

IN THE SUPREME COURT OF MISSISSIPPI

SHARON M. POOLE

APPELLANT

VERSUS

CAUSE NO. 2009-CC-00212

**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

Honorable Jim Hood, Attorney General

Honorable William Coleman, Hinds County Circuit Court Judge

Honorable George S. Luter, Counsel for Appellant

Ms. Sharon M. Poole, Appellant

Respectfully submitted,



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STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF THE ISSUES

- I. The Circuit Court properly held that the decision of the Board of Trustees of the Public Employees' Retirement System denying Ms. Poole's claim for disability benefits is supported by substantial evidence.
- II. This appeal should not be remanded for a new hearing as Ms. Poole had the burden to produce all documents relating to her case including the records of her rheumatologist at the hearing before the Disability Appeals Committee.

STATEMENT OF THE CASE¹

This matter involves an appeal filed by the Appellant, Sharon M. Poole, seeking review of the January 8, 2009 Order of the Circuit Court affirming the Order of the Board of Trustees of the Public Employees' Retirement System (hereinafter "PERS") entered on June 27, 2006. (Vol. I, R. 5.) The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny Ms. Poole's request for payment of disability 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). Ms. Poole filed an appeal in the Circuit Court. The Circuit Court affirmed the Order of the PERS Board of Trustees finding that the decision of the Board was not supported by substantial evidence.

STATEMENT OF THE FACTS

Sharon M. Poole, was employed as a supervisor for the Department of Human Services and had accumulated 30.50 years of service credit when she applied for Non-Duty Related Disability pursuant to Miss. Code Ann. §25-11-113 (1)(a). (Vol. II, R. 28.)

On October 29, 2002, Ms. Poole underwent surgery and had a transforaminal interbody fusion with pedicle screw instrumentation and a posterior lateral fusion. (Vol. III, R. 225.) Dr. David Lee of Hattiesburg performed the surgery. (Vol. III, R. 225.)

On January 22, 2003, Ms. Poole returned to Dr. Lee and he arranged for her to have a right SI joint injection given by Dr. David McKellar. (Vol. III, R. 245- 246.) On

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

June 16, 2003, Ms. Poole, despite her SI injections, was still having pain and Dr. Lee advised her that they would try a radiofrequency stimulator. (Vol. III, R. 238.) Ms. Poole continued to experience pain and after discussion with Dr. Lee she decided to have the hardware removed from her back on March 20, 2004. (Vol. II, R. 34; Vol. III, 237.) Ms. Poole testified at the hearing, that after the hardware was removed she was in less pain for three or four weeks and then the pain “gradually came back.” (Vol. II, R. 34.) Ms. Poole also stated that Dr. Lee gave her restrictions on bending and stooping and told her to sit in the car no longer than 45 minutes without getting up and moving around. (Vol. II, R. 37.)

On June 17, 2004, Ms. Poole complained of continuing back pain to Cindy Rouse, CFNP Southern Spinal Neurologic Spinal Institute. (Vol. II, R. 34; Vol. III, R. 220.) Ms. Poole returned to see Dr. Lee on December 6, 2004, and his impression was that she had lumbar disc degeneration, lumbar spondylosis² and failed back syndrome. (Vol. II, R. 18.; Vol. III, R. 214.) Dr. Lee also stated that he would support Ms. Poole “in her disability if she chooses to do so.” (Vol. III, R. 214.) However, Dr. Lee did not state that Ms. Poole was disabled. (Vol. III, R. 214.)

One July 11, 2005, in a letter to Trey Mecham with PERS, Cindy Rouse, CFNP wrote that Ms. Poole had multiple physical complaints of pain and had received multiple injections of both the lumbar and cervical spine. (Vol. III, R. 213.) Nurse Rouse also stated that Ms. Poole experienced neck pain and that she was going to put her through another MRI of the L-spine with and without contrast and that she was also scheduled for an epidural steroid injection on August 3, 2005. (Vol. III, R. 213.) Nurse Rouse also

² Spondylosis is defined as ankylosis of the vertebra; often applied nonspecifically to any lesion of the spine of a degenerative nature. *Stedman's Medical Dictionary* 1769 (Marjory Spraycard ed., 26 th ed., Williams and Wilkins 1995).

stated that they planned on sending Ms. Poole to Dr. McKellar for pain management evaluation and that she had many positive trigger point pain areas consistent with fibromyalgia. (Vol. III, R. 213.)

Dr. David C. Collipp, independent examining physician for PERS, wrote that Ms. Poole, from an objective standpoint, has the capacity to participate in light duty work and a maximum lift of 20 pounds. (Vol. III, R. 201.) At the request of PERS, Dr. Collipp examined Ms. Poole and his findings are in a letter dated August 5, 2005. (Vol. III R. 199-201.)

During the hearing Ms. Poole testified that her most recent trouble was in her lower back and more specifically a "pain that goes down her rear end down the side of her right leg, and then it goes across her shin into her ankle and her big toe." (Vol. II, R. 30.) Ms. Poole also testified that she started having muscle spasms in her neck, and that Dr. David McKellar did an MRI and discovered two bulging disks. (Vol. II, R. 30.) Dr. McKellar treated these disks by pain management, epidurals, and therapy. (Vol. II, R. 30-31) As far as Ms. Poole knows, there is no further surgery planned and she will continue to be treated by pain management "to see how it goes." (Vol. II, R. 33.)

Ms. Poole's average work day as a supervisor for the Department of Human Services includes supervising eligibility workers who determine eligibility for food stamps and TANFF. (Vol. II, R. 36.) Ms. Poole testified that she spends a lot of time at her desk reviewing cases and her case load at times can get quite heavy (Vol. II, R. 36.) Ms. Poole also explained that she has a lot of difficulty with sitting and that after sitting 25 or 30 minutes she needs to get up and move positions. (Vol. II, R. 37-38.) Also, Ms. Poole's work location changed after Hurricane Katrina. (Vol. II, R. 37.) After the

Hurricane, her workplace consisted of trailers connected by what she calls a “boardwalk.” (Vol. II, R.37.) Ms. Poole testified that the “boardwalk” is the length of a football field and she has to make the walk between the trailers ten (10) times a day. (Vol. II., R. 37.)

As of the hearing, Ms. Poole’s understanding was that the doctors were managing her pain and that she was taking narcotics to do so, but that it was difficult to work while taking those medications. (Vol. II, R. 40.) Ms. Poole testified that she manages her pain by taking the opiate Avinza and taking Marcaine for break through pain. (Vol. II, R. 41.) She stated that she no longer takes Klonopin for her muscle spasms because it “makes her real groggy and knocks her out,” and when this would happen she would have to go home. (Vol. II, R. 41.)

Special accommodations have been made at work for Ms. Poole (e.g. special chair)for “several years.” (Vol. II, R. 42.) Her supervisor, Lorraine Hill testified that Ms. Poole has missed a lot of work due to her back pain. (Vol. II, R. 43.) Ms. Hill was asked why Ms. Poole was not terminated if she was having a difficult time doing her job and she testified that it is the Department of Human Services’ policy to accommodate her. (Vol. II, R. 44.) Ms. Hill further clarified that if someone was not coming to work, they would be terminated from their position after a year. (Vol. II., R. 44.) Also, when asked about Ms. Poole’s performance evaluations, Ms. Hill stated that Ms. Poole had been evaluated as “acceptable.” (Vol. II, R. 44.)

Ms. Pool was denied non-duty related disability after the PERS Medical Board determined that there was insufficient objective evidence to support the claim that her medical condition prevented her from performing her duties as described of a Supervisor. (Vol. III, R. 307.) On November 9, 2005, Ms. Poole appealed such denial. (Vol. II, R. 61-

62.) Ms. Poole had a hearing before the Disability Appeals Committee on April 14, 2006 with Shelia Jones, presiding, and Drs. Joseph Blackstone and Mark Meeks. (Vol. II, R. 24-58.)

After reviewing the Statement of Facts, Conclusions of Law and Recommendation from the Disability Appeals Committee, the Board of Trustees of PERS ordered that Sharon M. Poole be denied disability on June 27, 2006. (Vol. II, R. 14-23.) Ms. Poole appealed to the Circuit Court which affirmed the Order of the Board of Trustees on June 27, 2009.

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. Poole would have to prove that the pain upon which she bases her claim is 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. Poole. Ms. Poole had the burden to produce all documents relating to her case, including those of her rheumatologist. It was not the burden of PERS to gather these documents after the hearing was closed. The objective medical evidence does not establish that Ms. Poole's back pain is disabling and therefore, she is not entitled to a disability benefit from the State of Mississippi.

The Board made its decision based on substantial evidence, PERS' Regulations, as well as the relevant statutes defining disability under Mississippi law. Based on the evidence and the testimony elicited at the hearing appearing in the record, it is clear that the only decision the Circuit Court could reach was to affirm the decision of the Board. As determined by the Board and upheld by the Circuit Court, Ms. Poole does not meet the requirements to receive disability because there is not any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain.

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 (Rev. 2006).

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. Poole's claim meets the requirements for the receipt of a disability benefit. The PERS Board of Trustees adopted the recommendation of the Disability Appeals Committee to deny disability benefits. The Order of the Board was properly affirmed by the Circuit Court on the basis that the denial of disability benefits is supported by substantial evidence.

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. Poole. *Laughlin v. Public Employees' Retirement System*, 11 So.3d 154, 158 (Miss. App. 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. *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. Poole 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. Poole. *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*, the Supreme 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 was supported by substantial evidence, and was neither arbitrary nor capricious. PERS was within its authority in making this determination and it was Ms. Poole's burden to produce all of her medical evidence to the Committee and not the burden of PERS. Thus, the Circuit Court in its Order entered January 8, 2009, properly affirmed the Order of the PERS Board of Trustees and the Circuit Court's decision should be affirmed on appeal.

I. THE CIRCUIT COURT PROPERLY HELD THAT THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. POOLE'S CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

"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. 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). This Court has further 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 Court will see that there is “more than a scintilla” of evidence to support PERS’ decision to deny disability benefits.

The Committee provided an extensive review of the documentation offered in support of Ms. Poole’s claim as evidenced in its most thorough findings of fact. 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, with a more than adequate basis for their recommendation that disability benefits be denied and their decision be upheld. The Circuit Court affirmed the Board’s decision. PERS asks this Court to affirm the lower Court’s decision.

Ms. Poole 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. Lee and Dr. Collipp and other physician’s notes in the record. Conclusions based on this information can hardly be said to be an insufficient basis for their decision.

The PERS Board’s finding that Ms. Poole did not prove she is disabled because of failed back syndrome³ and back pain is supported by the evidence in the record. Ms. Poole calls into question Dr. Collipp’s conclusions and her physical job requirements used as a basis for the Board’s decision. Dr. Collipp found Ms. Poole was able to perform light duty work with a maximum lift of twenty (20) pounds. (Vol. III, R. 201.) Using this recommendation, the Committee examined the physical job requirements found in the record.

³According to the Appeals Committee, failed back syndrome is not a physical diagnosis for a physical condition. (Vol. II, R. 21.)

Ms. Poole's job performance evaluations done by DHS County Director Lorraine Hill were "acceptable." (Vol. II, R. 44.) Ms. Hill testified that Ms. Poole had missed a lot of work and because of this she did not think that she could do her job, nevertheless, Ms. Poole was not fired and still received "acceptable" job performance evaluations from Ms. Hill.

The Disability Appeals Committee "reviewed each and every medical report and looked to see whether medical opinions are based on objective evidence and not just sympathy for Ms. Poole's complaints." (Vol. II, R. 20.) In doing so, the Committee determined that Ms. Poole's main complaint was back pain that she claimed to be disabling. (Vol. II, R. 21.) The Committee stated that Ms. Poole is a "lady who continues to work with no objective medical evidence of what might be causing her to suffer from pain that she alleges is disabling." (Vol. II, R. 21.) The Committee also noted that Ms. Poole was able to sit before them with some movement noted and was able to maintain her concentration. (Vol. II, R. 21.)

Ms. Poole states that there are "[N]umerous federal decisions that state disability can be based upon pain when it is 'constant, unremitting, and wholly unresponsive to therapeutic treatment'"; however, the only case cited is *Selders v. Sullivan*, 914 F.2d 614 (5th Cir. 1990). (Brief of Appellant, p. 8). *Selders* involves a determination of the Social Security Administration and not one in which a state agency such as PERS makes a disability finding. 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 distinguished *Selders* by noting 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." Also, in *Public Employees' Retirement System v. Dishmon*, 797 So.2d 888, 895 (Miss. 2001), this Court stated that the "methods of reaching a conclusion of whether a claimant is disabled may very well be vastly different, and Miss. Code Ann. Sec. 25-11-113 **clearly** does not bind PERS to any finding by the Social Security Agency." In *Dishmon* this Court went on to state that "there is no authority requiring PERS to substitute their opinion for that of the Social Security Agency." *Id.*

Ms. Poole cites that the appellate courts in Mississippi have noted in numerous PERS disability cases the existence of pain as a component of disability. (Appellant's Brief, page 8) The Disability Appeals Committee noted in their Proposed Statement of Facts, Conclusions of Law and Recommendations that "in other Mississippi statutes, awards of disability cannot be maintained solely on the complaints of pain." (Vol. II, R. 21.) Ms. Poole cites the case of *Public Employees Retirement System v. Marquez*, 774 So.2d 421 (Miss. 2000), in which Marquez "had been treated for atypical face pain... among many other diseases..." and that Marquez was under the care of a pain clinic." Ms. Poole's case is markedly different. She is suffering from pain which stems from no objective medical evidence and was sent for a "pain evaluation." (Appellant's Brief, page 8)

Ms. Poole also cites *Public Employees' Retirement System v. Thomas*, 809 So.2d 690 (Miss. App. 2001), for the contention that "constant pain" led to this Court upholding the Circuit Court's reversal of the Board's decision to deny Mr. Thomas disability benefits. After a thorough reading of the *Thomas* case it is evident that the Court did not focus on his pain. Rather, the Committee focused on Mr. Thomas' diabetes and other

medical problems stemming from this disease in affirming the Circuit Court's Order. Ms. Poole's use of this case in order to have this Court believe that pain was a major component in Mr. Thomas being awarded disability by this Court is contrary to the Court's decision.

Again, in *Public Employees' Retirement System v. Shurden*, 822 So.2d 258 (Miss. 2002), Ms. Poole arbitrarily quotes a section of the opinion where it was stated that Ms. Shurden had been hospitalized for pain; however, nowhere does this Court state that it based its decision on Ms. Shurden's pain. The same can be said for Ms. Poole's citation of *Public Employees' Retirement System v. Dearman*, 846 So.2d 1014 (Miss. 2003) for the contention of this Court noting "constant pain."

Further, Ms. Poole states that the cases of *Public Employees' Retirement System v. Waid*, 823 So.2d 595 (Miss. App. 2002) and *Howard v. Public Employees' Retirement System*, 971 So.2d 622 (Miss. App. 2007), are "very similar" to her own case. (Appellant's Brief, page 10) Ms. Poole likens her amount of leave to that in *Waid* and also states that Waid's "chronic severe fibromyalgia with attendant pain" was the reason for the Appeals Court upholding the Circuit Court's decision to overturn PERS' determination that Waid was not disabled. In doing so, Ms. Poole states in a footnote that Dr. Collipp, "PERS' own independent physician" stated that Ms. Poole's medical records indicate that she has "fibromyalgia. (Appellant's Brief, page 10) While it is true that Dr. Collipp did state such in his report, he was only noting what Ms. Poole's medical records stated as her condition, not confirming a diagnosis of fibromyalgia.

In *Public Employees' Retirement System v. Waid*, 823 So. 2d 595 (Miss. App. 2002), the Court stated that the Board of Trustees of PERS said that it adopted the

Disability Appeals Committee's findings of fact and conclusions of law, but the Disability Appeals Committee made no specific findings of fact. *Id.* at 597. While this is true for Ms. Waid's case where the Proposed Statement of Facts, Conclusions of Law and Recommendations was a mere two and a half pages with a three paragraph statement of facts and a one paragraph conclusion of law, Ms. Poole's case is much different. The Disability Appeals Committee's Proposed Statement of Facts, Conclusions of Law and Recommendations is eight full pages including an in-depth analysis of Ms. Poole's condition and recognition of her fibromyalgia. (Vol. II, R. 15-23.) Ms. Poole's case cannot be directly compared to *Waid* in this same manner. Also, Ms. Waid was considered to have chronic, severe fibromyalgia and had been granted Social Security Disability. *Public Employees' Retirement System v. Waid*, 823 So.2d at 598. Ms. Poole's fibromyalgia was never labeled chronic or severe and Ms. Poole had not applied for Social Security Disability at the time of her hearing.

In citing *Howard*, Ms. Poole makes the contention that it was PERS' duty to retrieve medical records from Ms. Poole's rheumatologist, which is not PERS's burden. The burden of production of such medical records falls squarely on Ms. Poole. Again, Poole asserts that her treating physician stated "'almost' the same thing about her.' (Appellant's Brief, page 10) Disability is determined based on Ms. Poole's medical records and not on their similarity to another case. The fact that her doctor may have stated **almost** the same thing as another doctor in another case that came before the Board is not determinative of Ms. Poole's disability determination.

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 v.*

Public Employees' Retirement System, 971 So.2d at 1284, "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. Poole's 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.

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. Poole's physicians in reaching their conclusion that she was not entitled to disability benefits as set forth under the statute. The Committee's findings are as follows, they reviewed the reports of Dr. Lee in which he determined that Ms. Poole had lumbar discogenic disease that was stable and he noted that Ms. Poole was able to work intermittently. (Vol. II, R. 18.) They also reviewed Dr. Lee's postoperative notes after Ms. Poole's lumbar fusion in which he noted that Ms.

Poole was doing well but she apparently developed back pain which subsequently led to the hardware being removed from her back. (Vol. II, R. 18.) After the hardware removal Ms. Poole reported that she was "70 % improved regarding her back and leg pain." (Vol. II, R. 18.) Ms. Poole was then sent to physical therapy and began complaining of sciatic pain down the right thigh. (Vol. II, R. 18.) An EMG was ordered and was found "completely normal," then Dr. Lee set up additional therapy and another MRI was done and found "no significant problem." (Vol. II, R. 18.) At the point Dr. McKellar had performed radio frequency denervation and this had relieved her pain about 50%, Ms. Poole reported that she could no longer effectively work . (Vol. II, R. 18.) Dr. Lee completed a form 7, Statement of Examining Physician form stating that Ms. Poole's "prognosis was good but she was to have no work at present." (Vol. II, R. 19.) Ms. Poole again returned to Dr. Lee's office complaining of pain on June 16, 2005 where an MRI showed surgical change and fusion at C4-6, multilevel disc disease and large left thyroid mass. (Vol. II, R. 19.) Dr. Lee treated this with an epidural steroid injection and a repeat MRI on July 18, 2005 showed "no evidence of recurrent disease of compromising lesions." (Vol. II, R. 19.)

The Committee further noted that Dr. Collipp, an expert in the field of physical medicine also evaluated Ms. Poole. He reviewed the entire body of records and noted that Dr. Lee's most recent exam found Ms. Poole's muscle strength to be 5/5 and "she did show some give way weakness in her right quadriceps and tibialis which she said was due to pain." (Vol. II, R. 19.) Dr. Collipp's physical exam noted some inconsistencies, including pain complaints and power and he concluded that Ms. Poole had the "physical capacity to perform light duty work with a maximum lift of 20 pounds." (Vol. II, R. 19;

Vol. II, R. 201.) Clearly, the Disability Appeals Committee did not arbitrarily ignore any of Ms. Poole's medical records when they determined that she was not permanently disabled. (Vol. II, R. 15.)

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. Poole was not qualified for disability benefits. Instead, the Committee evaluated all of the medical evidence made available to them and therefore the decision made by the Board and affirmed by the Circuit Court was supported by substantial evidence.

II. THIS APPEAL SHOULD NOT BE REMANDED FOR A NEW HEARING AS MS. POOLE HAD THE BURDEN TO PRODUCE ALL DOCUMENTS RELATING TO HER CASE INCLUDING THE RECORDS OF HER RHEUMATOLOGIST AT THE HEARING BEFORE THE DISABILITY APPEALS COMMITTEE.

After a thorough review of the medical records and testimony, the Committee determined that Ms. Poole did not meet the requirements for disability benefits as set out by the statute. The Committee's analysis of the medical documentation is thorough and provides this Court the basis for its recommendation that Ms. Poole is not entitled to regular disability benefits from the State of Mississippi. The Committee provided a reasoned and unbiased evaluation of the evidence. 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. Poole and the indepth analysis by the Committee is the substantial evidence necessary to support the decision to deny Ms. Poole's claim for disability benefits. Again it was Ms. Poole's burden to provide the evidence to the

Medical Board and the Disability Appeals Committee 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.

Contrary to Ms. Poole's assertion that the Committee did not consider all of her medical records relative to fibromyalgia, the Committee had evidence of Ms. Poole's fibromyalgia before it and did not consider Ms. Poole's fibromyalgia disabling. (Vol. II, R. 15-23.) Ms. Poole's fibromyalgia was mentioned several times in the record before the Committee:

- 1.) Ms. Poole testified that she has been diagnosed with **fibromyalgia** and gets trigger point injections from Dr. Benson for that about every two months. (Vol. II, R. 17.)
- 2.) In direct examination of Ms. Poole by Dr. Meeks, he noted that it has been mentioned that Ms. Poole has **fibromyalgia**. Ms. Poole testified that she had "point tenderness and had injections and a certain type of medication." (Vol. II, R. 51.)
- 3.) Dr. Chmelicek, Ms. Poole's family doctor, mentions in his notes that Ms. Poole "takes a lot of medication for her **fibromyalgia**." (Vol. II, R. 146.)
- 4.) In the notes of Cindy Rouse, CFNP Southern Spinal Neurologic Institute, Ms. Poole "continues to have trigger point soreness and tenderness consistent with **fibromyalgia**." (Vol. II, R. 157.)
- 5.) Nurse Rouse continued her notes and prescribed Ms. Poole Cymbalta for "less **fibromyalgia** pain." (Vol. II, R. 158.)
- 6.) In the notes of Nurse Rouse, Ms. Poole "continues to have trigger points throughout her body consistent with **fibromyalgia**." (Vol. II, R. 159.)
- 7.) In the independent report by Dr. Collipp, he explains that Ms. Poole's medical records "demonstrate that she has hypothyroidism, asthma, depression, and **fibromyalgia**. She did mention that she has **fibromyalgia**." (Vol. III, R. 199.)
- 8.) In the notes of Nurse Rouse, Ms. Poole "also has many positive trigger point pain areas consistent with **fibromyalgia**." (Vol. III, R. 213.)

9.) In the notes of Nurse Rouse, Ms. Poole has **fibromyalgia** and takes Ultram per Dr. Benson, her rheumatologist for this.” (Vol. III., R. 220.)

Clearly, the Committee had evidence of Ms. Poole’s fibromyalgia when it made its recommendation. If there were additional records, Ms. Poole did not meet her burden of producing all the records that she wanted before the Committee including those of her rheumatologist. Again, a rebuttable presumption exists in favor of PERS’ decision, and the burden of proving to the contrary was on Ms. Poole. *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

Ms. Poole contends that numerous decisions have held that fibromyalgia can be disabling; however, these cases are markedly different from Ms. Poole’s. In *Public Employees’ Retirement System v. Waid*, 823 So. 2d 595 (Miss. App. 2002), the Court stated that the Board of Trustees of PERS said that it adopted the Disability Appeals Committee’s findings of fact and conclusions of law, but the Disability Appeals Committee made no specific finding of fact. *Id.* at 597. While this is true for Ms. Waid’s case where the Proposed Statement of Facts, Conclusions of Law and Recommendations was a mere two and a half pages with a three paragraph statement of facts and a one paragraph conclusion of law, Ms. Poole’s case is much different. The Disability Appeals Committee’s Proposed Statement of Facts, Conclusions of Law and Recommendations is eight full pages including an in-depth analysis of Ms. Poole’s condition and recognition of her fibromyalgia. (Vol. II, R. 15-23.) Ms. Poole’s case cannot be directly compared to *Waid* in this same manner. Also, Ms. Waid was considered to have chronic, severe

fibromyalgia and had been granted Social Security Disability. *Public Employees' Retirement System v. Waid*, 823 So.2d at 598. Ms. Poole's fibromyalgia was never labeled chronic or severe and Ms. Poole had not applied for Social Security Disability at the time of her hearing.

In *Public Employees' Retirement System v. Dearman*, 846 So.2d 1014 (Miss. 2003), Ms. Dearman "developed a large number of debilitating medical conditions, including fibromyalgia. However, it is important to note that fibromyalgia was one of many conditions that Ms. Dearman was suffering from and not one that was focused on by the Court. The Court does not accept PERS' recommendation because they say that PERS "cannot choose to ignore the only evidence in the record from the examining physician, especially where it chose not to exercise its right to an independent medical evaluation under Miss. Code Ann. Sec. 25-11-113(1)(c) (Rev. 1999)." *Dearman*, 846 So.2d 1014,1018. Ms. Poole had an independent medical evaluation. Dr. Collipp performed this evaluation in which he found from an objective standpoint, that Ms. Poole had the physical capacity to participate with light duty work, and a maximum lift of twenty (20) pounds. (Vol. III., R. 201.)

In *Stevison v. Public Employees' Retirement System*, 966 So.2d 874,881 (Miss. App. 2007), the court noted that "the record in this case mirrors that in *Waid*." Again, Ms. Poole's case can be distinguished. Ms. Poole's fibromyalgia was not labeled chronic or severe, she had not applied for Social Security disability and Dr. Collipp provided an independent medical evaluation. (Vol. III, R. 201) Further, Ms. Poole, unlike Ms. Waid or Ms. Stevison, was not considered disabled by her doctors other than Dr. Lee's

adversarial statement that he would “support her in her disability if she chooses to do so.” (Vol. III, R. 214.)

It is well documented in the medical evidence presented by Ms. Poole that she is not entitled to disability benefits as defined by statute and PERS Regulations. The Disability Appeals Committee, as well as the Board of Trustees, as mandated by law, determines whether the claimant is unable to perform the usual duties of employment.

Again, 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 *Public Employees’ Retirement System v. Howard*, 905 So.2d at 1287 “determining whether an individual is permanently disabled is better left to physicians, not Judges.” Several physicians reviewed Ms. Poole’s application and medical documents. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee composed of two physicians and a nurse trained to review the medical reports submitted in support of Ms. Poole’s claim. Further, it is 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).


The decision of the Board of Trustees upheld by the Circuit Court is supported by substantial evidence and must not be remanded to PERS for a new hearing to review records Ms. Poole failed to provide. Thus, the decision of the Circuit Court should be affirmed.


CONCLUSION

The record clearly supports the decision entered by the PERS Board of Trustees and affirmed by the Circuit Court. It is clear that Ms. Poole's 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 affirmed by the Circuit Court is supported by substantial evidence and is neither arbitrary nor capricious. The Board considered all of the medical evidence before it including Ms. Poole's fibromyalgia. The Board validly exercised its discretion in determining which physicians recommendations should be followed and that decision was made with an understanding of the controlling principles and without disregarding relevant facts. The PERS Board of Trustees respectfully requests this Honorable Court affirm the Order of the Circuit Court entered on January 8, 2009.

Respectfully submitted this the 4 day of November 2009.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM APPELLEE

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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:

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Honorable William F. Coleman
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, Mississippi 39201-0327

This the 4 day of November 2009.


Mary Margaret Bowers, MSP
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