IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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

VERSUS — **CAUSE NO. 2010-SA-00483**

SUSAN MCDONNELL — **APPELLEE**

REBUTTAL BRIEF OF THE APPELLANT PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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PERS HAS THE AUTHORITY TO DETERMINE WHAT WEIGHT TO PLACE ON EACH PIECE OF MEDICAL EVIDENCE, BOTH OBJECTIVE AND SUBJECTIVE, IN MAKING ITS DETERMINATION AS TO WHETHER MS. MCDONNELL IS DISABLED.

Ms. McDonnell puts forth the argument that incapacity, "cannot be proved by objective evidence alone." (Appellee's Brief. p. 1). It is not the contention of PERS that subjective evidence must be disregarded and that Ms. McDonnell's disability must be proven solely on objective evidence; however, PERS would argue that Ms. McDonnell's subjective complaints of pain need to be supported by objective evidence. The Committee cannot be expected to declare someone disabled based solely on that person's subjective complaints. If that were the case then no claimant would have to provide documentation from physicians and the Committee would be expected to make decisions regarding Claimants on their subjective complaints alone. On the contrary, there must be an objective standard when making disability decisions. In *Laughlin v. PERS*, 11 So.3d 154 (Miss. Ct. App. 2009), this Court recently upheld both PERS and the Circuit Court by pointing out that "[t]here must be clinical or laboratory diagnostic techniques which show the existence of a medical impairment which could be reasonably be expected to produce the pain alleged." *Id.* at 159 (quoting *Selders*, 914 F.2d ,614 (5th Circ. 1990).

Disability is defined in Miss. Code Ann. Sec. 25-11-113 and 25-11-114 as the "incapacity to perform the usual duties of employment or the incapacity to perform lesser duties, if any, as the employer, in its discretion, may assign without material reduction in

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

compensation..." Dr. Jordan stated on his Physicians Form 7 that Ms. McDonnell had moderate degenerative disc disease (DJD) and recommended that Ms. McDonnell avoid prolonged standing or walking for more than twenty minutes at a time. (Appellee's Brief, p. 3). Dr. Leavengood' s Physician's Form 7 stated that with severe foot pain, Ms. McDonnell would need to sit 50 % of the day. (Appellee's Brief, p.4). Dr. Blount, an orthopedist, stated that Ms. McDonnell was "**at no risk for continuing her job within her job description.**" (Appellee's Brief, p. 9). Further, Dr. Blount stated that it would be her choice if Ms. McDonnell wanted to stop teaching. (Vol. II, R. 113).

Ms. McDonnell stated that she was "required to stand 95% of the workday." (Appellee's Brief, p.8). Some statements by her co-employees indicated, however, that Ms. McDonell was allowed to sit at her desk and elevate her ankles. (Vol. II. R. 23). The record indicates that Ms. McDonnell made **no** request for accommodations to her employer before terminating her employment, even though she admitted to using a scooter when going to the shopping mall. Reasonable accommodations that could have been made, such as using her scooter in a classroom that appeared large enough to accommodate a scooter or linking the student's computers to hers while she sat with her feet elevated were noted by the Committee. (Vol. II, R. 23, 80,81).

In making its recommendation, the Committee also pointed to the fact that Ms. McDonnell did not complete physical therapy because she complained it was painful. They noted, however, that while physical therapy can be painful it generally will result in improvement of the medical condition. (Vol. II. R. 23). Evidence also showed that Ms. McDonnell did not complete treatment with her chiropractor and she did not take medications as prescribed on several occasions. (Vol. II, R. 23.) The Committee pointed

to these facts to show that Ms. McDonnell has been offered treatment options to help with any pain and had chosen not to pursue them.

It is in PERS' discretion, as the finder of fact, to determine what weight is to be placed on each piece of medical evidence, both objective and subjective. So that such findings of fact will be made by impartial fact finders with the education and expertise to evaluate medical testimony and documentation, the Disability Appeals Committee is made up of two physicians and one attorney/nurse. It is clear from the record that when considering all the medical evidence before it, the Committee gave substantial weight to Dr. Blount's opinion that Ms. McDonnell could continue her job. Because of Dr. Blount's orthopedic specialty and since Ms. McDonnell's complaint was of joint pain in her ankles, it is logical that the Committee would place more weight on his opinion than that of Dr. Leavengood. This is so even though Dr. Leavengood had been seeing Ms. McDonnell over a longer period of time. The Committee supported their opinion by explaining that Dr. Leavengood is an internist who specializes in allergies and his findings of Ms. McDonnell were not well supported because his "functional capacity is not supported with the typical measurements of different movements." (Vol. II, R. 24). For this reason the Committee did not place as much value on his opinion regarding the severity of Ms. McDonnell's joint problems as they did to the opinion of an orthopedic specialist. Taking into consideration all subjective and objective medical evidence, the Committee unanimously found that Ms. McDonnell was not disabled within the definition of the PERS' statutes.

In *Public Employees' Retirement System v. Howard*, the Mississippi Court of Appeals reiterated that "it is for PERS, as fact finder, to determine which evidence is more

believable or **carries the most weight.**" 905 So. 2d 1279 at 1287 (Miss. App. 2003). Further, " there is a rebuttable presumption in favor of PERS ruling. Neither the appellate court nor the circuit court is entitled to substitute its own judgment for that of PERS, and it is impermissible for a reviewing court to re-weigh the facts of the case." *Pub. Employees' Ret. Sys. V. Card*, 994 So. 2d 239,242 (Miss. Ct. App. 2008) (quoting *Pub. Employees' Ret. Sys. V. Dishmon*, 797 So. 2d 888, 891 (Miss. 2001). The Disability Appeals Committee as fact finder was neither arbitrary nor capricious when it determined that there was not sufficient objective and persuasive medical evidence to support the severity of ankle pain alleged by Ms. McDonnell and that she failed to meet her burden of proof under Miss. Code Ann. Section 25-11-113 (Supp. 2009) of a disability that was "likely to be permanent" and which left her with the "inability to perform the usual duties of employment...." Accordingly, the decision of the Circuit Court should be reversed and the decision of PERS to deny disability retirement should be reinstated.

CONCLUSION

It is well settled law that there is a rebuttable presumption in favor a ruling made by PERS and that neither the Circuit Court nor this Court should substitute its judgment for that of PERS. The Committee cannot be expected to declare someone disabled based solely on the Claimants subjective complaints without credible objective medical records

to support the claim. For this reason and for the reasons of fact and law set out hereinabove and in Appellant's principal brief, the decision of the Circuit Court should be reversed and ruling of PERS in this matter should be reinstated.

Respectfully submitted this the 10 day of September 2010.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLANT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Brief of Appellant has been mailed, postage pre-paid, to:

Honorable Winston Kidd
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This, the 10 day of September, 2010.

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