

NO. 2009-CC-00212

IN THE SUPREME COURT OF MISSISSIPPI

SHARON POOLE

Appellant

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

Appellee

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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SHARON M. POOLE

APPELLANT

VS.

NO. 2009-CC-00212

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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.

1. Sharon M. Poole, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Sheila Jones, Presiding Hearing Officer of the Disability Appeals Committee of the Public Employees' Retirement System of Mississippi

Respectfully submitted,

GEORGE S. LUTER


ATTORNEY FOR APPELLANT

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BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

The appellant, Sharon M. Poole, files this Brief to urge the Supreme Court to reverse the order of the Hinds County Circuit Court entered January 8, 2009 that affirmed the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered June 27, 2006 which adopted the recommendation of the PERS Disability Appeals Committee which found "We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain. We have no choice but to recommend that Ms. Poole's request for disability benefits be denied." (R 21-22, RE 124-125, Tab 12).

II.

STATEMENT OF THE ISSUES

1. The decision of PERS should be reversed and rendered because it is not supported by substantial evidence and is legally incorrect since PERS' decision stated that they "....do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain."
2. Alternatively, the decision of PERS should be remanded for a new hearing for PERS to consider her fibromyalgia since no records from Poole's rheumatologist were obtained.

III.

STATEMENT OF THE FACTS

Sharon M. Poole was a supervisor with the Department of Human Services with 30.50

years of service when she applied for non-duty related disability retirement pursuant to Miss. Code Ann. 25-11-113 (1)(a) on December 23, 2004. (R 185, RE 1, Tab 1)

After years of back pain, Poole underwent a transforaminal interbody fusion, a right hemilaminectomy and foraminotomy with radical disketomy by Hattiesburg surgeon Dr. David Lee on October 29, 2002. (R 225, RE 49, Tab 2).

After doing well for some time, Poole reported low back pain and was referred for joint injections. (R 246, RE 42, Tab 2) Poole had three SI joint injections but continued to have right paraspinous pain and pain into her lateral knee area. (R 238, RE 35, Tab 2).

After continuing pain problems with treatment including SI injections, physical therapy, and a TENS unit, Dr. Lee on July 16, 2003 decided to remove her hardware from her back and bolster her fusion which was done on March 20, 2004. (R237, RE 34, Tab 2) Poole was instructed to do no bending, lifting, driving. (R 224, RE 28, Tab 2). In June, Poole returned to her physician and reported she was having more severe and frequent muscle spasms and reported she was unable to tolerate physical therapy due to pain. (R 220, RE 24, Tab 2).

On December 6, 2004, Dr. Lee reported that Poole returned for follow-up and found her to have lumbar disc degeneration, lumbar spondylosis, chronic pain, and failed back syndrome and stated he would support her application for disability. (R 214, RE 18, Tab 2.)

On January 11, 2005, Cindy Rouse, CFNP Southern Spinal Neurologic Spinal Institute reported Poole had multiple physical complaints of and pain, has received multiple pain injections, and has had two cervical fusions and a laminectomy and also trigger point pain areas consistent with fibromyalgia. (R 213, RE 2, Tab 2).

On January 11, 2005, DHS County Director Loraine Hill on Employer's Certification of Job Requirements reported that Poole "is working as much as possible but has to miss excessive amounts of work due to health" and it was her opinion that Poole could not perform her job. (R 139, RE 53, Tab 3).

On June 9, 2005, Dr. Hallie Bell reported an EMG showed Poole had "possible diffuse polyneuropathy..." (R 179, RE 62, Tab 7))

On August 5, 2005, Statement of Examining Physician Dr. David C. Collipp stated Poole's "movements...are slow, and with marked pain behavior...She notes moderate to severe pain with any passive movements of her lower limbs, including her ankles, knees, and hips and all motions." (R 199-200, RE 54-56, Tab 4))

On September 13, 2005, PERS Interim Executive Director Denise Owens-Mounger wrote Poole that the PERS Medical Board determined insufficient evidence to "support the claim that your medical condition prevents you from performing your duties as described of a Supervisor." (R 307, RE 57, Tab 5).

On November 9, 2005, Poole appealed such denial for a hearing before the Disability Appeals Committee. (R 61-62, RE 58-61, Tab 6)

On January 11, 2006, Family Practice physician Dr. Thomas V. Chmelicek reported Poole to be "under chronic pain control from Dr. McKellar to the point we have gotten as much improvement as I think we ever will get with her...She...requires to be on pain medications permanently. She has significant problems with mobility, range of motion, any kind of gait....It is my opinion that Ms. Sharon Poole is permanently disabled with a very small possibility of any kind of improvement in the future...there is nothing more we can do other than pain control." (R 69, RE 67, Tab 8)

Poole had a hearing before the Disability Appeals Committee on April 14, 2006 consisting of Sheila Jones, presiding, and Drs. Mark Meeks and Joseph Blackston. (R 24-58, RE 83-116, Tab 11)

At the hearing, Poole, who was unrepresented by counsel, testified she had pain in her lower back down her right leg, muscle spasms in her neck, and two bulging discs in her neck, and numbness in her right hand. (R 30, RE 89, Tab 11) She stated she was undergoing pain

management by Dr. David McKellar with epidural injections.

Poole further testified she was a supervisor of of eligibility workers and had to move from trailer to trailer to see workers and carry files. (R 37, RE 96, Tab 11) Poole testified she took oral morphine at night, Avinza for breakthrough pain, and muscle relaxers for spasms. (R 41, RE 100, Tab 11)

Loraine Hill, DHS County Director, testified that Poole really isn't able to "do what she is supposed to be doing." She testified Poole "attempts to come to work and she's in a supervisory position and she really needs to be there, and she is not able to do so." (R 43, RE 102, Tab 11).

Upon cross examination by Dr. Meeks, Poole further testified that she also had fibromyalgia and had point tenderness and saw a rheumatologist for that. (R 51, RE 110, Tab 11).

Poole's sister Rose Magee testified that Poole had "been in pain so much until it has ust about taken all of her energy away....because some weeks for three days she's not able to move...literally move out of bed from racking with pain." (R 114, RE 56, Tab 11)

On April 14, 2006, the Disability Appeals Committee recommendation stated that "Basically the main complaint here is that Ms. Poole has back pain that she claims is disabling....This is not to say that we believe Ms. Poole is making up her pain...We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition which is causing Ms. Poole to have pain." (R. 15-23, RE 118-126, Tab 12)

The PERS Board of Trustees order adopted such recommendation on June 27, 2006. (R 14, RE 117, Tab 12)

Poole appealed to Hinds County Circuit Court on July 26, 2006 and the Hinds County Circuit Court affirmed the decision of PERS on January 6, 2009.

SUMMARY OF THE ARGUMENTS

PERS' decision should be reversed and rendered because PERS merely stated they could find no objective evidence for her pain despite reports and medical records enumerating Poole's pain and its attendant result of her being unable to perform her job.

Alternatively, Poole's case should be remanded for a new hearing for PERS to obtain the records of her rheumatologist and consider her fibromyalgia and whether or not it is disabling alone or in concert with her other medical problems.

ARGUMENTS

1. The decision of PERS should be reversed and rendered because it is not supported by substantial evidence and is legally incorrect since PERS' decision stated that they "....do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain."

The legal requirement of proving PERS disability is stated at Miss. Code Ann. 25-11-113(1)(a) which states:

"...any active member in state service who has at least four (4) years of membership service credit may be retired by the Board of Trustees... provided the Medical Board, after 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 shall be retired."

Disability is defined in the same code section as the following:

"...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."

Contrary to the assertions of the opinions asserted in the recommendation of the Disability Appeals Committee, substantial lay and medical evidence support Poole's contention that she could not longer perform her duties as a DHS supervisor due to **pain** directly resulting from her failed back condition and fibromyalgia.

Hattiesburg neurosurgeon Dr. David Lee reported that Poole returned for follow-up and he found her to have lumbar disc degeneration, lumbar spondylosis, chronic pain, and failed back syndrome and stated he would support her application for disability. (R 214, RE 18, Tab 2.)

Cindy Rouse, CFNP for Southern Spinal Neurologic Spinal Institute reported Poole had multiple physical complaints of and pain, has received multiple pain injections, and has had two cervical fusions and a laminectomy and also trigger point pain areas consistent with fibromyalgia. (R 213, RE 2, Tab 2).

DHS County Director Loraine Hill on Employer's Certification of Job Requirements reported that Poole "is working as much as possible but has to miss excessive amounts of work due to health" and it was her opinion that Poole could not perform her job. (R 139, RE 53, Tab 3).

Dr. Hallie Bell reported an EMG showed Poole had "possible diffuse polyneuropathy"¹ (R 179, RE 62, Tab 7))

Even PERS Examining Physician Dr. David C. Collipp stated Poole's "movements...are slow, and with marked pain behavior...She notes moderate to severe pain with any passive movements of her lower limbs, including her ankles, knees, and hips and all motions." (R 199-200, RE 54-56, Tab 4). Although Dr. Collipp stated it was his opinion that Poole had "the physical capacity to participate with light duty work, and a maximum lift of 20 pounds at this time..." he noted she was "presently taking morphine in the form of Avinza, Nexium,

¹ Polyneuropathy is defined as "a condition in which many peripheral nerves are afflicted with a disorder." *Mosby's Medical, Nursing and Allied Health Dictionary, 6th Ed., page 1370.*

Traxodone, Ultram, Soma, and Benadryl.”²

Poole would assert that all of the available medical evidence available to the Disability Appeals Committee at the time of her hearing support her contention that she met the statutory definition of PERS disability which is merely inability to perform the specific job you had: “...the inability to perform the usual duties of employment...”

The law is clear in Mississippi that the decision of an administrative agency must be undisturbed unless it is (1) not supported by substantial evidence, (2) is arbitrary and capricious, (3) is beyond the scope or power granted to the agency, (4) violates one’s constitutional rights. *Public Employees’ Retirement System v. Marquez*, 774 So. 2d 421 (Miss. 2001); *Fulce v. Public Employees’ Retirement System*, 759 So. 2d 401, 404 (Miss. 2000); *Davis v. Public Employees’ Retirement System*, 750 So. 2d 1225, 1229 (Miss. 1999).

Additionally, the circuit court is “charged with the duty to review the record to determine whether there is substantial evidence...to reach a conclusion, a Circuit Court must look at the full record before it... while the Circuit Court performs limited appellate review, it is not relegated to wearing blinders.” *Mississippi State Board of Examiners. v. Anderson*, 757 So. 2d 1079, 1084.

Poole would assert that the the Committee legally erred and acted arbitrarily and capriciously when it held that it cannot award disability based on pain. The Committee incredibly held the following:

“So, it seems that today, the issue is whether this Committee can award disability solely based on the subjective complaints of pain that Ms. Poole has. Our statute does not provide that disability can be awarded for subjective complaints when nothing objective is present. Further, in other Mississippi statutes, awards of disability cannot be maintained solely on the complaints of pain. We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence

² Dr. Collipp also performed an independent medical evaluation of the claimant in *PERS v. Winston*, 919 So. 2d 106 (Miss. App. 2005) in which he also found the claimant able to perform light duty work after a one time evaluation of thirty five minutes. Despite Dr. Collipp’s opinion, the Court of Appeals affirmed the Circuit Court’s reversal of PERS’ denial of disability benefits.

of a disease or condition, which is causing Ms. Poole to have pain. We have no choice but to recommend that Ms. Poole's request for disability benefits be denied." (R 22, RE 125, Tab 12).

Numerous federal decisions hold that disability can be based upon pain when it is 'constant, unremitting, and wholly unresponsive to therapeutic treatment.' *Selders v. Sullivan*, 914 F. 2d 614 (5th Cir. 1990).

Further, the appellate courts in Mississippi have noted in numerous PERS disability cases the existence of pain as a component of disability. In *PERS v. Marquez*, 774 So. 2d 421 (Miss. 2000), the Supreme Court noted that Marquez had "been treated for atypical face pain..." among many other diseases and noted her treating physician, like Poole's physician herein, had "stated that Marquez 'is currently under the care of a pain clinic.'" Similarly, Poole's CFNP Cindy Rouse, writing for Poole's physician at the Southern Neurologic Spinal Institute, wrote the following regarding Poole's pain and its causes:

"She has multiple physical complaints and pain. She has received multiple injections of both the lumbar and cervical spine. She is also status post laminectomy to the lumbar spine at L5 level with interbody fusion device. She has also had a cervical fusion from C4 to C6. She continues to experience low back pain with radicular symptoms to the lower extremities including numbness and a burning sensation to the right anterior thigh. She is also experiencing neck pain that intensifies with certain movement of the neck with a cramping sensation to the right of the sternocleidomastoid muscles. I am also putting her through another MRI of the L-spine with and without contrast because the most recent one was done almost a year ago. She is also scheduled for an epidural steroid injection at the C3-4 level August 3, 2005. **We will send her to Dr. David McKellar for a pain management evaluation.** She also has many positive trigger point pain areas consistent with fibromyalgia.

The patient is in chronic pain and is unable to continue her working duties...." (R 213, RE 2, Tab 2)

Further, Poole's treating family practitioner, Dr. Thomas Chmelick wrote:

"Ms. Poole has been a patient of mine long-standing and I have been with

her through all her problems with her back....She basically had an L5-S1 fusion exploration with hardware removal. She has had previous surgery there two and half years ago with transforaminal interbody fusion and postural lateral fusion. She says she has failed the treatment and has been under chronic pain control from Dr. McKellar to the point we have gotten as much improvement as I think we ever will get with her. She has unfortunately suffered significant pain chronically and requires to be on pain medications permanently. She has significant problems with mobility, range of motion, any kind of gait. The records supporting this are definitely done at Southern Neurological Institute by Dr. McKellar as well as Dr. Lee....It is my opinion that therefore that Ms. Sharon Poole is permanently disabled with a very small possibility of any kind of improvement in the future and at this point and I really feel there is nothing more we can do other than pain control. Therefore, complete disability is my recommendation for this patient.” (R 69, RE 67, Tab 8)

After reading such an unbiased letters from medical professionals such as Ms. Rouse and Dr. Chmelicek, how could substantial evidence be found in the conclusion of the Disability Appeals Committee when they stated they could not find any objective and credible medical evidence for Poole’s chronic pain? Incredibly the Committee found the following:

“We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain.”

Poole would wonder what authority, statutory or otherwise, the Disability Appeals Committee would assert for such position?

Other reported decisions in PERS cases also discuss pain as a component of disability. In *PERS v. Thomas*, 809 So. 2d 690 (Miss. App. 2001), the Court of Appeals in affirming the Circuit Court’s reversal of PERS’ denial of disability retirement benefits noted that Thomas’ treating physician Dr. Crump listed many current and chronic medical problems such as “his diminishing vision stemming from his retinopathy, **constant pain**, and numbness to his lower extremities...” (809 so. 2d at 695).

In 2002, the Supreme Court, in affirming the Circuit Court's reversal of PERS decision to deny benefits, wrote in *PERS v. Shurden*, 822 So. 2d 258 (Miss. 2002), that Shurden "...had to be hospitalized for **pain**. At that time she was also experiencing problems with depression as well as multiple trigger points pain for which she was given injections [just like Poole] to help get relief." (822 So. 2d at 260) The next year the Supreme Court also listed pain as a component of disability in *PERS v. Dearman*, 846 So. 2d 1014 (Miss. 2003) in which the Supreme Court again affirmed the Circuit Court's reversal of PERS' denial noting "constant pain..."

Two cases very similar to Poole's case are *PERS v. Waid*, 823 So. 2d 595 (Miss. App. 2002) and *Howard v. PERS*, 971 So. 2d 622 (Miss. App. 2007). In *Waid*, like Poole, her supervisor stated that she experienced pain on the job which caused her to utilize substantial amounts of leave.³ Also like Poole, Waid's physician determined that she had fibromyalgia⁴ and all persons who testified at the hearing testified she had pain and she testified she left her position due to "chronic severe fibromyalgia with attendant pain..." Again, the Court of Appeals affirmed the Circuit Court's reversal of PERS' denial of benefits. In *Howard* the Court of Appeals reversed the Circuit Court's affirmance of PERS noting that her treating physician, Dr. Blanchard, reported her to have "...a severe case of fibromyalgia⁵ and in my opinion is not in any condition to be gainfully employed. This is due to the fact that she has chronic pain secondary to that and requires powerful analgesics for control of this pain." Poole would assert that her treating physician Dr. Chmelicek reported almost the same about her .

A review of the recommendation of the Disability Appeals Committee reveals a writing that merely recited the medical history of Poole and then in its section entitled "Analysis" merely

³ County DHS Director Loraine Hill wrote on Employer's Certification of Job Requirements that "Employee is working as much as possible but has to miss excessive amounts of work due to health" and further wrote "year of 1/2 day schedule- ADA Accommodation." (R 193, RE 53, Tab 3)

⁴ Even PERS own independent physician, Dr. Collipp, noted "her medical records demonstrate that she has hypothyroidism, asthma, depression and fibromyalgia." (R 199, RE 54, Tab 4)

⁵ Although Poole's records indicate that she has fibromyalgia and she testified she was being treated by a rheumatologist for such, the Committee made no effort to obtain such records despite specific statutory authority to obtain such information post hearing. See Miss. Code Ann. 25-11-120 (1).

opined that "Failed back syndrome is not a physical diagnosis for a physical condition..." and then stated:

"This is not to say that we believe Ms. Poole is making up her pain...But that is not what we have been charged to look for in this case. We need objective evidence of a disease or condition that would result in permanent disability...awards of disability cannot be maintained solely on the complaints of pain. We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain. We have no choice but to recommend that Ms. Poole's request for disability benefits be denied." (R 21-22, RE 124-125, Tab 12).

Poole would wonder if the Committee even read the report of her physicians or even the report of their own medical expert, Dr. Collipp, all of whom found Poole to be suffering disabling pain due to numerous identifiable medical conditions.

Poole would further wonder if the Committee has ever read PERS case law in which their decisions were reversed in which claimants were found disabled due to the pain from numerous medical conditions.

Poole would assert that considering her testimony of extensive pain, the lay testimony of her sister and the DHS County Director of her disabling pain, her history of extensive back and neck surgery, and the opinions of her numerous longtime treating physicians regarding her pain should cause the appellate court to rule that substantial evidence does not exist in the record to uphold the decision of the Disability Appeals Committee and further that it is legally incorrect since they state they have no authority to award disability based upon pain and their decision should be reversed and rendered and benefits order to be paid by PERS with interest.

2. Alternatively, the decision of PERS should be remanded for a new hearing for PERS to consider her fibromyalgia since no records from Poole's rheumatologist were obtained.

Poole was unrepresented by counsel until her appeal. Poole testified at her hearing that

she had been diagnosed with fibromyalgia and saw a rheumatologist. Numerous decisions have held that fibromyalgia can be disabling. See *Waid v. Public Employees' Retirement System*, 823 So. 2d 595 (Miss. App. 2002); *Public Employees' Retirement System v. Dearman*, 846 So. 2d 1014 (Miss. 2003); *Sheryl Stevison v. Public Employees' Retirement System*, 966 So. 2d 874 (Miss. App. 2007). Yet no records from such rheumatologist are contained in the record or obtained by PERS despite specific statutory authority to receive such post hearing. *Miss. Code Ann. 25-11-120(1)*.

The Mississippi Supreme Court in *Dean v. Public Employees' Retirement System*, 797 So. 2d 830 (Miss. 2000) stated that "Administrative hearings should be conducted in a fair and impartial manner, free from any suspicion or prejudice or unfairness. *McFadden*, 735 So. 2d at 158." See also *Burns v. Public Employees' Retirement System*, 748 So. 2d 181 (Miss. App. 1999) which states: "Both the United States and Mississippi Constitutions guarantee the right to due process of law before an administrative agency. U.S. Const. amend XIV; Miss. Const. art. 3, sect. 14. Administrative proceedings must be "conducted in a fair and impartial manner, free from any just suspicion or prejudice, unfairness, fraud or oppression." *Mississippi State Bd. of Health v. Johnson*, 197 Miss. 417, 19 So. 2d 445, 447 (1944).

Poole would assert that due process requires fairness that requires PERS to consider her complete medical records and obtain such records regarding her fibromyalgia and consider if such condition is disabling in itself or in combination with her other medical problems. Therefore, if the court does not reverse and render her case based on point one, the court should remand her case for a new hearing with directions to obtain such omitted records.

CONCLUSION

The Circuit Court should reverse and render the decision of PERS denying Poole disability benefits pursuant to Miss. Code Ann. 25-11-113 or alternatively, reverse and remand her case for a new hearing based upon her arguments advanced in Arguments two.

Respectfully submitted,

SHARON M. POOLE, Appellant

BY: George A. Luter
GEORGE S. LUTER, Her Attorney

CERTIFICATE OF SERVICE

I, George S. Luter, attorney for Appellant, hereby certify that I have hand delivered a copy of the foregoing Brief of Appellant to the following:

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SO CERTIFIED this the 14th day of September, 2009.

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