IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-SA-01671

PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI — APPELLANT

VERSUS

WILLIAM COLLINS — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
CAUSE NO. 251-09-71 CIV

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Public Employees'Retirement System of Mississippi, Appellant
2. William Collins, Appellee
3. Honorable Winston L. Kidd
4. Jane L. Mapp, Katie Lester Trundt, Attorneys for Appellant
5. Matthew S. Lott, Hanson Horn, Attorneys for Appellee

Respectfully submitted, this the 12th day of April, 2011.

APPELLEE, WILLIAM COLLINS

By: _____
Matthew S. Lott (MSB No. [redacted])
Hanson Horn (MSB No[redacted])

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BRIEF OF APPELLEE, WILLIAM COLLINS

COMES NOW, the Appellee, William Collins, in the above-styled and numbered cause, by and through his attorneys of record, Dogan & Wilkinson, PLLC, and files this brief, to show as follows:

I. STATEMENT OF THE ISSUES

A. THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MR. COLLINS' CLAIM FOR DISABILITY BENEFITS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.

II. STATEMENT OF THE CASE[1]

Mr. Collins filed a claim for disability benefits on June 6, 2008 with the Public Employees' Retirement System due to disabling coronary artery disease. His claim was denied by the Public Employees' Retirement System Medical Board on September 5, 2008. Mr. Collins appealed this decision to the Disability Appeals Committee of the Public Employees' Retirement System (hereinafter sometimes referred to as "Committee"). (Vol. II, R. 11). A hearing was held on November 14, 2008 and a decision was rendered denying benefits on December 16, 2008. (Vol. II, R. 14). The Circuit Court for the First Judicial District of Hinds County found that the Committee's decision was not supported by substantial evidence, and was arbitrary and capricious. (Vol. II, R. 14). On February 3, 2010, the Circuit Court entered an order reversing the decision Committee. (Vol. II, R. 14). Aggrieved by the decision, PERS filed this appeal.

III. STATEMENT OF THE FACTS

The Claimant, William Collins, is a 57-year-old man who resides in Hurley, Mississippi in Jackson County. He completed high school and worked for twenty-five years at International Paper in Moss Point, Mississippi before the plant shut down. He began working for the Jackson County School District at the East Central school as a maintenance worker and continued to

[1] References to the Record are indicated by "R." followed by the appropriate page number.

work as a maintenance worker throughout his time at the school before ceasing his employment on June 30, 2008. (Vol. II, R. 93). He has 5.5 years of service credit. (Vol. II, R. 15). He ceased this employment at the recommendation of his cardiologist, as he was unable to perform his duties as a maintenance worker due to his severe coronary artery disease. (Vol. II, R. 89). For this disease, he has undergone stenting procedures as well as a variety of other treatments.

Mr. Collins' duties as a maintenance worker vary widely, but include such things as building cabinets, building sidewalks, building add-ons to the school, roof repairs, hanging shelves for teachers and replacing lightbulbs, among other duties. Mr. Collins last worked on June 30, 2008, because he was fatigued and experiencing severe chest pain and could no longer do his job. (Vol. II, R. 16). He was further told by his cardiologist that he had three more arteries with disease but was not ready for stenting.(Vol. II, R. 16). Mr. Collins reported upon returning to work, he would feel pressure in his chest upon exertion, lack of energy and his blood pressure was elevated. (Vol. II, R. 16).

Mr. Collins was admitted to the hospital on April 20, 2006 for complaints of chest pain with exertion, loss of stamina and feeling tired (Vol. II, R. 197). He underwent an angioplasty on April 21, 2006 by Dr. George A. Feghali for severe angina with severe left circumflex and first obtuse marginal stenosis. (Vol. II, R. 206). A nuclear scan was performed on Mr. Collins' heart on June 1, 2006 which was normal. (Vol. II, R. 137). On September 11, 2006, Mr. Collins was seen for follow-up by Dr. Zayed. (Vol. II, R. 136). Mr. Collins reported he was feeling worse than before the stent. (Vol. II, R. 136). The doctor noted the stent had excellent results, although Mr. Collins had borderline blockage of the right coronary artery at 60-65%. (Vol. II, R. 136).

On March 5, 2008, Mr. Collins returned to see Dr. Feghali, and he wrote that he had seen Mr. Collins for CAD (coronary artery disease) and two stents and that his severe chest pain had

resolved after the procedure. (Vol. II, R. 132). Dr. Feghali later recommended a heart catheterization and wrote a prescription for Coreg CR and Plavix. (Vol. II, R. 133). Mr. Collins returned to the hospital on March 7, 2008 for his catheterization, and he was found to have one vessel with significant disease. (Vol. II, R. 120). Tests showed in-stent restenosis, hyperlipidemia and obesity (although Mr. Collins is far from obese). (Vol. II, R. 120-121). Another stent was inserted, and Mr. Collins was placed on Aspirin and statins for life, Plavix for a year or two, cardiac rehabilitation, including diet and exercise education. (Vol. II, R. 120-121). When Mr. Collins returned to Dr. Feghali on March 19, 2008, he reported he was doing fine and denied exertional chest pain and shortness of breath. (Vol. II, R. 115). Mr. Collins returned again to Dr. Feghali on May 21, 2008 reporting he had done well until he tried to return to work, and then he began developing substernal chest pain radiating from his left upper extremity. (Vol. II, R. 113). He continued to try to work, until he felt he could no longer work after his surgery in May of 2008. (Vol. II, R. 32).

Mr. Collins went to see Dr. Feghali again on July 2, 2008, returning with complaints of chest pain on exertion, and it was found that he had developed in-stent restenosis of the distal edge of the obtuse marginal branch stent. (Vol. II, R. 75). Another stent was used to reopen the vessel. (Vol. II, R. 75). Mr. Collins reported that his chest pain had resolved since the procedure, but that he was experiencing fatigue, lack of energy and shortness of breath. (Vol. II, R. 75). Dr. Feghali wrote a memo dated September 11, 2008 which stated he had treated Mr. Collins since 2006 for coronary artery disease, and that he pulled Mr. Collins from work because of unstable angina, and re-stenting due to restenosis. (Vol. II, R. 89; *See Memo attached as Exhibit A*). Dr. Feghali wrote that Mr. Collins continued to develop shortness of breath and chest pain at work due to physical activity. (Vol. II, R. 89; *See Exhibit A*).

Dr. Feghali stated that he stands by his decision to pull Mr. Collins from work per correspondence on February 12, 2009. He indicates that Mr. Collins is indeed disabled in that he is unable physiologically to perform the duties of a maintenance worker. (*See letter from Dr. Feghali, attached as Exhibit B*).

Mr. Collins underwent an independent medical evaluation on July 30, 2008 by Dr. Peeples. (Vol. II, R. 101). Dr. Peeples is a general practitioner, not a cardiologist, and saw Mr. Collins on one brief occasion for a total of fifteen (15) minutes. (Vol. II, R. 101). Dr. Peeples incorrectly reviewed Mr. Collins as a firefighter. (Vol. II, R. 101). Dr. Peeples reviewed the medical record and performed a physical exam. (Vol. II, R. 101). He clearly noted CAD, but discounted the complaints by Mr. Collins as psychiatric in origin. (Vol. II, R. 101-103) However, he neither stated Mr. Collins' complaints were unwarranted nor that he was malingering. (Vol. II, R. 101-103). Dr. Peeples concluded Mr. Collins, in his opinion, was not physically or psychologically disabled to a point that would result in permanent and likely total occupational disability. (Vol. II, R. 101-103). However, he did note that the case will probably need to be followed to evaluate Mr. Collins' depression. (Vol. II, R. 103).

At the hearing held on November 14, 2008, Mr. Collins testified he had never been to the doctor in his life, but began declining in health in 2006. After the initial stents were inserted, he stated:

> . . . I got them [blockages] fixed and went right back to work. I thought I was well. I didn't even go back to the doctor. Well, a year later it clogged back up, and I had to go back to the doctor then to get that fixed. Then I just kept feeling worse and worse, and I just couldn't do it. It got to where I didn't have no energy. After about two or three hours of work, I was give out. So I had to go back, and I have three more arteries clogging up, but they ain't far enough for them to put in stents, and I just got to where I couldn't go . . . It started hurting like somebody was sitting on my chest. Just didn't feel good . . . (Vol. II, R. 32- 33).

Mrs. Collins summarized her husband's illness succinctly:

Mainly the problem is not so much with the heart as it is with the heart disease. Like he said when he went back in that last catheterization that y'all have records on, June or July, that there was already a build up within the stents, and the other arteries, but it would have to be 75 percent before they will do anything, and he said it is progressive, and he said his is progressing faster than he would like for it too, but a lot of it is because he cannot tolerate medicine. And he is a stressed person anyway. I mean, he's always been stressed. Things make him uptight and he said that is a lot of his problem because he is stressed and it just locks him up and he starts having the high blood pressure, the flushing of the face, and just to reiterate what he said, he has worked so hard all the time. He's a workaholic. He would come home from work and get outside and work. We have 30 acres and there's always something to do, and the last year I have seen him go down and down. He would go to work, and by noon he would come to my room and his face would be flushed or he would be pale and he would be at the nurses' station. . . . He doesn't want to go anywhere any more. He has no desire or energy to go anywhere or to do anything. I went on vacation by myself last year. (Vol. II, R. 39-41).

The Committee denied Mr. Collins' claim. However, on appeal, the Circuit Court of the Fist Judicial District of Hinds County reversed the findings of the Committee based on the Committee's arbitrary and capricious judgment which is unsupported by the substantial evidence in favor of the Claimant. (Vol. II, R. 14).

IV. SUMMARY OF THE ARGUMENT

The Public Employees' Retirement System's (hereinafter sometimes referred to as "PERS") judgment denying benefits to Mr. William Collins was unsupported by the substantial evidence and was arbitrary and capricious. PERS ignored the medical diagnosis and recommendations of Mr. Collins' cardiologist of several and made their decision based on the findings of a general practitioner who evaluated Mr. Collins for a total of fifteen minutes. The Committee also failed to conduct any professional evaluation regarding Mr. Collins' emotional, mental, and psychological issues, although it was a topic of importance as evidenced by their repeated questioning of Mr. Collins on the issue. The Hinds Circuit Court applied the correct standard and properly reversed the Committee's ruling to find in favor of Mr. Collins.

V. ARGUMENT

A. Standard of Review

The Supreme Court applies the same standard of review that the lower courts are obligated to follow when reviewing the decisions of a circuit or chancery court regarding an action by an agency. *Eash v. Imperial Palace of Mississippi, LLC*, 4 So. 3d 1042 (Miss. 2009); *Public Employees' Retirement System v. Marquez*, 774 So.2d 421, 429 (Miss. 2000). Review of administrative agency decisions by this court and appellate courts is limited. (See URCCC 5.03). Rule 5.03 of the Uniform Rules of Circuit and County Court Practice provides that an agency's decision will not be disturbed on appeal unless the judgment was: (1) unsupported by substantial evidence, (2) arbitrary and capricious, (3) beyond the power of the agency, or (4) violates the complainant's statutory or constitutional rights. See *Pub. Employees' Ret. Sys. v. Smith*, 880 So.2d 348, 350-51 (Miss. Ct. App. 2004) (citing *Pub. Employees' Ret. Sys. v. Dearman*, 846 So.2d 1014, 1018 (Miss. 2003)). This court may not substitute its judgment for that of the administrative agency, and may not reweigh the evidence. *Pub. Employees' Ret. Sys. v. Howard*, 905 So.2d 1279, 1284 (Miss. 2005). If an agency's decision is not based on substantial evidence, it will be deemed arbitrary and capricious. *Pub. Employees' Ret. Sys. v. Allen*, 834 So.2d 50, 53 (Miss. Ct. App. 2002). "Substantial evidence" has been defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Pub. Employees' Ret. Sys. v. Marquez*, 774 So.2d 421, 425 (Miss. 2000). It is "more than a `mere scintilla' or suspicion." *Id.*

An agency decision is "arbitrary" if "it is not done according to reason and judgment, but depending on the will alone." *Public Employees' Retirement System*, 774 So.2d at 429; *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So.2d 973, 977 (Miss.1999). A "capricious" decision is "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.* If there is

substantial evidence supporting the agency's decision, the reviewing court must give this decision substantial deference. *Pub. Employees' Ret. Sys. v. Cobb*, 839 So.2d 605, 609 (Miss. Ct. App. 2002).

B.Argument and Authorities

The Public Employees' Retirement System judgment denying benefits to Mr. William Collins was unsupported by the substantial evidence and was arbitrary and capricious

Mr. Collins seeks disability benefits under Mississippi Code Annotated Section 25-11-113(1)(a) (Rev.2007). For disability retirement determination under this section there are two requirements. First, the medical board, after an evaluation of medical evidence, must certify that "the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired." Miss.Code Ann. § 25-11-113(1)(a) (Rev.2007). Then, the medical board shall apply the statutory definition of "disability" which is "[t]he 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." *Id.*

Mr. Collins was not offered any other covered employment. Therefore, PERS had to determine only whether he was unable to perform the usual duties of employment due to mental or physical incapacity for the further performance of duty and whether such incapacity was likely to be permanent such that he should be retired. Miss. Code Ann. § 25-11-113(1)(a) (Rev. 2007). An employee must prove non-work related permanent retirement disability to the PERS Medical Board according to the legal requirements of Mississippi Code Annotated Section 25-11-113(1)(a). The agency, not the reviewing court, acts as the finder of fact. *Cobb*, 839 So.2d at 609 (citing *Metal Trims Indus., Inc. v. Stovall*, 562 So.2d 1293, 1296 (Miss. 1990)). Fact-finding includes evaluating the testimony of witnesses for credibility. *Id.* PERS has the sole

responsibility of assessing the evaluations by medical personnel and determining which evaluations to rely upon. *Johnston v. Pub. Employees' Ret. Sys.*, 827 So.2d 1, 3 (Miss. Ct. App. 2002) (citing *Byrd v. Pub. Employees' Ret. Sys.*, 774 So.2d 434, 438 (Miss. 2000)).

However, "[s]orting through voluminous and contradictory medical records, then determin[ing] whether an individual is permanently disabled is better left to physicians, not judges." *Howard*, 905 So.2d at 1287. The purpose of the Appeals Committee is to evaluate proof, not offer evidence. A Claimant does not have to prove with absolute medical certainty that his work-related injuries were the cause of his disability but where there is a dispute between medical and non-medical (i.e., non-physician) testimony, the medical testimony should prevail. *Johnson v. Ferguson,* 435 So.2d 1191, 1193 (Miss. 1983).

In *Dishmon*, the court held, "[t]he question here is not whether there was evidence in support of Dishmon's disability, but whether there was substantial evidence to support the finding of the administrative agency. The standard of review limits this Court to reviewing the lower court's decision to determine whether the record can support this finding. . . ." *Pub. Employees' Ret. Sys. v. Dishmon*, 797 So.2d 888, 892 (Miss. 2001).

The Committee failed to provide substantial evidence for its decision by omitting key elements necessary to a proper decision. As stated, the central issue for the Committee to address was whether or not Mr. Collins is disabled. Disability in the statute is the capacity to perform usual duties of employment or the incapacity to perform such lesser duties. The Committee never addressed Mr. Collins' inability to perform his usual duties of employment. While they find the evidence persuasive that he is not disabled, the Committee failed to evaluate Mr. Collins based on his duties as a maintenance worker. In fact, the Committee incorrectly evaluated him as a firefighter initially. (Vol. II, R. 101)

Assistant Superintendent Mr. Dino Vecchio filled out PERS form 6B, Employers Certification of Job Requirements. Mr. Vecchio noted voluntary termination/resignation as the physician would not release Mr. Collins to return to work. (Vol. II, R. 95-96). Mr. Vecchio recorded that Mr. Collins' job requires continuous walking, standing, squatting, kneeling, bending and lifting up to fifty pounds. *Id.* The job also frequently requires crawling and stair climbing. *Id.* On rare occasions Mr. Collins would have to lift fifty to one hundred pounds. *Id.* Other activities of a maintenance worker involve overhead work, working on unprotected heights, continuous use of machinery, driving automotive equipment, as well as exposure to the outside elements. *Id.* There is frequent use of hand tools and power tools. *Id.* Mr. Vecchio opined that Mr. Collins is unable to perform his job. *Id.* He also noted Mr. Collins appears to be motivated towards continuing the current employment, but he has not been offered another job within the school without material reduction and compensation or change in location of employment. *Id.*

As illustrated above, a maintenance worker is primarily hands on and physical in nature. To make an assessment of disability, one must properly look at what the individual performs on a daily basis and evaluate the condition of the individual in relation to his duties. The record is devoid of such a finding, as it appears the Committee was unconcerned about how Mr. Collins felt during work. While working, Mr. Collins stated, "[i]t seems like some times somebody is sticking an ice pick in me and it's coming out between my ribs - I mean my shoulder blades." (Vol. II, R. 48-49). However, the Committee never mentions this in its ruling. Therefore, the Committee clearly failed to evaluate him in relation to his work environment, making their ruling erroneous and without basis.

Further indication of the poor assessment by the Committee, is that they note in its proposed statement that Mr. Collins' stenting procedures have been very successful even though

he had to have one stent redone. (Vol. II, R. 22). Yet, the record shows while Mr. Collins initially recovered quickly and returned to work after his first stent procedure, within a few months he was back for re-stenting due to further blockage. The stenting procedures and heart testing has been almost continuous since 2006, and Mr. Collins has returned to work after each surgery or test until the summer of 2008. Mr. Collins has shown a pattern of initial recovery post-stent, and even stress testing has initially revealed normal heart function, however, with time he continued to have problems that require further procedures.

The Committee notes that possibly one of the reasons for the replacement of one stent is that, "Mr. Collins has not been the most compliant with his medications, and that Mr. Collins is not making a serious change in his lifestyle." (Vol. II, R. 22). This is not a finding but a moral judgment. It is not for the Committee to judge Mr. Collins' lifestyle when it has no first hand knowledge of his lifestyle and does not cite any medical records showing non-compliance with medications. Furthermore, it is not proper for the Committee to judge the claimant's lifestyle when the only question is whether or not he is disabled. The Committee discounts Mr. Collins' chief complaints without taking into account the severity of his coronary artery disease, the fact that his doctor feels his condition is severe enough that he took him out of work, and the fact Mr. Collins has worked without leave his entire adult life until now.

The Committee submits in its ruling that "a diagnosis does not equal a disability", however, inversely a disability can come without a clear diagnosis. In *Marquez*, PERS denied benefits though the claimant presented medical evidence of numerous medical problems, including fibromyalgia, that suggested she could not perform the usual duties of her job as a school teacher. *Marquez*, 774 So.2d at 427. PERS denied benefits in part because there was a lack of objective medical evidence and Marquez's more recent medical problems were based on her subjective complaints. *Id.* at 426. Regarding PERS's rationale for the denial, the Supreme

Court stated: "[i]f medical diagnoses by licensed physicians are to be labeled 'subjective' evidence of medical ailments, it is unclear what PERS would consider to be 'objective' evidence." *Id.* at 427. Yet, the Supreme Court has held that medical diagnoses by licensed physicians are objective, not subjective, evidence of disability. *Id.* PERS cannot choose to ignore the only evidence in the record from the treating physician, a well-respected cardiologist who has been treating Mr. Collins for more than two years, especially where it chose not to exercise its statutory right to an independent medical evaluation by a proper specialist. Also, even though two doctors, Drs. Meeks and Blackston, attended the hearing and questioned Mr. Collins, there is absolutely no evidence in the record of any findings, assessments or opinions from these physicians. It would seem that PERS would be reliant on these physicians' opinions, however, a lack of record on any opinions by Drs. Meeks and Blackston leads to the conclusion that PERS relied totally on its own lay assessment rather than make an proper assessment based on medical testimony. "The substantial evidence that is sufficient to withstand appellate scrutiny cannot be evidence contained within the confines of the [heads of the doctors sitting on the PERS medical board]. It must be evidence in the record." *Pub. Employees' Ret. Sys. v. Thomas*, 809 So. 2d 690, 694 (Miss. Ct. App. 2001).

As this Court stated in *Flowers v. Pub. Employees' Ret. Sys.*, 952 So.2d 972, 980 (Miss. Ct. App. 2006), "[p]art of the benefit of having physicians on the Disability Appeals Committee is so that they can analyze the medical claims." "When a thorough set of findings and conclusions explain the expertise that those physicians applied, [the court] finds no fault in relying on such expertise." *Id.* "What is required [of the Committee] is an explanation that goes beyond mere conclusions." *Id.* at 981. Ultimately, the opinion of the PERS medical board is not evidenced in the record. Thus, it follows that PERS' decision to deny Mr. Collins disability benefits is not supported by substantial evidence and is, therefore, arbitrary and capricious.

The Committee further eludes the issue that there may be some psychological issues going on with Mr. Collins and fail to address the debilitating nature of depression or anxiety. Even though Mr. Collins stated he does not have emotional problems, the Committee never makes a finding that he is not disabled due to any depression or anxiety. Based on its speculation in the ruling, it obviously felt it needed further information on his depression and anxiety. "The medical board may request additional medical evidence and/or other physicians to conduct an evaluation of the member's condition." Miss.Code Ann. § 25--11--113(1)(e) (Rev.2007). Therefore, there is a gap in their reasoning on this issue.

According to Dr. Peoples, he stated Mr. Collins was referred for psychiatric treatment for depression and this case will probably need to be followed to see how he does with treatment for this depression. (Vol. II, R. 103). However, he cannot say that Mr. Collins is currently disabled from a medical standpoint. (Vol. II, R. 103). It should be noted that Dr. Peoples did not recommend follow-up for a psychiatric exam for Mr. Collins, and the Committee has not requested a medical exam of Mr. Collins' psychological health. The Committee is certainly within it rights to request an independent medical evaluation, psychologically speaking, but it has failed to due so despite its concerns about Mr. Collins' mental health. The Committee questioned Mr. Collins' extensively on his depression and anxiety and its relation to his physical complaints. It is obvious from the hearing transcript that the Committee suspects that Mr. Collins chief complaints are related to depression and anxiety, as the hearing officer states, "That's why we keep asking you about depression. Have you considered seeing a psychiatrist?" (Vol. II, R. 57). But there are no findings of fact as to his disability in this regard, and as stated, they have requested no follow-up.

Mr. Collins spoke about his stress and anxiety at his hearing:

> Q. I guess in a clinic note on May 28 he said you had tremendous stress; you had fatigue, shortness of breath, and were depressed, although he said you had stopped, I guess, working a little bit before this, and had actually started doing exercise and felt better with exercise.
>
> A. That was all - I tried to exercise to get back in shape and clear my vessels. They said that would help; and at first it was doing good, you know, and I kept working, but I got to feeling worse and worse, and I don't hunt and fish any more. She [Mrs. Collins] can tell you. I come in while I was working and couldn't do nothing.
>
> Q. What did y'all talk about as far at first, stress. He talks about tremendous stress. What was going on there?
>
> A. I had 250 women up there, teachers and cafeteria women, and custodians, and everyone of them grabbing me to do something, and I tried to do it all, and I couldn't.

(Vol. II, R. 35)

*****

> A. I did not get depressed until after I had resigned from work. That was the hardest thing I have ever done, and not being able to do what I used to do. I don't feel worthy, I can't do nothing. Like I said my heart's all right, it's the best it's going to be. I'm depressed because I can't work. Depression didn't take me out of work. I got depressed after the fact. (Vol. II, R. 43).

*****

> A. . . . they had in that file I was depressed. And that ain't so. I'm depressed because I can't work, and that's what got me in the depression. I've worked all my life. I wish I could be working. I got grandkids up there, my wife's there. I wasn't planning on going nowhere. I just got to where I couldn't do it. (Vol. II, R. 33).

It is clear that Mr. Collins has a disability physically and potentially emotionally based on the testimony and medical evidence. The Committee simply disregarded the substantial weight of the evidence in favor of disability and relied on the only evidence in favor of its decision - a general practice doctor hired by PERS who examined Mr. Collins for fifteen minutes. Further, despite the significant questioning by the Committee and its right to seek psychiatric evaluation

of Mr. Collins, the Committee failed to make a disability finding, psychologically speaking. There is insubstantial evidence to support the PERS decision and its decision is arbitrary and capricious.

VI. CONCLUSION

The Committee discounted Mr. Collins' chief complaints without taking into account the severity of his coronary artery disease, the fact that his doctor feels his condition is severe enough that he took him out of work, and the fact Mr. Collins has worked without leave his entire adult life until now. The substantial evidence from Mr. Collins' physicians is that he is unable to perform his duties as a maintenance worker. The Committee failed to make a proper assessment of him in relation to his job duties, which require a great deal of physical fitness. The Committee further failed to assess his potential emotional and psychological disability and have him evaluated for depression and anxiety despite their repeated questioning of Mr. Collins on this subject.

Therefore, the Public Employees' Retirement System judgment denying benefits to Mr. William Collins was unsupported by the substantial evidence and was arbitrary and capricious. The Hinds County Circuit Court found it was arbitrary and capricious and this Court should do so as well.

Respectfully submitted, this the 12th day of April, 2011.

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CERTIFICATE OF SERVICE

I, Hanson Horn, hereby certify that I have mailed, via United States First Class Mail, the original and four copies of BRIEF OF APPELLEE to the Clerk of the Supreme Court of the State of Mississippi, Kathy Gillis, Post Office Box 249, Jackson, Mississippi 39205-0249, for filing in the record. I have also served the BRIEF OF APPELLEE, to the following, via United States First Class Mail:

Honorable Winston L. Kidd
Circuit Court Judge of Hinds County
P.O. Box 327
Jackson, MS 39205-0327

Jane L. Mapp
Katie Lester Trundt
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, MS 39201-1005

This the 12th day of April, 2011.

Hanson Horn
HANSON HORN

EXHIBIT A

SOUTHERN MISSISSIPPI
HEART CENTER, P.A.

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Fellow of The American College of Cardiology and The Society for Cardiac Angiography & Interventions
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WILLIAM O. PASSARELLI III, M.D., FACC
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SEPTEMBER 11, 2008

RE: WILLIAM DWIGHT COLLINS

Mr. Collins is a patient whom I have been treating since 2006 for Coronary Artery Disease. I have pulled him from work due to unstable angina, and re-stenting due to restenosis. Patient continues to develope shortness of breath and chest pain when at work due to physical activity.

If you need any other information, please do not hesitate to contact my office.

Sincerely,

Georges A. Feghali,M.D.

EXHIBIT B

PASC Pt

WILKINSON, WILLIAMS, KINARD, SMITH & EDWARDS

ATTORNEYS AT LAW

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[1] ALSO LICENSED IN AL
[2] LICENSED IN LA ONLY
[3] LICENSED IN TX ONLY
[4] ALSO LICENSED IN LA
[5] ALSO LICENSED IN AL AND TX

February 12, 2009

Dr. George A. Feghali M.D.
3704 Bienville Boulevard, Suite B
Ocean Springs, MS 39564

Dear Dr. Feghali:

My name is Matthew Lott, and I represent Mr. William Collins, a patient of yours, in an appeal from the denial of his disability retirement benefits from the Public Employee Retirement System. Your opinions with regard to the status of Mr. Collins and his health would be greatly appreciated. As you know, Mr. Collins was a maintenance worker for the Jackson County School District before ceasing his employment on June 30, 2008. He ceased this employment at your recommendation as he was unable to perform his duties as a maintenance worker due to his severe coronary artery disease. For this disease, he has undergone stenting procedures as well as a variety of other treatments.

Mr. Collins last worked on June 30, 2008, because he was fatigued and experiencing severe chest pain and could no longer do his job. He was further told he had three more arteries with disease but was not ready for stenting. Mr. Collins reported upon returning to work, he would feel pressure in his chest upon exertion, and his blood pressure was elevated.

Mr. Collins was admitted to the hospital on April 20, 2006 for complaints of chest pain with exertion, loss of stamina and feeling tired. He underwent an angioplasty on April 21, 2006 by you for severe angina with severe left circumflex and first obtuse marginal stenosis. A nuclear scan was done on Mr. Collins' heart on June 1, 2006 which was normal. On September 11, 2006, Mr. Collins was seen for follow-up by Dr. Zayed. Mr. Collins reported he was feeling worse than before the stent. The doctor noted the stent had excellent results, although Mr. Collins had borderline blockage of the right coronary artery at 60-65%.

On March 5, 2008, Mr. Collins returned to see you, and you wrote that we had seen Mr. Collins for CAD and two stents and that his severe chest pain had resolved after the procedure. You later recommended a heart catheterization and wrote a prescription for Coreg CR and Plavix. Mr. Collins returned to the hospital on March 7, 2008 for his catheterization, and he was found to have one vessel with significant disease. Tests showed in-stent restenosis, hyperlipidemia and obesity. Another stent was inserted, and Mr. Collins was placed on Aspirin and statins for life, Plavix for a year or two, cardiac rehabilitation, including diet and exercise education. When Mr. Collins returned to you on March 19, 2008, he reported he was doing fine and

denied exertional chest pain and shortness of breath. Mr. Collins returned again to you on May 21, 2008 reporting he had done well until he tried to return to work, and then he began developing substernal chest pain radiating from his left upper extremity. However, he continued to work.

Mr. Collins went to see you again on July 2, 2008, returning with complaints of chest pain on exertion, and it was found that he had developed in-stent restenosis of the distal edge of the obtuse marginal branch stent. Another stent was used to reopen the vessel. Mr. Collins reported that his chest pain had resolved since the procedure, but that he was experiencing fatigue, lack of energy and shortness of breath. Then, you wrote a memo dated September 11, 2008 which said you had treated Mr. Collins since 2006 for coronary artery disease, and that you pulled Mr. Collins from work because of unstable angina, and re-stenting due to restenosis. You wrote that Mr. Collins continued to develop shortness of breath and chest pain at work due to physical activity.

My question to you doctor is, if disability is the inability to perform the usual duties of employment or the incapacity to perform such lesser duties without reduction in compensation, in your professional opinion is Mr. Collins disabled from his employment as a maintenance worker?

Yes, I agree GF No, I disagree _____

Sincerely,

Matthew S. Lott

wrong (no stent used & medical therapy recommended)

/llh

ADDENDUM

C

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Uniform Rules of Circuit and County Court Practice
Rule 5. 03. Scope of Appeals from Administrative Agencies

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or

2. Was arbitrary or capricious; or

3. Was beyond the power of the lower authority to make; or

4. Violated some statutory or constitutional right of the complaining party.

CREDIT(S)

[Adopted effective May 1, 1995.]

Current with amendments received through October 1, 2010

END OF DOCUMENT

West's Annotated Mississippi Code Currentness
Title 25. Public Officers and Employees; Public Records
Chapter 11. Social Security and Public Employees' Retirement and Disability Benefits
Article 3. Additional State Retirement and Disability Benefits (Refs & Annos)

§ 25-11-113. Disability retirement eligibility and allowances

(1)(a) Upon the application of a member or his employer, any active member in state service who became a member of the system before July 1, 2007, and who has at least four (4) years of membership service credit, or any active member in state service who became a member of the system on or after July 1, 2007, who has at least eight (8) years of membership service credit, may be retired by the board of trustees on the first of the month following the date of filing the application on a disability retirement allowance, but in no event shall the disability retirement allowance begin before termination of state service, provided that the medical board, after an evaluation of medical evidence that may or may not include an actual physical examination by the medical board, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired; however, the board of trustees may accept a disability medical determination from the Social Security Administration in lieu of a certification from the medical board. For the purposes of disability determination, the medical board shall apply the following definition of disability: the inability to perform the usual duties of employment or the incapacity to perform such lesser duties, if any, as the employer, in its discretion, may assign without material reduction in compensation, or the incapacity to perform the duties of any employment covered by the Public Employees' Retirement System (Section 25-11-101 et seq.) that is actually offered and is within the same general territorial work area, without material reduction in compensation. The employer shall be required to furnish the job description and duties of the member. The employer shall further certify whether the employer has offered the member other duties and has complied with the applicable provisions of the Americans With Disabilities Act in affording reasonable accommodations that would allow the employee to continue employment.

(b) Any inactive member who became a member of the system before July 1, 2007, with four (4) or more years of membership service credit, or any inactive member who became a member of the system on or after July 1, 2007, with eight (8) or more years of membership service credit, who has withdrawn from active state service, is not eligible for a disability retirement allowance unless the disability occurs within six (6) months of the termination of active service and unless satisfactory proof is presented to the board of trustees that the disability was the direct cause of withdrawal from state service.

(c) Any member who is or becomes eligible for service retirement benefits under Section 25-11-111 while pursuing a disability retirement allowance under this section or Section 25-11-114 may elect to receive a service retirement allowance pending a final determination on eligibility for a disability retirement allowance or withdrawal of the application for the disability retirement allowance. In such a case, an application for a disability retirement allowance must be on file with the system before the beginning of a service retirement allowance. If the application is approved, the option selected and beneficiary designated on the retirement application shall be used to determine the disability retirement allowance. If the application is not approved or if the application is withdrawn, the service retirement allowance shall continue to be paid in accordance with the option selected. No person may apply for a disability retirement allowance after the person begins to receive a service retirement allowance.

(d) If the medical board certifies that the member is not mentally or physically incapacitated for the future performance of duty, the member may request, within sixty (60) days, a hearing before the hearing officer as provided in Section 25-11-120. All hearings shall be held in accordance with rules and regulations adopted by the board to govern those hearings. The hearing may be closed upon the request of the member.

(e) The medical board may request additional medical evidence and/or other physicians to conduct an evaluation of the member's condition. If the medical board requests additional medical evidence and the member refuses the request, the application shall be considered void.

(2) Allowance on disability retirement.

(a) Upon retirement for disability, an eligible member shall receive a retirement allowance if he has attained the age of sixty (60) years.

(b) Except as provided in paragraph (c) of this subsection (2), an eligible member who is retired for disability and who has not attained sixty (60) years of age shall receive a disability benefit as computed in Section 25-11-111(d)(1) through (d)(4), which shall consist of:

(i) A member's annuity, which shall be the actuarial equivalent of his accumulated contributions at the time of retirement; and

(ii) An employer's annuity equal to the amount that would have been payable as a retirement allowance for eligible creditable service if the member had continued in service to the age of sixty (60) years, which shall apply to the allowance for disability retirement paid to retirees receiving such allowance upon and after April 12, 1977. This employer's annuity shall be computed on the basis of the average "earned compensation" as defined in Section 25-11-103.

(c) For persons who become members after June 30, 1992, and for active members on June 30, 1992, who elect benefits under this paragraph (c) instead of those provided under paragraph (b) of this subsection (2), the disability allowance shall consist of two (2) parts: a temporary allowance and a deferred allowance.

The temporary allowance shall equal the greater of (i) forty percent (40%) of average compensation at the time of disability, plus ten percent (10%) of average compensation for each of the first two (2) dependent children, as defined in Sections 25-11-103 and 25-11-114, or (ii) the accrued benefit based on actual service. It shall be payable for a period of time based on the member's age at disability, as follows:

Age at Disability	Duration
60 and earlier	to age 65
61	to age 66
62	to age 66
63	to age 67
64	to age 67
65	to age 68
66	to age 68

67	to age 69
68	to age 70
69 and over	one year

The deferred allowance shall begin when the temporary allowance ends and shall be payable for life. The deferred allowance shall equal the greater of (i) the allowance that would have been payable had the member continued in service to the termination age of the temporary allowance, but no more than forty percent (40%) of average compensation, or (ii) the accrued benefit based on actual service at the time of disability. The deferred allowance as determined at the time of disability shall be adjusted in accordance with Section 25-11-112 for the period during which the temporary annuity is payable. In no case shall a member receive less than Ten Dollars ($10.00) per month for each year of service and proportionately for each quarter year thereof reduced for the option selected.

(d) The member may elect to receive the actuarial equivalent of the disability retirement allowance in a reduced allowance payable throughout life under any of the provisions of the options provided under Section 25-11-115.

(e) If a disability retiree who has not selected an option under Section 25-11-115 dies before being repaid in disability benefits the sum of his total contributions, then his named beneficiary shall receive the difference in cash, which shall apply to all deceased disability retirees from and after January 1, 1953.

(3) Reexamination of retirees retired on account of disability. Except as otherwise provided in this section, once each year during the first five (5) years following retirement of a member on a disability retirement allowance, and once in every period of three (3) years thereafter, the board of trustees may, and upon his application shall, require any disability retiree who has not yet attained the age of sixty (60) years or the termination age of the temporary allowance under subsection (2)(c) of this section to undergo a medical examination, the examination to be made at the place of residence of the retiree or other place mutually agreed upon by a physician or physicians designated by the board. The board, however, in its discretion, may authorize the medical board to establish reexamination schedules appropriate to the medical condition of individual disability retirees. If any disability retiree who has not yet attained the age of sixty (60) years or the termination age of the temporary allowance under subsection (2)(c) of this section refuses to submit to any medical examination provided in this section, his allowance may be discontinued until his withdrawal of that refusal; and if his refusal continues for one (1) year, all his rights to a disability benefit shall be revoked by the board of trustees.

(4) If the medical board reports and certifies to the board of trustees, after a comparable job analysis or other similar study, that the disability retiree is engaged in, or is able to engage in, a gainful occupation paying more than the difference between his disability allowance, exclusive of cost of living adjustments, and the average compensation, and if the board of trustees concurs in the report, the disability benefit shall be reduced to an amount that, together with the amount earnable by him, equals the amount of his average compensation. If his earning capacity is later changed, the amount of the benefit may be further modified, provided that the revised benefit shall not exceed the amount originally granted. A retiree receiving a disability benefit who is restored to active service at a salary less than the average compensation shall not become a member of the retirement system.

(5) If a disability retiree under the age of sixty (60) years or the termination age of the temporary allowance under subsection (2)(c) of this section is restored to active service at a compensation not less than his average compensation, his disability benefit shall end, he shall again become a member of the retirement system, and contributions shall be withheld

and reported. Any such prior service certificate, on the basis of which his service was computed at the time of retirement, shall be restored to full force and effect. In addition, upon his later retirement he shall be credited with all creditable service as a member, but the total retirement allowance paid to the retired member in his previous retirement shall be deducted from his retirement reserve and taken into consideration in recalculating the retirement allowance under a new option selected.

(6) If following reexamination in accordance with the provisions contained in this section, the medical board determines that a retiree retired on account of disability is physically and mentally able to return to the employment from which he is retired, the board of trustees, upon certification of those findings from the medical board, shall, after a reasonable period of time, terminate the disability allowance, whether or not the retiree is reemployed or seeks that reemployment. In addition, if the board of trustees determines that the retiree is no longer sustaining a loss of income as established by documented evidence of the retiree's earned income, the eligibility for a disability allowance shall terminate and the allowance terminated within a reasonable period of time. If the retirement allowance is terminated under the provisions of this section, the retiree may later qualify for a retirement allowance under Section 25-11-111 based on actual years of service credit plus credit for the period during which a disability allowance was paid.

(7) Any current member as of June 30, 1992, who retires on a disability retirement allowance after June 30, 1992, and who has not elected to receive benefits under subsection (2)(c) of this section, shall relinquish all rights under the Age Discrimination in Employment Act of 1967, as amended, with regard to the benefits payable under this section.

CREDIT(S)

Laws 1952, Ch. 299, § 16; Laws 1968, Ch. 578, § 3; Laws 1977, Ch. 450, § 3; Laws 1978, Ch. 382, § 1; Laws 1986, Ch. 472, § 1; Laws 1991, Ch. 513, § 5; Laws 1992, Ch. 576, § 4; Laws 1993, Ch. 617, § 5; Laws 1995, Ch. 627, § 3; Laws 1996, Ch. 472, § 4, eff. from and after passage (approved April 5, 1996); Laws 2002, Ch. 627, § 9, eff. July 1, 2002. Amended by Laws 2007, Ch. 407, § 5, eff. July 1, 2007.

Current through the 2010 Regular and 1st and 2nd Extraordinary Sessions

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