

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 98-CC-00022-COA**

KATHERYN SUZANNE BURNS

APPELLANT

v.

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 11/17/1997
TRIAL JUDGE: HON. JAMES E. GRAVES JR.
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: GEORGE S. LUTER
ATTORNEYS 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 THE PERS DISABILITY
APPEALS COMMITTEE DENYING BENEFITS
DISPOSITION: REVERSED AND REMANDED - 04/20/99
MOTION FOR REHEARING FILED: 04/28/99; 06/29/99-REVERSED AND REMANDED
CERTIORARI FILED:
MANDATE ISSUED: 7/20/99

MODIFIED OPINION

ON MOTION FOR REHEARING

BEFORE McMILLIN, P.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

¶1. The original opinion is withdrawn and the following is substituted. The motion for rehearing is denied.

¶2. Katheryn Burns appeals the judgment of the Hinds County Circuit Court affirming the denial of her disability benefits. Burns argues (1) that the decision of the Public Employees' Retirement System (PERS) was arbitrary, capricious, and not supported by substantial evidence (2) that she was denied benefits due to an unfair conflict of interest within the appeals process, and (3) that the hearing before the PERS Disability Committee was unfair in that she was unrepresented by counsel and was suffering the effects of recent brain surgery. Finding merit in Burns's second assignment of error, we address only that issue and reverse and

remand this case to the Hinds County Circuit Court with instructions to remand to PERS for proceedings consistent with this opinion.

FACTS

¶3. Katheryn Burns had been employed as a school teacher with the Jones County School District for over eighteen years when she terminated her employment on May 26, 1987. Burns maintains that her termination was due to her physical inability to meet the responsibilities of her position; however, PERS claims that Ms. Burns's failed to offer objective medical evidence to support her claim for disability benefits under PERS law.

¶4. Ms. Burns filed for disability benefits in October of 1987, and her application was thereafter presented to the PERS Medical Review Board. The Board denied Ms. Burns's 1987 claim. Ms. Burns advised of the decision to deny duty-related disability benefits and was advised of her right to appeal the denial of her claim in 1987 before the full Medical Board. However, she chose not to appeal the decision to deny her 1987 application. In 1987, when an application was denied by the Medical Staff, a full review of the denial, if a request was timely filed, was had on appeal before the full Medical Board. Ms. Burns waived her right to appeal the 1987 decision since she failed to exhaust her administrative remedies.

¶5. In 1996, Ms. Burns submitted a second application for duty-related disability benefits. This application was received by PERS on January 23, 1996. The initial review of the documentation in support of her 1996 claim was by the Medical Board including Drs. Vohra and Winkelmann. The Medical Board denied Ms. Burns's request for disability benefits. At that time, if an appeal was timely filed, review was available before the Disability Appeals Committee, which was comprised of two Medical Board Members, Drs. Vohra and Winkleman, two members of the Board of Trustees, and an attorney from the Attorney General's office. This time, Ms. Burns timely appealed the Medical Board's decision to the Disability Appeals Committee.

¶6. The PERS Board of Trustees adopted the Committee's recommendation, and Ms. Burns thereafter appealed the Board's order to the Hinds County Circuit Court. Thus, it is the denial of benefits under the 1996 application for benefits which is the subject of this appeal. Therefore, any award of duty-related disability benefits due to Ms. Burns would be payable from the first month following receipt of the 1996 application. The PERS Board of Trustees adopted the Committee's recommendation, and Burns thereafter appealed the Board's order to the Hinds County Circuit Court. The circuit court rendered its opinion affirming the decision of the PERS Board of Trustees. It is from this order that Burns now brings forth her appeal to this Court.

DISCUSSION

DID AN UNFAIR CONFLICT OF INTEREST DEPRIVE BURNS OF DISABILITY BENEFITS?

¶7. When reviewing the decision of an administrative agency, this Court is limited in that we may only reverse upon a showing that the agency's decision was (1) unsupported by substantial evidence, (2) arbitrary and capricious, (3) beyond the agency's powers, or (4) violated some statutory or constitutional right of the complaining party. *Brinston v. Public Employees' Retirement Sys.*, 706 So. 2d 258 (¶6) (Miss. Ct. App. 1998). "[T]here is a rebuttable presumption in favor of the action of an administrative agency and the burden of proof is upon one challenging its action." *Ricks v. Mississippi State Dep't of*

Health, 719 So. 2d 173 (¶11) (Miss. 1998). Both the United States and Mississippi Constitutions guarantee the right to due process of law before an administrative agency. U.S. Const. amend. XIV; Miss. Const. art. 3, § 14. Administrative proceedings must be "conducted in a fair and impartial manner, free from any just suspicion or prejudice, unfairness, fraud, or oppression." *Mississippi State Bd. of Health v. Johnson*, 197 Miss. 417, 427, 19 So. 2d 445, 447 (1944).

¶8. After a careful review of the record, it appears that Ms. Burns has met her burden of proving that her constitutional guarantees of due process have been violated by virtue of Drs. Vohra and Winkelmann sitting in judgment of their own conclusions that Ms. Burns was not entitled to disability benefits. The conflict of interest at issue in this case casts serious doubts on the integrity of the process by which PERS reviews its disability claims. By evaluating Ms. Burns and then sitting on the Medical Review Board in 1996 as well as on the Disability Appeals Committee, Drs. Vohra and Winkelmann were essentially reviewing their own disability benefit decisions. As such, we are of the opinion that Ms. Burns may have been prejudiced by the denial of her 1996 claim for duty-related benefits. Accordingly, we reverse and remand this case to the Hinds County Circuit Court with instructions to remand to PERS for a neutral and unbiased review of Ms. Burns's disability claim.

¶9. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

KING, J. AND BRIDGES, COLEMAN, IRVING, LEE, PAYNE, AND THOMAS, JJ., CONCUR.

SOUTHWICK, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY MCMILLIN, C.J.

SOUTHWICK, P.J., CONCURRING IN PART AND DISSENTING IN PART

¶10. The basis for my disagreement with the majority was explained in my separate opinion in *Dean v. Public Employees' Retirement System*, 98-CC-0033-COA. In summary, I find no defect in the PERS procedure that permits one of the three physicians who are the sole members of the medical review board to conduct a physical examination of an applicant. However, I agree that members of the medical review board cannot later sit as members of an appellate review tribunal regarding their own decision.

¶11. Therefore I agree that we should reverse, but without invalidating the first level review procedures being following by PERS.

MCMILLIN, C.J., JOINS THIS SEPARATE OPINION.