IN THE SUPREME COURT OF MISSISSIPPI

DOROTHY J. KNIGHT — APPELLANT

VS. — NO. 2010-CC-01586

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. Dorothy J. Knight, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Jane Mapp, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Hon. Jeff Weill, Hinds County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER

George S. Luter

ATTORNEY FOR APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUE

1. Did the Circuit Court err in affirming the decision of PERS because it is not supported by substantial evidence and is legally incorrect since PERS' decision stated that "...There is no statutory provision wherein an award of disability can be granted for pain when no objective reason for that pain can be produced. We have no proof of a medical illness that is causing Ms. Knight's pain."

STATEMENT OF THE CASE

The appellant, Dorothy Knight, files this Brief to urge the Circuit Court to reverse the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered August 28, 2007.

The PERS Disability Appeals Committee recommendation to the Board stated:

> "The employer's certification of job description states that Ms. Knight does her job but with pain. Pain is subjective and there is no way to measure it. There is no statutory provision wherein an award of disability can be granted for pain when no objective reason for that pain can be produced. We have no proof of a medical illness that is causing Ms. Knight's pain. We have noted that she has some arthritis of the feet but that does not explain the complaints of sock like numbness and fever. We cannot recommend disability without persuasive and credible objective medical evidence of a disability. Thus, in this case, we cannot recommend Ms. Knight's request for disability be approved." (R 28 RE 119, Tab 17).

STATEMENT OF THE FACTS

Dorothy Knight applied for non duty related disability pursuant to Miss. Code Ann. 25-11-113(1)(a) on April 5, 2006. Knight was a committee assistant for the Mississippi State Senate. (R 101, RE 1, Tab 1, and R 98, RE 43-A, Tab 14)

On May 11, 2006, Mississippi State Senate Comptroller Ann Brandon wrote on PERS Form 6B-Employer's Certification of Job Requirements that Knight could not perform her job due to "The rigors of working for the Legislature during Session requires at a minimum 9-14 hours days. The job requirements demand the employee to be on on their fee, up & down stairs, standing at the copy machine, preparing for committee meetings, in addition to a administrative & clerical responsibilities. This is a high stress, high stamina, high energy job."(R 110 RE 5, Tab 2).

She further certified that Knight had not been offered another job.

Knight stated on PERS form 8-Medical Information Form that her disability was "severe pain in feet; numbness in feet causing me to fee off balance; Have had pain for 17 years; has become more severe last 2 years, have never stopped working." (R 111, RE 6, Tab 3)

Jackson neurologist Richard Weddle indicated in his notes of July 19 , 2005 that Knight suffered "vascular headaches, restless legs syndrome, and "edema of her feet..." (R 136, RE 11, Tab 4)

Pursuant to PERS' request for an independent medical examination, Jackson internist Samuel Peeples reported June 21, 2006, that Knight's symptoms "are very suggestive of peripheral neuropathy. The symptoms as she describes them to me are severe enough that it would suggest the possibility of disability...At this point, I cannot state that she is disabled, although she seems to be a truthful patient. It does appear that her symptoms are aggravated a great deal by her work." (R 119, RE 25, Tab 7)

On November 10, 2006, Knight underwent foot surgery by podiatrist Dr. B. T. Sullivan at the Mississippi Foot and Surgery Center-a lapidus fusion, abunionectomy/osteotomy, an osteomtomy 2nd, and removal of a skin lesion (R 173-174, RE 28-29, Tab 9)

On December 8, 2006, Senator Alice Harden wrote that as chairman of the Senate Education Committee she worked very closely with Knight and that since 2001 she had watched Knight's health deteriorate "to the degree that she was hardly able to stand or walk for any

period of time." She requested that PERS favorably consider Knight's application. (R 186-187, RE 30-31, Tab 10)

On September 8, 2006, Knight was informed that the Medical Board had determined "that there was insufficient objective evidence to support the claim that your medical condition prevents you from performing your duties as described of a Committee Assistant. (R 147, RE 38-39, Tab 12)

Knight timely appealed to the Disability Appeals Committee pro se on October 6, 2007. (R 95-96, RE 41-42, Tab 13)

Knight's first hearing was held on December 11, 2006 before Disability Appeals Committee members Sheila Jones, presiding hearing officer, and Drs. David Duddleston and Mark Meeks. (R 30-92, RE 30-104, RE 15).

Knight testified that she had pain in her feet coming from inside and that every step was "totally agonizing" and that the pain "starting getting worse in the past three years." (R 38-39, RE 51-52, Tab 15)

Upon questioning by Dr. Duddleston, Knight stated that it was not feasible for her to use a scooter in the Capitol "because you've got to be free to move about and jump up and go. You really can't have any kind of an obstacle like that, like a scooter or something like that." (R 52, RE 65, Tab 15)

After the first hearing, PERS referred Knight to Jackson orthopedic surgeon Dr. Philip J. Blount who reported after Knight had a 17% permanent impairment based on gait and mobility. He further opined that unmyelinated type C pain fibers can cause painful neuropathy and that such are not detected on routine electrodiagnostic evaluations since as Knight had. Blount stated that Knight was "suitable for sedentary work. She should not be asked to walk long distances." (R 194-195, RE 36-37, Tab 11).

Senate comptroller Ann Brandon testified at the first hearing that Knight had health

problems but would do her job no matter what. (R 62, RE 75, Tab 15) Her sister, Bettie Trotter and friend Ellis Morrison both testified that Knight endured great pain while being extremely diligent about her job. (R 66, RE 79, Tab 15).

The hearing was deferred after the first hearing for additional information and a second hearing held August 6, 2007. (R 68-92, RE 81-104, Tab 15)

At the second hearing State Senators Alice Hardin, Cindy Hyde Smith and Gloria Williamson all testified. Senator Smith testified that she observed Knight's health decline for seven and one half years to where she could not function. (R 70, RE 82, Tab 15) Senator Williamson testified that it was 'heart breaking' to watch Knight 'come to work with her fee and neck in such bad shape'. (R 75, RE 87, Tab 15) Senator Hardin testified that she had observed Knight move "from a very vibrant energetic employee" to "someone who was constantly in pain..." (R 84, RE 96, Tab 15).

The Disability Appeals Committee recommended Knight's application for disability retirement be denied on August 7, 2007 and the Board of Trustees of PERS ordered such on August 28, 2007. (R 14-29, RE 107-121, Tab 17)

SUMMARY OF THE ARGUMENT

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.

ARGUMENT

1. The Circuit Court erred in affirming the decision of PERS because it is not supported by substantial evidence and is legally incorrect since PERS' decision stated that "...There is no statutory provision wherein an award of disability can be granted for pain when no objective reason for that pain can be produced. We have no proof of a medical illness that is causing Ms. Knight's 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."

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.

The Circuit Court erred by affirming PERS who legally erred by finding the following:

> "The employer's certification of job description states that Ms. Knight does her job but with pain. Pain is subjective and there is no way to measure it. There is no statutory provision wherein an award of disability can be granted for pain when no objective reason for that pain can be produced. We have no proof of a medical illness that is causing Ms. Knight's pain. We have noted that she has some arthritis of the feet but that does not explain the complaints of sock like numbness and fever. We cannot recommend disability without persuasive and credible objective medical evidence of a disability. This, in this case, we cannot recommend Ms. Knight's request for disability be approved." (R 28).

a. The Committee's Decision is arbitrary and capricious due to their legally incorrect belief there must be a statutory provision for an award of disability due to pain

Apparently, the PERS Disability Appeals Committee has the legally incorrect belief that it cannot award disability based upon complaints of pain "when no objective reason for that pain can be produced." The Committee's statement is both legally incorrect since no Mississippi statute exists to prohibit such.

Rather, the the appellate courts in Mississippi have noted in numerous PERS disability cases the existence of pain as a component leading to a finding of disability. In *PERS v. Marquez, supra*, the Supreme Court noted that Marquez had "been treated for atypical face pain..."

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 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 Knight'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 Knight, her supervisor stated that she experienced pain on the job which caused her to utilize substantial amounts of leave. 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 stated "...she has chronic pain secondary to that and requires powerful analgesics for control of this pain."

The Committee's decision thus meets the legal standard of "capricious" since it appear to have done without reason, in a whimsical manner, implying either a lack of understanding or or a disregard of the surrounding facts and settled controlling principles. *Burkes v. Amite County Sch. Dist.,* 708 So. 2d 1366, 1370 (Miss. 1998).

b. Second, the Committee's decision is factually incorrect when it states "no objective reason for that pain can be produced" for Knight's pain when their own experts Drs. Blount and Peeples state Knight's pain is suggestive of peripheral neuropathy

After the Disability Appeals Committee made the legally incorrect statement that "There

is no statutory provision wherein an award of disability can be granted for pain when no objective reason for that pain can be produced..." The Committee then make the incredible factually incorrect assertion that "We have no proof of a medical illness that is causing Ms. Knight's pain. We have noted that she has some arthritis of the feet but that does not explain the complaints of sock like numbness and fever. We cannot recommend disability without persuasive and credible objective medical evidence of a disability. Thus, in this case, we cannot recommend Ms. Knight's request for disability be approved."[1] (R 28 RE 119, Tab 17).

Apparently the Committee failed to read the reports of PERS own selected medical experts, internist Dr. Samuel Peeples, and orthopedic surgeon Dr. Philip Blount, both of whom suggested Knight was disabled.

Dr. Peeples stated that despite normal nerve conduction studies that he thought Knight's symptoms "very suggestive of peripheral neuropathy" adding "The symptoms as she describes them to me are severe enough that it would suggest the possibility of disability." (R119, RE 25, Tab 7). Dr. Blount gave Knight a 17 per cent whole person impairment and explained why her nerve conductions tests did not show the presence of perpheral neuropathy:

> "It is well-known in the medical literature that unmyelinated type C pain fibers can cause painful neuropathy and these are not detected on routine electrodiagnostic evaluations. It is therefore, possible that she does have peripheral neuropathy that is not picked up on nerve conduction studies or needle EMG." (R 194, RE 36, Tab 11)

Dr. Blount further recommended a Knight see an orthotist for shoe modifications, a podiatrist for further evaluation of her feet, a trial of Lyrica for "neuropathy pain symptoms", a physical therapist to evaluate her for adaptive equipment and safety.

[1] Oddly, the Chairman of the Disability Appeals Committee Sheila Jones admitted knowledge of such medical proof that could cause such pain at the August 6, 2007 hearing when Betty Knight the sister of Knight pointed out that Dr. Blount said Knight could have peripheral neuropathy and "it's not picked up by the machine. He's the second doctor that has said that..." Jones replied "He did say that." (R 85, RE 97, Tab 15) Why Jones would admit this at the hearing and then state in her recommendation that they have no "persuasive and credible objective medical evidence of a disability" is unexplainable.

Dr. Blount further reported he only felt Knight suitable for "sedentary"[2] work and "should not be asked to walk long distances." (R 194-195, RE 36-37, Tab 11)

The Committee states that "doctors are the best able to determine whether the medical evidence justifies an award of disability" In response, Knight would ask: Why doesn't the Committee follow the opinions of their own medical experts Dr. Peeples and Blount when say they believe Knight's pain is caused by perpheral neuropathy and they suggest she is disabled? (R 26, RE 118, Tab 17)

Both Drs. Peeples and Blount recognized Knight's complaints of pain. The Mississippi Supreme Court in *Pub. Employees' Ret. Sys. v. Marquez, supra,* held medical diagnoses by licensed physicians are objective, not subjective, evidence of disability. To ignore the objective opinions of Drs. Peeples and Blount the Committee showed its opinion to be "arbitrary" since it was not "...done according to reason or judgment, but depending on the will alone." *Burkes, supra.*

c. Third, the Committee's decision is arbitrary and capricious and when it fails to consider the lay testimony of Senators Cindy Hyde Smith, Gloria Williamson, Alice Hardin, and Senate comptroller Ann Brandon that Knight suffered unbearable pain and was unable to perform her job

In an unusual show of concern, five ladies who had worked with for several years and had observed her physical difficulties and obvious pain the last two years, testified in Knight's behalf.

Senate Comptroller Ann Brandon testified Knight's feet were so swollen they spilled out of the top of her shoe, that her movements were slow and painful to watch.

[2] The Committee incorrectly states that Dr. Blount stated "Ms. Knight can return to her sedentary job." Dr. Blount stated Knight was suitable for 'sedentary" work but Knight's job as a committee assistant as described by her supervisor, Ann Brandon, Comptroller of the Mississippi Senate, as requiring "frequently" walking, stair climbing, and bending at the waist" and further described by Brandon as a "high stress, high stamina, high energy job" show that her job was not a sedentary job and was likely a light to medium duty job as described by the Dictionary of Occupational Titles. (R 108-110, RE 3-5, Tab 2)

(R 62-63, RE 75-76, Tab 15)

Fellow committee assistant Ms. Trotter[3] testified that she worked beside Knight for twelve years and observed her to be in "great pain, specifically for the last two or three years." (R 65, RE 78, Tab 15).

Senator Cindy Hyde Smith testified she was a "first hand witness" as she watched Knight's health decline and had seen "so many nights of tears in her eyes" and "so many days she came in humped over until it got to the point that we said you're going to have to go home." (R 70, RE 82, Tab 15).

Senator Gloria Williamson testified she had known Knight many years and it was "heart breaking to watch her try to come to work with her fee and her neck in such bad shape." (R 74-75, RE 86-87, Tab 15)

Senator Alice Harden testified she had known Knight since 1988 and watched her "progress and move to someone who was constantly in pain..." (R 84, RE 96, Tab 15)

Further, Knight's sister, Betty Knight, testified that Knight would wake her up screaming in the middle of the night and she would be "holding her feet". (R 67, RE 80, Tab 15)

Yet, despite the unbiased testimony of these five coworkers and a sister, the Committee arbitrarily and capriciously states "Lay testimony cannot overcome a void of medical evidence." However, a review of the objective medical evidence by PERS own experts, Drs. Blount and Peeples supplies a logical medical reason for the lay witnesses' descriptions of Knight's disabling foot and neck pain---the existence of peripheral neuropathy---which Presiding Hearing Officer Sheila Jones acknowledged at the hearing that Drs. Blount and Peeples suggested such condition, admitting "He did say that." (R 85, RE 97, Tab 15)

To ignore the lay opinions of the six ladies who testified as to Knight's pain without any discussion as to their lack of veracity the Committee showed its opinion to be "arbitrary" not "...done according to reason or judgment, but depending on the will alone." *Burkes, supra.*

[3] The record does not otherwise identify her.

d. Fourth, the Committee's decision is arbitrary and capricious as shown by its factual inaccuracies

The Committee's recommendation contains inaccuracies that Knight would point out that should belie her argument that the Committee's decision is arbitrary and capricious and unsupported by substantial evidence.

The Committee incredibly states *"The void of medical evidence surrounding Ms. Knight's complaints of foot pain is obvious."*[4] (R 24, RE 116, Tab 17) Apparently, the Committee did not read treating neurologist Dr. Richard Weddle's December 14, 2004 note where he state "Neurotin did not help the pain in her feet..." (R 137, RE 12, Tab 4) or the report of Dr. Peeples where he notes Knight "has had poor balance related to the numbness in her feet and has had several falls. She says her feet swell at times." (R 118, Re 24, Tab 7) or the rest of his report where he states her symptoms are "very suggestive of peripheral neuropathy." (R 119, RE 25, Tab 7) or Dr. Blount's diagnosis of foot problems such as bilateral metatarsalgia, left great toe hallux valgus, status post fusion of the first metatarsal..." (Re 193, RE 35, Tab 11) or the operative report of Dr. B. T. Sullivan, the podiatrist who performed surgery on Knight. (R 173, RE 28, Tab 9). To say there is a "...void of medical evidence surrounding Ms. Knight's complaints of foot pain..." is simply incredible in the light of the above stated objective medical evidence.

Second, the Committee again makes a legally incorrect statement when it states *"The Committee has no way of procuring medical records without the assistance of the claimant"*[5] The Committee then goes on to state "This Committee has only to work with the records that Ms. Knight either acquired or assisted in acquiring." (R 276, Re 119, Tab 17) Apparently the Committee implies that Knight failed to supply medical records. Such a conclusion has been

[4] The Committee recommendation later goes on to say "As a matter of fact, there is no document in this file that has a "foot" diagnosis on it. Knight would respond that Dr. Sullivan's records and Dr. Blount's report prove otherwise.

[5] Miss. Code Ann. 25-11-120 allows the Committee to defer a decision "in order to request ...additional existing medical records not previously submitted by the claimant."

has been expressly condemned in *Stevison v. Pub. Emp. Ret. Sys.*, 966 So. 2d 874 (Miss. App. 2007) where the Court of Appeals stated:

> "PERS had the ability to populate the record with the information needed to render its decision, yet it chose to forego this option. PERS instead decided to assume the missing information contained opinions of no disability. Thus, it manufactured evidence adverse to Stevison. This was impermissible in light of PERS's ability to obtain the records and the requirement that PERS base its decision on record evidence. We hold that, when PERS foregoes its option to order additional medical records, it cannot assume the missing records contained opinions of no disability."

For the Committee to imply that Knight did not supply all medical records is further evidence of the arbitrary and capricious decision they rendered.

Third, the Committee states *"None of these doctors has written anywhere that Ms. Knight is disabled."* (RE 27, RE 119, Tab 17) Again, the Committee apparently never read Dr. Peeples' report where he stated "The symptoms as she describes them to me are severe enough that it would suggest the possibility of disability." (R119, RE 25, Tab 7) or Dr. Blount's report where he gave Knight a 17 per cent whole person impairment and explained Knight only suitable for "sedentary"[6] work and "should not be asked to walk long distances."---both requirements that would preclude her job as a committee assistant. (R 194-195, RE 36-37, Tab 11) Such inaccurate statements are again evidence of the arbitrary and capricious decision the Committee rendered.

[6] The Committee incorrectly states that Dr. Blount stated "Ms. Knight can return to her sedentary job." Dr. Blount stated Knight was suitable for 'sedentary" work but Knight's job as a committee assistant as described by her supervisor, Ann Brandon, Comptroller of the Mississippi Senate, as requiring "frequently" walking, stair climbing, and bending at the waist" and further described by Brandon as a "high stress, high stamina, high energy job" show that her job was not a sedentary job and was likely a light to medium duty job as described by the Dictionary of Occupational Titles. (R 108-110, RE 3-5, Tab 2)

CONCLUSION

Knight would state that the foregoing argument should make it clear that the decision by the Disability Appeals Committee is legally incorrect, unsupported by substantial evidence and is arbitrary and capricious and the Circuit Court erred in affirming such decision.

The Supreme Court or Court of Appeals should reverse and render the decision of the Circuit Court affirming PERS' denying Knight disability benefits pursuant to Miss. Code Ann. 25-11-113 with prejudgment interest.

Respectfully submitted,

DOROTHY J. KNIGHT, Appellant

BY: George S. 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 22nd day of March, 2011.

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