

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2009-CC-00212-COA**

**SHARON POOLE**

**APPELLANT**

**v.**

**THE PUBLIC EMPLOYEES' RETIREMENT  
SYSTEM**

**APPELLEE**

DATE OF JUDGMENT:	1/8/2009
TRIAL JUDGE:	HON. WILLIAM F. COLEMAN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE S. LUTER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: MARY MARGARET BOWERS
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
TRIAL COURT DISPOSITION:	AFFIRMED THE DECISION OF PERS DENYING AN AWARD OF DISABILITY
DISPOSITION:	REVERSED AND RENDERED: 8/17/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**EN BANC.**

**KING, C.J., FOR THE COURT:**

¶1. Sharon M. Poole appeals from the order denying her disability benefits. The Hinds County Circuit Court affirmed the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS), which adopted the recommendation of the PERS' Disability Appeals Committee (Committee) to deny Poole disability benefits. The Committee found it lacks authority to grant benefits because it could not find "any objective and credible medical evidence of a disease or condition, which is causing Ms. Poole to have pain."

¶2. On appeal, Poole raises the following issues:

1. The decision of PERS should be reversed and rendered because it is not supported by substantial evidence and is legally incorrect since PERS' decision stated that they "do not believe we have authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition, which is causing Poole to have pain."
2. Alternatively, the decision of PERS should be remanded for a new hearing for PERS to consider her fibromyalgia since no records from Poole's rheumatologist were obtained.

¶3. Finding error, we reverse and render.

### FACTS

¶4. Poole was a supervisor with the Mississippi Department of Human Services (DHS) with more than thirty years of service when she applied for Non-Duty Related Disability pursuant to Mississippi Code Annotated section 25-11-113(1)(a) (Supp. 2009).

¶5. Poole testified that she has lower-back pain and neck problems; she had surgery on her neck in 1998. After years of back pain, Poole underwent lower-back surgery in 2002. After surgery, her pain returned, and she had a second surgery in March 2004.

¶6. Poole is required to supervise workers and clerks and has a lot of deskwork and computer work. Poole says that she has trouble sitting and tries to move around. She has been told by one doctor to do no bending, lifting, stooping, or driving more than forty-five minutes at a time. Since Hurricane Katrina, Poole was working in trailers and had difficulty maneuvering from one trailer to another, by using a "boardwalk." Poole testified that the "boardwalk" is the length of a football field and that she has to make the walk between the trailers ten times a day.

¶7. On January 11, 2005, DHS County Director Loraine Hill reported that Poole was “working as much as possible but has to miss excessive amounts of work due to health.” It was her opinion that Poole could not perform her job. The Committee noted that Poole somehow had managed to work, and she had maintained acceptable evaluations in her job even with her pain.

¶8. On September 13, 2005, PERS Interim Executive Director Denise Owens-Mounger wrote Poole a letter stating that the PERS Medical Board had determined that there was insufficient evidence to “support the claim that your medical condition prevents you from performing your duties as described of a Supervisor.” Poole appealed this decision.

¶9. At the hearing before the Committee on April 14, 2006, Poole testified that she had pain in her lower back down her right leg, muscle spasms in her neck, two bulging discs in her neck, and numbness in her right hand. There were several witnesses who testified at the hearing. Poole presented medical records consisting of diagnoses and past treatments by Dr. David Lee and Cindy Rouse with the Southern Spinal Neurologic Institute. Dr. Lee performed the back surgery in October 2002. After her pain returned, Poole was treated with injections, physical therapy, and a TENS unit. In March 2004, Dr. Lee performed another back surgery to remove the hardware and bolster her fusion. Poole experienced more severe and frequent muscle spasms and was unable to tolerate the pain of physical therapy.

¶10. In December 2004, Dr. Lee re-examined Poole and found that she had lumbar disc degeneration, lumbar spondylosis, chronic pain, and failed-back syndrome. Dr. Lee also stated that he would support Poole’s application for disability. Rouse also concluded that Poole was in chronic pain and unable to continue working.

¶11. At the hearing before the Committee, Poole also presented Dr. Thomas V. Chmelicek's opinion that Poole had reached maximum improvement and was disabled. Dr. Chmelicek is Poole's family physician; he reported that Poole was under chronic-pain-control management and permanently requires pain medication. Dr. Chmelicek stated that Poole is permanently disabled with a very small possibility of improvement.

¶12. Dr. David Collip examined Poole on August 5, 2005, at PERS' request. Dr. Collip found Poole's movements appeared slow and painful. Dr. Collip determined that Poole could perform light duty work and lift no more than twenty pounds.

¶13. The Committee stated its recommendation as follows:

Basically the main complaint here is that Ms. Poole has back pain that she claims is disabling . . . . This is not to say that we believe that Ms. Poole is making up her pain . . . . We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or condition which is causing Ms. Poole to have pain.

¶14. The Board's order adopted the Committee's recommendation. Poole then appealed to the Hinds County Circuit Court, which affirmed the decision of PERS.

### **STANDARD OF REVIEW**

¶15. Unless PERS' decision is not supported by substantial evidence, arbitrary or capricious, beyond the scope or power granted to the agency, or violates constitutional rights, the reviewing court should not disturb its conclusion. *Pub. Employees' Ret. Sys. v. Howard*, 905 So. 2d 1279, 1284 (¶13) (Miss. 2005).

### **DISCUSSION**

¶16. Mississippi Code Annotated section 25-11-113(1)(a) states in part:

[A]ny active member in state service who became a member before July 1, 2007, and who has at least four (4) years of membership service credit . . . may be retired by the board of trustees . . . provided that the medical board, after an evaluation of medical evidence . . . 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 . . . .

¶17. Section 25-11-113(1)(a) defines “disability” as:

[T]he inability to perform the usual duties of employments or the incapacity to perform 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.

¶18. Poole argues that all the available medical evidence available to the Committee supports her contention that she met the statutory definition of disability.

¶19. Contrary to the argument made by PERS, this Court is not substituting its judgment for that of the agency rendering the decision and is not reweighing the facts. The Court does not challenge any of the factual findings, only the legal interpretation of these facts. The Court finds that PERS had statutory authority to grant Poole disability based on the medical evidence before it and that there is no requirement for a specific medical condition if the evidence supports the inability to continue work or disability.

¶20. In *Stevison v. Public Employees’ Retirement System*, 966 So. 2d 874, 880 (¶20) (Miss. Ct. App. 2007), the Court stated that PERS had decided: “Because there is no credible, objective test that supports Stevison’s subjective complaints . . . Drs. Tynes’s and Daggett’s diagnosis of disabling conditions constituted patient advocacy, not legitimate medical diagnoses.” PERS chose to ignore the doctors’ diagnoses and disability opinions and

determined that the claimant presented no objective evidence. *Id.* at ¶22). In that case, the Court compared PERS' dismissal of the evidence similar to actions in cases involving disabling fibromyalgia or chronic fatigue syndrome. *Id.* at 881 (¶22).

¶21. In *Public Employees' Retirement System v. Dearman*, 846 So. 2d 1014 (Miss. 2003); *Public Employees' Retirement System v. Marquez*, 774 So. 2d 421 (Miss. 2000); and *Public Employees' Retirement System v. Waid*, 823 So. 2d 595 (Miss. Ct. App. 2002), PERS' decisions were reversed because the agency had ignored the opinions of the treating physicians, labeling the opinions as subjective. *See Stevison*, 966 So. 2d at 881-82 (¶¶22-25). "Yet, the supreme court has held that medical diagnoses by licensed physicians are objective, not subjective, evidence of disability." *Id.* at 882 (¶25) (citing *Marquez*, 774 So. 2d at 427 (¶22)). Accordingly, because we find objective evidence in the record and in the findings, we hold that the PERS' decision to deny disability to Poole is not supported by substantial evidence. Sending the case back on remand would serve no useful purpose since the evidence of disability is already part of the record. Therefore, we reverse and render with disability benefits awarded.

¶22. There is no dispute that Poole was in pain and that she was unable to substantially perform the duties of her position. The fact that the Committee was unable to find the specific cause of her pain was not fatal to a finding of disability.

¶23. In *Doyle v. Public Employees' Retirement System*, 808 So. 2d 902, 905 (¶8) (Miss. 2002), the supreme court stated that it is not the court's job to determine whether the claimant has presented enough evidence to prove that she is disabled, but whether PERS has presented enough evidence to support its finding that the claimant is not disabled. Because we are

unable to find that the record supports a finding that Poole was not disabled according to statute, we reverse and render, finding that she should have received disability benefits.

**¶24. THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**LEE AND MYERS, P.JJ., IRVING, BARNES AND ISHEE, JJ., CONCUR. CARLTON AND MAXWELL, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY ROBERTS, J.**

**GRIFFIS, J., DISSENTING:**

¶25. I respectfully disagree with the majority. In my opinion, the majority errs by reweighing the evidence and substituting its judgment for that of the Public Employees' Retirement System (PERS). I find substantial evidence in the record to support the PERS decision.

¶26. In *Public Employees' Retirement Systems v. Cobb*, 839 So. 2d 605, 609 (¶12) (Miss. Ct. App. 2003), this Court unanimously held:

In administrative matters, the agency, and not the reviewing court, sits as finder of fact. That fact-finding duty includes assessing the credibility of witnesses and determining the proper weight to give to a particular witness's testimony. A reviewing court 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.

(Internal citations omitted).

¶27. “There is a rebuttable presumption in favor of a PERS ruling. Neither the appellate court nor the circuit court is entitled to substitute its own judgment for that of PERS, and it is impermissible for a reviewing court to re-weigh the facts of the case.” *Pub. Employees'*

*Ret. Sys. v. Card*, 994 So. 2d 239, 242 (¶15) (Miss. Ct. App. 2008) (quoting *Pub. Employees' Ret. Sys. v. Dishmon*, 797 So. 2d 888, 891 (¶9) (Miss. 2001)). “As long as the reviewing court finds that the Board’s decision was supported by evidence and absent of fraud, it shall render the Board’s decision conclusive.” *Id.* at (¶14).

¶28. PERS does not bear the unreasonable burden of completely disproving every disability claim. This Court is not charged with the task of determining whether there is “substantial evidence” of a disability. *Pub. Employees' Ret. Sys. v. Dishmon*, 17 So. 3d 87, 91 (¶19) (Miss. 2009). The question before this Court is whether there was “substantial evidence” to support PERS finding that there was no disability. *Id.*

¶29. Substantial evidence “means something more than a mere scintilla of evidence” or “such relevant evidence as reasonable minds might accept as adequate to support a conclusion.” *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991).

¶30. The PERS’ Disability Appeals Committee (Committee) set forth the following findings:

Disability is the medical incapacity for further performance of duty that is likely to be permanent and the employee should be retired. *See* Regulation 45A of PERS Board of Trustees, Administration of PERS Disability Benefits, and Mississippi Code Ann. Section 25-11-114, (1972, as amended). Ms. Poole has the burden of persuading this Committee that she is disabled and to do that, we must have objective and credible medical evidence that Ms. Poole has a medical condition which has resulted in her disability. We also note that Ms. Poole is somehow managing to work[,] and she is maintaining acceptable evaluations in her job as a supervisor even with her complaints of severe pain.

This case is not an easy case. This Committee has evaluated each and every medical report and looked to see whether medical opinions are based on objective evidence and not just sympathy for Ms. Poole’s complaints. Ms. Poole has told this Committee that she has failed back syndrome. She was concerned about that diagnosis. Failed back syndrome simply means that Ms.



Poole's complaints of pain were not relieved after her lower back surgery. Failed back syndrome is not a physical diagnosis for a physical condition.

Basically, the main complaint here is that Ms. Poole has back pain that she claims is disabling. She does have some evidence of degenerative disease of her spine as evidenced by her neck and low back surgery, but the problem is that there is a void of evidence that would explain Ms. Poole's complaints of neck and low back pain. When looking at the objective tests, the MRIs were essentially normal and certainly did not explain the complaints of pain. The EMGs were normal as far as a radiculopathy was concerned. And even Dr. [David] Lee wrote that he could not explain why Ms. Poole is continuing to complain of pain.

This is not to say that we believe Ms. Poole is making up her pain. We are sympathetic to her situation. But that is not what we have been charged to look for in this case. We need objective evidence of a disease or condition that would result in a permanent disability. What we have is a lady who continues to work with no objective medical evidence of what might be causing her to suffer from pain that she alleges is disabling. During the hearing, this Committee noted Ms. Poole was able to turn her neck and head without any noticeable stiffness or pain. She was able to sit before us with some movement noted[,] but she was able to maintain her concentration.

So, it seems that today, the issue is whether this Committee can award disability solely based on the subjective complaints of pain that Ms. Poole has. Our statute does not provide that disability can be awarded for subjective complaints when nothing objective is present. Further, in other Mississippi statutes, awards of disability cannot be maintained solely on the complaints of pain. We do not believe we have the authority to award disability in this case because we cannot find any objective and credible medical evidence of a disease or a condition, which is causing Ms. Poole to have pain. We have no choice but to recommend that Ms. Poole's request for disability benefits be denied.

¶31. The task of this Court is to determine whether there was substantial evidence to support the finding that Poole is not disabled. The Committee's findings contain this substantial evidence required to support the PERS decision.

¶32. PERS was in a far better position to evaluate Poole's medical history and the evidence presented. This Court is required to give deference to the PERS decision. We cannot

substitute our judgment, and we must not reweigh the facts. *Pub. Employees' Ret. Sys. v. Howard*, 905 So. 2d 1279, 1284 (¶15) (Miss. 2005). I would affirm the judgment of the circuit court; therefore, I respectfully dissent from the majority's decision.

**ROBERTS, J., JOINS THIS OPINION.**