

**IN THE COURT OF APPEALS, STATE OF MISSISSIPPI**

ESTHER L. ROBERTS

APPELLANT

vs.

CASE NO. 2009-CC-01028

PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
OF MISSISSIPPI, (PERS)

APPELLEE

**REBUTTAL BRIEF  
OF APPELLANT**

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### **PRELIMINARY STATEMENT**

The principal brief on behalf of Appellant, Esther L. Roberts, was timely filed with the Clerk of the Supreme Court of Mississippi on September 2, 2009. A brief for Appellee, Public Employees' Retirement System of Mississippi, (PERS), was filed with the Clerk of the Court on October 14, 2009.

Following agreement of the parties, the Supreme Court, on October 30, 2009, granted Appellant's Motion for an extension of time, until December 2, 2009, to file this brief in rebuttal, and on the same date, by Notice to the parties, assigned this case to The Court of Appeals.

Therefore, in accordance with said Notice, and pursuant to Mississippi Rules of Appellate Procedure 32 (b), Appellant's brief in rebuttal is captioned with the name of The Court of Appeals, State of Mississippi.

**REBUTTAL BRIEF  
OF APPELLANT  
ESTHER L. ROBERTS**

COMES NOW appellant, Esther L. Roberts, by her undersigned counsel, who submits this brief in rebuttal to the brief filed on behalf of appellee, Public Employees' Retirement System, PERS, on October 14, 2009.

Before proceeding, however, counsel for appellant respectively directs the Court's attention to the Statement of Issues appearing in appellee's brief on page 2.

- 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.

The source of these issues is the Standard of Review approved by The Supreme Court of Mississippi for appeals from a final order or judgment from administrative agencies limiting appellate jurisdiction to the determination whether the final administrative order or judgment is: 1. supported by substantial evidence; 2. arbitrary or capricious; 3. beyond the agency's authority; or, 4. in violation of a constitutional or statutory right of the claimant. PERS v. Dishmon, MS-0724.204 (S. Ct.2009); PERS v. Finklea, 862 So.2d 569 (Ct. App.2004); PERS v. Ross, 829 So.2d 1238 (S. Ct. 2002); PERS v. Dishmon, 797 So.2d 888 (Miss. 2001); and PERS v. Marquez, 774 So.2d 421 (S. Ct.2000).

These prerequisite criteria, approved by The Supreme Court of Mississippi, were

adopted and made a part of the Uniform Circuit and County Court Rules, in Rule 5.03, effective May 1, 1995.

The thrust of appellant's argument on appeal to this Court is that the Final Order of the PERS Board of Trustees **is not** supported by substantial evidence, as defined by The Supreme Court of the United States and The Supreme Court of Mississippi; and, that the said Final Order **is arbitrary and capricious**, and **does violate** a statutory right of appellant, Esther L. Roberts, under Section 25-11-113(1)(a), Mississippi Code of 1972, Ann.

By appellee's averments to the contrary, in the foregoing Statement of Issues, the issues in this case are therefore joined.

The Final Order of the PERS Board of Trustees, dated April 15, 2008, fails to comply with the first, second and fourth prongs in the Standard of Review approved by The Supreme Court of Mississippi.

The first prong, *substantial evidence*, requires a **legal** definition. Both The Supreme Court of the United States and The Supreme Court of Mississippi have defined *substantial evidence* as:

"...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

Richardson v. Perales, 402 U.S. 389 (1971).

Delta CMI v. Speck, 586 So.2d 768 (1991)

In an earlier decision, The Supreme Court of the United States held that:

"The substantiality of evidence must take into account whatever in the record detracts from its weight. ...[A]

reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view"

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

In 1998, this Court concurred with the same legal definition. See: Tolson v. Anderson-Tully Co. 724 So.2d 399 (Ct. App. 1998).

The Fifth Circuit Court of Appeals has adopted a similar definition. See: Anthony v. Sullivan, 654 F.2d 289 (1992) and Green v. Schweiker, 699 F.2d 1162 (1994). The Fifth Circuit designed a methodology for determining *substantial evidence*: Consideration must be given to the clinical and laboratory findings of both treating and non-treating physicians, and to the opinions of those physicians on both the duration and severity of the claimant's medical impairments. If available, the corroborating testimony of the claimant's family and neighbors concerning the effect of the impairments upon the claimant's daily activities and ability to perform basic work activities, both with respect to past jobs actually held or to other jobs of the same or lesser exertional and skill levels. These factors must be considered together with the claimant's age, education and work history. See: Johnson v. Harris, 612 F.2d 993 (1980).

The United States District Courts for both the Northern and the Southern Districts of Mississippi have concurred with the same definition of *substantial evidence*. Garner v. Richardson, 339 F. Supp. 1126 (N.D. Miss. 1971) and Little v. Secretary HEW, 173 F. Supp. 276 (S.D. Miss. 1959).

In the recent Dishmon decision, The Supreme Court of Mississippi stated:

“The primary question before this Court is not, as the trial court concluded, whether there is ‘substantial evidence’ of a disability, but whether the record contains substantial evidence to support PERS’ finding that Dishmon is not disabled”. MS-0724.204 (2009 pg. 4).

PERS by its Medical Board, Disability Appeals Committee and Board of Trustees has denied the application of appellant, Esther L. Roberts, for disability retirement benefits based upon the opinion of Dr. David Collipp, a frequent examiner for PERS, who saw Roberts, on October 11, 2007, for thirty-one minutes, by his own account, including the time for a physical examination, and who determined that she “is physically capable to perform a minimum of light duty per DOT, with a maximum lift of 20 pounds”. Record, Vol. 2, pp. 132-134.

Appellant does not ask this Court to re-weigh the medical evidence in this case, but to look at the entire medical record, including the reports and opinions of appellant’s treating physicians, and to see if it can “...conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view”.

Universal Camera v. N.L.R.B., 340 U.S. 474 (1951).

Dr. Michael C. Patterson performed surgery on appellant’s cervical spine in August 3, 2005, and November 21, 2006. His post-operation diagnosis following the last surgery was disc herniation, degenerative disc disease and cervical radicular syndrome. Record, Vol. 3, pp. 205-212.

Three treating physicians, Dr. Y. Susi Folse, Dr. David McKellar and Dr. Joe Nick Leigh have seen appellant for pain management including physical therapy and



epidural steroid injections. Dr. Folse limited appellant to sitting and standing 30 minutes at a time and lifting to no more than 10 pounds, and believed that appellant's pain would cause an absence from work of 4 days each month. Record, Vol. 3, pp. 164-170. Between June 16, 2006 and February 15, 2007, Esther L. Roberts was absent from her job at Forrest County Schools a total of 64 days as reported by Jenna Escudera, Special Services Director, because of severe pain and the side effects of narcotic medication. Vol. 2, pp. 118-120, 122-123. In a Statement of Examining Physician he provided PERS, Dr. Mckellar said appellant was "not likely to improve". Record, Vol. 3, pp. 175-186.

According to the *Dictionary of Occupational Titles*, 4<sup>th</sup> edition, Revised, 1991, to which Dr. Collipp refers, there is no "light duty" described therein. If Dr. Collipp intended to state that Esther L. Roberts had the capacity for "light work", which is described in the DOT, such work requires standing and walking up to 6 hours in an 8 hour workday, and the ability to lift and carry up to 20 pounds as often as 20 minutes in each hour. DOT, Appendix C, p. 1013.

There is zero medical evidence in Esther L. Roberts' entire record which is consistent with Dr. Collipp's opinion.

With abundant respect for Circuit Court Judge William F. Coleman, who, on December 19, 2008, affirmed the Final Order of the PERS Board of Trustees, counsel for appellant contends that the charge to the Circuit Court upon this appeal, under Rule 5.03, was not to reweigh the evidence or sit as fact-finder, but to determine if the Final Order of the PERS Board of Trustees was supported by *substantial evidence* as defined by The Supreme Court of the United States in Perales, and by The Supreme Court of Mississippi

in Speck, above; and whether the Final Order complied with the other prerequisite criteria of Rule 5.03.

In accordance with the holding in the recent Dishmon decision, rendered in July, 2009, this record does not contain *substantial evidence* to the PERS finding that Esther L. Roberts is not disabled.

The Final Order of the PERS Board of Trustees also fails to comply with the second prong of Rule 5.03. According to case precedent in The Supreme Court of Mississippi, the PERS decision is arbitrary and capricious.

An administrative agency's decision is "arbitrary" when it is not well grounded on reason or judgment, and substantial evidence does not undergird its findings and conclusion. McGowan v. Mississippi State Oil & Gas Board, 604 So. 2d 312 (1992); Burks v. Amite County School District, 708 So.2d 1366 (1998).

There is a line of cases in The Mississippi Supreme Court which holds that if a decision of an administrative agency is not supported by substantial evidence, it necessarily follows that the decision is both arbitrary and capricious. Mississippi State Department of Health v. Natchez Community Hospital, 743 So. 2d 973; PERS v. Marquez, 774 So. 2d 421 (S. Ct. 2000); PERS v. Dishmon, 797 So. 2d 888 (Miss. 2001).

Counsel for appellant contends further that the Final Order of PERS fails to comply with the fourth prong of Rule 5.03 because it violates Esther L. Roberts' statutory right to disability retirement benefits.

For reasons stated above, the Final Order is not supported by substantial evidence, and, therefore, is both arbitrary and capricious. In addition, the Final Order of PERS

infers, legally, that Esther L. Roberts continues to have the ability to perform the usual duties of her employment with Forrest County School District, when **all** evidence in this record—save for the thirty-one minute opinion of Dr. Collipp—supports a contrary conclusion.

The statutory definition of disability directed to PERS by the Mississippi Legislature contains the following elements:

1. The inability to perform the usual duties of employment.
2. The incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation.
3. The incapacity to perform the duties of any employment covered by the Public Employees' Retirement System that is actually offered and is within the same general territorial work area, without material reduction in compensation.

Mississippi Code of 1972, Section 25-11-113(1)(a), (2008 Supp.).

In completing the Employer's Certificate of Job Requirements of appellant's job with Forrest County School District, Jenna Escudera, Special Services Director for the School District, and appellant supervisor, clearly stated that Esther L. Roberts could not continue to perform the duties of her job due to excessive absences caused by pain and the side effects of her narcotic medications.

Appellant testified at her hearing before the PERS Disability Appeals Committee that she hoped to return to her job as secretary and bookkeeper, but could not work on a sustained basis due to her medical impairments. Record, Vol. 2, pp. 30, 46, 53-56.

Roberts has not been offered "lesser duties" by Forrest County School System,

and she has not been actually offered “any employment covered by the Public Employees Retirement System (Section 25-11-101 et seq) within the same general territorial area, without material reduction in compensation”, in the language of the statute.

If the Final Order of PERS denying Esther L. Roberts’ application for disability retirement under Section 25-11-113(1)(a), is not supported by *substantial evidence*, as legally defined by both The Supreme Court of the United States and The Supreme Court of Mississippi in the foregoing cited cases, and is, therefore, both arbitrary and capricious, the said Final Order violates Roberts’ entitlement to disability retirement as defined in this statute.

**Conclusion and Prayer for Relief**

Appellant, Esther L. Roberts, by her undersigned counsel, prays that this Court will grant her appeal, and reverse the decisions below, and award her disability retirement benefits in accordance with the Public Employees’ Retirement Law of 1952 from the date of termination of employment, February 2, 2007.

In the alternative, Roberts prays that this Court will remand this case to the Hinds County Circuit Court with directions to reverse the Final Order of PERS and award benefits, or remand this case to PERS for a new hearing on the merits.

Respectfully submitted,



Angela Davis-Morris  
Attorney for Appellant

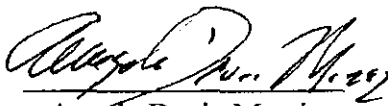
### Certificate of Service

I, Angela Davis-Morris, Attorney for Appellant, Esther L. Roberts, 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 *Rebuttal Brief of Appellant* to:

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Hinds County Circuit Court Judge  
Post Office Box 327  
Jackson, MS 39205-0327

Honorable Mary Margaret Bowers  
Special Assistant Attorney General  
Public Employees' Retirement System  
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This the 2<sup>nd</sup> day of December, 2009.



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