IN THE SUPREME COURT OF MISSISSIPPI

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI (PERS)	APPELLANT
VERSUS	CAUSE NO. 2010-SA-00483
SUSAN MCDONNELL	APPELLEE

BRIEF OF THE APPELLEE

ORAL ARGUMENT
REQUESTED

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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 Quentin McColgin, Counsel for Appelle

Susan McDonnell, Appellee

Respectfully Submitted,

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I. Whether PERS has the authority to disregard medical evidence that takes into consideration Ms. McDonnell's pain under the agency's objective medical evidence standard on the basis that such evidence is subjective. PERS contents that it does. Ms. McDonnell disagrees.

II. Whether the Circuit Court's finding is correct that PERS' conclusion that Ms. McDonnell is not disabled is not supported by substantial evidences. PERS contends that it is not. Ms. McDonnell disagrees.

STATEMENT OF THE CASE

The Appellee, Susan McDonnell, files this brief to urge the Supreme Court to affirm the opinion of the Hinds County Circuit Court, by the Honorable Winston L. Kidd, wherein the Court found that the decision of the Disability Appeals Committee adopted by the Board of Trustees of the Public Employees Retirement System (PERS) "was not supported by substantial evidence and was therefore, arbitrary and capricious" and reversed the decision of the Board of Trustees of the Public Employees' Retirement System and ordered benefits paid to Ms. McDonnell. (R. 12).[1] This matter involves an appeal filed by the Appellant, PERS, seeking review of the December 10, 2009, Order of the Circuit Court reversing the Order of the Board of Trustees of the Public Employees' Retirement System entered on August 26, 2008. (R. 13). The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendations of the Disability Appeals Committee that denied Ms. McDonnell's request for payment of disability as defined in Miss. Code Ann. § 25-11-113 (Supp. 2009). This appeal is authorized and governed pursuant to Miss. Code Ann. § 25-11-120 (Rev. 2006).

STATEMENT OF THE FACTS

Susan McDonnell was a computer discovery teacher who instructed eighth graders in keyboarding, word processing, database, and desktop publishing for Biloxi schools. (R. 33, 34). Ms. McDonnell was forced to terminate her job with 29 years credited service on August 31, 2007 because of bilateral ankle pain and swelling that prevented her from performing her job duties. (R. 33,93). Her class duties required her to walk around the room and monitor the student's fingers as they performed their keyboard exercise. (R. 33). Ms. McDonnell had six computer discovery classes a day that were 52 minutes in length with 4 minutes breaks between

[1] R. refers to volume II of the record succeeded by the page number.

classes. (R. 35). For the seventh class, she went to another building and monitored students for 30 minutes. (*Id.*). Each student was assigned a computer and Ms. McDonnell was required to be continuously on her feet monitoring the students as they performed their exercises. (R. 36).

Ms. McDonnell had experienced pain in her ankles for five years prior to her termination of her employment. (R. 39). These problems became acute in November 2006. (R. 179). She first sought medical attention by Dr. Leavengood for the pain in her right ankle. (*Id.*). Dr. Leavengood's initial assessment was bursitis and tendonitis. (R. 179). Thereafter she reported to Dr. Smith, her back surgeon, on December 26, 2006 that she was supposed to see a doctor about her ankle pain soon. (R. 116). The pain and swelling got so severe that Ms. McDonnell was not capable of performing everyday activities, and forced her to "limp" around her classroom to help her students. (R. 39). Due to the worsening of her ankle pain, She was seen by an orthopedic specialist, Dr. Jordan on March 16, 2007. (R. 182). X-Rays showed moderated degenerative changes in the ankle and some anterior lipping of the tibia. (R. 182). She was placed on a Medrol dose pack. (*Id.*). Dr. Jordan completed a Physician's form 7 stating that Ms. McDonnell had moderate DJD and bursitis and that these two conditions will likely deteriorate. (R. 181). Due to these conditions, Dr. Jordan restricted Ms. McDonnell's standing/walking to no longer than 20 minutes at a time.

Ms. McDonnell was next seen by Dr. Burwell on March 30, 2007 complaining of ankle pain and reporting that the Medrol pack given to her by Dr. Jordan did not help. (R. 170). She also reported that she had worn ankle brace that caused pain itself with ambulation so she had used an electric scooter to get around school. (*Id.*). X-rays showed moderate degenerative changes of the ankle joint. (*Id.*). Dr. Burwell diagnosed Ms. McDonnell as having DJD of the right ankle with tendonitis. (*Id.*). Because of her diabetes, Dr. Burwell prescribed pain

medication and cortisone injections, alternating ankles, every three months. (R. 43). The cortisone shots alleviated the pain for diminished durations after each was administered. (*Id.*). They gave her some relief from the pain but no relief from the swelling. (R. 43).

On June 4, 2007 Ms. McDonnell returned to Dr. Leavengood after experiencing severe pain in her left foot. (R. 177). Her medication was changed to rule out gout vs. a stress fracture. (*Id.*). No stress fracture was noted on the x-ray, but lateral ligamentous instability was suspected along with probably previous tarsonavicular fracture with post-fracture residual deformity. (*Id.*). He put her on antibiotics for cellulitis. (*Id.*). Dr. Leavengood completed a Physician's form 7 stating that with the severe foot pain, Ms. McDonnell was not able to stand 85% of the day and that she needed to sit frequently at more than 50% of the day. (R. 172). He subsequently completed a Medical Source Statement restricting her to standing/walking less than two hours a day. (R. 240). As to the reason for this restriction Dr. Leavengood wrote: "the patients' pain stemming from osteoarthritis changes is in her ankles." (R. 241).

Ms. McDonnell returned again to Dr. Burwell on October 3, 2007 again complaining of ankle pain and swelling. (R. 165). Another cortisone injection was administered. (*Id.*). Ms. McDonnell's diagnosis remained bilateral DJD of the ankles. (*Id.*). Dr. Burwell completed a Physician's form 7, Statement of Examining Physician and he wrote that Ms. McDonnell has degenerative joint disease of both ankles, moderate, severe and pain and swelling. (R. 164). He restricted Ms. McDonnell to limited waking, standing and climbing. (*Id.*). He subsequently completed a Medical Source Statement restricting her to standing/walking less than two hours a day based on a degenerative disc disease diagnosis. (R. 244).

Ms. McDonnell underwent on Independent Medical Examination Conducted by Dr. Blount, an orthopedics specialist. (R. 110). Dr. Blount saw Ms. McDonnell on January 28,

2008. Ms. McDonnell told Dr. Blount that she was not able to work due to ankle pain and swelling. (*Id.*). She also reported that she wore Merrill cushion shoes, sometimes uses a cane and uses a motorized scooter for the Mall. (R. 110, 111). Ms. McDonnell also complained of low back pain which is worse with standing for prolonged periods. (R. 110). Ms. McDonnell reported she was dieting and lost 25 pounds. (R. 111). She also performed some pool therapy at home. (*Id.*). Dr. Blount found an antalgic gate but that Ms. McDonnell was able to heal-toe walk. (R. 112). Tenderness was noted over the right tibialis tendon and ankle joint and on the left, the ankle joint only. (R. 112). Yet, full range of motion of the ankles was present. (R. 113). Dr. Blount thought that Ms. McDonnell had bilateral ankle osteoarthritis, lumbar spondylosis and status post two surgeries, and medical issues such as hypertension, diabetes and obesity. (*Id.*). Dr. Blount opined that she was at no risk to continue working according to her job description but noted that tolerance was in question. (*Id.*).

On March 6, 2008, Ms. McDonnell was notified that her Application for Disability Retirement was denied. (R. 215). Ms. McDonnell appealed this decision, and a hearing was held before the Disability Appeals Committee on June 2, 2008. (R. 26). The Disability Appeals Committee concluded that while there was credible and objective medical evidence that Ms. McDonnell had DJD of the ankles, she was not disabled from performing her duties as a technology teacher. (R. 22).

Ms. McDonnell disability benefits were denied on August 26, 2008. (R. 13). Ms. McDonnell appealed this decision to the Circuit Court. (R. 11). After reviewing the record, the Circuit Court reversed the PERS' decision. (R. 12). The Circuit Court, after evaluating the overwhelming evidence, found Ms. McDonnell's condition was disabling, and the disability was the direct cause of her withdrawal from state service. (*Id.*). The Court also found that PERS

presented no evidence that Ms. McDonnell was not disabled from performing her teaching duties and that the PERS decision was not based on substantial evidence. (*Id.*). PERS is now appealing the Circuit Court order granting Ms. McDonnell disability.

STANDARD OF REVIEW

Rule 5.03 of the Uniform Rules of Circuit and County Court Practice limits review by the Supreme Court to a determination of whether the Board of Trustees' decision was: (1) supported by substantial evidence; (2) was arbitrary or capricious; (3) beyond the authority of the Board to make; or (4) violated a statutory or constitutional right of Ms. McDonnell. *Public Employees' Retirement System v. Howard*, 905 So.2d 1279, 1284 (Miss. 2005); *Doyle v. Public Employees' Retirement System*, 808 So.2d 902, 903 (Miss 2002); *Mississippi State Bd. Of Public Accountancy v. Gray*, 674 So.2d 1251, 1253 (Miss. 1996) (citing *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So.2d 901, 902 (Miss. 1994)).

A reviewing court may not substitute its judgment for that of the agency rendering the decision and may not reweigh the facts. *Public Employees' Retirement System v. Marquez*, 774 So.2d 421, 425 (Miss. 2000). It is within the Court's power to reverse the agency decision if such decision was not supported by substantial evidence. *Id.* at 429. Substantial evidence means "such evidence as reasonable minds might accept as adequate to support a conclusion." *Delta, CMI v. Speck*, 586 So.2d 768, 773 (Miss. 1991). "If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *Public Employees' Retirement System v. Marquez*, 774 So.3d 421, 429 (Miss. 2000). "An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *Id.* at 429 (citing *Burks v. Amite County Sch. Dist.*, 708 So.2d 1366, 1370 (Miss. 1998)). "An act 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.*

SUMMARY OF THE ARGUMENT

PERS disregarded medical evidence from treating sources because those sources considered Ms. McDonnell's ankle pain in formulating their restriction's on her physical activities. PERS' disregard of this evidence is based on the agency's objective medical evidence standard which PERS interprets as requiring the exclusion from its consideration of subjective medical evidence. The imposition of this stand is contrary to accepted medical practice and statutory authority. It deprives Ms. McDonnell of her right to have essential medical evidence considered in determining her claim for disability and constitutes arbitrary and capricious agency action.

The Circuit Court's holding that there is no substantial evidence supporting PERS' conclusion that Ms. McDonnell is not disabled is correct and should be affirmed. PERS relied upon the opinion of Dr. Blount to counter the proof supplied by the three treating physicians who took into consideration her ankle pain and restricted her standing/walking activities to significantly less than which was required to perform her job duties. Juxtaposed to those opinions is the opinion of Dr. Blount who opined that Ms. McDonnell will not exacerbate the underlying disease process (osteoarthritis) by performing her job duties. These different opinions focus on different causes of disability that are mutually exclusive and proof of disability from one cause (pain) is not negated by proof that another disabling cause is absent.

ARGUMENT

The legal requirement of proving disability is set forth in Miss. Code Ann § 25-11-113(1)(a) which states:

> "....any active member in state service who has at least four 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 should be retired."

Disability is defined in the same statute as:

> "...the inability to perform the usually 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 that is actually offered and is within the same general territorial work area, without material reduction in compensation."

Miss. Code Ann. § 25-11-113.

The Circuit Court reversed the PERS decision denying Ms. McDonnell's disability because it was not supported by substantial evidence. The overwhelming evidence supports the Circuit Court finding that Ms. McDonnell's ankle condition was disabling and this disability was the direct cause of her withdrawal from service.

I. PERS DOES NOT HAVE THE AUTHORITY TO LIMIT THE MEDICAL EVIDENCE IT CONSIDERS TO OBJECTIVE MEDICAL EVIDENCE.

The principle issue in this case is whether the imposition of the "objective medical evidence" standard by PERS exceeds its authority and is, therefore, *ultra vires*. This standard is imposed in the agency decision adopted by PERS stating, "the medical evidence supporting disability must be ... objective." (R. 22). This standard is used by the agency to exclude considerations of pain in the evaluation of the functional capacity to perform work-like functions such as standing and walking which is required 95% of the workday to perform Ms.

McDonnell's job duties. (R. 77). The decision considered only the anatomic evaluation of Ms. McDonnell's ankle impairment by orthopedist Blount, who reported Ms. McDonell was "at no risk for continuing her job within her job description. Tolerance is in question and it would be her choice if she wanted to stop teaching." (R. 113).

PERS then found that Ms. McDonnell's ankle impairment was "not severe" and disregarded the three opinions of treating sources, two of which were also orthopedists (Drs. Jordan and Burwell), that submitted functional assessments of Ms. McDonnell's ankle impairment that considered Ms. McDonnell's pain. (R. 22, 164, 181). All three of these treating sources opined that Ms. McDonnell's capacity to stand/walk was limited in duration to substantially less than that required to perform her job duties. (R. 164, 172, 181). Notwithstanding this latter evidence PERS found: "... [W]hen looking at the most objective medical evidence, the Committee sees that while Mrs. McDonnell has degenerative disease of the ankles, the disease is not severe ...." (R. 22).

The demonstration of the *ultra vires* nature of this "objective medical evidence" standard begins with consideration of the *Guides To The Evaluation of Permanent Impairments*, 5th Ed., Chicago, IL published by the American Medical Association (Guides), pertinent portions (pp. 1-3, 565-589) of which are included as Excerpt tab 4 submitted with this brief. It is requested that official notice be taken thereof. According to these Guides, pain "is the most common cause of disability...." (Guides, p. 567). "Pain is subjective. Its presence cannot be readily validated or objectively measured." (*Ibid.*, p. 566). Thus, "[p]hysicians need to use their clinical judgment as to what constitutes normal or expected pain in conditions that produce widely variable amounts of pain...." (*Id.*). These Guides further state: "Pain is an essential determinant in the incapacitation of many individuals who undergo impairment evaluations." (*Ibid.*, p. 567). They

also cite with approval the following observation by the Institute of Medicine Committee on Pain and Disability and Chronic Illness Behavior:

> "The notion that all impairments should be verifiable by objective evidence ... is fundamentally at odds with a realistic understanding of how disease and injury incapacitate people. Except for a few conditions ... most diseases ... do not prevent people from working by mechanical failure. Rather, people are incapacitated by a variety of unbearable sensations when they try to work."

(*Id.*).

The Guides further state in the conclusion of the "Pain" chapter (Chapter 18), the following:

> "The assessment of pain-related impairment constitutes a substantial challenge, as it is the most common reason for disability, the most subjective, and perhaps the most multifaceted. Equitable quantification of impairment requires attention to subjective experiences of pain and emotional distress, as well as reports of behavioral impairment, all of which can only be confirmed indirectly. At times, it seems to present the dilemma of being too difficult to perform and too essential to omit."

(Guides, p. 586). As explained in this chapter, when the rating of an impairment under the conventional chapters (Chapters 3-17), adequately captures the functional loss, then the pertinent chapter should be used exclusively. (*Ibid.*, p. 570). Otherwise, the procedures described in the "Pain" chapter should be used to determine if a pain related assessment should be performed and, if so, to evaluate the extent of additional loss of function that is warranted by consideration of pain. (*Ibid.*, p. 573).

Postulating these Guides as a paradigm of accepted medical practice, it is clear that both Dr. Blount's evaluation as well as the PERS decision deviated from accepted medical practice by considering only objective medical evidence and ignoring considerations of pain. This conclusion is no reflection of Dr. Blount. He merely complied with the PERS charter letter of December 21, 2007 commissioning him to perform the Independent Medical Examination of Ms. McDonnell that repeatedly states that any disability determination must be based on "objective

medical evidence." (R. 20). PERS, on the other hand, cannot justify its deviation. Certainly the enabling statute does not provide for the exclusion of pain considerations or other subjective medical evidence in disability determinations by PERS. It provides that an employee eligible for retirement:

> "may be retired by the Board ... provided that the ... Board, after the evaluation of medical evidence, ... certifies that the [employee] is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the [employee] should be retired."

MCA Sec. 25-11-113(1)(a). This same provision defines disability as "the inability to perform the usual duties of employment." (*Id.*) The use of the terms "incapacitated" and "inability to perform" in this statute connotes the loss of functional which, in some cases, as here, cannot be proved by objective evidence alone. Thus, it cannot be said that the enabling statute mandates the exclusion of subjective medical evidence of pain in disability determinations by PERS. To the contrary, the language of that statute supports the conclusion that pain should be considered in PERS disability determinations because "pain", according to the Guides, is recognized as "an essential determinant in the incapacitation of many individuals."

PERS, thus far, has made no claim before this Court or the lower Court that it has statutory authority to impose this "objective medical evidence" standard. Instead, PERS asserts in Appellee's Brief before the lower Court that it has such authority under its procedural rules. Thus, it is stated at page 20 of Appellee's Brief before the lower Court that PERS' authority to impose this standard lies in the agency interpretation of Chapter 42, Sec. 108(3) authorizing: "Hearing Officers to excluded evidence ... lacking in probative value ....". This rule is a gatekeeping rule and cannot serve as authority to disregard evidence that is admitted into the record. Presumably such evidence is probative and it is incumbent upon the agency adjudicators to consider all such evidence that is not otherwise excluded by some other evidentiary rule.

Furthermore, agency authority to promulgate rules and regulations is confined to promulgating those implementing its statutory authority. To promulgate a rule that is inconsistent with an agency's statutory authority would be a usurpation of statutory authority. Thus, this bootstrap argument cannot prevail. Finally, subjective evidence of pain in disability determinations is, in fact, probative evidence on both the issue of impairment severity and its disabling effects notwithstanding PERS' erroneous conclusion to the contrary.

Nevertheless, PERS found Ms. McDonnell's ankle impairment to be "not severe" by disregarding physical restrictions by three treating physicians that took into consideration Ms. McDonnell's pain in favor of Dr. Blount's evaluation that did not consider Ms. McDonnell's pain. The stated reason for this preference was that the latter was: "the most objective evidence." PERS also listed as one of the reasons for rejecting the opinion of Dr. Leavengood: "And pain is subjective." (R. 23).

Thus, the imposition of the "objective medical evidence" standard by PERS is not only contrary to accepted to medical practice but it also exceeds the agency's authority. Therefore, it is an *ultra vires* assertion of authority by the agency. The result of imposing this standard is to prejudice claimants such as Mrs. McDonnell by requiring them to undergo the expense and delays entailed in pursuing their judicial appeals. It also results in the needless expenditure of scarce judicial resources in considering those appeals. The most egregious result is that countless meritorious claims have been unjustly denied but not appealed due to the claimants' lack of resources.

II. THE CIRCUIT COURT WAS CORRECT IN FINDING THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT MS. MCDONNELL WAS NOT DISABLED.

The Circuit Court's decision that there was no substantial evidence to support the PERS' decision to deny Ms. McDonnell disability should be upheld. The Circuit Court, after evaluating what the Court described as "the overwhelming evidence", correctly found that PERS presented no evidence to the contrary that Ms. McDonnell was unable to perform her teaching duties because of her ankle pain. (R. 12). Thus, the Court properly reversed PERS' finding that Ms. McDonnell was not entitled to disability.

Ms. McDonnell had the burden to prove her condition is disabling pursuant to the enabling statute. *Public Employees' Retirement System v. Dishmon*, 797 So.2d 888, 893 (Miss. 2001). Ms. McDonnell has met this burden by presenting evidence from her three treating physicians who opined that she was unable to stand/walk sufficiently to perform her job duties as described in her job description due to the osteoarthritis of her ankles. (R. 164, 172, 181). This condition causes her significant pain as well as swelling, tenderness, effusion, and erythema about the ankles. (R. 37-44, 90-1, 112-13). Dr. Jordan restricted her to no prolonged standing or walking more than 20 minutes. (R. 181). The other two physicians, Drs. Burwell and Leavengood, assessed her as being able to stand/walk less than two hours during the workday. (R. 240, 244). Since her job description specifies that she is required to stand/walk 95% of the day, and her employer certified that those activities were continuous (R. 76-7), this medical evidence is sufficient to establish entitlement to disability which is defined in the enabling statute as "the inability to perform the usual duties of employment." MCA Sec. 11-25-113(1)(a).

This conclusion is buttressed by the final decision dated December 17, 2009 by an Administrative Law Judge of the Social Security Administration wherein it is held that Ms.

McDonnell does not have the functional capacity to stand and walk as required to perform her teaching job and that she is permanently and totally disabled. This decision is set forth as Excerpt tab 5 accompanying this brief. It is requested that this Court take official notice of that decision.

It is note worthy to observe at this point that Ms. McDonnell's credibility is not as issue. The fact finders found her to be "sincere witness" and observed that they had "no reason to doubt that Ms. McDonnell has ankle pain." (R. 22, 23).

In reviewing the PERS decision, it is the reviewing courts job to determine "whether PERS has presented substantial evidence to support its finding that the claimant is not disabled." *Public Employees' Retirement System v. Henderson*, 867 So.2d 262, 264 (Miss. App. 2003) (citing *Doyle v. Public Employees' Retirement System*, 808 So.2d 902, 905 (Miss. 2002)); *Public Employees' Retirement System v. Dishmon*, 17 So.3d 87, 93 (Miss. 2009). Here, the Circuit Court found that PERS had not presented *any* evidence to support that Ms. McDonnell was not disabled from performing her teaching duties. (R.12). This finding is based on the lack of evidence presented by PERS negating the opinion evidence from the three treating physicians that Ms. McDonnell had significant pain emanating form her ankles that limited her capacity to continuously stand/walk as her job required. (*Id.*).

The only evidence presented by PERS to refute the evidence of a disabling condition was the opinion of Dr. Blount, the independent medical examiner employed by PERS. Dr. Blount opinioned that Ms. McDonnell was "not at risk for continuing her job with her description outline on Form 6-B. Tolerances is in question and it would be her choice if she wanted to stop teaching." (R. 113). As essentially confirmed by Dr. Leavengood who responded to Dr. Blount's opinion, the latter's opinion is that Ms. McDonnell's performance of her job duties

entailing almost constant standing/walking will not exacerbate her ankle condition but that tolerance to the resulting pain is the question. (R. 87). In other words, Ms. McDonnell can continue her job duties if she can tolerate the pain. Thus, Dr. Blount's opinion is equivocal on the crucial issue of whether Ms. McDonnell's ankle pain incapacitates her.

Dr. Blount's opinion is equivocal because it is not inconsistent with the opinions of three treating physicians that Ms. McDonnell does not have the functional capacity to stand/walk of sufficient duration to perform her job duties. Dr. Blount frames the issue by stating "tolerance is in question" but did not address that issue. (R. 113). In contrast the three treating physicians addressed that issue and opined that her pain limited her standing/walking to significantly less than required to perform her job. (R. 182, 240, 244). While there is a difference of opinion between Dr. Blount and the treating physicians, these opinions are mutually exclusive in that they address the presence or absence of different disability causes. One does not negate the other.

Because PERS mistakenly considered Dr. Blount's opinion to conflict with those of the three treating physicians, PERS then expressed a preference for the former over the latter opinions, stating: "Because of this specialty, we find Dr. Blount more persuasive regarding what Ms. McDonnell is physically able to do." (R. 24). At one level, the expression of this preference demonstrates arbitrary agency decision making. If this statement is interpreted as expressing a preference for the opinions of one physician because of his superior qualifications, the preference is irrational because two of the three treating physicians are orthopedists, as is Dr. Blount. If, on the other hand, the reason for this preference are directed solely to Dr. Leavengood who is an internist, than PERS has failed to give reasons for preferring Dr. Blount's opinion are those of Drs. Jordan and Burwell. As stated in *Mississippi Sierra Club v. Mississippi Dept. of Envtl.*

Quality, 819 So.2d 515, 524 (Miss. 1995), an agency must provide reviewing courts more than conclusory findings and conclusion and must set forth reasons for its decision. The conclusionary expression of preference for Dr. Blount's opinion simply does not meet this criteria. An unreasonable preference by an administrative agency is, be definition, arbitrary. *Id.* at 523 (citing *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So.2d 312, 323 (Miss. 1992)).

Of greater significance than PERS' expressed preference of Dr. Blount's opinion is that PERS does not correctly frame the issue before it. The issue is not as expressed in the decision "what Ms. McDonnell is physically able to do." (R. 24). The issue is whether she has the functional capacity to perform her job duties. Dr. Blount's opinion on this issue is no more than she can stand and walk which is not disputed. However, Dr. Blount's opinion is not probative on the issue of her functional capacity. He did not exercise his "clinical judgment" as physicians are encouraged to do in the Guides by considering Ms. McDonnell's pain. Thus, PERS can be said to have preferred an anatomic evaluation over the functional capacity evaluation by the treating sources that took into consideration her pain.

Thus, the Circuit Courts' decision reversing the PERS' decision denying disability based on the Court's finding that "PERS presented no evidence that McDonnell was not disabled" is correct. *Public Employees' Retirement System v. Dishmon*, 797 So. 2d 888, 893 (Miss. 2001). Based on that fatal error, the decision by the Circuit Court reversing the PERS decision should be affirmed.

CONCLUSION

Ms. McDonnell's disability benefits awarded by the Circuit Court should be upheld. PERS does not have the authority to limit the medical evidence it considers to objective medical evidence only. The PERS' enabling statute does not support nor mandate the use of this

standard. To determine a claimant's incapacitation and inability to perform job duties requires an evaluation of function loss, which in this case cannot be proven by objective evidence alone. By refusing to consider medical evidence that considered Ms. McDonnell's pain on the basis that is subjective and does not meet its objective medical evidence standard, PERS exceeds its statutory authority. It also results in the exclusion of evidence "too essential to omit."

Further, Ms. McDonnell has meet her burden by showing the existence of substantial evidence by the opinions of her three treating physicians that she cannot perform her job duties. That evidence consists of Dr. Jordan's restriction that she should avoid prolonged standing/walking, as well as Drs. Leavengood and Burwell's functional capacity evaluations' both of which restricts her to standing/walking less than two hours during the workday. (R. 181, 240, 244). That evidence is sufficient to meet the substantial evidence standard which is defined as "such evidence as reasonable minds might accept as adequate to support a conclusion." *Delta, CMI v. Speck,* 586 So.2d 768, 773 (Miss. 1991).

PERS then must show the existence of substantial evidence proving Ms. McDonnell is not disabled. *Public Employees' Retirement System v. Henderson*, 867 So. 2d. 262, 264 (Miss App. 2003) (citing *Doyle v. Public Employees' Retirement System*, 808 So.2d 902). PERS has not met this burden because the evidence it relied upon (Dr. Blount's opinion) does not meet the definition of substantial evidence proving that Ms. McDonnell is not disabled. Dr. Blount does not express an opinion on whether Ms. McDonnell has the capacity to stand/walk as required by her job description. (R. 110-13). He merely observes that such work activity will not exacerbate her underlying ankle condition. (*Id.*). Thus, Dr. Blount is opining that Ms. McDonnell is not disabled from the standpoint that standing/walking activity is contraindicated. These different reasons or causes for

disability are mutually exclusive and proof that Ms. McDonnell is disabled as a result of one cause, is not negated by proof that she is not disabled as the result of another cause. Thus, it simply cannot be said that reasonable minds might accept Dr. Blount's opinion as supporting the conclusion that Ms. McDonnell is not disabled. Proof that continued performance of job duties will not exacerbate the underlying disease process does not constitute proof that she cannot perform those duties because of ankle pain. His opinion, at best, merely proves that she is not disabled for other reasons that have not been claimed. Thus, the Circuit Courts finding that PERS "presented no evidence that [Ms. McDonnell] was not disabled" is correct and should be affirmed.

Respectfully submitted this the **30th** day of August, 2010

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