

IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANT

VERSUS

CAUSE NO. 2010-CC-00918

REBECCA WORLOW

APPELLEE

BRIEF OF THE APPELLANT

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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 Katie Lester Trundt, Counsel for Appellant

Honorable Jim Hood, Attorney General

Honorable Winston Kidd, Hinds County Circuit Court Judge

Honorable, Michelle Dean Easterling, Counsel for Appellee

Ms. Rebecca Worlow, Appellee

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. WORLOW'S CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

II.

THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. WORLOW'S CLAIM FOR DISABILITY IS NEITHER ARBITRARY NOR CAPRICIOUS.

STATEMENT OF THE CASE¹

This matter involves an appeal filed by the Appellant, Public Employees' Retirement System (hereinafter "PERS"), wherein PERS seeks review of the Order of the Circuit Court entered on December 10, 2009, reversing the Order of the Board of Trustees of the Public Employees' Retirement System (hereinafter "PERS Board") entered on June 27, 2006. The PERS Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny Ms. Worlow's request for the 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

Rebecca Worlow was employed as a teacher with the Aberdeen School District and had 26 years of service credit at the time she terminated employment on May 26, 2005 at the end of the 2004-2005 school year. (Vol. II, R. 28-29: 130, 177-78.) She was eligible for a PERS service retirement at that time. Ms. Worlow was offered a teaching contract for the 2005-2006 school year, but instead of retiring based on her years of service or accepting the offered teaching contract she applied for regular non-duty related disability June 15, 2005. (Vol. II, R. 29.) The primary basis for Ms. Worlow's disability claim was a diagnosis of rheumatoid arthritis (RA). (Vol. II, R. 20.).

Ms. Worlow is receiving special service retirement benefits while pursuing her claim for disability as she is eligible to retire with a service retirement benefit. Ms.

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

Worlow's disability application was reviewed by the PERS Medical Board which is made up of three medical doctors, but a decision was deferred pending an independent medical evaluation. (Vol. II, R. 130, 190, 192.) An Independent Medical Examination was conducted by Dr. Laura Gray who found that Ms. Worlow's "skeletal exam reveals **no significant** bone pathology due to her Rheumatoid Arthritis." (Vol. II, R. 149.) Further, Dr. Gray noted that Ms. Worlow's "Rheumatologist does not suggest she is unable to continue her duty as teacher". (Vol. II, R. 149) Following receipt of the medical evaluation the Medical Board again reviewed Ms. Worlow's claim for disability. (Vol. II, R. 130.) Determining that there was insufficient objective medical evidence to support a claim of disability the Medical Board denied Ms. Worlow's claim. (Vol. II, R. 184-185.) Aggrieved of the Medical Board's determination Ms. Worlow filed a Notice of Appeal to the Disability Appeals Committee. (Vol. II, R. 61-62.)

The hearing before the Disability Appeals Committee, made up of two doctors and one attorney/nurse, was conducted by telephone conference call. The Committee heard sworn testimony, received medical and other documentary evidence, and gave due consideration to the applicable law and regulations. The Committee listened to testimony from Ms. Worlow about her duties at work and the physical complaints she claimed were preventing her from performing her job.

Ms. Worlow testified that she taught fourth grade special education and that while she did have the service credit to retire; her teaching certificate was good until 2010. (Vol. II, R. 37; 53.) She further testified that she "was lead teacher for my building, and it really took a lot of foot work, duty, and all that type of thing". (Vol. II, R. 53.) Ms. Worlow had been lead teacher for 5 or 6 years. (Vol. II, R. 53.) It is important to note that

even though her principal stated on the PERS Form 6B that he did not think Ms. Worlow could perform her job, Ms. Worlow was offered a teaching contract for the 2005-2006 school year. (Vol. II, R. 54, 140.) Ms. Worlow's employer also certified that she missed only twenty-two days of work during the twelve months prior to her termination. (Vol. II, R. 140.)

In addition to filing for disability with PERS, Ms. Worlow also applied for disability benefits from the Social Security Administration and was denied. She explained that in her opinion the reason for the social security denial was that she "didn't have enough evidence, enough objective evidence, and so I'm appealing that also" . (Vol. II, R. 54.)

Ms. Worlow contended that she suffered from arthritis problems prior to 2005; however, it was not until March 2005 that she was tested for rheumatoid arthritis. (Vol. II, R. 29, 39.) According to Ms. Worlow, her main problems at that time were with her wrist, hands and fingers. (Vol. II, R. 30.) She also testified that she was having difficulty walking and had problems with her knees and hips. (Vol. II, R. 32.) Although she said that her shoulders, neck and elbows presented problems during the last school year that she taught, she was not having difficulty with them at the time of the hearing. (Vol. II, R. 32.)

Ms. Worlow testified that she first went to her regular doctor in March 2005 who agreed to test her for rheumatoid arthritis. (Vol. II, R. 29). The earliest medical records submitted by Ms. Worlow are the April 29, 2005, progress notes of Dr. Arthur Brown which state that Ms. Worlow had a high RA titer, but that her hands did not look swollen and that her feet had no deformity. She was referred to a rheumatologist. (Vol. II, R.

156). On May 3, 2005, she returned to Dr. Brown who stated under the "Objective" section of the notes that Ms. Worlow had no synovial thickening and no joint problems. On May 20, 2005, Dr. Brown did note some "synovial thickening in the right wrist, elbow, and ankle" and prescribed Methotrexate and Naprosyn, but by June 14, 2005 he only noted tenderness in her wrist. (Vol. II, R. 154-55).

Ms. Worlow was then seen by Dr. Asa, a rheumatologist. Dr. Asa's records show that in August 2005, x-rays of Ms. Worlow's hand and feet were normal, her RA titer was normal, but that her C-reactive protein was elevated. (Vol. II, R. 166-75). He continued the Methotrexate but later prescribed Humira. Ms. Worlow said that she had a serious reaction to the Humira. (Vol. II, R. 33-34.) The record indicates that many of Ms. Worlow's problems were the result of her adverse reaction to the Humira. As a result of the Humira she made numerous visits to the emergency room and other doctors. Ms. Worlow testified that as a result of taking the Humira she suffered from severe headaches, swelling of her glands, diarrhea, fever, chills, and a suppressed immune system resulting in infections. (Vol. II, R. 34-36) During the reaction to the Humira, Ms. Worlow took several steroids that helped to lessen her body's reaction to the Humira. (Vol. II, R. 41.) Ms. Worlow secured the services of Dr. Atiq after her reaction to the Humira which was prescribed by Dr. Asa. (Vol. II, R. 35, 43.)

Ms. Worlow was seeing Dr. Atiq at the time of the hearing and she stated that her symptoms were better. (Vol. II, R. 40.) She was referred to Dr. Atiq by an emergency room physician, Dr. Hayes, who is now her general doctor. (Vol. II, R. 43, 45.) She was also referred to a neurologist to determine whether she suffered from Multiple Sclerosis.

It was determined by the neurologist that Ms. Worlow does not have Multiple Sclerosis.
(Vol. II, R. 45.)

Ms. Worlow testified that she takes Methotrexate and muscle relaxers, however, it was noted by the Hearing Officer that those medications would not help with her bones.
(Vol. II, R. 47.)

During questioning Dr. Blackston asked the following:

Q. And she gives a very thorough report here and she kind of describes what had been going on with you with your shot and Humera [sic] and the Methotrexate, but one of the things that **she said is that when she saw you that you really didn't have any, what we call, active synovitis, which, you know, your joints were [sic] all inflamed.**

A. Right.

Q. She did say that you had what's called crepitus, which means some noise or some grinding sounds in you jaws and your knees, and that she was going to check some labs and look at your x-rays and all that, and she says you were going to come back in about eight weeks, which would have been about right with that April visit. **But I, you know, it's kind of an inconsistent, what she's saying there pretty much sounds like you're doing pretty well with your arthritis, and then we've got, you know, Dr. Hayes pretty much about the same time saying you're really kind of in bad shape.** So I just kind of wonder what you feel about how we ought to address that?

A. Okay, well, the best I can explain to you is that when I saw Dr. Atiq, I had had all the steroids. I think that I had a lot of inflammation and it was going down, and that's what she said, and that really, for one thing, I suppose I have very dense bones. I don't know if that helps out any. (Vol. II, R. 48-49)

In addition to the testimony offered at the hearing, the committee also considered the medical records submitted by Ms. Worlow's from her various physicians. The Disability Appeals Committee offered the following summary of the medical evidence:

Dr. Brown was Ms. Worlow's family doctor but we only have his records beginning with April 29, 2005, at which time Ms. Worlow was complaining of pain in her hands and feet. **Dr. Brown found no swelling or deformity and his diagnosis was arthralgia and depression.** She was placed on Mobic and Lexapro. A

rheumatoid titer was high at that time. In May of 2005, Ms. Worlow's joint complaints were rapidly escalating and **Dr. Brown found a couple of elevated blood tests suggesting rheumatoid arthritis.** Ms. Worlow was placed on Naprosyn and Methotrexate. She was referred to a rheumatologist.

Dr. Asa is Ms. Worlow's Rheumatologist and we have his records. Beginning with a July 26, 2005, evaluation, Ms. Worlow was referred for evaluation of her rheumatoid arthritis. **Ms. Worlow reported her problems developed in 1993,** and it is noted that she has joint pain and early morning stiffness. She has taken steroids in the past but she reported that the six months prior to this visit, her problems had become very bad. On physical exam, some swelling was noted in her finger joints and other joints showed some decrease in the range of motion. Ms. Worlow reported she had pain and tenderness in many of her joints. Dr. Asa concurred that she probably had RA and many tests were performed. **Ms. Worlow's rheumatoid titer was normal but her C-reactive protein was elevated. X-rays of her hands and feet were normal.** Even though he had just seen Ms. Worlow one time, Dr. Asa completed a form 7, Statement of Examining Physician form and wrote that while Ms. Worlow was not at maximum medical improvement (MMI), she was unable to stand for longer than 30 minutes or use her hands and wrists for more than 30 minutes continuously.

Dr. Brown completed a form 7, Statement of Examining Physician form but it contains no date. He wrote that because of her stiff joints and limited mobility, her writing and computer work are affected and she is unable to stand for very long.

Ms. Worlow was evaluated by Dr. Gray on November 28, 2005, and she wrote that after reviewing all records performing her own physical exam and history, she opined that **Ms. Worlow's x-rays revealed no significant pathology and that her rheumatologist had not limited her activity or said that she was unable to work.**

Ms. Worlow developed some problems swallowing and was seen in the emergency room on February 1, 2006. It was thought she may have had a reaction to one of her medications. She was complaining of chills and joint aches all over her body. It appears she was discharged the next day. Another emergency room visit occurred on February 9, 2006, this time for a severe headache that had been going on for a week. She was discharged with instructions to manage the headaches at home.

On February 14, 2006, Ms. Worlow was seen by Dr. Hayes for evaluation of her joint pain and stiffness. She was being followed for the drug reaction and Dr. Hayes also wrote that she was being evaluated for the possibility of Multiple Sclerosis. On February 19, 2006, there was a third trip to the emergency room for fever, chills and dizziness. She also complained of trouble swallowing. She had tests run under the direction of Dr. Meeks on February 23, 2006. (Vol. II, R. 18-20.)

Based on Ms. Worlow's testimony, as well as, the summary of the medical documentation offered by Ms. Worlow in support of her claim and the Disability Appeals Committee's analysis of the medical records of **all** the treating physicians, the Committee reached the conclusion that Ms. Worlow is not entitled to disability benefits under the governing statute. (Vol. II, R. 21.) This recommendation was then submitted and adopted as the decision of the Board of Trustees on June 27, 2006.

SUMMARY OF THE ARGUMENT

The Order of the PERS Board of Trustees is supported by substantial evidence and should not have been reversed by the Circuit Court. In order to qualify for a disability benefit under PERS law, **Ms. Worlow would have to prove not only that she has been diagnosed with certain ailments but that the conditions 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, which took into consideration all of the medical evidence offered by Ms. Worlow. There is substantial evidence to show that Ms. Worlow's ailments are not permanently disabling and therefore, she is not entitled to a disability benefit from the State of Mississippi.

Ms. Worlow was provided a fair and impartial hearing. The Order of the PERS Board of Trustees is premised on substantial evidence and is neither arbitrary nor capricious, was entered within the Board's authority, and was not rendered in violation of any constitutional or statutory right of the Appellant. The Recommendation of the Disability Appeals Committee, adopted by the PERS Board in its Order, should be affirmed.

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 who became a member before July 1, 2007: (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. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. Miss. Code Ann. §25-11-119(7) (Supp. 2009). The Medical Board reviews all

medical documentation, arranges independent medical examinations, and considers all medical evidence prior to making a determination regarding an application for disability. Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the Disability Appeals Committee 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. Worlow'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 improperly reversed by the Circuit Court on the basis that the

denial of disability benefits was not supported by substantial evidence and was arbitrary and capricious.

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. Worlow. *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).

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. Worlow 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. Worlow. *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”. The Board of Trustees based their decision on the substantial medical evidence presented to them by the Disability Appeals Committee that Ms. Worlow was not disabled. The substantial medical evidence presented to the Board by the Disability Appeals Committee clearly satisfies PERS’ burden.

The Order of the PERS Board of Trustees was supported by substantial evidence, was neither arbitrary nor capricious nor violated any statutory or constitutional right of Ms. Worlow and, thus, the Order of the Board of Trustees entered June 27, 2006, must be affirmed.

I.

THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. WORLOW'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). The facts support the decision of the PERS Board of Trustees that Ms. Worlow is not entitled to disability benefits.

There is substantial evidence to support the Board's decision, and its actions are neither arbitrary nor capricious. The Board has the authority to make a decision relative to disability, and it did so within the confines of the laws of Mississippi and PERS Regulations.

The Mississippi Supreme 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, *Public Employees’ Retirement System v. Howard*, 905 So. 2d at 1285. This Court, 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, 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. Worlow’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, and now this Honorable Court with a more than adequate basis for their recommendation that disability benefits be denied and their decision be upheld.

Ms. Worlow’s main complaint and basis for seeking disability is based on rheumatoid arthritis. The Circuit Court stated in its favorable opinion to Ms. Worlow, that “based on the facts in the record, ... all indicate Ms. Worlow could not perform her job as a fourth grade special education teacher due to her **severe Rheumatoid Arthritis**.” (Vol. I, R. 7.) PERS would assert that contrary to the Circuit Court’s finding, that there is substantial evidence in the record to uphold the Committee’s decision that there was not

enough objective medical evidence to support Ms. Worlow's claim that she is permanently and totally disabled.

There is a scarcity of objective medical evidence in the record concerning Ms. Worlow's rheumatoid arthritis diagnosis or its effect on her ability to perform her job duties. Almost all of the evidence concerning the severity of her condition and related pain and stiffness is subjective and self-reported by Ms. Worlow either to the Committee or to her doctors and restated in their notes. The objective medical evidence provided to the Committee does not support the severity of the pain reported by Ms. Worlow.

Ms. Worlow filed for disability on June 15, 2005, before she ever saw a rheumatologist and the earliest medical records submitted by Ms. Worlow are from April 29, 2005, just six weeks prior to her claim. Those progress notes of Dr. Arthur Brown state that Ms. Worlow had a high RA titer, but that her hands did not look swollen and that her feet had no deformity. (Vol. II, R. 156). On May 3, 2005, she returned to Dr. Brown who stated under the "Objective" section of the notes that Ms. Worlow had no synovial thickening (i.e. inflammation) and no joint problems. On May 20, 2005, Dr. Brown did note some "synovial thickening in the right wrist, elbow, and ankle", but by June 14, 2005 he only noted tenderness in her wrist. (Vol. II, R. 154-55). Dr. Asa's records from August 2005 show that x-rays of Ms. Worlow's hand and feet were normal and that her RA titer was normal. (Vol. II, R. 166-75). Many of Ms. Worlow's medical records after August 2005 involve emergency room and doctor visits related to her adverse reaction to the drug Humira, as well as other non-RA related ailments. Dr. Hayes, who is now her general doctor, referred her to a neurologist to determine whether

she suffered from Multiple Sclerosis. It was determined by the neurologist that she does not have Multiple Sclerosis. (Vol. II, R. 43-45; 70).

At the time of the Disability Appeals Committee hearing, Ms. Worlow was seeing Dr. Atiq, a rheumatologist. Dr. Atiq's notes from her February 14, 2006 musculoskeletal examination show that Ms. Worlow had full range of motion in her neck, shoulders, elbows and hips, with only some tenderness in her neck, shoulders and wrists. Also, her bilateral wrists, MCPs PIP, and DIPs had no active synovitis. She did have significant crepitus (i.e. crackling or grinding sounds) in her TM joints (i.e. jaws) and bilateral knees, but her knees had only mild synovitis. Her bilateral ankles were unremarkable. Dr. Atiq also noted that "patient feels much better being on Medrol Dosepak...." (Vol. II, R. 69).

This medical evidence in no way suggests that Ms. Worlow had "severe" rheumatoid arthritis as the lower court states and the facts show. In fact, her test results in no way support Ms. Worlow's contentions regarding the severity of her RA and associated pain. Clearly, the lower court was re-weighing the medical documents presented by Ms. Worlow and previously evaluated by the medical experts sitting on the Disability Appeals Committee.

It should also be noted that Ms. Worlow applied for and was denied social security disability benefits. (Vol. II, R. 54.) Additionally, an independent medical evaluation was performed by Dr. Gray who found that the "x-rays revealed no significant pathology and that her rheumatologist had not limited her activity or said that she was unable to work".

Again, the Committee which is composed of two physicians and one attorney-nurse reviewed the normal x-ray reports and other medical documentation and found **no substantial evidence** to support the severity and debilitating nature of her pain as alleged by Ms. Worlow. The Committee found that there was not persuasive evidence in the record to show that Ms. Worlow is permanently and totally disabled. It also is important to note, as the Committee did, that the school district was obviously satisfied with her work as she was offered a contract for the next teaching year.

The Circuit Court stated in its conclusion that “PERS presented no reasonable evidence that Ms. Worlow was not disabled while performing her teaching duties and thus, PERS conclusion was not based on substantial evidence.” (Vol. I, R. 9.) The Circuit Court failed to apply the correct standard of review. A rebuttable presumption exists in favor of PERS’ decision, and the burden of proving to the contrary is on Ms. Worlow. *Public Employees’ Retirement System v. Howard*, 905 So.2d at 1284 PERS has the duty to determine which of the physicians’ assessments and other documentation it should rely on in making a determination. PERS would ask why the Circuit Court is making the assessment as to what medical evidence is “reasonable” when 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. This is the idea behind the creation and expansion of administrative agencies.” Here, the lower court is re-weighing the medical evidence to determine what is “reasonable” when the standard is clearly substantial evidence. Further, Disability Appeals Committee is in a much better position to evaluate what medical evidence is considered substantial. As in *Public Employees’ Retirement System v. Cobb*, 839 So.2d 605, 609 (Miss. App. 2003), the lack

of convincing evidence offered by Ms. Worlow and the analysis by the Committee is the substantial evidence necessary to support the decision to deny Ms. Worlow's claim for disability benefits.

Several physicians on both the Medical Review Board and the Disability Appeals Committee reviewed Ms. Worlow's application and medical documents. It is further within PERS discretion to determine which evidence should garner the most weight. *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 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.

The Appeals Committee reviewed the documentation provided by each of Ms. Worlow's physicians in reaching their conclusion that she is not entitled to disability benefits as set out under the statute.

Further, the Disability Appeals Committee sitting as the finder of fact, presented a well-reasoned recommendation to the Board of Trustees. The Committee, in making its recommendation, did not make a hasty decision in determining that Ms. Worlow was not

qualified for disability benefits. Instead, the Committee evaluated all of the medical evidence made available to them and heard testimony from Ms. Worlow, therefore their decision was supported by substantial evidence.

II.

THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MS. WORLOW'S CLAIM FOR DISABILITY IS NEITHER ARBITRARY NOR CAPRICIOUS.

The Mississippi Supreme Court has defined arbitrary and capricious by stating "an administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *Mississippi State Department of Health v. Natchez Community Hospital*, 743 So.2d 973, 977 (Miss. 1999). "An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Id.* The record supports PERS' finding, thus, the action of the PERS Board of Trustees is neither arbitrary nor capricious.

After a thorough review of the medical records and testimony, the Committee found substantial evidence that Ms. Worlow does 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. Worlow is not entitled to a regular disability benefit from the State of Mississippi. The Committee provided a reasoned and unbiased evaluation of the evidence.

It is well documented in the medical evidence presented by Ms. Worlow 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.

PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. Again, as noted in *Public Employees' Retirement System v. Howard*, 905 So.2d 1279, 1287 (Miss. 2005), "determining whether an individual is permanently disabled is better left to physicians, not Judges." Several physicians reviewed Ms. Worlow'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 one attorney-nurse trained to review the medical reports submitted in support of Ms. Worlow'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 is supported by substantial evidence and is neither arbitrary nor capricious because it was made according to reason and judgment and, thus, should be affirmed.

CONCLUSION

Based on the record before this Court, the Circuit Court clearly reweighed the evidence substituting its judgment for that of the administrative agency. The record clearly supports the decision entered by the PERS Board of Trustees. It is within the administrative agency's discretion as to which medical reports garner more weight. The Order of the PERS Board of Trustees is supported by substantial evidence, is neither arbitrary nor capricious and was not entered in violation of either statutory or

constitutional rights of the Appellee. Therefore, the PERS Board of Trustees respectfully requests this Honorable Court reverse the Order of the Circuit Court entered December 10, 2009, and reinstate the Order of the PERS Board of Trustees entered on June 27, 2006.

Respectfully submitted this the 6th day of October 2010.

**PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLEE**

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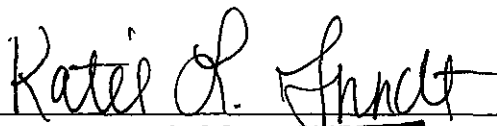
CERTIFICATE OF SERVICE

I, Katie Lester Trundt, Attorney for the Appellant, 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 Appellant* to:

Michelle D. Easterling, Esq.
Attorney at Law
P. O. Box 835
West Point, MS 39773

Honorable Winston Kidd
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, Ms 39205-0327

This the **6th** day of October 2010.


Katie Lester Trundt, MSB [REDACTED]
Special Assistant Attorney General