Stevison would have been entitled to benefits even if her disabling fibromyalgia had a psychiatric component." Id. Also relevant was the Court's reference to the *Marquez* ruling that "if medical diagnoses by licensed physicians are to be labeled 'subjective' evidence of medical ailments, it is unclear what PERS would consider 'objective' evidence." Id. at 427.

PERS chose not to exercise its right under *Miss. Code Ann.* Section 25-11-113(e) to request additional medical evidence and/or other physicians to conduct an evaluation of the claims of any of the fibromalgia sufferers in the cases reviewed here, and those denials of disability were all reversed, at least in part, as a consequence. It seems that PERS does not accept fibromyalgia as a disabling disease.

regard to Dr. Hensarling's finding of disability, (V. II, p. 224) there was "No objective evidence of fibromyalgia." (V. I, p. 30).

We have observed that in the thirty-one pages of treatment notes and lab reports supplied by Dr. Hensarling, there are at least four office visit findings that a "classic trigger point pattern" was noted in Ms. Wright's condition. (V. II, p. 213, 220, 223, 225), and each visit documented pain and chronic fatigue, and elevated ESR, a standard lab test for polymyalgia rheumatica. The trigger point diagnostic testing has been recognized in prior decisions. In Ms. Wright's case it was overlooked by the Committee, in their analysis, when they stated that "No trigger points were documented, and to a doctor, the lack of documentation means that it did not exist." (V. I, p. 30). Dr. Hensarling also noted his frequent conversations with Dr. Gupta on their joint effort to treat the combination of disabling conditions which seemed to exacerbate each other so severely. (V. II, p. 226).

The Supreme Court explained in *PERS v. Dearman* , 846 So. 2nd 1014 (Miss. 2003) that medical evidence of disabling fibromyalgia provided by an examining physician is not only objective, but that it must be given the elevated status and respect by PERS that it deserves. Id. at 1018. Dearman, like Marquez , was a teacher who claimed that her numerous health conditions left her disabled and unable to perform her job duties. Dearman's treating physician found her permanently disabled as a result of her medical condition and recommended that she cease work. Id. at 1015. PERS concluded in its decision that Dearman, regardless of the physicians opinion, had failed to prove disability. Id. at 1016. The

evidence because the record was "devoid of any evidence that Dearman is not disabled." *Id. at* 1018.

Turning *Dearman* upside down, the Disability Appeals Committee seems to be saying in Ms. Wright's case that they will give greater weight to the opinion of consultants because treating physicians tend to act as "advocates" for their patients in disability claims. (V. II, p. 69) We do not share this view of the "healing profession" and we are particularly disturbed that Ms. Wright's two physicians after five years of treatment of the combination of panic disorder, depression and fibromyalgia have been so mischaracterized in their efforts to treat Mr. Wright's disabling conditions.

To reject the treating physicians' opinions demonstrates PERS' "lack of understanding of or disregard for the surrounding facts and settled controlling principles" which the Supreme Court has set out as the definition of capriciousness. *PERS v. Marquez, 774 So. 2nd at 430.* By ruling against Ms. Wright and entering their opinion on the same day as the second hearing, the Disability Appeals Committee could not have conducted anything more than a cursory review of the voluminous treatment records from Dr. Gupta, Dr. Hensarling, and Ms. Wright's pharmacy.

Overlooking the Court of Appeals decision that it was a violation of due process not to allow Ms. Wright to provide evidence of continuing treatment, the Disability Appeals Committee announced over and over that they would not review the new material. For example, the Disability Appeals Committee announced that

reference to that proposition anywhere in the statute or the caselaw. Surely, when a claim continues to be reviewed after five years, such as this one has, the Court would find it helpful to know what has happened to Ms. Wright after that long a time. As the additional treatment records reveal, she is still "struggling" after "countless treatments,", (V. II, p. 254), and her two treating physicians, Dr. Gupta and Dr. Hensarling are continuing to treat and manage the panic disorder, depression and fibromyalgia, and only recently, have restated their belief that Ms. Wright is disabled now and has been for the five years she has been seen by each of them. (V. II, p. 148-9)(V. II, p. 210)

Just to make it clear that this is another of PERS' unannounced rules which is rigorously enforced, the Committee stated several more times in several different ways: " Are you talking about something that is going on now? We don't want any of this in the record;" (V. I, p. 64); "the date of termination controls;" (V. I, p. 82); "We would object if she was not taking them at the time she terminated her employment." (V. I, p. 93). Again, "We look for a permanent disability that is going to knock you out of your job forever. ***That's what we are looking for.***" (V. I, page 39).

When the Court of Appeals issued its mandate to PERS it stated clearly that Ms. Wright shall have the opportunity to "provide supplemental evidence from her treating physician." (Wright v. PERS, para. 23) The intent of the mandate was that PERS would also consider the supplemental evidence provided. PERS refused. Their decision makes it clear that PERS intended to ignore every shred of evidence

2. The analysis given by PERS after the second hearing is fundamentally flawed.

In Ms. Wright's case PERS chose to exercise its right to independent medical evaluations under *Miss. Code Ann. Sect.* 25-11-113(1)(c), but neither the psychiatrist nor the psychologist who were chosen was a rheumatologist or was regularly engaged in the treatment of fibromyalgia. As a consequence, neither evaluated Ms. Wright's fibromyalgia and the opinions of her two current physicians on that disabling condition remain uncontradicted. Furthermore, in discussing Ms. Wright's primary diagnosis of panic disorder, neither of the consultants discussed the effect of fibromyalgia in combination with panic disorder, leaving the evidence of the disabling combination uncontradicted.

The Board's employment of the two physicians, one whose report in large part supported Ms. Wright, and one whose report was so filled with errors that it was necessary to correct it by affidavit, do not provide substantial evidence for PERS finding that Ms. Wright is not disabled. Certainly, such examinations cannot be reasonably compared to the 15 treatment visit Ms. Wright made to Dr. Hensarling or the 46 treatment visits Ms. Wright made to Dr. Gupta.

There are, after all, more than 75 pages of continuing medical treatment evidence to add to the 50 pages accumulated before the first hearing. Combined with Dr. Gupta's opinion letters, all treatment records point toward Dr. Gupta's conclusion. The records show that Ms. Wright had been seeing psychiatrists since her first panic attack experience in June 2000. The three psychiatrists who treated

of the evidence of disability makes the PERS search for contradictory evidence entirely unnecessary.

We are left then with two reports which PERS obtained to evaluate Ms. Wright's claim for disability benefits. The first of those was submitted by Dr. Edward L. Manning, Ph.D., a clinical psychologist, not a psychiatrist, as were Ms. Wright's three treating specialists. Dr. Manning's examination and review of Ms. Wright's condition revealed "primarily depressive complaints." Ms. Wright was found by him to have a "low tolerance to stresses and/or demands with episodes of exacerbation of depression along with exeracerbation of somatic complaints that she sees as limiting in nature." He found that there were "indications of persistent and perhaps debilitating anxious[ness]." (V.1, p.151).

Dr. Manning not only acknowledged the panic disorder reports and diagnoses of Dr.'s Covington, Bishop and Gupta, but he embraced them wholeheartedly: "Her self report and general clinical interview, participation in a structured clinical interview, and completion of a series of personality measures are certainly all consistent with the above noted diagnoses." (V. 1, p. 153) Dr. Manning concluded with the conjecture that better treatment for those conditions could "possibly give her a better opportunity to return to work." (V. 1, p. 153) Since he is not an M.D., and is unable to prescribe medications, one wonders what "better treatment" he might have in mind.

We urge this Court not to regard the possibility of improvement as anything more than speculation. The Supreme Court has said, "[d]oubt does not constitute a

benefits is arbitrary and capricious." *PERS v. Ross,* 829 So. 2nd 1238, 1243 (Miss. 2002). The Supreme Court has also held that a PERS decision is arbitrary and capricious if based on nothing more than "suspicion." *PERS v. Marquez*, 808 So. 2nd at 425. Indeed, we urge the Court to see Dr. Manning's report as fully and convincingly supportive of Ms. Wright's claim, just as the first Circuit Court decision found it to be when it stated that "Dr. Manning diagnosed Claimant with similar ailments with the addition of Social Phobia and Agoraphobia." (V. II, p.252)

Dissatisfied with the results obtained from Dr. Manning, and unimpressed with the obvious incremental effect which each supporting physician and each additional medical source record gave to Ms. Wright's claim, the PERS Board continued the quest for contradictory evidence. It sought the opinion of Dr. Webb, an independent psychiatrist. Even then, Judge Kidd's decision found that Dr. Webb "agreed that Ms. Wright suffered from Panic Disorder, but concluded that it was not disabling." (V. II, p. 252).

Dr. Webb reported many if not most of the same symptoms that the treating physicians had observed. Errors and assumptions of fact are more likely to have led him to his conclusion, rather than his medical evaluation. Those errors were corrected by Ms. Wright by affidavit (V. II, p. 145-6) and, pursuant to the Court of Appeals remand, by testimony of her mother. (V. I, pages 61-72). It was an error to report that Ms. Wright was improving on new medication. Her medications had been consistently increased over time from 50 mg. of Zoloft prescribed by Dr. Covington, to 100 mg. of Zoloft prescribed by Dr. Bishop, to 200 mg. of Zoloft

Prozac, he did not report significant improvement.

Dr. Webb was wrong about medications and he was wrong about psychotherapy. We now see from Dr. Gupta's billing records that there were no fewer than sixteen psychotherapy sessions between Jan. 17, 2001 and Sept. 2, 2003. (V. II, p. 140) With very little effort, Dr. Webb could have discovered this fact, so as to avoid the embarrassingly inaccurate statement that Ms. Wright was "only seeing Dr. Gupta for medication checks once a month." (V. II, p. 125)

Thus, Dr. Webb's opinion is predicated on two fundamental errors: Ms. Wright's treating physician had made no effort to alternate medications for the best combination and Ms. Wright had not received any psychotherapy as part of her treatment. This double error led to the oft repeated phrase that her treatment had not been "optimized." This would be a stunning insight if it were true, but it is not, as the affidavit, testimony and new evidence makes clear. The new information provided has completely undermined whatever value Dr. Webb's opinion on disability might otherwise have had.

There is a degree of circularity to the PERS finding that Ms. Wright "will undoubtedly improve with optimized treatment." (V. I, p. 31) The circle can be broken only by a review of the many changes of medication and the many sessions of psychotherapy and counselling during the course of Dr. Gupta's treatment. The pharmacy records alone acknowledge at least seven changes, as shown by the exhibit submitted at the second hearing. (V. II, p. 141-2)

too transitory, and too insubstantial to justify the imposition of a finding of substantial evidence. **Dearman,** supra, p. 1016. Furthermore, the use of the word "undoubtedly" in connection with any mental disorder seems particularly uncalled for. That level of certainty does not exist for the psychiatric specialist describing a proposed treatment result for a fragile human being.

By any rational measure, the opposite conclusion could easily be drawn. Ms. Wright has had no full-blown panic attacks since Dr. Gupta's treatment began. She has had frequent smaller attacks, often every other day, lasting 30 minutes and requiring Ativan and bed rest of several hours to recover. (V.1, p.78) The full-blown attack in 2000 which was her first serious introduction to her panic disorder, leading to her two-week bed confinement and extended recovery period, has thus far been avoided thanks primarily to Dr.Gupta's expertise.

The combination of antidepressants and antianxiety medications is suggested as the best course of treatment for panic disorder, according to recognized medical sources such as the Merck Manual. Those same sources report that Selective Seratonin Reuptake Inhibitors (SSRIs), are perhaps the best of the antidepressants available and they cause the least debilitating side effects. The fact that Dr. Gupta has made a varied use of three SSRIs, and has combined them with Ativan, an antianxiety drug, suggests that he has in fact optimized Ms. Wright's treatment, preventing any further full-blown attacks, an achievement for which he can be justifiably proud.

observed is ...her hands trembling, shortness of breath, and she turns red around her neck, and the Ativan does keep it from going into the full blown attack, where she has to be in bed for two weeks, but it still takes 30 minutes or an hour to get over it, and the medication makes her tired and lethargic." (V.1, p.77).

Ms. Wright's inability to return to her former duties is not a failure of treatment but a result of the combination of three intractable disorders: panic disorder, depressive disorder and fibromyalgia with chronic pain. Any one of these conditions by itself could be disabling, but in combination are found to exacerbate the symptoms of each other, creating a difficulty of treatment, and requiring the constant communication and coordination of her physicians. (V.11, p. 210) PERS' failure to recognize that fact is not based on substantial evidence and is therefore arbitrary and capricious.

III WHETHER APPELLANT'S DUE PROCESS AND STATUTORY RIGHTS WERE VIOLATED BY APPLYING AN UNAUTHORIZED STANDARD OF DISABILITY

We now ask a fundamental question: Is PERS applying a narrower definition of disability in this case than it is authorized to do, and if they have done so, is their decision arbitrary and capricious as a result? Re-examining the statute we find that a disability applicant must be ". . . mentally or physically incapacitated for the further performance of duty," that the incapacity is "likely to be permanent," and that the medical board shall apply the following definition of disability:the "inability to perform

assign." *Miss.Code Ann.*, Sect. 25-11-113(1)(a).

Juxtaposed against the statutory language are the Committee pronouncements: "totally and permanently", ". . .must be permanent," "for us that means forever," and, finally, "for us that means until you die." (V. I, p. 56). "We look for a permanent disability that is going to knock you out of your job forever. ***That's what we are looking for."*** (V. I, page 39). If these pronouncements by the Committee have taken the place of the law, why have they been kept secret? Is there ever a justification in a government of law for keeping the law itself secret?

The statute makes it clear that one does <u>not</u> have to be totally and permanently disabled from doing anything ever again. In fact, the statute recognizes that an employer may assign lesser duties and if the disability applicant is capable of performing lesser duties, they would not be considered disabled. In this case, no lesser duties were offered to Ms. Wright and she was not able to perform her usual duties. Significant to the issue is that Ms. Wright no longer held a Nursing License after the Board of Nursing determined that she was not competent to practice nursing, (V. II, p. 147), therefore, her work as a Register Nurse for the Health Department was no longer possible.

We have argued elsewhere that Ms. Wright's condition, as supported by her treating physicians, meets the statutory definition and standard of disability and that argument is not inconsistent with our position on this point of fundamental fairness: neither Ms. Wright nor anyone else should be forced to prove that they are "totally and permanently" disabled "forever". It is wrong of PERS to require it and we urge

makes it clear that PERS is fixated not on the statute but on their misuse of the harsher terminology: the usage is found at V. II, p. 31 ("permanent and likely totally disabled"); same page ("permanent and total disability"); p. 33 ("total and likely permanent"); same page ("total and permanent"); p. 34 ("permanent and total disability"); p. 35 ("permanent and total"); and on the same page ("not permanently disabled.")

This is not merely a semantic argument but a matter of real consequence. The seriousness of a diagnosis of disability which is "likely to be permanent" is sufficient to identify the inability to perform usual duties, or the incapacity to perform lesser duties, which are the emphasis of the statute. It does not require the bleak, fatalistic overlay improperly added to the definition by PERS.

This Court is not bound by an agency's interpretation of a rule it did not make, such as a rule that outlines procedures it must follow. *Encarnacion ex rel. George v. Barnhart*, 331 F.3d 78 (2nd Cir. 2003). The legislature could have drafted the definition of disability more narrowly, by using the terms "total" and "permanent," without qualification. It did not do so and so we ask this Court to reject the narrower reading. Courts must frequently overrule agency interpretations that contravene the clear dictates of a statute. See, e.g., *CJS PUBADLAW Sec.*212.

Governmental agencies are expected to maintain high standards of honesty when dealing with its citizens. Likewise, courts have placed great emphasis on making it possible for those who deal with the government in any way to rely on any clearly announced rules and to reduce the helplessness of persons who are in a

Constitutional Law, Foundation Press, pp. 515-6.

While courts do afford great deference to an agency's interpretation of its own statutes and rules, if the agency's interpretation is contrary to the unambiguous terms or best reading of a statute, no deference is due. *Sierra Club v. Miss. Env. Quality Permit Bd.*, 943 So.2d 673, 679 (Miss. 2006). This Court cannot omit or add to the plain meaning of a statute or presume that the legislature failed to state something other than what was plainly stated. *City of Houston v. Tri-Lakes, Ltd.*, 681 So.2d 104, 106 (Miss. 1996).

A careful review of the statutory language reveals no suggestion of a more draconian requirement of "total" or "permanent" disability which Ms. Wright must endure "forever," lasting "until you die," as PERS so inconsiderately phrased it. For this Court to conclude otherwise would render the statute meaningless. The established right to disability benefits guaranteed by the definitions of the Mississippi legislature should not be so easily circumvented and the PERS definition of disability so easily substituted. Such a stranglehold by PERS on the intent of the statute is not merely a bump in the road but a massive roadblock to the plain meaning intended by the legislature.

Expectations of employees which are reasonable and which are demonstrably induced by governmental statutes become interests protected by due process when they are grounded in the explicit rules of state law. Employees of the state are entitled to expect and rely on exactly what the statute may say without the worry that a state agency may apply a less favorable interpretation, rather than the

perform the usual duties of employment" and that her treating physicians found her "mentally or physically incapacitated" and certified that the condition was "likely to be permanent," and no "lesser duties" were assigned, her disability retirement would be forthcoming. Ms. Wright is entitled to disability benefits as a part of her contract of employment with the State of Mississippi, as defined by statute -- nothing more and nothing less.

CONCLUSION

Simply put, the definition of substantial evidence is a legal definition. It was applied by Judge Kidd in this case to the factual record developed by PERS. With no new evidence submitted by PERS, the decision of Judge Kidd is now the law of the case and should not be disturbed. Furthermore, the evidentiary basis for Ms. Wright's claim of disability has been substantially strengthened by the introduction of new treatment records from Dr. Gupta and Dr. Hensarling, with each describing a consistent five year treatment of disabling panic disorder, depressive disorder and fibromyalgia with chronic pain.

Finally, the PERS Hearing Officer who was also quoted in Judge William F. Coleman's Order from which we are appealing said Ms. Wright must be "KNOCKED OUT OF HER JOB'.

We do not know what this means under the law but the fact that the State of Mississippi Nursing Board would not renew Ms. Wright's nursing license even in an

from work should in itself prove that her disability is total and permanent, or at least "likely to be permanent" which is what the law requires. It appears to us that Judge Coleman is saying the DAC can choose which medical evidence to use and that the Court MUST accept the Committee's decision. We respectfully disagree with Judge Coleman and feel the Court should conduct its own independent, objective review of the evidence to determine whether substantial evidence was presented to either approve or deny disability benefits. In this situation, it is clear there is substantial evidence to approve benefits for Ms.Wright. The Record contains the prior order from the Hinds County Circuit Court awarding benefits, plus the Order from the Mississippi Court of Appeals wherein they state the Committee relied solely on Dr. Webb's report. Dr. Webb spent no more than forty (40) minutes with Ms. Wright.and was paid $1500.00 for his report which would calculate to over a Three Million Dollar annual salary. See Exhibit 2 attached hereto which was recently found in our files and which PERS "inadvertently" left out of the Record.

Dr. Webb came to a different conclusion than Drs. Gupta, Hensarling, and Dr. Manning, a psychologist, who spent several hours on two different days with Ms. Wright. Drs. Gupta and Hensarling have treated Ms. Wright for over six years.. Ms. Wright's mother, Ms. Farmer, spent two hours at the hearing on June 8, 2007 pointing out to the Committee where Dr. Webb contradicted himself in his own report and also where the evidence in the Record proved his rationale was wrong – i.e., she had had medication changes and psychotherapy as was also pointed out in the Court of

We also provided for the Record a letter from the MS Nurses Licensing Board stating they would not renew Ms. Wright's license even in an inactive status due to her treating physicians' diagnoses. The Committee REFUSED to even consider this . It would APPEAR LOGICAL to us if the Board of Nursing says Ms. Wright is disabled and it is likely permanent that the Personnel System would agree with them. HOW CAN MS. WRIGHT WORK AS A NURSE WITHOUT A LICENSE? Surely the Committee understands this since they are doctors and a nurse themselves.

We are at a loss as to what else we could furnish to the Committee -- it appears that they refuse to accept the evidence. Ms. Wright, with the help of her Mother, has been litigating this case for six years and this is the second time it has had to go completely through the process and through the Courts. This has caused undue emotional and financial hardships and we pray the Court will award benefits to Ms. Wright.

Below is an analysis of the evidence provided in support of disability by Ms. Wright and also evidence used by PERS to support non-disability.

Ms. Wright's Evidence of Disability	***PERS Evidence of Non Disability***
Five years medical treatment from Dr. Gupta, and his certification of total and permanent disability	***Dr. Webb's report which has been shown to have no merit***
Five years medical treatment from Dr. Hensarling and his certification of total and permanent disability	
Report of Dr. Edward Manning, PERS own consultant, whose report verified Dr. Gupta's diagnoses and found other mental problems as well.	

accept this but it is definitely good and further proof of disability.

Acceptance of disability by Aetna Insurance Company

The MS State Nursing Board saying that Ms. Wright is disabled and refusing to renew her license due to her illnesses, also with the belief she will not get better. Also, according to the Nursing Practices Act of Mississippi, it would be against the law for Ms. Wright to practice nursing while taking mind altering drugs.

Hinds County Judge Winston Kidd's Order Approving disability benefits for Ms. Wrightt.

For the foregoing reasons, the decision of the Hinds County Circuit Court and the Public Employees' Retirement system of Mississippi is not based on substantial evidence and is arbitrary and capricious.

The evidence clearly supports Ms. Wright's disability status and she respectfully requests this Court to reverse the opinion and order of Judge William F. Coleman of the Hinds County, Mississippi Circuit Court and to order disability retirement benefits for Ms. Kelly L. Wright.

Respectfully submitted this the 29th **day of** October, 2008

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 Brief of the Appellant to:

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

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

So certified this the 29th day of October, 2008.

Kelly L. Wright
KELLY L. WRIGHT

OF MISSISSIPPI

PROVIDING SECURITY
FOR YOUR FUTURE

PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
BUILDING

429 MISSISSIPPI STREET
JACKSON, MISSISSIPPI
39201-1005

(601) 359-3589
1-800-444-PERS

FRANK READY
Executive Director

Dr. Edward Manning
4500 I-55 North
Suite 234
Jackson, MS 39212

CERTIFIED

RE: Independent Medical Evaluation for Kelly Wright SSN: 428-29-0907

Dear Dr. Manning:

Thank you for agreeing to accept this referral for an Independent Medical Evaluation. The PERS Medical Board has reviewed the enclosed records of the above referenced applicant for Non-Duty Related disability benefits and found there was insufficient objective evidence to support the claim for benefits. Thus, additional information is being requested for use in determining eligibility for disability benefits.

Ms. Wright 's evaluation is scheduled for Thursday, January 16, 2003 at 11:45 a.m. and Tuesday, January 21, 2003 at 8:30 a.m. PERS has agreeed to pay up to $1,500.00 for the cost of this evaluation. If it is believed special testing is required at a cost over and above the cost of services for which PERS has agreed to accept responsibility, please contact our office for prior approval. Generally, diagnostic testing can be approved by staff over the phone.

Please mail the bill and the narrative evaluation to:

Public Employees' Retirement System of Mississippi
Disability Program
429 Mississippi Street
Jackson, MS 39201

PERS defines disability, for purposes of determining benefit eligibility, as the physical or mental incapacity to perform one's own occupation or such other job as may have been offered by the employer without a significant reduction in pay. Such incapacity must be permanent and total. The determination of disability must be based on objective medical evidence. The applicant's job requirements as described by the employer are compared to the abilities of the applicant as may be affected by his or her medical condition. If the applicant has no limitations or restrictions preventing performance of the requisite duties of the job, then the applicant's claim is not approved. However, if, on the basis of objective medical evidence, a medical condition is documented which is of such severity, chronicity, and/or is non-responsive to adequate medical treatment resulting in functional limitations and restrictions preventing performance of essential job functions, the applicant's claim is approved.

Again, we appreciate your willingness to evaluate this applicant. If you have any questions, please contact this office at (601) 359-3589.

Sincerely,

Sheila King

Sheila King
Director
PERS Disability Program

PROVIDING SECURITY
FOR YOUR FUTURE

PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
BUILDING

429 MISSISSIPPI STREET
JACKSON, MISSISSIPPI
39201-1005

(601) 359-3589
1-800-444-PERS

FRANK READY
Executive Director

Dr. Mark Webb
576 Highland Colony Parkway
Ridgeland, MS 39175

CERTIFIED

RE: Neuropsychological Evaluation for : Kelly Wright SSN:428-29-0907

Dear Dr. Webb:

Thank you for agreeing to accept this referral for a Psychological Evaluation. The PERS Medical Board has reviewed the enclosed records of the above referenced applicant for disability benefits and found there was insufficient objective evidence to support the claim for benefits. Thus, additional information is being requested for use in determining eligibility for disability benefits.

Ms. Wright's evaluation is scheduled for Monday, July 14, 2003 at 10:30 a.m. PERS has agreed to pay up to $1500.00 for the cost of this evaluation. If it is believed special testing is required at a cost over and above the cost of services for which PERS has agreed to accept responsibility, please contact our office for prior approval. Generally, diagnostic testing can be approved by staff over the phone.

Please mail the bill and the narrative evaluation to:

Public Employees' Retirement System of Mississippi
Disability Program
429 Mississippi Street
Jackson, MS 39201

PERS defines disability, for purposes of determining benefit eligibility, as the physical or mental incapacity to perform one's own occupation or such other job as may have been offered by the employer without a significant reduction in pay. Such incapacity must be permanent and total. The determination of disability must be based on objective medical evidence. The applicant's job requirements as described by the employer are compared to the abilities of the applicant as may be affected by his or her medical condition. If the applicant has no limitations or restrictions preventing performance of the requisite duties of the job, then the applicant's claim is not approved. However, if, on the basis of objective medical evidence, a medical condition is documented which is of such severity, chronicity, and/or is non-responsive to adequate medical treatment resulting in functional limitations and restrictions preventing performance of essential job functions, the applicant's claim is approved.

Again, we appreciate your willingness to evaluate this applicant. If you have any questions, please contact this office at (601) 359-3589.

Sincerely,

Sheila King

Sheila King
Director
Disability Program

granted law wrong. $1500.00 paid

Exhibit Appellant's Brief

EXHIBIT

Exhibit 2