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 APPELLANT

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VERSUS **CAUSE NO. 2010-SA-00489**

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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 Appellee

Ms. Susan McDonnell, Appellee

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE

CASE Continued

STATUTES & ADMINISTRATIVE CODES

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 Circuit Court erred in reweighing the evidence by finding the order of the Board of Trustees of the Public Employees' Retirement System is unsupported by substantial evidence.

II. The Circuit Court erred in holding that the decision of the Board of Trustees of the Public Employees' Retirement System is arbitrary and capricious.

STATEMENT OF THE CASE[1]

This matter involves an appeal filed by the Appellant, Public Employees' Retirement System, 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 (hereinafter "PERS") entered on August 26, 2008. (Vol. II, R. 13.) The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny 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, instructing in keyboarding, word processing, data base and desktop publishing for Biloxi Schools. She had 29 years of service credit when she terminated her employment on August 31, 2007. (Vol. II, R. 33,93). On October 12, 2007, Ms. McDonnell applied for Non- Duty Related Disability. (Vol. II, R. 95 – 98).

Ms. McDonnell has seen numerous physicians for, and been diagnosed with, various medical conditions over the last ten years, including: obesity (Vol. II, R. 113), some tennis elbow (Vol. II, R. 193-4), knee pain (Vol. II, R. 192, 196), heel pain (Vol. II, R. 188), bursitis in her hip, (Vol. II, R. 186) back pain, (Vol. II, R.161) for which she was non-compliant with treatment and abandoned her physical therapy (Vol. II, R. 198-

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

9), tendonitis for which she was non-compliant and abandoned her physical therapy (Vol. II, R. 198-9), hypertension (Vol. II, R. 111, 155) and diabetes (Vol. II, R. 111, 155

The Committee found the following medical chronology relevant to the current complaint of osteoarthritis: While Mrs. McDonnell had been experiencing some pain in her ankles over the last 5 years, it was only in March 2007, four months before terminating her employment, that she first described having severe problems with her ankles. (Vol. II, R. 16). At that point she was seen by Dr. Theodore F. Jordan who prescribed her an oral steroid and referred her to Dr. Dudley S. Burwell. Dr. Jordan also completed a Physician's Form 7 stating that Ms. McDonnell had moderate degenerative joint disease (DJD), and that he recommended that she avoid prolonged standing or walking for more than 20 minutes at a time. (Vol. II, R. 20).

On March 30, 2007, Ms. McDonnell was seen by Dr. Burwell, who diagnosed her as having DJD of the right ankle, with tendonitis, and administered a Cortisone injection. (Vol. II, R. 20). Ms. McDonnell returned to Dr. Burwell on May 9, 2007, complaining of some swelling in her ankle, although the Cortisone shot had given her relief from the pain. He injected the ankle again, and ordered rheumatoid tests. (Vol. II, R. 20).

On June 4, 2007, Ms. McDonnell visited Dr. Douglas C. Leavengood, her internist, and reported that she was experiencing pain, this time in her left foot. Dr. Leavengood changed her medication in an attempt to rule out gout, and prescribed her with antibiotics for an unrelated condition. (Vol. II, R. 20). Dr. Levangood also completed a Physician's Form 7 stating that while she was experiencing severe foot pain, Ms. McDonnell would need to sit more than 50% of the day. (Vol. II, R. 20 – 21).

On Oct. 3, 2007, Ms. McDonnell saw Dr. Burwell again. Her diagnosis remained DJD of the ankles, and she was administered another Cortisone shot in her right ankle. (Vol. II, R. 21). Dr. Burwell also completed a Physician's Form 7 stating that Ms. McDonnell had DJD of the ankles, was experiencing some pain and swelling, and should limit her walking, standing, and climbing (Vol. II, R. 21), although by this time she had already terminated her employment. (Vol. II, R. 15). Dr. Burwell injected Ms. McDonnell's left ankle with Cortisone for the first time on December 19, 2007 (Vol. II, R. 21), three and one-half months after she terminated her employment. Over the next three months, Dr. Burwell injected each of her ankles once. (Vol. II, R. 21).

Pursuant to her claim for disability, Ms. McDonnell underwent an Independent Medical Examination on January 28, 2008, by Dr. Phillip J. Blount, an orthopedic specialist with University Orthopedic Associates. (Vol. II, R. 21). She reported that she was unable to work due to ankle pain, and that she periodically used a cane, as well as a motorized scooter during trips to the shopping mall. (Vol. II, R. 21). She also reported that she was dieting and had lost 25 pounds, and had been performing some therapy in her swimming pool at her home. (Vol. II, R. 21, 111). Dr. Blount noted that Ms. McDonnell was able to heel-to-toe walk, that all major muscle groups and reflexes were normal, and although there was some tenderness noted, the full range of motion was present in both ankles. (Vol. II, R. 21).

Dr. Blount concluded that Ms. McDonnell had bilateral ankle osteoarthritis, lumbar spondylosis and status post two surgeries, and general issues such as hypertension, diabetes and obesity. (Vol. II, R. 21). Ms. McDonnell has testified that she stands five feet five inches tall and weighs two-hundred and thirty pounds. (Vol. II, R.

53). Based on his examination of Ms. McDonnell and her medical records, the Committee noted that Dr. Blount opined that she was at no risk to continue working as per her job description (Vol. II, R. 21 – 22), but noted that she had not received a comprehensive treatment regimen for her osteoarthritis, and had either not received, or had failed to comply with, physical therapy for her foot, ankle or orthotic trail. (Vol. II, R. 22).

In an undated letter, Ms. McDonnell's internist, Dr. Leavengood deferred to Dr. Blount's opinion regarding the risk of any damage resulting from returning to work, but argued that her pain would prohibit her from performing her teaching duties. (Vol. II, R. 86).

On March 6, 2008, Ms. McDonnell was notified by the PERS Medical Review Board that her Application for Disability Retirement was denied. (Vol. II, R. 215). Ms. McDonnell appealed this decision, and a hearing was held before the Disability Appeals Committee on June 2, 2008, where Ms. McDonnell appeared and was represented by counsel. (Vol. II, R. 26). Based on the testimony presented at the hearing and the documentation that now comprises the record on appeal, the Disability Appeals Committee, comprised of two physicians and a chief hearing officer who is a nurse/attorney, concluded that while there was credible and objective medical evidence that Ms. McDonnell had DJD of the ankles, there was no such evidence that the condition was so severe that she is disabled from performing her duties as a technology teacher. (Vol. II, R. 22).

The Committee noted that her pain has been controlled by Cortisone injections administered once every few months, (Vol. II, R. 23, 24), and that she had made no

request for accommodations to her employer before terminating her employment, even though the Committee noted such accommodations as using her scooter in a room which appeared large enough to accommodate a scooter or link the student's computer monitors to her desk (Vol. II, R. 23,80,81). Finally, the committee noted that regarding the conflicting opinions of Drs. Blount and Leavengood, they found Dr. Blount's opinion regarding her condition more persuasive as his specialty is orthopedics, as opposed to Dr. Leavengood, who is an internist with a specialty in allergies. (Vol. II, R. 24, 86).

Accordingly, the Appeals Committee recommended to the Board of Trustees that Ms. McDonnell's request for Non-Duty Related disability benefits be denied. (Vol. II, R. 25). The Board of Trustees adopted the Appeals Committee's findings, conclusions, and recommendations by Order denying Ms. McDonnell disability benefits issued August 26, 2008. (Vol. II, R. 13). Ms. McDonnell appealed this decision to the Circuit Court and the Circuit Court reversed PERS' Order, hence this appeal.

SUMMARY OF THE ARGUMENT

The Order of the PERS Board of Trustees is supported by substantial evidence. PERS does not seek to deny that Ms. McDonnell does not experience pain, but under Mississippi Law – Miss. Code Ann. Section 25-11-113 – in order for Ms. McDonnell to receive disability payments, she has to prove that the condition which causes her pain, and upon which she bases her claim, is ***disabling*** and that the disability was the direct cause of her withdrawal from state service. The record, however, shows that Ms. McDonnell's pain did not interfere with her work, let alone disable her or directly cause her to withdraw from service. To the contrary, Ms. McDonnell herself admits that the

pain is controlled by a simple Cortisone shot administered once every two-to-six months (Vol. II, R. 43, 49). The PERS Board of Trustees took into consideration all of the medical evidence offered by Ms. McDonnell, and found that this evidence did not establish that Ms. McDonnell's ankle pain is disabling and therefore, she is not entitled to a disability benefit from the State of Mississippi.

Furthermore, the requirement that medical evidence be both credible and objective is not in violation of PERS authorizing statute. Miss. Code Ann. Section 25-11-113(1)(a), and PERS Regulation Chapter 45A, Sections 104(2)-(4)) clearly mandate that the PERS Medical Board may make a determination for or against disability status only after a review of medical evidence. Just as it is fundamental to the interests of every contributing PERS member and PERS itself that medical evidence furnished by a member to enable them to draw disability payments must be credible, it is fundamental that it be objective as well. While it is true that pain is a subjective condition, PERS, has recognized that there can be, and must be, objective medical evidence; evidence of a diagnosis based on objective medical science that adequately supports the subjective complaint of pain, and convinces the Board that the pain is disabling. PERS submits this is only rational, or in the alternative, at least more rational than the "subjective evidence".

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, which arranges and passes upon all medical examinations for disability purposes. The PERS Medical Board is composed of physicians appointed by the PERS Board of Trustees. Miss. Code Ann. §25-11-119(7) (Supp. 2009). Any person aggrieved by a determination of the PERS Medical Board may request a hearing before the designated hearing officer 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. McDonnell'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 incorrectly reversed by the Circuit Court on the basis that the denial of disability benefits is not supported by substantial evidence.

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. McDonnell. ***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); ***Thomas v. Public Employees' Retirement System***, 995 So.2d 115, 118 (Miss. 2008); ***Public Employees' Retirement System v. Dean***, 983 So.2d 335, 339(Miss. App. 2008); ***Public Employees' Retirement System v. Card***, 994 So.2d 239, 242 (Miss. App. 2008); ***Case v. Public Employees' Retirement System***, 973 So.2d 301, 310 (Miss. App. 2008); ***Brakefield v. Public Employees' Retirement System***, 940 So.2d 945, 948 (Miss. App. 2006); ***Public Employees' Retirement System v. Howard***, 905 So.2d 1279, 1284 (Miss. 2005); ***Public Employees' Retirement System v. Stamps***, 898 So.2d 664, 673 (Miss. 2005); ***Public Employees' Retirement System v. Smith***, 880 So.2d 348, 351 (Miss. App. 2004); ***Public Employees' Retirement System v. Henderson***, 867 So.2d 262, 264 (Miss. 2004); ***Public Employees' Retirement System v. Dishmon***, 797 So.2d 888, 891 (Miss. 2001); ***Byrd v. Public Employees' Retirement System***, 774 So 2d 434, 437 (Miss. 2000); ***Brinston v. Public Employees' Retirement System***, 706 So.2d 258, 259 (Miss. 1998).

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. McDonnell 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. McDonnell. ***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". In ***Public Employees' Retirement System v. Henderson***, 867 So.2d 262, 264 (Miss. App. 2003), the Court citing ***Doyle v. Public Employees' Retirement System***, 808 So.2d 902, 905

(Miss. 2002) noted: "It is not this courts job to determine whether the claimant has presented enough evidence to prove she is disabled, but whether PERS has presented enough evidence to support its finding that the claimant is not disabled." Also See: ***Public Employees' Retirement System v. Burt***, 919 So.2d 1150, 1156. (Miss. App. 2005). The Board of Trustees based their decision on the substantial medical evidence presented to them by the Disability Appeals Committee that Ms. McDonnell 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. McDonnell and, thus, the Order of the Board of Trustees entered August 26, 2008, must be affirmed.

I. The Circuit Court erred in reweighing the evidence by finding the order of the Board of Trustees of the Public Employees' Retirement System denying Ms. McDonnell's claim for disability is unsupported by substantial evidence.

The Circuit Court erred in determining that the Board's decision to deny Ms. McDonnell's disability benefits was not supported by substantial evidence (Vol. I, R. 8). The record clearly shows that the Committee reviewed all of the objective medical evidence presented by Ms. McDonnell before concluding that she was not disabled according to PERS statute.

"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). This 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, ***Howard***, 905 So. 2d at 1285. 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, this Court 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. McDonnell'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 the Board's decision be upheld.

The PERS Board's finding that Ms. McDonnell did not prove she is disabled because of her arthritis, based on the recommendations of the Committee, is supported by the evidence in the record. The record shows that the Committee members, comprised of Dr. Nicholas, Dr. Duddleston and Attorney-Nurse, Shelia Jones, considered the independent medical evaluation of Dr. David Blount, the Physician's Forms 7 from Drs. Burwell, Jordan, and Leavengood, as well all medical records and office notes submitted by Ms. McDonnell regarding varied diagnoses given over the last 5 years for medical problems unrelated to the osteoarthritis of the ankles for which Ms. McDonnell makes her claim for disability payments. Furthermore, Dr. Nicholas and Dr. Duddleston questioned Ms. McDonnell thoroughly on her medical history, symptoms, treatments and diagnoses, culminating in Dr. Duddleston approaching Ms. McDonnell and examining the ankles in question himself (Vol. II, R. 47 – 48).

Ms. McDonnell's failure to prove that her arthritis is disabling and that she should be retired because of it, is perhaps most clearly illustrated by the Physicians' Forms 7 submitted by her various doctors, all of whom were familiar with her condition, and one of whom (Dr. Leavengood) was her regular treating physician and family doctor. The Form 7 is completed by a physician not "in support" of a particular application, but rather as a "complete, detailed and if possible conclusive" report to PERS regarding the patient's true physical condition. (*See:* Physician's Form 7 introductory instructions, (Vol. II, R. 165, 172) The Committee found that of the three Physician Form 7's that were submitted, none were sufficient to show that Ms. McDonnell was unable to perform her work if she chose to do so. In fact, they were indicative of the opposite.

Dr. Jordan's Form 7 stated simply that she should avoid walking or standing for more than 20 minutes at a time (Vol. II, R. 182), but her co-workers submitted statements indicating that she was allowed to sit and elevate her ankles while teaching (Vol. II, R. 72), and Ms. McDonnell testified that she had, for her last semester, been able to teach from a sitting position at her desk (Vol. II, R. 36); Dr. Burwell's Form 7 was more vague, stating that her impairment was defined as "limited walking, standing, and climbing;" (Vol. II, R. 165) but the threshold for drawing disability payments, is not being "limited" in walking, it is being disabled from performing your job such that you must be retired.

Finally, Dr. Leavengood, her personal doctor and strongest advocate, submitted his Form 7 listing her diagnosis as "chronic foot and back pain" without describing any underlying reason or cause, disease or condition, medical or otherwise, whatsoever. (Vol. II, R. 172). In fact, the committee noted twice in its recommendation to the Board that Dr. Leavengood had failed to support his functional capacity findings with any of the standard correlating measurements. (Vol. II, R. 22, 24). As to Ms. McDonnell's limitations, Dr. Leavengood stated that because of her pain Ms. McDonnell needs to be sitting more than half of her day (Vol. II, R. 172). The record, and Ms. McDonnell's own testimony show that her pain is managed well through injections received once every three months (Vol. II, R. 43, 49

While this Court has noted that the "lack of evidence at the agency level becomes the substantial evidence on appellate review..." ***Thomas v. Public Employees' Retirement System,*** 995 So.2d 115, 119 (Miss. 2008) ***quoting Public Employees' Retirement System v. Cobb,*** 839 So.2d 605, 609-10 (Miss.Ct.App.2003), and therefore enough to "suggest the necessity of affirming the agency's decision." ***Id.***, PERS'

determination is bolstered by the fact that there was objective medical evidence which refuted Ms. McDonnell's claim also presented, in the form of the Independent Medical Examination (IME) performed by Dr. Philip Blount, an Orthopedic specialist with University Orthopedic Associates. Dr. Blount's IME, acknowledged the presence of Bilateral ankle osteoarthritis, (Vol. II, R. 113)and while she did report some pain she had not reported numbness or tingling in her feet, or falling as a result of her arthritis (Vol. II, R. 110). Furthermore, she was able to heel-to-toe walk (Vol. II, R. 113), and exhibited a full range of motion in her ankle (Vol. II, R. 113). Dr. Blount opined that she was at no risk for continuing her job as per the description provided, and that it would be **her choice** if she wanted to stop teaching. (Vol. II, R. 113). Armed with their own medical expertise, and confronted with a lack of medical evidence in favor of Ms. McDonnell's position, as well as the presence of independent medical evidence against Ms. McDonnell's position, the Committee, and the Board certainly had "more than a scintilla" of evidence on which to base their denial, and it should therefore be upheld.

Ms. McDonnell's counsel cited in his brief to the Circuit Court the case of ***Public Employees' Retirement System v. Bishop***, 942 So.2d 259 (Miss.Ct.App.2006), as "having the same fact pattern" and "[being] dispositive here. . . ." But counsel mischaracterizes the ***Bishop*** case on both propositions; ***Bishop*** is easily distinguished from the case currently before the bench.

Firstly, the facts of ***Bishop*** weighed much more heavily in the Appellant's favor in that case. For instance, Mr. Bishop's treating physician at the Ochsner clinic performed the usual pain severity tests and was able to provide an objective measurement, ***(Id. at 263)***, while Ms. McDonnell's treating physician, an internist and

allergist at Gulf Coast Asthma & Allergy Clinic, provided a Form 7 with no diagnosis beyond "chronic foot and back pain" and not even an attempt at objective quantification of the level of her pain, beyond "severe." (Vol. II, R. 172). Also, in ***Bishop***, the appellant's Functional Capacity Exam (analogous to the IME in the case at bar), indicated that he demonstrate[d] significant pain behaviors during testing such as grunting, grimacing, even "tearing up" on several occasions. ***Id. at 262.*** This can be contrasted with the case at bar, where neither the IME nor any of the Physicians' Form 7's submitted on Ms. McDonnell's behalf make note of any such behavior; rather, Dr. Blount's IME, which represents the most thorough of the examination reports submitted to the Committee notes her arthritis, and characterizes her pain level from 5-10 on a 1-10 scale level, which she **self-reports**. Not a single physician in the case at bar noticed any of the obvious signs of pain that were so persuasive in the ***Bishop*** case. ***Id at 265***. Lastly, in ***Bishop***, there was no examination report or Form 7 submitted to PERS that did not recommend disability, except for a partially completed Form 7 submitted by one of the Appellee's physicians. ***Id. at 264.*** This is the exact opposite in the case at bar, where the only examination report out of the 3 Form 7's and the IME that actually recommends disability is that of Dr. Leavengood, which the Committee found lacking for want of any quantifiable or objective rationale behind his diagnosis of "foot pain," and which failed to note or in any way take account of the pain management program that she testified was working (Vol. II, R. 172). The fact pattern in ***Bishop***, then, is not even similar to the case at bar, and is accordingly not relevant, let alone dispositive, to this case.

II. The Circuit Court erred in holding that the decision of the Board of Trustees of the Public Employees' Retirement System is arbitrary and capricious.

The Circuit Court erred in holding that the PERS decision was arbitrary and capricious. In order for this Court to conclude that the PERS Order is arbitrary or capricious, it would have to conclude that the Board's ruling was "not done according to reason and judgment, but depending on the will alone." ***Public Employees' Retirement System v. Howard***, 905 So. 2d 1279, 1285 (Miss. 2005) The Court in ***Howard*** also noted "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.

The Circuit Court provides no analysis to support its assertion that a panel of doctors, who are faced with two differing medical opinions on whether or not a patient is disabled, may not find one of the opinions more compelling and actually agree with it. In a very real way, this is, in fact the raison d'etre of the Committee. Composed exclusively of medical professionals, two physicians and one attorney-nurse, it is there to parse the medical evidence to determine what is compelling and what is not. The Mississippi Supreme Court has heard this very argument before, and agreed that the Committee has the sole responsibility for discerning what medical reports or physician opinions are more compelling in cases where they conflict: "The weight given to the statements of a personal physician is determined by PERS, and it is not for the courts to reweigh the facts." ***Public Employees' Retirement System v. Stamps,*** 898 So.2d 664, 674 (Miss. 2005); *See also:* ***Byrd v. Public Employees' Retirement System***, 774 So.2d 434, 438

(Miss. 2000); ***Brakefield v. Public Employees' Retirement System,*** *940* So. 2d 945, 948 (Miss.Ct.App. 2006); ***Case v. Public Employees' Retirement System,*** 973 So.2d 301, 315 (Ms.Ct.App. 2008). That the Committee can give more weight to one physician's report than another's is now settled law in Mississippi. Were it not so, PERS could not pass upon any application in which medical opinions conflicted (which characterizes a majority of cases before the Appeals Committee).

In the case before this honorable Court, the Committee found Dr. Blount's opinions more compelling than Dr. Leavengood's because his specialty was more relevant to the medical condition at hand, and his examination was more thorough, (Vol. II, R. 24) - a fact conceded to by the Appellee herself in her brief to the Circuit Court. There is no wrong in the Committee performing the function for which it was created. Were the Committee not expected to parse the medical records and opinions and use their own expert judgment to determine what is compelling and what is not, there would be no reason for comprising it almost exclusively of physicians. The fact that the Committee found Dr. Blount's opinion on the matter more compelling than Dr. Leavengood's does not make their decision arbitrary; quite the opposite - it makes it prudent.

The Committee, then, had substantial evidence on which to base their decision: They had a lack of evidence supporting the supposition that Ms. McDonnell's pain was disabling, especially in light of the fact that she testified that it was controlled well with regular cortisone shots; they had their own medical education and training coupled with a thorough examination of the appellee, her medical records, physician's statements, even a brief examination of her ankles; finally, they had the Independent Medical Examination of a specialist in orthopedics who opined that she was at no danger by continuing her

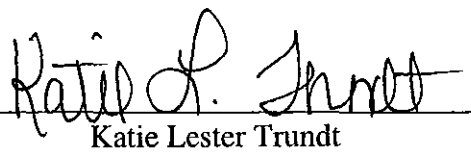
occupation. Therefore, PERS' decision to deny Ms. McDonnell's disability benefits should be affirmed.

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 August 26, 2008.

Respectfully submitted this the **26th** day of July 2010.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
APPELLEE

By: 
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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:

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

This the **26** day of July 2010

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