

IN THE SUPREME COURT OF MISSISSIPPI

ESTHER L. ROBERTS

APPELLANT

VERSUS

CAUSE NO. 2009-CC-01028

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI (PERS)**

APPELLEE

BRIEF OF THE APPELLEE

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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 disqualification or recusal.

The Board of Trustees of the Public Employees' Retirement System

Honorable Mary Margaret Bowers, Counsel for Appellee

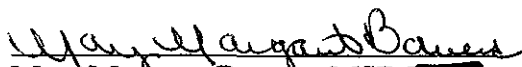
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Honorable William Coleman, Hinds County Circuit Court Judge

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Ms. Esther Roberts, Appellant

Respectfully submitted,



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STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE ISSUES

- I.** The Decision of the Board of Trustees of the Public Employees' Retirement System Denying Ms. Roberts' Claim for disability benefits is supported by substantial evidence and was neither arbitrary or capricious.
- II.** Pursuant to Miss. Code Ann. 25-11-113(1)(a) (Supp. 2009) the Order of the Circuit Court upholding the Final Order of the Board of Trustees of the Public Employees' Retirement System does not violate a statutory right of Ms. Roberts.

STATEMENT OF THE CASE¹

This matter involves an appeal filed by the Appellant, Esther L. Roberts, seeking review of the Order of the Circuit Court affirming the Order of the Board of Trustees of the Public Employees' Retirement System (hereinafter "PERS") entered on November 21, 2008. (Vol. I, R. 4.) The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny Ms. Roberts' request for payment of disability benefits as defined in Miss. Code Ann. §25-11-113 (Supp. 2009). This appeal is authorized and governed pursuant to Miss. Code Ann. §25-11-120 (Rev. 2006).

STATEMENT OF THE FACTS

Ms. Roberts was employed as a special services bookkeeper for the Forrest County Schools and she had six and a quarter (6.25) years of service credit at the time of the hearing. (Vol. II, R. 30.) Ms. Roberts terminated her employment on February 2, 2007 and applied for non-duty related disability. (Vol. II, R. 30.) Ms. Roberts had surgery in 2005 and a second surgery in 2006 followed by a twelve-week leave of absence in 2006. (Vol. II, R. 31, 33.) Ms. Jenna Escudero was Ms. Roberts supervisor and signed her Certification of Job Requirements. (Vol. II, R. 31.)

After Ms. Roberts' second surgery, she continued to have a lot of pain in her neck and she testified that she did not regain control of her left hand and fingers. (Vol. II, R. 33.) She had some epidural shots to "take care" of some of the pain and the surgery directly helped for a "little while"; however, she testified that she still had some pain

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

from her previous surgery. (Vol. II, R. 33.) Ms. Roberts testified that the pain continued to “get worse” and that she “fully intended to go back to work because she loved her job.” (Vol. II, R. 33.) She also testified that she started to sit down at her home computer for short periods of time to practice. (Vol. II, R. 34.) When Ms. Roberts sat at her computer she “could not physically make her fingers work” and she did not have the “coordination” or “speed or accuracy” that she had before. (Vol. II, R. 34.) Ms. Roberts testified that she would “start hurting very, very badly, and I would stop and take a rest, ... and I continued to try this several times a day.” (Vol. II, R. 34.) She also would try to sit down and write and it was “real hard” for her to grip the pen to write. (Vol. II, R. 34.) Ms. Roberts testified that it was obvious to her that she “could not make it through an eight hour day and be as functional as she once was.” (Vol. II, R. 34.)

Ms. Roberts described that her duties “consisted of a lot of paperwork, mostly computer work, and writing.” (Vol. II, R. 35.) Ms. Roberts testified that in her opinion she could no longer be “100 percent” at her job. (Vol. II, R. 35.) There were no other jobs in the office that were not computer work because it was the school system and that was “extremely difficult” for her. (Vol. II, R. 35.) She testified that she had a lot of pain and she went home from work everyday and sat on a heating pad, laid it on her neck and she “literally cried at night because she was in so much pain.” (Vol. II, R. 35.) At the hearing Ms. Roberts testified that she still could not sit at a computer and could not make her fingers work. (Vol. II, R. 35.) Ms. Roberts “bet(s) she could not type five words a minute” and she stated that she cannot get by doing this because all she has ever done is office work. (Vol. II, R. 35.) However, Ms. Roberts also testified that she would have

“three good days where she could function all day long,” but she “would have to take two days to get over the three that she just worked.” (Vol. II, R. 35.)

Ms. Roberts testified specifically that when she sits at the computer it hurts in the back of her neck and in the middle along her spine. (Vol. II, R. 36.) The pain she experienced would go down both of her shoulders and her arms; she described this as if “she had been cutting all day long with a pair of scissors.” (Vol. II, R. 36.) Ms. Roberts testified that the pain was like this before her first surgery and that she was experiencing a lot of tension headaches at the back of her neck. (Vol. II, R. 37.) Also, her right arm started to go numb before her first surgery and Dr. Folse suggested a CT and an x-ray to see what was going on. (Vol. II, R. 37.) Ms. Roberts testified that this was when Dr. Folse discovered that she had some disks in her neck that were collapsing and she started some physical therapy and epidural shots. (Vol. II, R. 37.) Ms. Roberts believes that this was in the time period of March 2005 to June 2005, and that “it got so bad” that Dr. Folse “suggested that she take off a few weeks from work to see if that would help.” (Vol. II, R. 37.) Ms. Roberts physical therapy helped “a little” but “her bones kept collapsing in her neck” and in August 2005 she had her first surgery and she did not return to work until November 2005. (Vol. II, R. 38.)

Two months after the surgery Ms. Roberts stated that she could not “hardly” use her right hand because it was going numb and hurting specifically in the part toward her little finger and it radiated back to her elbow. (Vol. II, R. 38-39.) At this time, Ms. Roberts was wearing wrist splints at night while she slept. (Vol. II, R. 39.) She was wearing the wrist splints because Dr. Folse thought it might be “carpal tunnel” and they were doing everything that they could to help. (Vol. II, R. 39.)

In June 2006, Ms. Roberts had a nerve conduction study and she had not had any studies performed before this. (Vol. II, R. 39.) Ms. Roberts testified that this report showed that she had some carpal tunnel. (Vol. II, R. 39-40.) At the time of this study, Ms. Roberts was back working and was "pretty aggravated" with her hands. (Vol. II, R. 40.)

In July 2006 Ms. Roberts went to a hand specialist, Dr. Scharpu, and he gave her some shots in her wrist but according to Ms. Roberts they really did not help her. (Vol. II, R. 40.) She only saw Dr. Scharpu once because carpal tunnel was not her problem. (Vol. II, R. 40.) She further testified that the pain was coming more from her neck. (Vol. II, R. 40.) Ms. Roberts clarified that she was told that the shots would help her if it had been carpal tunnel, but because they did not she "guesses" that it was not carpal tunnel syndrome. (Vol. II, R. 40.)

Dr. Meeks asked Ms. Roberts to clarify what her pain was like before her first surgery in 2005. (Vol. II, R. 41.) Her pain was worse in her right arm and she believes that pain was between a 5/6 and a 6/7. (Vol. II, R. 41.) Ms. Roberts testified that after her first surgery she was off of work for four months. (Vol. II, R. 41.) When Ms. Roberts returned to work she "really struggled" and still had pain. (Vol. II, R. 41.) This pain was in her neck and shoulders by the end of the day she was "really tired." (Vol. II, R. 41.) She describes this as being "tired of holding her head up," but she did the best she could because she loved her job. (Vol. II, R. 41.) When she went home from work she would take pain medicine and sit with the heating pad on her neck to get some relief. (Vol. II, R. 41.) Ms. Roberts could not sleep in her bed and slept in her recliner because she was unable to get comfortable. (Vol. II, R. 41.)

After Ms. Roberts' first surgery her pain continued to get worse and her left arm "started doing weird stuff." (Vol. II, R.42.) Her arm hurt really badly in her left tricep and under her left forearm as described by Dr. Meeks, when she pointed to the affected area. (Vol. II, R. 42.) Ms. Roberts testified that on October 26, 2006, Dr. Folse did a CT mylogram. (Vol. II, R. 42.) She testified that this was the "worst experience" and she had another mylogram on October 11, 2007. (Vol. II, R. 42.) This mylogram showed that she was having increased pain that was on a level 4/5 and her bone had broken down and was falling on that nerve. (Vol. II, R. 42) Ms. Roberts testified that Dr. Patterson told her that it was the reason her left side was giving her so much trouble. (Vol. II, R. 42-43.)

Dr. Meeks questioned Ms. Roberts about her pain and what it was like in January of 2007. (Vol. II, R. 43.) She responded that in the short term the pain improved "a little" because he got rid of the immediate pain on the underside of her left arm. (Vol. II, R. 43.) Ms. Roberts says that getting the bone off the nerve helped. (Vol. II, R. 43.) When Ms. Roberts did get back to Dr. Folse in March 2006, she was still having a great deal of pain in her neck and muscle spasms and they were continuing pain management. (Vol. II, R. 43.) At this point, she proceeded with the second surgery and then they continued with the medications and epidural injections to help manage the pain. (Vol. II, R. 43-44.)

Ms. Roberts medication consists of Lyrica 150 milligrams, one to two capsules every day; Ambien CR 12.5 milligrams, one tablet by mouth prior to bed time; Opana, 20 milligrams, four a day (she is switching to 40 milligrams to take two a day); Cymbalta, 30 milligrams, three a day; Vistaril, 25 milligrams, one to three times a day; Premarin, 0.9 milligrams, once a day; Zanaflex, 4 milligrams, two to three times a day; Topomax, 100 milligrams, one at bedtime; Maxalt ODT, 10 milligrams, these are taken for migraine

headaches; Lortab, 7.5 milligrams, these are taken for breakthrough pain. (Vol. II, R. 45.) If Ms. Roberts is at home then she will take Tylenol because it makes her sleepy with her Maxalt, and if she goes somewhere and cannot take Tylenol then she will take a Lortab. (Vol. II, R. 45.) Ms. Roberts testified that she has breakthrough pain everyday and is hoping that now that her Opana has been doubled that this will stop happening; however, at the time of the hearing she had been taking it for a week and was still experiencing breakthrough pain. (Vol. II, R. 46.)

Dr. Blackston asked how Ms. Roberts was convinced to have a second surgery on her neck after the first one did not work and she said that she was hoping it would be what she needed. (Vol. II, R. 46.) Ms. Roberts further explained that she had "never really been sick before, other than migraines," and she had to really trust that it would help. (Vol. II, R. 47.) Ms. Roberts stated that her C-8 and T-1 was also herniated and she asked Dr. Blackston what to do to help this. (Vol. II, R. 47.) Dr. Blackston explained to Ms. Roberts that he knew people with herniated disks that did not have surgery and he said that there was nothing wrong with a second or third option. (Vol. II, R. 48.) Dr. Blackston continued to explain that he thinks her problem is more muscle spasms and tightness and these things cannot be seen on an x-ray. (Vol. II, R. 48.)

Dr. Patterson indicated in his notes that after Ms. Roberts second surgery she had gotten a resolution of the symptoms that she had in her arms. (Vol. II, R. 49.) Ms. Roberts testified that she told Dr. Patterson that she was still hurting in her arms. (Vol. II, R. 49.) She also testified that Dr. Patterson wanted her to have an EMG test to see if it was carpal tunnel causing her problems because he wanted to make sure it was not still coming from her neck. (Vol. II, R. 49.) Ms. Roberts testified that this is when Dr.

Patterson referred her back to Dr. Folse. (Vol. II, R. 49.) Ms. Roberts testified that once Dr. Patterson saw that the bones had healed that was "all he wanted to see." (Vol. II, R. 49-50.) Dr. Patterson noted on March 8, 2007 that Ms. Roberts told him she had applied for disability. (Vol. II, R. 190.) He wrote that he "believed that this (her application for disability) may be part of what is behind the poor results in this case." (Vol. III, R. 190.)

When Ms. Roberts went back to Dr. Patterson and did some physical therapy and she was not able to complete it because it "hurt, really, really bad." (Vol. II, R. 50.) Ms. Roberts testified that it hurt in her neck and shoulders and they were having her lift and roll her shoulders. (Vol. II, R. 50.) She also did manipulatives with her hands and she had a couple of exercise bands that she pulled. (Vol. II, R. 50.) Also Ms. Roberts used some "little small weights" to strengthen her wrists. (Vol. II, R. 50.) Ms. Roberts attended physical therapy for three weeks for three days a week and this was referred by Dr. Folse. (Vol. II, R. 50-51.) Ms. Roberts testified that she talked with Dr. Folse about everything and she was told by her that if the physical therapy was not helping her then there was no need to continue it. (Vol. II, R. 51.) Ms. Roberts stated that this physical therapy took place at the beginning of 2007, which was about five or six weeks after surgery when her insurance deductible started over. (Vol. II, R. 51.)

Ms. Roberts testified that her mild right carpal tunnel syndrome and moderate left carpal tunnel "has settled down quite a bit" because she was not working. (Vol. II, R. 52.) She further testified that the carpal tunnel does not tend to bother her anymore because she can't type and is not using those muscles. (Vol. II, R. 52.) In January 2007, Ms. Roberts had another EMG, the kind with needles and it showed no carpal tunnel. (Vol. II, R. 52.) As of the hearing Ms. Roberts was not wearing splints any longer. (Vol. II, R. 52.)

According to Ms. Roberts, the biggest thing that keeps her from doing her work is the fact that she has to sit and type and answer the phone; however, she did not have to pick up the phone because there was a headset. (Vol. II, R. 53.) The amount of typing Ms. Roberts did was a "good bit" and they have a database of 400 children that she would put information into three different databases. (Vol. II, R. 53.) Ms. Roberts stated that she would probably be at the computer for six hours a day to keep current and that it was hard for her to hold her head in one position. (Vol. II, R. 54.) Ms. Roberts stated that she tried to reposition her head and she tried it at home and it "literally hurt to hold her head up." (Vol. II, R. 54.) Ms. Roberts testified that she has a soft cervical collar that she has put on at home at times. (Vol. II, R. 54.) She also had a home cervical traction unit when she was doing her first physical therapy. (Vol. II, R. 54.) She could put the traction unit on the floor or a good firm bed and it had a "strange looking thing" that you could put on it to elevate it. (Vol. II, R. 54-55.) Ms. Roberts thinks that she had to have a thirty minute lesson to put the "thing" together. (Vol. II, R. 55.)

To summarize Ms. Roberts' history, she had her first neck surgery in August 2005. (Vol. II, R. 55.) She took off work and was off for about three months and went back to work in November 2005. (Vol. II, R. 55.) Then, Ms. Roberts worked fairly continuously until the next November when she had her second surgery. (Vol. II, R. 55.) Between June and February Ms. Roberts missed 64 days with her FMLA leave. She explained she would have a good week followed by a week with a couple of bad days. (Vol. II, R. 56.) Ms. Roberts believes that she started her FMLA leave on November 8, 2006, and she did not go to work after this date and was terminated in February of 2007.

(Vol. II, R. 56.) At the time of the hearing, Ms. Roberts had applied for social security disability and was turned down and was awaiting an appeal. (Vol. II, R. 57.)

Ms. Roberts clarified, at the end of the hearing, that she still has migraine headaches. (Vol. II, R. 59.) She testified that she probably has one or two a month, but they generally last for one or two days. (Vol. II, R. 59.) She explains the 1-2 days by stating that if she wakes up with a migraine and it is usually all day and into the night. (Vol. II, R. 59.)

Ms. Roberts has seen several people at the South Mississippi Psychiatric for treatment and is currently seeing Cindy Rouse APMHN/CFNP. (Vol. II, R. 59.) Ms. Roberts is seeing Ms. Rouse for depression and anxiety. (Vol. II, R. 59.) Ms. Roberts started going to South Mississippi in August 2004 when all her problems began. (Vol. II, R. 59.) This was suggested by Dr. Folse because she thought that she might need to speak with someone. (Vol. II, R. 59.) Ms. Roberts did some "talk therapy" for a while with a doctor in Hattiesburg and eventually began taking medication. (Vol. II, R. 59.) She went through several doctors there, mostly because they moved. (Vol. II, R. 60.)

At the time of the hearing, Ms. Roberts testified she was experiencing one to two anxiety attacks a week. (Vol. II, R. 60.) She describes what happens during these "attacks." (Vol. II, R. 60.) Ms. Roberts testified that she begins getting real hot, and her heart runs away, she gets really nervous and has shortness of breath. (Vol. II, R. 60.) Ms. Roberts says that a contributing factor to these attacks is her not being able to work and not having the income that she used to have. (Vol. II, R. 60.) Ms. Roberts clarifies that her husband does work and her pay check was not much, but it did help. (Vol. II, R. 60.)

She explains that she has worked since she was in the 10th grade and has not been unemployed until now. (Vol. II, R. 60.)

Ms. Roberts testified that she experiences side effects from her medication. (Vol. II, R. 61.) She takes muscle relaxers that make her queasy and she says that “naturally” she cannot take them if she is going to be out anywhere and so she will “improvise” and take a Lortab. (Vol. II, R. 61.) She testified that Maxalt makes her feel “like she is in another world.” (Vol. II, R. 61.)

SUMMARY OF THE ARGUMENT

The Order of the PERS Board of Trustees affirmed by the Order of the Circuit Court is supported by substantial evidence. In order to qualify for a disability benefit under PERS law, Ms. Roberts would have to prove that the medical problems upon which she bases her claim are disabling and that the disability was the direct cause of her withdrawal from state service. The record clearly supports the Order of the PERS Board of Trustees upheld by the Circuit Court, which took into consideration all of the medical evidence offered by Ms. Roberts. The objective medical evidence does not establish that Ms. Roberts’ medical problems are disabling and therefore, she is not entitled to a disability benefit from the State of Mississippi, as determined by PERS and the Circuit Court.

The Order of the PERS Board of Trustees affirmed by the Order of the Circuit Court does not violate a statutory right of Ms. Roberts. It is the duty of PERS to determine which of the physicians’ assessments and other documentation it should rely

on when making its determination. The record clearly supports the Order of the PERS Board of Trustees and it is clear they took into consideration all of the medical evidence offered by Ms. Roberts. The Circuit Court properly upheld the Order of the PERS Board in its Order dated November 21, 2008. (Vol. I, R. 4.)

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 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. §§25-11-113 and 25-11-114 (Supp. 2009).

Applications for disability benefits are reviewed by the PERS Medical Board, which arranges and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. Miss. Code Ann. §25-11-119(7) (Supp. 2009). 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. §25-11-120 (Supp. 2008).

Disability, as defined under PERS law, Miss. Code Ann. §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.

§25-11-113 further provides that:

. . . in no event shall the disability retirement allowance commence before the termination of the state service, provided that the medical board, after a medical examination, 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 . . .

The question before the PERS Medical Board, the Disability Appeals Committee and the PERS Board of Trustees was whether Ms. Roberts' claim meets the requirements for the receipt of a disability benefit. The PERS Board of Trustees concluded that the recommendation of the Disability Appeals Committee to deny disability benefits should be adopted as the decision of the Board. The Circuit Court then affirmed the Board's Order on November 21, 2008, hence this appeal.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit and County Court Practice 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 or capricious; or (3) was beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of Ms. Roberts. *Laughlin v. Public Employees' Retirement System*, 11 So.3d 154, 158 (Miss. 2009); *Public Employees Retirement System v. Dozier*, 995 So. 2d 136, 138 (Miss. App. 2008); *Thomas v. Public Employees' Retirement System*, 995 So. 2d 115, 118 (Miss. 2008); *Public Employees' Retirement System v. Dean*, 983 So.2d 335, 339 (Miss. App. 2008); *Public Employees' Retirement System v. Card*, 994 So.2d 239, 242 (Miss. App. 2008); *Case v. Public Employees' Retirement System*, 973 So.2d 301, 310 (Miss. App. 2008); *Brakefield 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. 2004); *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).

A reviewing Court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. *Thomas v. Public Employees' Retirement System*, 994 So. 2d at 120 *Brakefield v. Public Employees' Retirement*

System, 940 So. 2d at 948; *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 350; *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 891; *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), the Mississippi Supreme 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.** [*Emphasis added*]

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.” In this case there are medical tests and evaluations that Ms. Roberts has undergone. Several different physicians have reviewed the reports in the file with 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 *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1287, this Court reiterated that "it is for PERS, as 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 this 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. Roberts. *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1284; *Public Employees' Retirement System v. Stamps*, 898 So. 2d at 673; *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 891; *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 Honorable 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. [Emphasis added]

In *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 893, the 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". 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 1150, 1156. (Miss. App. 2005)

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

I. THE DECISION OF THE BOARD OF TRUSTEES DENYING MS. ROBERT'S CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NEITHER ARBITRARY NOR CAPRICIOUS.

"Unless PERS' order was not supported by substantial evidence, or was arbitrary or capricious, the reviewing court should not disturb its conclusions." *Public Employees' Retirement System v. Howard*, 905 So. 2d 1279, 1284 (Miss. 2005). Upon close reading of the record presently before this Honorable Court, it is evident that the decision of the PERS Board of Trustees is based upon substantial evidence as found by the Circuit Court. Substantial evidence has been defined as "evidence which affords an adequate basis of fact from which the fact at issue can be reasonably inferred." *Brakefield v. Public Employees' Retirement System* 940 So. 2d at 948; *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1285; *Davis v. Public Employees' Retirement System*, 750 So. 2d 1225, 1233 (Miss. 1999).

Although Ms. Roberts states that this Court has set forth a methodology for determining "substantial evidence" the case she cites as *Johnson v. Harrell* is actually by correctly styled *Johnson v. Harris*, 612 F. 2d 993 (C.A. Tex. 1980) which is a case appealed to the United States District Court for the Western District of Texas involving a claim for benefits under the Social Security Act. The requirements for the receipt of a benefit from the Social Security Administration differ from the requirements for a benefit under the laws governing the administration of the State Retirement System.

Further, Ms. Roberts states that the case of *Anthony v. Sullivan* 954 F. 2d 289 (1992) defines substantial evidence as whether the evidence in the record is relevant and reasonable. Ms. Roberts also cites that the case of *Western v. Harris* 633 F. 2d 1204

(1978) for the contention that the record as a whole should be considered in a determination of substantial evidence. While these cases are from the Fifth Circuit, both concern social security benefits and thus, are distinguishable from the law governing the administration of the Public Employees' Retirement System.

In the recent case of *Laughlin v. Public Employees' Retirement System*, 11 So.3d 154, 159-60 (Miss. App. 2009), the Mississippi Court of Appeals noted that the "determination of disability pursuant to the provisions of the Social Security Act," is not the same as that determination "pursuant to the provisions of the Mississippi Public Employees' Retirement System." The Court of Appeals was distinguishing Ms. Laughlin's case from that of a Fifth Circuit case in which the claimant was seeking a social security determination of disability. Likewise, Ms. Roberts is using cases which involve provisions under the Social Security Act and not the provisions of the Public Employees' Retirement System. Similarly, in *Public Employees' Retirement System v. Dishmon*, 797 So.2d at, 895 this Court stated, "There is no authority requiring PERS to substitute their opinion for that of the Social Security or the A.L.J." It is clear that there is no requirement that the same standards utilized by the Social Security Administration be applied to a claim for disability from the State of Mississippi.

This Court has defined substantial evidence as evidence that is "more than a scintilla; it must do more than create a suspicion, especially where the proof must show bad faith." *Mississippi State Board of Examiners for Social Workers and Marriage and Family Therapists v. Anderson*, 757 So. 2d 1079, 1086 (Miss. Ct. App. 2000) (quoting *Mississippi Real Estate Commission v. Ryan*, 248 So.2d 790, 794 (Miss. 1971) (citing 2 Am. Jur. 2d *Administrative Law* § 688 (1962))). Also see, *Howard*, 905 So. 2d at 1285.

Upon review of the record, including the findings of the Disability Appeals Committee and its thorough analysis of the medical documentation and testimony offered at the hearing, this Honorable Court should affirm the Circuit Court's Order which upheld the Order of the Board finding that there is substantial evidence to support PERS' decision to deny disability benefits.

The Committee provided an extensive review of the documentation offered in support of Ms. Roberts' claim as evidenced in its most thorough analysis and which the Circuit Court must have relied on in making its decision. The Committee then went on to provide a thorough analysis of the evidence and testimony in the record and certainly provided the Board of Trustees, the Circuit Court, and now this Honorable Court with a more than adequate basis for their recommendation that disability benefits be denied and their decision be upheld. The Committee's analysis provides,

the medical evidence that was before this Committee today shows that Ms. Roberts has significant disease up and down her spine. **Fortunately, her disease was or appears to have been corrected with her two surgeries and now what Ms. Roberts complains of is muscle pain.** This Committee would refer Ms. Roberts to most of her physician's clinic notes **finding normal muscle strength and normal flexes. In fact, more evidence that her problem is muscular is that the trigger point injections helped her..... the likely reason that Ms. Roberts has this muscle pain is because she failed to complete her physical therapy.** Ms. Roberts told this Committee that she only went to therapy for about three weeks because it hurt. That reason is not a very good reason to stop therapy. In fact, Ms. Roberts is having muscle pain now. **There is no medical evidence that explains these complaints. The record is absent of why Ms. Roberts continues to have pain. There is no medical explanation for complaints of muscle pain. The myelograms dated October 12, 2007 show no evidence of spinal stenosis of the lumbar spine or nerve root compression. There was no evidence of cervical spine stenosis and no indication of nerve root compression there either. Dr. Folse's clinic notes throughout treatment show no muscle atrophy, no deformities, normal gait and normal muscle sensory and motor tests. The only finding she notes is tenderness mostly in the pericervical and trapezium muscles and these two findings are without a physiological medical explanation.**

As far as the claims of depression is concerned. **Ms. Roberts did not present as a depressed person** but it is not uncommon for persons in pain to feel down. However, **when reviewing Ms. Roberts' psychiatric reports, she has had several stressors including problems with her husband and her home. We also note that the most recent EMG states Ms. Roberts has no evidence of carpal tunnel syndrome.**

This Committee is more inclined to endorse the physical limitations as set out by Dr. Collipp. Ms. Roberts has the physical ability to perform her light duty job. Even Dr. Folse and Dr. Collipp agree about limitations except for the lifting restrictions. And Ms. Roberts testified she works six hours a day at a keyboard she does not perform a lot of lifting.

This Committee cannot recommend disability when there is no persuasive medical evidence that Ms. Roberts is physically unable to perform her job. In fact, she is physically able to do her job, but she complains she has pain that keeps her from it. As written above, there is no medical evidence that would explain all of this pain that Ms. Roberts complains. She has muscle pain and that is treated with physical therapy. Ms Roberts never made a good faith effort to complete her physical therapy. So, what this Committee submits is that the pain of which Ms. Roberts complains, is muscular in nature and should not result in a permanent and likely total occupational disability.

This Committee has reviewed all of the medical evidence and actually talked with Ms. Roberts for an hour. We were able to discuss her symptoms with her and observe her movement and demeanor. We noted nothing unusual. Ms. Roberts' diagnosis of degenerative disease of the spine is just a diagnosis and does not automatically constitute a disability. The medical records do not document problems from the diagnosis that would cause a significant impairment in her ability to perform her job. Even Dr. Patterson was puzzled as to why Ms. Roberts did not improve with surgery until Ms. Roberts reported she was going to apply for disability. He wrote that the thought that decision by Ms. Roberts explained why she continued to complain of pain. This Committee is not necessarily agreeing with Dr. Patterson except that we agree that there is no medical explanation in this record as to why Ms. Roberts did not improve and return to work.

Ms. Roberts finds the rationale and conclusions reached by PERS in denying her benefits to be insufficient. The PERS Board based their decision on the recommendations of the Committee members comprised of Dr. Blackston, Dr. Meeks and Shelia Jones as well as the evaluations of Dr. Alsheikh, Dr. Bell, Dr. Folse, Dr. McKellar, Dr. Collipp,

Dr. Patterson, Dr. Leigh, Dr. Gillespie and Cindy Rouse, APMHN/CFNP and all physician's notes in the record. Conclusions based on this information can hardly be said to be an insufficient basis for their decision.

Ms. Roberts states that the question she is asking this Court is whether the record contains substantial evidence to support PERS' finding, "whether PERS had presented enough evidence to support the finding that the claimant is not disabled" *Public Employees' Retirement System v. Henderson* 867 So. 2d 262 (Miss.App. 2003); (Appellants Brief, page 11). Clearly, the Committee had evidence of Ms. Roberts' medical conditions when it made its recommendation. Ms. Roberts had the burden of proving that her medical conditions were disabling. Again, a rebuttable presumption exists in favor of PERS' decision, and the burden of proving to the contrary was on Ms. Roberts. *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1284; *Public Employees' Retirement System v. Stamps*, 898 So. 2d at 673; *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 891; *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).

Further, Ms. Roberts asks this Court to determine whether the opinion of Dr. Collipp amounts to "substantial evidence" (Appellant's Brief, page 11). As stated above, the Committee not only reviewed **all** of the evidence in the record but observed Ms. Roberts' demeanor at the hearing that was over an hour in length. The PERS Board's finding that Ms. Roberts did not prove she is permanently disabled because of her

complaints of multiple medical conditions is supported by evidence in the record. Ms. Roberts asserts that based on the totality of medical evidence presented coupled with observations made by Jenna Escudera, Special Services Director, she has met her burden. The opinion of a lay person should not be taken as conclusive evidence of disability. *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 894. The Committee provided a reasoned and unbiased evaluation of the evidence. It is evident from the Committee's thorough report that they did not rely only on Dr. Collipp's report as Ms. Roberts asserts. Instead, the Committee relied on the entire medical record offered by Ms. Roberts. As Judge Coleman noted in his opinion affirming the PERS' Board's finding that Ms. Roberts was not disabled, the "board was faced with conflicting medical evidence and gave a reason for its decision; therefore, the decision is found to be supported by substantial evidence and this Court **cannot** inject its own opinion." (Vol. I, R. 5.).

As in *Public Employees' Retirement System v. Cobb* 839 So.2d at 609-610 the Court noted that, the lack of convincing evidence offered by Ms. Roberts and the in depth analysis by the Committee is the substantial evidence necessary to support the decision to deny Ms. Roberts' claim for disability benefits. Again it was Ms. Roberts' burden to provide the evidence to support her claim for disability. *Public Employees' Retirement System v. Howard*, 905 So. 2d at 1284; *Public Employees' Retirement System v. Stamps*, 898 So. 2d at 673; *Public Employees' Retirement System v. Dishmon*, 797 So. 2d at 891.

PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. As noted in *Howard*,

“determining whether an individual is permanently disabled is better left to physicians, not Judges. This is the idea behind the creation and expansion of administrative agencies.” Several physicians reviewed Ms. Roberts’ application and medical documents. It is further within PERS discretion to determine which documents garner more weight than others. *Byrd v. Public Employees’ Retirement System*, 774 So.2d 434, 438 (Miss. 2000) Also see: *Brakefield v. Public Employees’ Retirement System*, 940 So. 2d at 948 This is exactly what the Medical Board, Disability Appeals Committee and PERS Board of Trustees did in this case. Although Ms. Roberts states that “deference should be given to the opinions of the individuals’ treating physicians” this is a standard applied in social security cases. This is not a standard as such in cases involving a determination of disability by PERS, although a finding by social security is given consideration.

Miss. Code Ann. § 25-11-113(1) (a) (Supp. 2009) sets forth the method by which the Medical Board is initially to determine if disability is present:

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.

Following an appeal to the Disability Appeals Committee they reviewed the documentation provided by each of Ms. Roberts’ physicians in reaching their conclusion that she is not entitled to disability benefits as set forth under the statute.

The Disability Appeals Committee presented a lengthy and well-reasoned recommendation to the Board of Trustees. The Committee, in making its

recommendation, did not make a hasty decision in determining that Ms. Roberts was not qualified for disability benefits. Instead, the Committee evaluated **all** of the medical evidence made available to them and their recommendation was therefore supported by substantial evidence and was not arbitrary or capricious. This Honorable Court should affirm the Circuit Court's Order entered November 21, 2008. (Vol. I, R. 4.)

II. ACCORDING TO MISS. CODE ANN. SEC. 25-11-113(1)(a) (SUPP 2009) THE FINAL ORDER OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DOES NOT VIOLATE A STATUTORY RIGHT OF MS. ROBERTS.

Ms. Roberts argues that the statement of Jenna Escudera in completing the PERS form that Ms. Roberts "clearly ... could not continue to perform duties of that employment" is consistent with the opinions of her treating physicians (Appellant's Brief, page 13). However, PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. On October 26, 2005, Dr. Folse wrote that he still intended that Ms. Roberts get back to work. (Vol. II, R. 19.) On March 8, 2007, Dr. Patterson noted that Ms. Roberts applied for disability. (Vol. III, R. 190.) He stated that he "believed that this (application for disability) may be part of what is behind the poor results in this case." (Vol. III, R. 190.) Also introduced into evidence at the hearing were several medical reports from 2008 in which a brain MRI was noted to be normal. (Vol. II, R.21.)

Ms. Roberts was also examined by Dr. Collipp, an expert in the field of physical and rehabilitation medicine. (Vol. II, R.21.) Dr. Collipp concluded that Ms. Roberts suffered from two neck surgeries, degenerative joint and disc disease and carpal tunnel syndrome, depression, headaches and chronic pain; however, he concluded that at a minimum Ms.

Roberts was able to do light duty work with a maximum lift of 20 pounds.(Vol. II, R. 21.) Ms. Roberts asserts that Dr. Collipp's findings are opposed by the opinions of her treating physicians. (Appellant's Brief p. 14.) As stated above, Ms. Roberts' physicians thought that she could work and questioned her results in relation to her application for disability. The PERS Board did not base their opinion solely on Dr. Collipp's opinion as seen in the Proposed Statement of Facts, Conclusions of Law, and Recommendations all was taken into consideration.

Again, as noted in *Howard*, "determining whether an individual is permanently disabled is better left to physicians, not Judges. This is the idea behind the creation and expansion of administrative agencies." Several physicians reviewed Ms. Roberts application and medical documents. Ms. Escudera's opinion is not that of a physician and was given the requisite amount of weight by the Committee. In *Public Employees' Retirement System v. Dishmon*, 797 So.2d at 891, 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 further within PERS discretion to determine which documents garner more weight than others. *Byrd v. Public Employees' Retirement System*, 774 So.2d 434,438 (Miss. 2000) Also see: *Brakefiled v. Public Employees's Retirement System*, 940 So.2d at 948 (Miss. App. 2006). This is exactly what the Medical Board, Disability Appeals Committee and PERS Board of Trustees did in this case.

Ms. Roberts also asserts her rights were violated as she was not assigned to some other duty that she could perform in the territory within which she worked and without a

reduction in compensation.” In stating this, Ms. Roberts is referring to Miss. Code Ann.

§ 25-11-113(1) (a) (Supp. 2009). While the law does state:

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 within the same general territorial work area, without material reduction in compensation,

it is not a requirement that an individual be reassigned. PERS does not assign individuals to other duties, this is the prerogative of the employer. PERS’ duty was to evaluate whether Ms. Roberts was disabled. In determining disability one can be disabled if not capable of performing their own job duties or those lesser duties which may have been assigned. These decisions were based on reason and done with both reason and judgment.

Burks v. Amite County School District, 708 So.2d 1366, 1370 (Miss. 1998).

The Disability Appeals Committee presented a lengthy and well-reasoned recommendation to the Board of Trustees. The Committee, in making its recommendation, did not make a hasty decision in determining that Ms. Roberts was not qualified for disability benefits. Instead, the Committee evaluated all of the medical evidence made available to them. Although, Ms. Roberts states her statutory rights under 25-11-113(1)(a) were violated, Section 25-11-113(1)(a) merely provides a definition for disability under PERS Law.

CONCLUSION

The record clearly supports the decision entered by the PERS Board of Trustees affirmed by the Circuit Court. It is clear that Ms. Roberts' case does not meet the requirements for the receipt of a disability benefit under the laws governing the administration of the Public Employees' Retirement System. The Order of the PERS Board of Trustees is supported by substantial evidence and is neither arbitrary nor capricious. The Board considered all of the medical evidence before it. The Board validly exercised its discretion in determining which physician's recommendations should be followed and that decision was made with an understanding of the controlling principles and without disregarding relevant facts. Ms. Roberts has failed to prove a violation of any statutory right. PERS asks that this Honorable Court affirm the Order entered by the Circuit Court on November 21, 2008, which affirmed the Order of the PERS' Board of Trustees entered April 15, 2008.

Respectfully submitted this the 14 day of October 2009.

**PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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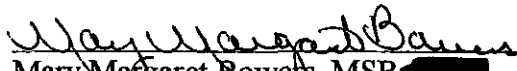

CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that I have this day hand delivered or mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to:

Angela Davis-Morris, Esq.
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Honorable William F. Coleman
Hinds County Circuit Judge
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This the 14 day of October 2009.


Mary Margaret Bowers, MSB 
Special Assistant Attorney