IN THE SUPREME COURT OF MISSISSIPPI

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

VERSUS — **CAUSE NO. 2010-SA-01671**

WILLIAM COLLINS — **APPELLEE**

BRIEF OF THE APPELLANT

Jane L. Mapp, MSB No. [redacted]
Katie L. Trundt, MSB No. [redacted]
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, Mississippi 39201-1005
Email: JMapp@pers.ms.gov
Telephone: (601) 359-3592
Fax. No. (601) 359-2285

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 DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM DENYING MR. COLLINS' CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NEITHER ARBITRARY OR CAPRICIOUS.

STATEMENT OF THE CASE

This matter involves an appeal filed by the Appellant, William D. Collins, seeking review of the Order of the Board of Trustees of the Public Employees' Retirement System (hereinafter "Board") dated December 16, 2008 (Vol. II, R. 14). The Board adopted the Proposed Statement of Facts, Conclusions of Law, and Recommendation of the Disability Appeals Committee to deny Mr. Collins' request for payment of disability as defined in Miss. Code Ann. §25-11-113 (Rev. 2010). This appeal is authorized and governed pursuant to Miss. Code Ann. §25-11-120 (Rev. 2010).

STATEMENT OF THE FACTS[1]

William Collins was a maintenance worker with the Jackson County School District. At the time Mr. Collins terminated employment on June 30, 2008, he had 5.50 years of service credit. (Vol. II., R. 31, 90). On June 6, 2008, Mr. Collins' application for

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

non-duty related disability based on coronary artery disease that required him to undergo a stent procedure was received by the Retirement System. (Vol. II, R. 90, 92-93).

Mr. Collins testified that he is unable to work as he has had two blockages in his heart for which he has undergone surgery and that presently there is more blockage but not enough at this time for the placement of a stent. (Vol. II, R. 32). He testified that he is depressed because he is unable to work. (Vol. II, R. 33). Mr. Collins stated that his first stent was placed in April 2006 and following the surgery his physician, Dr. Feghali, released him to return to work without limitations in September of that year. (Vol. II, R. 36) He has been prescribed various statins such as Lipitor and Crestor but, according to Ms. Collins, he is unable to tolerate such medications. (Vol. II, R. 36,37). As recent as July 2008 Dr. Feghali was recommending "aggressive statin therapy" for Mr. Collins. (Vol. II, R.74).

Although Mr. Collins testified that he has been treated by his primary care physician, Dr. Smith, for depression he testified that he did not become depressed until after he terminated his employment. (Vol. II, R. 36, 43-44). Additionally, although Mr. Collins was not claiming asbestosis as a disabling disease, he testified that he had been diagnosed with the condition as a result of working for International Paper as a welder for many years. (Vol. II, R.59-60).

At the time of the hearing before the Disability Appeals Committee. Mr. Collins testified that his claim was denied by the Social Security Administration and that he was appealing the denial. (Vol. II, R.57).

The Committee thoroughly reviewed the medical information provided by Mr. Collins and found that he underwent angioplasty in April 2006 by Dr. Feghali and did

well and was discharged the following day. (Vol. II, R. 17). Although he was given Lipitor, he complained of fatigue and so he stopped taking the medication. Mr. Collins was placed on another medication and was instructed to do cardiac rehabilitation and follow-up with Dr. Feghali in six months. He later underwent a nuclear scan which was found to be normal. (Vol. II, R. 17).

Dr. Feghali noted that Mr. Collins' shortness of breath, chest pain, low stamina and fatigue and depressive mood were because of stress, because his "nuclear imaging did not show any evidence of ischemia and his left ventricular systolic function appeared to be preserved." (Vol. II, R. 110). Mr. Collins reported to his doctor in September 2006 that he felt much better when mowing the grass and Dr. Feghali told him that "he should return to his previous level of activity with no limitation since he feels better when working". (Vol. II, R. 134).

The Committee noted that when Mr. Collins returned to see Dr. Feghali in March 2008 his "severe chest pain had resolved". Dr. Feghali noted that Mr. Collins missed several appointments and took himself off all medication except aspirin.(Vol. II, R.120, 184). In March 2008 he underwent a heart catherization showing one vessel to have blockage, thus, another stent procedure was done. Two weeks later, Mr. Collins returned to Dr. Feghali and reported he was doing fine and denied any shortness of breath or chest pain during exertion.(Vol. II, R. 115). In May 2008 Mr. Collins complained of periodic chest pain mainly when at work, yet Dr. Feghali pointed out that Mr. Collins had started exercising, jogging and walking without any difficulties when he took off of work for a week. (Vol. II, R. 110).

In May 2008 Mr. Collins had a Perfusion Study of his heart which showed "normal myocardial perfusion and function and no evidence of ischemia or fibrosis. No wall abnormalities were noted and the ejection fraction and systolic function of the heart were also normal." (Vol. II, R. 112). When Mr. Collins returned to Dr. Feghali reporting fatigue, Dr. Feghali noted that there was nothing found on the treadmill or scan. (Vol. II, R. 111-112). Following the stent, Mr. Collins reported that his chest pain was resolved, but, he had shortness of breath and fatigue. Dr. Zayed, who completed a PERS Form 7, listed no limitations for Mr. Collins and an EKG done in July showed "normal sinus rhythm". His ejection fraction was also normal The degree of blockage that he was showing was considered non-surgical. (Vol. II, R. 112-113).

The Committee commented on the Independent Medical Evaluation that was done by Dr. Peeples on July 30, 2008.(Vol. II., R. 101-103). After reviewing all of the medical records Dr. Peeples noted that Mr. Collins' cardiologists believed that his symptoms or complaints are psychiatric in origin. (Vol. II, R. 101-103). Dr. Peeples, according to the Committee, found that Mr. Collins has Coronary Artery Disease (CAD) but that it was not clear that his complaints are related to the CAD. Based on the record, Dr. Peeples could not find that Mr. Collins was physically or psychologically disabled to such point that he has a permanent or likely total occupational disability. (V. II, R. 103).

Accordingly, the Appeals Committee recommended to the Board of Trustees that Mr. Collins' request for non-duty related disability benefits be denied. (Vol. II, R. 24). The Board of Trustees adopted the Appeals Committee's findings, conclusions, and recommendations by Order denying Mr. Collins disability benefits issued December 16, 2008. (Vol. II, R. 14).

SUMMARY OF THE ARGUMENT

The decision of the PERS Board of Trustees is supported by substantial evidence. In order to qualify for a disability benefit under PERS law, Mr. Collins would have to prove that the condition upon which he bases his claim is permanently disabling and that the disability was the direct cause of his withdrawal from state service. The record clearly supports the Order of the PERS Board of Trustees which took into consideration all of the medical evidence offered by Mr. Collins. The decision of the PERS Board of Trustees is supported by substantial evidence and is neither arbitrary nor capricious.

It is clear the only decision the Board could make was that Mr. Collins' claim does not meet the definition of a disability as defined under PERS law. The Order of the PERS Board of Trustees is premised on substantial evidence and is neither arbitrary nor capricious.

PERS does not seek to deny that Mr. Collins does suffer from Coronary Artery Disease, but under Mississippi Law – Miss. Code Ann. §25-11-113 – in order for Mr. Collins to receive disability payments, he has to prove that the condition which causes his complaints, and upon which he bases his claim, is *disabling* and that the disability was the direct cause of his withdrawal from state service. The record, however, shows that Mr. Collins' complaints should not prevent him from his work, let alone render him disabled or directly cause him to withdraw from service. The PERS Board of Trustees took into consideration all of the medical evidence offered by Mr. Collins, and found that this evidence did not establish that Mr. Collins is disabled and therefore he is not entitled

to a disability benefit from the State of Mississippi. PERS asks that this Honorable Court reverse the decision of the Hinds County Circuit Court and affirm the decision of the Board of Trustees.

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: (1) a regular disability benefit payable to members who have at least four (4) years of creditable service[2] 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 (Rev. 2010).

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) (Rev. 2010). Any person aggrieved by a

[2] If a claimant was a member in the System prior to July 1, 2007, he was vested with four (4) years of service credit. Anyone becoming a member after July 1, 2007, must have eight (8) years of service credit to be vested.

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. 2010).

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 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 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 Mr. Collins' claim meets the requirements for the receipt of a disability benefit. The PERS Board of Trustees concluded that the recommendation of the Disability Appeals Committee to deny disability benefits should be adopted as the decision of the Board. 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 and was arbitrary and capricious.

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 Mr. Collins. ***Laughlin v. Public Employees' Retirement System***, 11 So.3d 154, 158 (Miss. App. 2009); ***Public Employees' Retirement System v. Dean***, 983 So.2d 335, 339 (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).

The Mississippi Supreme Court stated in ***Public Employees' Retirement System v. Dishmon,*** 797 So.2d at 891, that there is a rebuttable presumption in favor of a PERS ruling. 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 Mr. Collins 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, the Mississippi Supreme 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 the Supreme 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 Mr. Collins. ***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 Order of the PERS Board of Trustees was supported by substantial evidence, was neither arbitrary nor capricious and, thus, the Order of the Circuit Court entered February 4, 2010, should be reversed and the Order of the PERS' Board of Trustees entered December 16, 2008, should be affirmed.

I. THE DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS) DENYING MR. COLLINS' CLAIM FOR DISABILITY BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NEITHER ARBITRARY OR CAPRICIOUS.

"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). The Mississippi Supreme 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 based their questions and comments on the medical records submitted by Mr. Collins in support of his claim. The proceeding before the Committee is typically non-adversarial as one can see by reviewing the proceeding at the hearing. In the Circuit Court's opinion the Court states that "there is substantial evidence to support the finding that the Appellant has debilitating coronary artery disease." (Vol. I, R. 14.) However, Dr. Meeks commented on the medical records as follows:

> You know, just looking at these records and tests you had done on your heart, it looks like your heart is fixed, and the **good news is that you have not had any kind of heart attack causing permanent damage to your heart. Your muscle pumps normal, and although you had some blockages it was not enough to impair the blood flow where it is now, so based on these tests we would expect your heart to be fine and you could do whatever you wanted to do at this point in time.** [Emphasis added] (Vol. II, R. 38)

Again, Dr. Meeks noted during the hearing that:

> And you had **two other heart tests that are both only marginal.** You continue to have those same symptoms, **but two other tests are not showing any problems.**[*Emphasis added*] (Vol. II, R. 51)

Dr. Blackston, during questioning, also noted from the medical records:

> I can assure you, Mr. Collins, that I don't think anybody up here thinks you're faking or this is something made up or anything like that. The thing that is confusing, us, I think, and again, I don't know anybody that's on the Medical Board that reviewed your records, and obviously they didn't have a chance to talk with you. But I don't' think anybody there felt like, you know, that this was putting on or faking. I think the concern was pretty much the same concern that Dr. Meeks and I both have, which **is you've had some very concerning symptoms which were associated with a blockage in one of your arteries in your heart, but it looks like your most recent evaluation by what looks like a pretty well qualified cardiologist kind of gives you a clean bill of health with regard to your heart.** Now, you have had blockages in there, but it doesn't look like something that would suggest that you are having what he refers to as unstable angina, which is pain that is coming from an acutely blocked up blood vessel in your heart. And I think he's probable having trouble understanding why you're having that pain too. (Vol. II, R. 53-54) [*Emphasis added*]

As set forth in ***Public Employees' Retirement System v. Howard,*** 905 So.2d at 1287, "sorting through voluminous and contradictory medical records, then determining whether an individual is permanently disabled is better left to physicians, not judges". The Appeals Committee provided the Board with a lengthy summary of the medical

evidence. They also thoroughly questioned and observed Mr. Collins during the hearing, while at the same time, relying on the medical evidence offered by Mr. Collins in making their decision. The Appeals Committee was in a far better position to review this evidence than was the Circuit Court.

Regarding the finding of substantial evidence to support the Committee's decision when insufficient evidence is presented by a claimant to support a disability determination, the Court has ruled 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.*** It was the medical opinion of the Appeals Committee that Mr. Collins failed to present substantial evidence of a permanent disability as defined by the PERS statute. PERS' determination to deny disability benefits is further bolstered by the fact that there was objective medical evidence which refuted Mr. Collins' claim presented in the form of the Independent Medical Examination (IME) performed by Dr. Peeples.

Composed of two physicians and one attorney-nurse, it is the Committee's duty to parse the medical evidence and determine what is compelling and what isn't. It is the Committee that 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 (Miss.Ct.App. 2008). That the Committee can give more weight to one physician's report than another's is now settled law in Mississippi, and it makes sense. 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). The Committee clearly did review the medical documentation offered by Mr. Collins in support of his claim for disability benefits. There is nothing 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.

Miss. Code Ann. §25-11-113(1)(a) allows for payment of disability benefits, as opposed to regular retirement benefits, only after "an evaluation of medical evidence" making "medical evidence" a baseline necessity for approving an application for disability. Pursuant to Miss. Code Ann. §25-11-17, the Board has adopted Regulation Chapter 45A, Sections 104(2)-(4)), which mandate, as required by §25-11-113, that the disability applicant must submit medical evidence to support his/her application, similarly, the PERS Medical Board makes its decision based on medical evidence. When a member appeals a determination of non-eligibility for disability payments, he does so to the Board of Trustees through the Appeals Committee, in accordance with Miss. Code Ann. Section 25-11-120 and PERS Regulations Chapter 42, specifically Section 108(3), which allows for the admission of any evidence which the Hearing Officer feels to be

reasonably trustworthy and probative. Here then, is the root of the "objective and credible medical evidence" standard. Miss. Code Ann. 25-11-113(1)(a) requires medical evidence. The regulations promulgated to affect §25-11-113 allow the hearing officer at an appeal of the denial of benefits to allow medical evidence which is believed to be ***trustworthy and probative***, which has been translated by the physicians and medical/legal professionals on the Appeals Committee to mean ***credible and objective*** – credible medical evidence being trustworthy and objective medical evidence being probative.

PERS argues that it is not beyond the scope of the enabling statute to require that evidence be probative and trustworthy, these are the same basic requirements for all evidence encapsulated in almost any evidentiary ruling scheme, be it federal, state, or administrative. This being the case, PERS would be derelict in its duty as a fiduciary to its members not to require evidence to meet this most common of evidentiary standards. Nor does it go beyond the bounds of PERS enabling statute to allow a committee made up of physicians and medical/legal professionals to decide that the best way to ensure that medical evidence is trustworthy is to require it to be credible, and to ensure that it is probative, require it to be objective.

In ***Public Employees' Retirement System v. Marquez,*** 774 So. 2d 421, 427 (Miss. 2000), cited by Mr. Collins in his appeal to the Circuit Court, this Honorable Court found that where there was no evidence to the contrary, physicians' reports and records were objective proof of pain. It is important to note, however, that in ***Marquez***, the appellant grounded her claim for disability in severe depression, as well as pain. In actuality, the court found that there was objective evidence of pain *and* depression, and never indicated which, if either, it was basing its decision upon. ***Marquez*** at 427– 29.

Further, the recommendation in ***Marquez*** was certainly not as thorough as the recommendation before this Court today. Here, the Committee noted that the evidence offered in support of Mr. Collins' claim indicated that although he suffered some CAD there was insufficient evidence to support a claim of disability. Mr. Collins had actually been released by his doctor to return to work following his stent procedures.

Mr. Collins also cited the case of ***Public Employees' Retirement System v. Thomas,*** 809 So.2d 690 (Miss. Ct. App. 2001), that indicates that the evidence used by the physicians deciding a case of disability can not be that which is confined within their heads. The recommendation in ***Thomas*** was very brief and clearly did not indicate why the Committee ruled as they did other than there was insufficient medical evidence in the record. In the case presently before the Court the Proposed Statement of Facts, Conclusions of Law and Recommendations is 10 pages in length unlike the recommendations in both ***Marquez*** and ***Thomas***. Following a lengthy summary of the medical evidence which reviews all of the medical documentation submitted by Mr. Collins, the Committee then offers its through analysis as follows:

> ... Mr. Collins has the burden of persuading this Committee that he is disabled as defined by the PERS statute and to do that, **he must produce both credible and objective medical evidence** that he has a medical disability that has resulted in a permanent and likely total occupational disability. Mr. Collins is claiming that he has a disability because of heart disease as evidenced by his stents and that he has been told by his doctors that he is a very sick man and cannot work any longer. He specifically denies any psychiatric problems like depression or anxiety. Mr. Collins says he has angina and fatigue and that he cannot take his statin medications because they make him feel worse. **This Committee, which is composed of two physicians and a nurse/attorney were able to discuss Mr. Collins' medical records and symptoms with him. We were able to watch him. It is clear that Mr. Collins believes he can no longer work. But the problem lies with the medical evidence that Mr. Collins provided. The evidence** seems to be

complete but the problem is that the evidence, while supporting the premise that Mr. Collins does have CAD, it **does not support that Mr. Collins has debilitating CAD**. Mr. Collins clearly has had several stents placed in the arteries that supply blood to his heart. But, with this technology and the skills of the doctors, **he has never suffered heart damage because of the disease. And what the stents do is open the diseased vessels so that they are functioning fairly normally**. This Committee does note that Mr. Collins' stenting procedures have been very successful even though he had to have one stent redone. But, possibly one of the reasons for that may be that Mr. Collins has not been the most compliant with his medications. And, it also seems that Mr. Collins is not making a serious change in his lifestyle.

This Committee has seen the note from Dr. Feghali that Mr. Collins is unable to work. But, this memo is not supported by his many tests and the medical records. In fact, at the time of termination, Dr. Feghali, a cardiologist, was unable to identify a disabling problem with Mr. Collins' heart. Mr. Collins says he was told that his heart is very sick. **This Committee agrees that Mr. Collins has CAD, but his heart is perfectly functional at this time.** This Committee submits that a diagnosis does not equal a disability. Mr. Collins never followed up with a psychiatrist to be evaluated for the possibility of depression or anxiety. He clearly stated that he did not have emotional problems. But it seems to this Committee that there is also no clear or persuasive evidence that Mr. Collins is disabled from his CAD. We would note several doctors' records that refer to depression or anxiety as the cause of shortness of breath or chest pain. Why he never went to be evaluated for those possibilities, this Committee cannot be sure.

The job of this Committee is to evaluate the evidence before it to look for persuasive proof that Mr. Collins is disabled from a medical condition that is permanent and likely total. It is not here. That being the case, this Committee recommends that Mr. Collins' claim for disability be denied. [*Emphasis added*] (Vol. II, R. 21-23)

Moreover, it is PERS that has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. The "weight given to the statement 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 (Miss. 2005) As noted in ***Public Employees' Retirement System vs. Howard,*** 905 So.2d at 1288, "determining whether an individual is permanently disabled is better left to physicians, not Judges." Several physicians reviewed Mr. Collins' application and medical documentation. The Board of Trustees relied on the findings of fact of the Disability Appeals Committee to review the medical reports submitted in support of Mr. Collins' claim. Further, it is within PERS discretion to determine which documents garner more weight than others. ***Public Employees' Retirement System v. Stamps***, 898 So.2d at 674; ***Byrd v. Public Employees' Retirement System***, 774 So.2d at, 438

Mr. Collins contended in his appeal to the Circuit Court that the Committee failed "to address the debilitating nature of depression or anxiety". Mr. Collins did not claim that he is disabled because of depression and in fact stated that he did not become depressed until he did not return to work. (Vol. II, R. 33). Although the treating physicians felt that Mr. Collins' concerns could be more psychological or that he suffered from depression there is no proof offered that if he does suffer from depression that it is debilitating. Again, in ***Public Employees' Retirement System v. Dishmon***, 797 So.2d at 893 the Court stated that "the applicant for disability has the burden of providing to the Medical Board and to the Appeals Committee that he or she is in fact disabled". In the instant case, not only did Mr. Collins not provide evidence that his condition was disabling, but his own medical records indicate that just a week prior to filing for disability benefits he informed his doctor that had started exercising, jogging, and walking without any difficulties.

The Circuit Court stated in its conclusion that "the record reflects there is substantial evidence to support the finding that Appellant has debilitating coronary artery disease" (Vol. I, R. 14.) The Circuit Court failed to apply the correct standard of review in this case. The question on appeal is whether PERS' decision to deny disability benefits was supported by substantial evidence, not whether there was substantial evidence to support a finding of a disability. PERS does not bear the unreasonable burden of completely disproving every disability claim. It was Collins who had the burden to prove to the Board that he is in fact disabled within the context of the PERS' statutes. Since substantial evidence is less than a preponderance, it is possible for the same evidentiary record to provide substantial support for both a finding of a disability and a finding that Collins' medical condition did not amount to a permanent disability within the meaning of the PERS' statutes. Because this court must affirm the decision of PERS if supported by substantial evidence, it may not reverse even if, viewed another way, the evidence would have provided substantial support for a disability finding. See, *Bynum v. Miss. Dept. of Education*, 906 So.2d 81, 91 (Miss.Ct.App. 2005).

"[T]here 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." *Public Employees' Retirement System v. Card*, 994 So. 2d 239,242 (Miss. Ct. App. 2008) (quoting *Public Employees' Retirement System v. Dishmon*, 797 So. 2d 888, 891 (Miss. 2001). Stated differently, even if the members of this honorable court would have reached a different conclusion, had they been sitting as finders of fact, they may not reweigh the evidence and substitute their opinion for that of the Board.

PERS has the duty to determine which of the physicians' assessments and other documentation it should rely on in making a determination. The Circuit Court erred in making the assessment as to what medical evidence is "substantial to support 'debilitating' coronary artery disease" when as noted in ***Public Employees' Retirement System v. Howard***, 905 So.2d at 1287 "determining whether an individual is permanently disabled is better left to physicians, not judges. This is the idea behind the creation and expansion of administrative agencies." Here, the lower court re-weighed the medical evidence to determine what is "reasonable" when the standard is clearly substantial evidence.

Further, the Disability Appeals Committee is in a much better position to evaluate what medical evidence is considered substantial. As in ***Public Employees' Retirement System v. Cobb***, 839 So.2d 605, 609 (Miss. App. 2003), the lack of convincing evidence offered by Mr. Collins and the analysis by the Committee is the substantial evidence necessary to support the decision to deny Mr. Collins claim for disability benefits. Even if this honorable Court somehow determines that there is substantial evidence to support Mr. Collins' disability claim, there is indisputably also substantial evidence to support PERS' decision that Mr. Collins is not disabled under PERS statute and therefore the decision of the Board of Trustees must be accorded deference and affirmed.

CONCLUSION

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***. The Circuit Court erred by substituting is judgment for that of the

Disability Appeals Committee and the PERS' Board of Trustees. The Circuit Court stated that it "made an objective review of the record"; however, the two physicians and one attorney-nurse were in a much better position to "objectively review Mr. Collins medical records and observe him at the hearing than was the Circuit Court. (Vol. I, R. 14).

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). The Disability Appeals Committee and Board did have substantial evidence upon which to base their decision. The Committee had their own observations, they had several physician's reports which did not advocate for or indicate the necessity for disability benefits, they had an Independent Medical Examination, and they had the appellant's own testimony. PERS maintains that this is "more than a scintilla" and asks for this Court to uphold its decision.

Based on the record before this Court, it 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. In this case the medical evidence does not support Mr. Collins claim for disability benefits as set forth in the well reasoned and unbiased evaluation of the Disability Appeals Committee which was adopted by the Board of Trustees. 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 Mr. Collins. The PERS Board of Trustees respectfully requests this Honorable Court to affirm its Order entered December 16, 2008 and reverse the Order entered by the Circuit Court on February 4, 2010.

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:

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

Matthew S. Lott, Esq.
Dogan & Wilkinson, PLLC
P. O. Box 1618
Pascagoula, MS 39568-1618

This, the 10th day of March 2011.

Jane L. Mapp, MSB [redacted]
Katie L. Tundt, MSB [redacted]
Special Assistants Attorney General