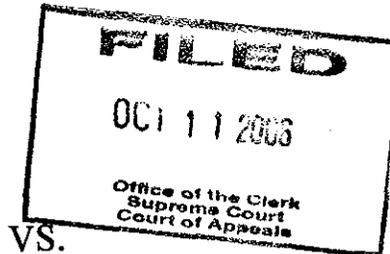


COPY

NO. 2006-SA-00841

IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON



Appellant

VS.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

Appellee

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

GEORGE S. LUTER
405 Tombigbee Street
Post Office Box 3656
Jackson, Mississippi 39207-3656
Telephone: (601) 948-0021
Facsimile: (601) 948-0093
GEOLAW1502@AOL.COM
MSB # [REDACTED]

Attorney for Appellant

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VS.

NO. 2006-SA-00841

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Sheryl Stevison, Appellant;
2. George S. Luter, Attorney for Appellant;
3. Pat Robertson, Executive Director, Public Employees' Retirement System of Mississippi;
4. Honorable Jim Hood, Attorney General of Mississippi;
5. Mary Margaret Bowers, Special Assistant Attorney General assigned to the Public Employees' Retirement System of Mississippi; and,
6. Hon. Bobby DeLaughter, Hinds County Circuit Judge.

Respectfully submitted,

GEORGE S. LUTER

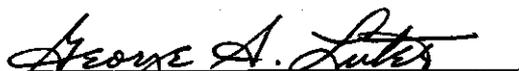

ATTORNEY FOR APPELLANT

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BRIEF OF APPELLANT

I

STATEMENT OF THE CASE

The appellant, Sheryl Stevison, filed this Brief to urge the Circuit Court to reverse the order of the Board of Trustees of the Public Employees' Retirement System of Mississippi (hereafter "PERS") entered August 26, 2003 which adopted the recommendations of the PERS Disability Appeals Committee which found:

"These cases are always difficult, but the statute is clear that objective evidence is what is required to prove disability in this forum. We have considered the opinions of the two physicians stating that Ms. Stevison is disabled, and maybe she is for Social Security purposes, but she does not have objective proof in the file that a disability exists." (R 24, RE 74, Tab 12).

II

STATEMENT OF THE ISSUES

- 1. The decision of PERS' denying Stevison's disability retirement is not supported by substantial evidence because her disability is supported by reports of her treating physicians which are uncontradicted since PERS did not order a medical exam.**
- 2. Alternatively, the decision of PERS should be reversed and remanded for PERS to obtain a psychiatric report due to PERS' failure order a psychiatric evaluation and to obtain and review any psychiatric records obtained in Stevison's Social Security case and obtain all medical records.**

III.

STATEMENT OF THE FACTS

Sheryl Stevison was employed as a teacher assistant for the Wayne County School District for 11.5 years. (R 69, RE 30, Tab 11). After suffering numerous health problems and missing 43.5 days during the 2001-2002 school year, Stevison applied for non duty related disability with PERS on August 26, 2002 after her last day of July 31, 2002. (R 72, RE 1, Tab 1). On the same day, school district business manager Doug Everitt certified that Stevison could not perform her job and had not been offered another job within the agency. (R 78-79, RE 4-5, Tab 2).

On January 18, 2002, Hattiesburg rheumatologist Dr. Beverly Myers saw Stevison upon referral from Dr. John Beaman and it was her impression she had left sciatica of undetermined etiology or possibly a nerve irritated intrapelvically. (R 214, RE 14, Tab 4).

On February 4, 2002, Stevison reported to Hattiesburg gynecologist Dr. John Holland she had back pain beginning three years ago but it worsened on September 14, 2001 when she picked up something and the pain got worse. (R 207, RE 9, Tab 3). Dr. Holland recommended pain management since she was unable to work, bend, or stoop. (R 207, RE 9, Tab 3).

On February 28, 2002, Hattiesburg rheumatologist Dr. David I. Weiss found Stevison to have left hip pain with possible radicular component with prominent left trochanteric bursitis. (R 198, RE 16, Tab 5). Dr. Weiss saw Stevison again on March 25, 2002, where he noted she had only transient improvement after physical therapy and found her to have "chronic low back/sacroiliac pain of unclear etiology. Low titer ANA without features of a connective tissue disease." (R 194). Stevison was given corticosteroids and given procedure for pain and discussed trial of NSAID therapy with Vioxx.

On August 23, 2002, Dr. Robert Daggett, on referral from treating family physician, Dr.

Tynes, found Stevison to have Sjogren's syndrome and muscle spasm of the piriformis muscle and was given an exercise program and muscle relaxant. (R 108). After returning on September 10, 2002, Daggett found her to have pain in her joints, wrist and ankles and describes her pain as flu type symptoms with achiness all over. (R 109).

On October 7, 2002, family practitioner Dr. M. S. Tynes indicated on PERS form "Statement of Examining Physician" that Stevison had Sjogren's syndrome, fibromyalgia, piriformis syndrome with depression, with poor prognosis and had restrictions of "minimal physical activity". (R 203, Re 18, Tab 6).

On January 30, 2003, Dr. Tynes reported that Stevison has "Piriformis Syndrome with apparently permanent damage, fibromyalgia, Sjogren's Syndrome and osteoarthritis quite concerning from recent bone scan was "unable to do minimal walking and standing." Tynes added "I don't see how she would be able to perform this duty [teacher's assistant] due to her pain and fatigue plus her depression is also significant." (R 68, RE 29, Tab 10).

On March 13, 2003, HealthSouth Gulfport reported Stevison's Functional Capacity Evaluation results stating Stevison reported pain from 6 to 9 on a 10 scale and that she reported severe pain while performing the test while giving consistent effort but was limited to light work. The evaluation reported that Stevison had "tenderness, palpable spasm and multiple trigger points palpable throughout the suboccipital region, cervical paraspinals, upper trapezius muscles, rhomboids, gluteals, piriformis muscles, and lumbar paraspinal muscles." Further, the report indicated Stevison had "pain in all planes of cervical, lumbar, shoulder, elbow, wrist, hand, hip, knee, and ankle range of motion." (R 96, RE 22, Tab 7).

On April 4, 2003, Stevison was informed by letter from then PERS Executive Director Frank Ready that the PERS Medical Board had found "insufficient objective evidence" to support her application for disability retirement. (R 241, RE 26, Tab 8).

On April 23, 2003, Stevison filed her Notice of Appeal for a hearing before the PERS

Disability Appeals Committee. (R 65-66, RE 27-28, Tab 9).

Stevison was afforded a hearing before the PERS Disability Appeals Committee consisting of Sheila Jones, presiding, and Drs. William Nicholas and David Duddleston. (R 27-62, RE 31-66, Tab 11).

At her hearing, Stevison, who was not represented by counsel, testified that she worked as a teacher's assistant for eleven (11) years doing anything requested such as assisting with children, decorating bulletin boards, floats, running copies and planning kindergarten graduation. She testified on September 14, 2001 she came to school hurting in her lower back and hips and the pain got worse and after going to 15 or 16 physicians it was found she had Piriformis Syndrome and also Sjogren's Syndrome. (R 6-8, RE 32-34, Tab 11).

Under questioning by Dr. Duddleston, Stevison stated she subsequently did not sleep well and with the pain and lack of sleep she just could not do her job. (R 35-36, RE 39-40, Tab 11). She stated the Piriformis Syndrome prevented her from sitting or standing for long periods of time and that it involves pain like a "lightening strike." She stated her principal would not agree to give her less duties since "you had to do what you had to do." (R 39, RE 43, Tab 11). Stevison stated she had tried antidepressants such as Paxil, Celexa, and Lexapro, and also pain medication such as Lortab. (R 41-42, RE 45-46, Tab 11).

Stevison testified in response to Dr. Nicholas that her pain was real and that she was doing the best she could and if she could work she would be at the schoolhouse working. Stevison added that the Functional Capacity Evaluation order by PERS "liked to have killed me to go through everything they asked me to do" and that she was "laid up for three days." She added that her pain was all over her body, that she could not open a Coke bottle at home and the pain felt like "somebody has...shattered everything..." (R 52-54. RE 586-58, Tab 11).

Mary Ann Walker testified that she was a teacher and Stevison was her assistant and that the past year was a hard year for Stevison and that although she made accommodations for her

there were times when “she just was not able to cope.” She stated Stevison loved her job, did anything requested, was very dedicated, and kept her room organized and was a leader and would be back with her if she “was physically able to do so.” (R 58-61, RE 63-65, Tab 11).

On June 30, 2003, the PERS Disability Appeals Committee recommended denial of Stevison’s application for disability retirement stating Stevison “should have been “evaluated for psychiatric care” and that “we were not provided the records from [other ten] other physicians” and that “Ms. Stevison’s physicians were acting as advocates for their patient... but the proof for disability in this case is measured objectively and the record is void of same.” The PERS Board of Trustees adopted such recommendation on August 26, 2003. (R 16, Re 76, Tab 12).

Stevison timely appealed to Circuit Court on September 22, 2003 and the Circuit Court affirmed the ruling of PERS on April 10, 2006. (R 9, RE 80, Tab 13).

SUMMARY OF THE ARGUMENT

The decision of PERS’ denying Stevison’s application for disability retirement is not supported by substantial evidence since two of her treating physicians gave opinions she was disabled, the Functional Capacity Evaluation report indicated Stevison suffered pain, and no examination was obtained by PERS indicating otherwise, thus no evidence exists in the record to uphold their decision.

Alternatively, PERS’ decision should be reversed and remanded because they admitted they did not obtain all of her medical records and they admitted that Stevison “should have been “evaluated for psychiatric care” and that “we were not provided the records from [other ten] other physicians”. A reading of the administrative law judge’s decision in Stevison’s Social Security disability case would reveal reports from two psychiatrists yet PERS chose not to use its statutory authority to obtain a psychiatric examination or all medical records.

IV.

ARGUMENT

1. **The decision of PERS' denying Stevison's disability retirement is not supported by substantial evidence because her disability is supported by reports of her treating physicians which are uncontradicted since PERS did not order a medical exam.**

The legal requirement of proving PERS disability is stated at Miss. Code Ann. 25-11-

113(1)(a) which states:

“...any active member in state service who has at least four (4) years of membership service credit may be retired by the Board of Trustees... provided the Medical Board, after medical examination shall certify that the member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that the member shall be retired.”

Disability is defined in the same code section as the following:

“...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.”

Thus, Stevison only had to prove she had four years of service (which she met with 11.5 years of service) and that she was unable to perform her job as a teacher's assistant.

Stevison would contend that a review of the record will show that the objective opinions by Stevison's treating physicians clearly show she was disabled from her job. Additionally, the FCE ordered by PERS clearly showed that Stevison was suffering great pain.

First, Dr. M. S. Tynes on October 7, 2002, indicated on PERS form “Statement of Examining Physician” that Stevison had Sjogren's syndrome, fibromyalgia, piriformis syndrome

with depression, with poor prognosis and had restrictions of “minimal physical activity”. (R 203, Re 18, Tab 6).

Dr. Tynes on January 30, 2003 again reported that Stevison has “Piriformis Syndrome with apparently permanent damage, fibromyalgia, Sjogren’s Syndrome and osteoarthritis from a recent bone scan showed Stevison was “unable to do minimal walking and standing.” Tynes added “I don’t see how she would be able to perform this duty [teacher’s assistant] due to her pain and fatigue plus her depression is also significant.” (R 68, RE 29, Tab 10).

HealthSouth Gulfport reported Stevison’s Functional Capacity Evaluation results stating Stevison reported pain from 6 to 9 on a 10 scale and that she reported severe pain while performing the test while giving consistent effort and was limited to light work. The evaluation reported that Stevison had “tenderness, palpable spasm and multiple trigger points palpable throughout the suboccipital region, cervical paraspinals, upper trapezius muscles, rhomboids, gluteals, piriformis muscles, and lumbar paraspinal muscles.” Further, the report indicated Stevison had “pain in all planes of cervical, lumbar, shoulder, elbow, wrist, hand, hip, knee, and ankle range of motion.” (R 96, RE 22, Tab 7).

Additionally, Stevison’s treatment records show Hattiesburg rheumatologist Dr. Beverly Myers determined Stevison to have left sciatica of undetermined etiology or possibly a nerve irritated intrapelvicly. (R 214, RE 14, Tab 4). Hattiesburg gynecologist Dr. John Holland found Stevison to have back pain beginning three years ago and recommended pain management since she was unable to work, bend, or stoop. (R 207, RE 9, Tab 3).

Hattiesburg rheumatologist Dr. David I. Weiss found Stevison to have left hip pain with possible radicular component with prominent left trochanteric bursitis. (R 198, RE 16, Tab 5) and further found her to have “chronic low back/sacroiliac pain of unclear etiology. Low titer ANA without features of a connective tissue disease.” (R 194).

Meridian rheumatologist Dr. Robert Daggett found Stevison to have Sjogren’s syndrome

and muscle spasm of the piriformis muscle and was given a exercise program and muscle relaxant. (R 108). After returning on September 10, 2002, Daggett found her to have pain in her joints, wrist and ankles and describes her pain as flu type symptoms with achiness all over. (R 109).

Further, the law is clear in Mississippi that the decision of an administrative agency must be undisturbed unless it is (1) not supported by substantial evidence, (2) is arbitrary and capricious, (3) is beyond the scope or power granted to the agency, (4) violates one's constitutional rights. *Public Employees' Retirement System v. Marquez*, 774 So. 2d 421 (Miss. 2001); *Fulce v. Public Employees' Retirement System*, 759 So. 2d 401, 404 (Miss. 2000); *Davis v. Public Employees' Retirement System*, 750 So. 2d 1225, 1229 (Miss. 1999).

Substantial evidence is "relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Marquez, supra*.

However, regardless of the foregoing PERS denied Stevison's application for disability retirement, stating:

"These cases are always difficult, but the statute is clear that objective evidence is what is required to prove disability in this forum. We have considered the opinions of the two physicians stating that Ms. Stevison is disabled, and maybe she is for Social Security purposes,¹ but she does not have objective proof in the file that a disability exists. In this forum, disability must be established by objective proof of same. This Committee has made a diligent search of this record looking for evidence to support Ms. Stevison's claim of disability and it is just not here. We have to assume that Ms. Stevison's physicians were acting as advocates for their patient and there is certainly nothing wrong with that, but the proof for disability is (sic) this case is measured objectively and the record is void of same." (R 24, RE 74, Tab 12).

However, Stevison would argue that PERS has clearly failed to follow numerous decisions that state that disability cannot be denied in the face of the opinions of numerous treating physicians, particularly when PERS has failed to employ an independent medical examiner as it

¹ 42 United States Code 423(d) defines disability for Social Security disability as "(A) inability to engage in any substantial gainful activity by reason of any medically determinable impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months..."

did in Stevison's case.

In *Marquez, supra*, like Dishmon here, the Mississippi Supreme Court noted that

“PERS put forth no controverting evidence in the face of various diagnoses made by various credible doctors. When medical evidence and testimony given by Marquez is contrasted with PERS' rationale for denial of benefits, the evidence supporting PERS' decision to deny benefits appears insubstantial.” 74 So. 2d 421 at 429.

Further, the Mississippi Court of Appeals in *Public Employees' Retirement System v. Ocenious Thomas*, 809 So. 2d 690 (Miss. App. 2001) announced PERS was not entitled to reject evidence when no “contrary view of that evidence was offered”, stating:

“It is the view of this Court that there is a lack of substantial evidence to support PERS' decision. While PERS was entitled to be skeptical of Thomas' testimony or even differ with Dr. Crump's conclusion that Thomas is disabled, we find nothing in the record disputing or contradicting the evidence presented by Thomas. Therefore, we cannot find the substantial evidence upon which PERS could have relied. PERS would have been entitled to choose between different pieces of evidence or competing views on the same piece of evidence. However, it was not entitled to reject the only evidence presented when no contrary view of that evidence was offered, unless the offered evidence is so absurd or unbelievable that no reasonable person could believe it.” (at 696).

More recently, the Supreme Court on April 3, 2003 in *Public Employees' Retirement System v. Elsie Dearman*, 846 So. 2d 1014 (Miss. 2003) held:

“PERS cannot choose to ignore the only evidence in the record from the examining physician, especially where it chose not to exercise its right to an independent evaluation under Miss. Code Ann. 25-11-113(1)(c)(Rev. 1999).”

The Court of Appeals later that year on December 2, 2003 in *Cauthen v. PERS*, 860 So. 2d 829 (Miss. App. 2003) noted such precedent stating:

“Based on the fact that this Court is bound by the precedent of these decisions, we look to them for direction in identifying and dealing with the pivotal issues upon which this case must be

decided. The cases are *PERS v. Dearman*, 846 So. 2d 1014 (Miss. 2003), and *PERS v. Marquez*, 774 So.2d 421 (Miss. 2000).

Then on January 6, 2004, the Court of Appeals in *PERS v. Finklea*, 862 So. 2d 569 (Miss.App.2004) stated :

“While PERS may choose between contradictory medical evidence and may reject evidence it finds deficient, PERS may not, without explanation, deny disability benefits when faced with apparently substantial, objective medical evidence of disability.”

Shortly thereafter, the Court of Appeals on July 24, 2004 in *PERS v. Kellum*, 878 So. 2d 1044 (Miss. App. 2004) relying on the Supreme Court’s latest pronouncement in *Dearman, supra*, stated:

In affirming the decision of the circuit court, this Court is informed by the cases of *Public Employees’ Retirement System v. Dearman*, 846 So. 2d 1014 (Miss. 2003) and *Public Employees’ Retirement System v. Marquez*, 774 So. 2d 421 (Miss. 2000). See also *Cauthen v. Pub. Employees; Ret. Sys.*, 860 So.2d 829 (Miss. App. 2003).

In *Marquez*, the claimant suffered from multiple illnesses including fibromyalgia and chronic fatigue syndrome. *Marquez*, 774 So. 2d at 423. PERS found that there was insufficient objective medical evidence that Marquez’s medical problems rendered her permanently disabled from her job as a school teacher. *Id.* at 428-29. Marquez submitted medical records tending to confirm her health problems. *Id.* at 427. The supreme court observed that medical records are considered objective, not subjective, evidence of disability. *Id.* at 427. The supreme court found that PERS’s conclusion was not substantiated by the record because PERS did not adequately explain why it rejected the objective medical evidence of Marquez’s disability. *Id.* at 429.

In *Dearman*, the court more clearly articulated that medical evidence of disability provided by an examining physician is objective evidence that must be afforded elevated respect by PERS. *Dearman*, 846 So. at 1018. Dearman claimed that various health conditions rendered her disabled from her job as a teacher. *Id.* at 1016. Dearman’s

treating physician found her permanently disabled as a result of her medical condition and recommended she cease work. *Id.* at 1015. PERS found that Dearman had failed to prove disability. *Id.* at 1016. The supreme court found that the PERS's order was not supported by substantial evidence because the record was "devoid of any evidence that Dearman was not disabled." *Id.* at 1018. The court stated that the opinions of the physicians on the Medical Board and the Disability Appeals Committee are not conclusive, and that "PERS cannot choose to ignore the only evidence in the record from the examining physician, especially where it chose not to exercise its right to an independent medical evaluation under Miss. Code Ann. 25-11-113(1)(c)." *Id.*

In Stevison's case, like the case in *Dearman*, PERS never chose to exercise its right to an independent medical examination. Further, Dishmon's longtime treating physician, Dr. Tynes, who had followed her course of health and prescribed her treatment for several years, gave at least two reports, filled out the PERS provided "Statement of Examining Physician" in all of which he gave his well documented opinion that Stevison had physical problems and was unable to perform her job and was disabled.

After a review of the above medical evidence, Stevison would contend the decision of PERS---which is based on **no** independent medical examination---cannot contain substantial evidence when based upon the dictates of *Marquez* or *Dearman, supra*.

Further, the Supreme Court in *Public Employees' Retirement System v. Robert Ann Shurden*, 802 So. 2d 258 (Miss. 2002) noted that the receipt of disability benefits to deserving claimants should not be unnecessarily out of reach:

"PERS should not stray from its purpose of Miss. Code Ann 25-11-113, to compensate disabled employees that have not met the 25 year criteria, in denying benefits nor set the bar so high that this purpose is frustrated."

Stevison would assert that the opinion of PERS is not supported by substantial evidence since it is arbitrary and capricious and is based only on the opinions of the Disability Appeals

