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SC Court of Appeals

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Richland County

APPEAL FROM ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Appellant Case No. 2022-000182

Docket No. 21-ALJ-30-0222-AP

Jerry Arnette, Appellant,

v.

South Carolina Public
Employee Benefit Authority,
Employee Insurance Program
(PEBA),

Respondent,

INITIAL REPLY BRIEF OF APPELLANT

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Appellant *pro se*

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Jerry Arnette,) Appellant Case No. 2022-000182
Appellant,)
)
Vs.) **APPELLANT’S BRIEF**
South Carolina Public Employee)
Benefit Authority, Employee)
Insurance Program,)
Respondent.)

I. STATEMENT OF ISSUE ON APPEAL

Appellant Jerry Arnette (hereinafter “Appellant”) appeals the decision of the Honorable S. Phillip Lenski dated January 25, 2022, and Respondent, South Carolina Public Employee Benefit Authority, Employee Insurance Program (hereinafter “PEBA”), under the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-310 *et. Seq.* (1986 and Supp. 2006), to deny his claim for basic long term disability benefits (hereinafter “LTD”). (Id at 1-7)

This action is for judicial review by the Court of Appeals pursuant to South Carolina Code Ann. § 1-23-380 of PEBA’s decision under the State of South Carolina LTD Plan (hereinafter “Plan”). The specific issues on appeal are whether or not Appellant’s benefits under the plan are limited to twenty-four-months under the Musculoskeletal and Connective Tissue Conditions Limitation in the policy and/or disabled from performing any occupation due to non-limited conditions.

First, it is undisputed by the Appellants treating physicians, and Respondent’s reviewing physicians, and PEBA, that the Appellant has limitations and/or restrictions from working after

that date [May 14,2019] due to his diagnosis of lumbar radiculopathy with neurological abnormalities, which is a condition specifically excluded from the [24-month Limitation]. (*Id.* at 72). “disabilities as a result of the following conditions are not limited:... radiculopathies that are documented by electromyogram...(*Id.* at 12, 13, 16, and 77). This was proven and documented on March 12, 2018 by a “Needle EMG of the right leg revealed chronic L5 and S1 Radicular Changes and the Needle EMG examination was performed in 7 muscles. The study was abnormal in 5 of the muscles.” (NCS/EMG Report *Id.* at 67), as required by PEBA.

The Appellant’s limitations and restrictions are in agreement with his treating physician, Dr. Jason Highsmith’s diagnosis that the Appellant is fully disabled from lumbar radiculopathy with neurological abnormalities, (*Id.* at 12 and 71). This doctor is a board certified Neurosurgeon and has extensive experience and knowledge treating patients with these conditions.

Second, at issue, with the Respondents, (PEBAS) reviewing physicians, is that their opinions vary drastically from each other and from the Appellants treating physicians as to the Appellants limitations, restrictions and disability. (*Id.* at pages 13 thru 17 pages 30-34). The Appellant has issue with the Respondents reviewing physicians as they have not physically seen, or treated, or spoken to the Appellant to discuss any medical conditions, side effects of medications, or the severity of his symptoms pertaining to his disability. The Respondents reviewing physicians, make no mention or take into consideration, the Appellants well documented medications taken for radiculopathy with neurological abnormalities and pain, or the side effects of those medications and how it affects his limitations and restrictions and his ability to work any job, or to function daily. The Respondents physicians have not addressed the fact that the Appellant would miss multiple days a month due to his inability to function fully from constant pain and side effects from the medications that he takes for Lumbar Radiculopathy with Neurological abnormalities. These medications are, Gabapentin 300 MG, Tramadol HCL 50

MG, and Cyclobenzaprine 10 MG and their combined Side Effects (*Id* at pages 41-44, 59 & 70 are more pronounced as they are taken together Daily. These side effects include, but are not limited to, Drowsiness, Dizziness, Blurred Vision, Loss of Coordination, Tiredness, Blurred / Double vision, Lightheadedness, Headaches, Tremors, Shallow Breathing, Difficulty Waking Up, Constipation, and Heart problems such as a Slow Heartbeat or Irregular Heart Rhythms, (*Id* at pages 41-44). The Appellant has to stop or reduce these medications on days that he has to drive to doctor appointments, etc. The Appellant can't drive on many days out of the month as side effects restrict driving with warnings, "Do Not Drive, Operate heavy equipment, or do Anything that needs alertness or clear vision until you can do it safely. (*Id* at pages 41-44) The Appellant lives alone and getting someone to drive him is difficult and often impossible. This makes it clear that the Appellant can not work at any job in the National Economy because of his Lumbar Radiculopathy with neurological abnormalities and pain and the medications that he takes for this condition that also affect his ability to function daily and cognitively.

Third, the Appellant has issue with the statement, "PEBA's summary of Arnette's medical records will focus on Arnette's medical records related to his back condition and lumbar radiculopathy for the time period from late 2018 through mid- 2020.", (Respondents Brief dated December 6, 2021. (*Id.* at Page 26 and 28 in footnotes). The appellant has issue with PEBA as the record as a whole should have been taken into account and not their focus on just a part of the Appellant's medical records, as the Appellants medical records clearly showed a large Lumbar disc herniation before Lumbar Microdisectomy in 2016 a " Large Focal Disc extrusion at L4-5 on the right with compression of the thecal sac and compromise of the right lateral recess. (*Id* at page 45, 47, 48 and 54) leaving residual Lumbar Radiculopathy in the right leg, pain in the right leg, causing numbness and pain. (*Id.* at Page 70) dating back to an MRI on January 04, 2016.

Fourth, the Appellant has issue with the Respondents brief dated December 6, 2021. (Id at pages 26 and 27) where under the title “Arnette’s Medical Records and Receipt of LTD Benefits” the timeline of his surgeries is incorrect and clearly erroneous. The Respondents Brief incorrectly states that “Arnette stopped working on February 13, 2017 and underwent surgery by Dr. Highsmith, a neurosurgeon, for cervical disc herniations on March 6, 2017. (Id. at 667. Following the surgery, Arnette, who has a history of polyarthralgia (joint pain), continued to complain of joint pain. (Id. at 493). After ceasing work and undergoing back surgery.” This statement is completely incorrect. (Id at pages 26 and 27) and continues in the Respondents Initial Brief dated May 24, 2022. (Id at pages 4 and 5). The Appellant actually had the back surgery on May 9th in 2016, because of a large disc herniation with lumbar radiculopathy and neurological abnormalities,(Id at page 47 and 48) that is well documented in the Appellants medical records, prior to the cervical disc herniations surgery that occurred in 2017. There was no back surgery as the Respondents Brief incorrectly states following ceasing work in 2017. The back surgery occurred prior in 2016 and needs to be corrected in the Respondents Current 2022 Brief, as it is an Incorrect, Clearly Erroneous, and Misleading Statement of Fact that the Respondent repeats in their Briefs.

The appellant’s medical records repeatedly show that he initially had an MRI showing a Large Lumbar Disc Herniation at L4-5 with compression on the thecal sac and compromise of the right lateral recess on January 4, 2016, because of radiculopathy, pain in the right leg, causing numbness and pain. (Id. at page 70). Then on May 9, 2016, Dr. Jason Highsmith performed a Lumbar L4-L5 Microdiscectomy on Appellant because of a “Massive L4-5 Disk Herniation” with Radiculopathy into the right leg with worsening foot drop, and Neurologic decline with numbness and pain in the leg and foot. (Id. at page 47 and 48). It wasn’t until later on March 06, 2017, that Dr. Highsmith performed an Anterior Cervical Discectomy and Arthroplasty on 2

levels C5-6 and C6-7 because of Cervical Disk Herniations at both levels causing neck and radicular arm pain. (*Id.* at page 52 and 53).

“The Appellant, Arnette filed a claim for LTD benefits under the Plan, which was approved because Standard determined that Arnette’s back condition and related pain prevented him from returning to work in his own occupation as a Commercial Drivers License Examiner, (CDL) which Arnette received LTD benefits for the entire 24-month own occupation period of disability from May 15, 2017, through May 14, 2019.” (*Id.* at page 27). The Appellant later had to pay back the money owed by him, to Standard Insurance Company, for this 24 month period of LTD, as per his contractual agreement, on approximately August 12, 2019, in the amount of \$28,654.37, after being awarded and receiving Full Social Security Disability benefits and back pay, starting from August 01, 2017, (*Id.* at Pages 61-64).

Fifth, The Appellant also has issue with the Respondents Brief dated December 06, 2021 (*Id.* at Page 28) where under “ III. Statement of Dr. Highsmith” the Respondents Brief states “Notably neither Dr. Highsmith’s Statement nor his medical records identifies any specific limitations and restrictions that Arnette has as a result of his radiculopathy.” This is clearly erroneous as “Statement of Dr. Jason Highsmith” (*Id.* at page 70-71) States that “His (Mr. Arnette’s) activities are limited as follows:” Then it goes on to state... He can’t lift more than 10 lbs., cannot sit, stand, or walk for prolonged periods of time, has difficulty performing some activities of daily living, because of his medical conditions it is difficult for him to maintain a consistent schedule, and he can’t perform any activity for an extended period of time. Dr. Highsmith states that he is a medical doctor licensed to practice in South Carolina and is board certified in Neurosurgery and that his statement is based upon his medical education, experience, his specific knowledge of Mr. Arnette’s medical problems and treatment history. (*Id.* at page 70-71).

Due to the Respondents Brief clearly having erroneous statements, inaccurate timeline of the surgical record, and choosing to focus only on just part of the Appellants medical record instead of the record as a whole, presented as fact by the Respondents Brief (*Id.* at page 26 in footnotes) and (Respondents Briefs dated December 06, 2021 and May 24, 2022) and the lack of consideration for the Appellants physical pain, physical limitations to function daily, and prescription medication side effects, preventing the Appellants daily ability to function cognitively, to drive every day, or work, full or part-time, anywhere in the national economy, the Appellant sincerely requests that the Court of Appeals reverse the order of Judge S. Phillip Lenski and PEBA's denial of LTD benefits because the decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

II. STATEMENT OF THE CASE

Appellant was employed with the South Carolina Department of Motor Vehicles in Field Services as a CDL License Examiner, Appellant was a participant in the State Basic Long Term Disability Plan. On January 4, 2016, Appellant, having radiculopathy with pain radiating into right leg and foot causing numbness and shooting pain, had an MRI showing a large Lumbar disc herniation, at L4-L5. On May 9, 2016, Dr. Jason Highsmith performed a lumbar decompression at L4-L5 on Appellant. "To date, there is still residual radicular leg pain with numbness in the right leg and some disc herniation." (*Id.* at page per Dr. Highsmith). The Appellant then exhausted all leave and vacation time and was forced to return to work on or about August 10, 2016 or be terminated. The Prescription medications, Gabapentin, for nerve pain, Cyclobenzaprine, a muscle relaxer, and Tramadol for pain, used in the treatment of lumbar radiculopathy with neurological abnormalities, causes the Appellant to struggle with memory loss, mental foginess, lack of concentration, dizziness, blurred vision, drowsiness, lack of coordination, etc. The Appellant struggled to function because of these prescription medications

that he had to take while working for the South Carolina Department of Motor Vehicles, and driving to and from work. Due to side effects of those medications, the Appellant could not remember previous computer skills and learned tasks, and with the amount of pain that radiated into his right leg and foot with numbness, every day at work was a constant struggle, and he feared being fired for his inability to remember and perform work tasks. The Appellant was forced to cease working in February 2017 due to lumbar radiculopathy with pain in his right leg with neurological abnormalities, facet arthropathy, osteoarthritis and disc disease. Appellant filed a claim for basic LTD benefits with Standard Insurance Company. Standard approved his claim for twenty-four months. Appellant underwent testing on March 12, 2018, NCS/EMG, this report proved that the right leg revealed chronic L5-S1 radicular changes proving radiculopathy in the right leg with neurological abnormalities. (*Id.* at page 66-69) And showing proof as required by PEBA's definition of a long-term disability not limited to the 24 months term disability and proven by PEBA'S Required Test for Radiculopathy. After appealing Standards denial and the case was reviewed PEBA stated that the Appellant had met the definition for disability for long term disability per the March 12, 2018, NCS/EMG report that proved the Appellant has radiculopathy in the right leg with neurological abnormalities. (*Id.* at page 66-69).

Then Standard denied Appellant's claim effective May 14, 2019, asserting that his benefits were limited to twenty-four months under the Musculoskeletal and Connective Tissue Condition Limitation in the policy and that he was not disabled from any occupation from any non-limited medical conditions. After exhausting all appeals with Standard, Appellant appealed the denial to PEBA. On March 19, 2021, PEBA issued the final denial for Appellant's LTD claims, stating: "Therefore, PEBA, finds that the medical records do not support that Claimant has Limitations for restrictions due to any nonlimited conditions, including radiculopathy ,neurological abnormalities or other enumerated internal medicine conditions, that would

have impaired his ability to perform Any Occupation on a Full-time basis after May 14,2019. PEBA finds that Claimant is not Disabled from radiculopathy, neurological Abnormalities or other enumerated internal medicine conditions whether each condition is considered individually, or in combination with one or more other conditions. Accordingly, PEBA, concludes that Claimant’s BLTD claim was properly closed after May 14, 2019.” (*Id.* at page 10). Appellant then timely served his Notice of Appeal with the Administrative Law Court. Appellants Appeal was denied by Judge S. Phillip Lenski on January 25, 2022. Appellant then timely served his Notice of Appeal with the South Carolina Court of Appeals on February 22, 2022.

III. APPLICABLE PLAN TERMS

Appellant believes the following plan terms are relevant:

“DEFINITION OF DISABLITLY

...

B. Any Occupation Definition of Disability

During the Any Occupation Period you are required to be Disabled from all occupations.

You are Disabled from all occupations if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of Any Occupation,

Any Occupation means any occupation or employment which you are able to perform, whether due to education training or experience, which is available at one or more locations in the national economy and in which you can be expected to earn at least 65% of your Indexed Pre-disability Earnings within twelve months following your return to work, regardless of whether you are working in that or any other occupation.” (*Id.* at page 13).

“A. Limitation

No LTD Benefits are payable after you have been disabled for 24 months during your entire lifetime (exclusive of any Benefit Waiting Periods). If your Disability was caused or contributed to by the following, or medical or surgical treatment of the following:

...

5. Chronic Pain, Musculoskeletal and Connective Tissue Conditions, Chronic Pain, Musculoskeletal and Connective Tissue Conditions means conditions such as fibromyalgia, reflux sympathetic, dystrophy, or myofascial pain, carpal tunnel, or repetitive motion syndrome, temporomandibular joint disorder, craniomandibular joint disorder, arthritis, diseases or disorders of the cervical, thoracic, or lumbosacral back and its surrounding soft tissue, and sprains or strains of joint or muscles.

However, Disabilities as a result of the following conditions are not limited: neoplastic diseases, neurologic diseases, endocrine diseases, hematologic diseases, asthma, allergy-induced reactive lung disease, tumors, malignancies, or vascular malformations, demyelinating diseases, lupus, rheumatoid or electromyogram and computerized tomography or magnetic resonance imaging, scoliosis, radiculopathies that are documented by electromyogram, spondylolisthesis, grade II or higher, myelopathies and myelitis, traumatic spinal cord necrosis, osteoporosis, discitis, Paget's disease." (*Id.* at page 11).

IV. STATEMENT OF SUBSTANTIVE FACTS FOM THE RECORD ON APPEAL

Appellant does continue to be completely and totally disabled due to lumbar radiculopathy with neurological abnormalities, a non-limited condition under the policy. This is supported by the Appellants treating physicians, required EMG testing for proof by PEBA, and even partially by the Respondents record reviewing physicians, (non-treating, record reviewing only, physicians).

The Appellant has been seen and treated in the offices of Dr. Jason Highsmith in South Carolina and received a second opinion from Dr. Richard Guyer (whom reportedly performed surgery on Tiger Woods back and he returned to Golf), in Texas, both expert surgeons in difficult back surgery and with extensive experience treating patients with this condition. On March 12, 2018, Appellant underwent an EMG (electromyogram) which concluded: "Needle EMG of the right leg reveals chronic L5 and S1 radicular changes." (*Id.* at pages 66-69). Proving radiculopathy with neurological abnormalities.

On September 19, 2019, Appellant was treated by Dr. Highsmith, who has seen and treated Mr. Arnette many times, noted that Appellant suffered from "Chronic L5-S1 radicular changes." as

proven per EMG testing (*Id.* at page 12). He also noted that “Unfortunately, the patient has been with disabling chronic radiculopathy with neurologic deficits and pain. He cannot take standard nonsteroidal anti-inflammatories which would be helpful in treating his pain, but symptoms certainly qualify him for disability.” (*Id.* at page 12).

On or around January 20, 2020, Dr. Highsmith, a board-certified neurosurgeon specializing in complex and minimally invasive spine surgery, completed a statement on Appellant’s behalf:

1. I am a medical doctor licensed to practice in the state of South Carolina, and I practice in Charleston, South Carolina. I am board certified in Neurosurgery. I have been asked by my patient, Mr. Jerry Arnette, to provide this statement to be used in his quest for disability insurance benefits. This statement is based upon my medical education, experience, my specific knowledge of Mr. Arnette’s medical problems and treatment history.
2. Mr. Arnette suffers from radiculopathy. Subjectively, as a result, he suffers:
 - a) Chronic back pain,
 - b) Tingling in feet and legs;
 - c) Radiating pain in feet and legs;
 - d) Decreased sleep;
 - e) Fatigue;
 - f) Muscle aches

His activities are limited as follows:

- i) He has difficulty performing some activities of daily living;
- ii) He cannot perform any activity for an extended period of time;
- iii) He cannot sit, stand, or walk for prolonged periods of time;
- iv) Because of his medical condition it is difficult for him to maintain a consistent schedule;
- v) He cannot lift more than 10 lbs.

Mr. Arnette’s subjective symptoms are consistent with his diagnosed conditions.

3. Mr. Arnette’s treatment compliant, and he currently takes Amlodipine, Gabapentin, Allopurinol, Bethanechol, Cyclobenzaprine, Tamsulosin, Pantoprazole and Tramadol.
4. It is my understanding from Mr. Arnette that his disability insurance provider has terminated benefits asserting that his disability claim is limited to twenty-four months.
5. I have been advised that the disability policy in question contains a definition of disability as follows:

B. Any Occupation Definition of Disability

During the Any Occupation Period, you are required to be Disabled from all occupations.

You are Disabled from all occupations if, as a result of Physical Disease, Injury, Pregnancy or Mental Disorder, you are unable to perform with reasonable continuity the Material Duties of Any Occupation.

Any Occupation means any occupation or employment which you are able to perform, whether due to education, training or experience, which is available at one or more locations in the national economy and in which you can be expected to earn at least 65% of your Indexed Pre-disability Earnings within twelve months following your return to work, regardless of whether you are working in that or any other occupation.

6. It is my opinion, based upon my medical education and experience and based upon my specific knowledge of Mr. Arnette's problems and treatment history that he is and has been disabled, as a result of his radiculopathy, from performing any occupation, consistent with the definition of disability above. I render my opinion based upon Mr. Arnette's diagnosis of radiculopathy and the subjective symptoms he suffers. It is my opinion that he has been so disabled since February 2017 and that he will remain so indefinitely into the future." (*Id.* at pages 70 and 71).

On November 7, 2018, Appellant saw Dr. Richard Guyer, who is certified by the American Board of Orthopedic Surgery, and specializes in spinal surgery. Dr. Guyer is the co-founder of the Texas Back Institute. Appellant complained of lower back pain that radiated to both legs and feet. (*Id.* at page 27). Dr. Guyer assessed the Appellant with chronic low back pain that radiated into his legs. (*Id.* at 27). Dr. Guyer recommended a lumbar discography and stated Appellant may be a candidate for additional back surgery. (*Id.* at 27).

Medications prescribed for and taken by Appellant for radiculopathy with neurological abnormalities. The medications listed were Gabapentin, Tramadol and Cyclobenzaprine. Listed on the undated "Statement of Dr. Jason Highsmith" (the "Statement"). (*Id.* at pages 41-44, 70 and 71).

- 1) Gabapentin 300 mg capsule. Uses: Gabapentin is used with other medications to prevent and control seizures. It is also used to relieve nerve pain following shingles (a

painful rash due to herpes zoster infection) in adults. Gabapentin is known as an anticonvulsant or antiepileptic drug.

Side Effects: Drowsiness, dizziness, loss of coordination, tiredness, blurred/double vision, unusual eye movements, or shaking (tremor) may occur.

Precautions: This drug may make you dizzy or drowsy or blur your vision.... Do not drive, use machinery, or do anything that needs alertness or clear vision until you can do it safely.... Dizziness and loss of coordination can increase the risk of falling. (*Id.* at 43-44)

2) Tramadol HCL 50 mg tablet.

Uses: This medication is used to help relieve moderate to moderately severe pain.

Side Effects: Nausea, vomiting, constipation, lightheadedness, dizziness, drowsiness, or headache may occur.... To reduce the risk of dizziness and lightheadedness, get up slowly when rising from a sitting or lying position.

Precautions: This drug may make you dizzy or drowsy.... Do not drive, use machinery, or do anything that needs alertness until you can do it safely. (*Id.* at 42)

3) Cyclobenzaprine 10 mg tablet.

Uses: Cyclobenzaprine is used short-term to treat muscle spasms. It is used along with rest and physical therapy. It works by helping to relax the muscles.

Side Effects: Drowsiness, dizziness, dry mouth, constipation, or tiredness may occur.

Precautions: This drug may make you dizzy or drowsy.... Do not drive, use machinery, or do anything that needs alertness until you can do it safely. (*Id.* at 41)

V. RESPONDENT'S REVIEWING PHYSICIANS

The Appellant was not physically seen, treated or contacted by the Respondent's, medical record only, reviewing physicians. The Respondent repeatedly states in their briefs that the Respondents Physicians called and left a message for Dr. Highsmith and that he didn't return their call. The Respondents Physicians have not asked or received written consent to contact

Dr. Highsmith, by the Appellant and have not provided proof of such in writing to Dr.

Highsmith's office, as of May 31, 2022, whom Mr. Arnette asked to check his, the Appellants, medical record for any such written correspondence to Dr. Highsmith's office.

The Respondents Physicians would have been given written consent by the Appellant to discuss or review any of his medical records with Dr. Highsmith, but this consent was not

requested ,or even suspected , by the Appellant who has been very cooperative by granting any and all written consent in the past, as requested by PEBA and Standard Insurance.

Dr. Highsmith would not be able to discuss the Appellants medical history or be able to correspond with the Respondents Physicians without their proof of written consent. The Appellant has symptoms, restrictions, and limitations in line with and as stated by his treating physician, Dr. Highsmith with which the Respondents Physicians agree on the disability of Radiculopathy with neurological abnormalities, but vary greatly on their ideas of limitations and restrictions of the Appellant, whom they have not met, treated or spoken to about his medical symptoms, pain, medications or ability to function daily.

On February 13, 2020, Dr. Solomon Rojhani reviewed Appellant's claim and opined:

“3. Are any of the claimant's diagnoses caused, contributed to and/or considered any of the following as of 05/14/19 and continuing beyond?

- **Neurologic diseases;**
- **Asthma or allergy – induced reactive lung disease**
- **Demyelinating diseases, lupus, rheumatoid or psoriatic arthritis;**
- **Herniated discs with neurological abnormalities documented by EMG, and CT or MRI;**
- **Radiculopathies that are documented by EMG:**
- **Spondylolisthesis, grade II or higher, myelopathies and/or myelitis?**

Yes, the provider documented chronic L5-S1 radicular changes. His 3/12/18 EMG reflected this and confirmed radiculopathy. The claimant also had evident neurological abnormalities.

4. If so, and any such conditions result in any type of limitations/restrictions as of 05-15-19 and continuing beyond, which would impair him from performing full-time work activities, please list those conditions and the limitations/restrictions they cause. Again, please explain the medical information/reasoning that supports your conclusions.

The claimant has had lower back, right leg and right foot pain (9/18/19, Dr. Highsmith). On examination, tenderness was noted on his cervical thoracic and lumbar paraspinal muscles. There were palpable thoracic and lumbar paraspinal muscle spasms. Trigger points were noted on the right and left trapezius, latissimus dorsi, and right and left quadratus lumborum. There were also moderate to severe tenderness from L3 to S1 with limited range of motion. His X-ray showed multilevel degenerative changes, most notable from L-3-S1. His thoracic MRI exhibited multilevel disc disruptions at T1-2 and from T6 to T9. The claimant has an extensive history related to lumbar DDD, and radiculopathy and accordingly requires R/L's as follows:

Lumbago, Lumbar radiculopathy:

Sitting: Frequently up to 6 hours total per day

Standing: 15 minutes at a time, up to 1 hour total per day

Walking: 15 minutes at a time, up to 1 hour total per day

Lifting: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Pushing: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Pulling: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Climbing stairs: Occasionally

Balancing: Occasionally

Stooping: Never

Kneeling: Never

Couching: Never

Crawling: Never

Reaching: Occasionally overhead or below waist level, unrestricted at desk with bilateral hands using lower extremities for foot controls: Unrestricted using left; occasionally using the right foot.” (*Id.* at page 14).

On March 10, 2020, Dr. Rojhani issued an addendum to his opinion, stating:

“For questions #4- Dr. Rojhani listed restrictions/limitations of the diagnoses of Lumbago and lumbar radiculopathy. Can he note if there would be any change in those R/Ls listed if he did not include the lumbago, and only consider that those are caused by/related to the lumbar radiculopathy and neurological abnormalities?”

Only considering the R/Ls caused by/related to the lumbar radiculopathy and neurological abnormalities the following are recommended:

Sitting: Unrestricted

Standing: 15 minutes at a time, up to 1 hour total per day

Walking: 15 minutes at a time, up to 1 hour total per day

Lifting: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Carrying: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Pushing: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Pulling: Occasionally up to 20 lbs., frequently up to 10 lbs. bilateral upper extremities

Climbing stairs: Occasionally

Balancing: Occasionally

Stooping: Never

Kneeling: Never

Couching: Never

Crawling: Never

Reaching: Unrestricted at desk, overhead or below waist level with bilateral hands using lower extremities for foot controls: Unrestricted using left; occasionally using the right foot.”
(*Id.* at page 15).

On October 2, 2020, Dr. David Burke reviewed Appellant’s claim and opined:

1. Please list the claimant’s medically supported diagnosis as of and continuing beyond 6/1/2020.

Lumbar radiculopathy; axial neck pain; axial low back pain; axial mid back pain

2. Are any of the diagnosis caused or contributed to by any other following:

Fibromyalgia, reflex sympathetic dystrophy or myofascial pain, arthritis other rheumatoid or psoriatic arthritis, disease or disorders of the cervical or lumbosacral and its surrounding soft tissue, or sprains or strains of the joints or muscles?

Yes, the diagnoses are caused or contributed to by disease or disorders of the cervical and lumbosacral back and its surrounding tissue.

3. If yes to #2, and you exclude all limitations/restrictions caused by those conditions, is impairment from fulltime work activities within reasonably consistent, 40 hr./week work schedule supported after 06/1/2020? Please explain why or why not, noting which conditions, if any, are causing which limitations and restrictions?

If those conditions are excluded, there is no evidence of impairment from fulltime work activities within a reasonably consistent, 40 hr./week work schedule supported after 6/1/20.

The claimant is a 51-year-old male who ceased work 2/1/2017 due to neck, mid and low back pain and radiculopathy. Supported diagnoses include lumbar radiculopathy; axial neck pain, axial low back pain, axial mid back pain. 3/12/18 EMG/NCS revealed chronic L5 and S1 radicular changes. 9/28/18 MI L-spine revealed moderate degenerative disease of the lumbar spine; multilevel NF stenosis ranging from mild to mild/moderate. Per Dr. Highsmith on 7/31/20, the claimant reports neck, mild and low back pain. His neck pain has improved since undergoing cervical arthroplasty as well as radicular arm pain, but he has neck stiffness at C4-5. His biggest complaint is midthoracic pain radiating to the chest wall. He has multiple thoracic disruptions. He notes increased numbness/tingling/weakness as well as pain the right lateral foot (L5-s1). PE: 4/5 strength with right dorsiflexion and hip flexion; otherwise 5/5; 2/4 DTRs throughout; diminished sensation in the dorsal right foot distally, otherwise intact; tenderness of the cervical paraspinal muscles; tenderness in the midline C3-7 with limited ROM; negative Spurling’s; tenderness of the lumbar muscles with muscle spasms; trigger points in the left quadratus lumborum; tenderness in the midline from L2-s1 with limited ROB; negative SR. Thus, R/Ls would be supported from these conditions; however, if excluded, there is no evidence of other impairment.

- 4. Are any of the claimant's diagnosis caused, contributed to and/or consider any of the following as of 6/1/20 and continuing beyond? Neurologic diseases; asthma or allergy related-induced reactive lung disease; demyelinating diseases, lupus, rheumatoid or psoriatic arthritis; herniated discs with neurological abnormalities documented by EMG and CT or MRI; radiculopathies documented by EMG; spondylolisthesis, grade II or higher, myelopathies and or myelitis?**

Yes, some of the claimant's diagnoses are caused, contributed to and/or considered neurologic diseases; demyelinating diseases, herniated discs with neurological abnormalities documenting by EMG and CT or MRI; radiculopathies documented by EMG as of 6/1/20 and continuing beyond.

- 5. If so, any such conditions result in any type of limitations and restrictions as of 6/1/20 and continuing beyond, which would impair him from performing full-time work activities, please list those conditions and the limitations and restrictions they cause. Again, please explain the medical information/reasoning that supports your conclusions in detail.**

No. Such conditions would not result in any type of limitations and restrictions as of 6/1/20 and continuing beyond, which would impair him from performing full-time work activities. However, from 6/1/20 and continuing beyond, the impairment condition that meets the criteria in questions #4 include lumbar radiculopathy, L5-S1, axial neck pain, axial low back pain, and axial mid back pain, which would require R/Ls. However, this would not preclude full-time work activities. The claimant is a 51-year-old male who ceased work 2/1/2017 due to neck, mid and low back pain and radiculopathy. Supported diagnoses include lumbar radiculopathy; axial neck pain, axial low back pain, axial mid back pain. 3/12/18 EMG/NCS revealed chronic L5 and S1 radicular changes. 9/28/18 MI L-spine revealed moderate degenerative disease of the lumbar spine; multilevel NF stenosis ranging from mild to mild/moderate. Per Dr. Highsmith on 7/31/20, the claimant reports neck, mild and low back pain. His neck pain has improved since undergoing cervical arthroplasty as well as radicular arm pain, but he has neck stiffness at C4-5. His biggest complaint is midthoracic pain radiating to the chest wall. He has multiple thoracic disruptions. He notes increased numbness/tingling/weakness as well as pain the right lateral foot (L5-s1). PE: 4/5 strength with right dorsiflexion and hip flexion; other wise 5/5; 2/4 DTRs throughout; diminished sensation in the dorsal right foot distally, otherwise intact; tenderness of the cervical paraspinal muscles; tenderness in the midline C3-7 with limited ROM; negative Spurling's; tenderness of the lumbar muscles with muscle spasms; trigger points in the left quadratus lumborum; tenderness in the midline from L2-s1 with limited ROM; negative SLR.

Thus, R/Ls would be supported from lumbar radiculopathy, axial neck pain, axial low back pain and axial mid back pain as exams document 4/5 strength with right dorsiflexion and hip flexion, diminished sensation in the dorsal right foot distally, tenderness in the midline from C3-7 with limited ROM and tenderness in the midline from L2-S1 with limited ROM.

As of 6/1/20 and continuing beyond, with re-evaluation on or around 1/1/2021:

Sitting: constantly (30 minutes at a time for up to 8 hours/day) -frequently change positions every 30 minutes with a 1-2 minute "stand and stretch" break.

Standing: frequently (30 minutes at a time, up to 4 hours/day)

Walking: frequently (30 minutes at a time, up to 4 hours/day)

Lifting/Carrying: Occasionally up to 20 lbs.

Pushing/Pulling: Occasionally up to 40 lbs.

Climbing stairs: frequently

Balancing: frequently

Stooping: frequently

Kneeling: frequently

Crouching: frequently

Crawling: frequently

Reaching: overhead – frequently
 desk level – constantly
 below waist activities – frequently

Use lower extremities for foot controls; occasionally RLE; unrestricted LLE

Fingering/handling; unrestricted BUE.

The claimant’s abilities are sustainable on a full-time basis with provided R/Ls.” (*Id.* at page 17).

The Appellant requests that you take note of the fact these two Respondents physicians have greatly different diagnosis of the Appellants limitations and restrictions and abilities to function and keep in mind these Respondents physicians have only reviewed the medical records and have not seen or treated him and do not mention any of the medications of record or side effects.

VI. STANDARD OF REVIEW

Section 1-23-380(A)(5) establishes the standard of review for appeals of PEBA’s decision under the Plan, and states as follows:

“The court may not substitute its judgement for the judgement of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2003, as amended by 2006 S.C. Acts 387, House Bill No. 3285, Ratification No. 398). “Substantial evidence” is the standard for judicial review of agency decisions. *Hendley v. S.C. Budget & Control Bd*, 510 S.E.2d 421 (S.C. 1999).

“Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.”

McCraw v. Mary Black Hosp., 565 S.E.2d 286, 289 (S.C. 2006) (quoting *Tiller v National Health Care Center*, 513 W.E. 2d 843, 845 (S.C. 1999)). The Court of Appeals, may reverse the decision if the Administrative findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

VII. ARGUMENT

The Administrative Law Court and PEBA did not adequately consider the medications of record that the Appellant takes daily for lumbar radiculopathy and neurological abnormalities. These medications cause physical and cognitive side effects that prevent the Appellant from working any job in the National economy. PEBA’S decision to deny Appellant’s benefits is clearly erroneous in the view of the reliable, probative, and substantive evidence in the entire record. PEBA relied on a flawed reviewing physician opinions that did not adequately consider Appellant’s medical conditions and the symptoms that he suffers from. PEBA’s (Respondents) reviewing physicians have not seen, treated or contacted the Appellant to discuss any medical conditions, side effects of medications, or symptoms pertaining to his disability. The

Respondents physicians vary greatly in their diagnosis on the Appellants limitations and restrictions. It is also the Appellant's argument that the Administrative Law Court did not consider the medications of record, that have numerous physical and cognitive side effects, that the Appellant takes daily for lumbar radiculopathy and pain. These medications prevent the Appellant from working any job at all in the National economy, as no employer will retain an employee taking these medications with these side effects on a daily basis and with the number of sick days necessary because of the Appellants condition.

The Appellant's physician has consistently and unequivocally opined that the Appellant is completely and totally disabled due to lumbar radiculopathy with neurological abnormalities, a proven non-limited condition. PEBA and the Respondents reviewing physicians concur that the appellant has radiculopathy with neurological abnormalities. (*Id.* at pages 71 thru 76). This condition and subjective symptoms cause him to be completely and totally disabled from performing any occupation from May 14, 2019, to the present, and ongoing into the future.

As a result, the Administrative Law Court and PEBA's denial of Appellant's claim for basic long term disability benefits was "clearly erroneous in the view of the reliable, probative, and substantial evidence on the whole record." (*McCraw*, 565 S.E.2d at 289).

VIII. CONCLUSION

Due to the Respondents Brief clearly having erroneous statements, inaccurate timeline of the surgical record, and choosing to focus only on just part of the Appellants medical record instead of the record as a whole, presented as fact by the Respondents Brief (*Id.* at page 26 in footnotes) and (Respondents Briefs dated December 06, 2021 and May 24, 2022) and the lack of consideration for the Appellants physical pain, physical limitations to function daily, and prescription medication side effects, preventing the Appellants daily ability to function

cognitively, to drive every day, or work, full or part-time, anywhere in the national economy. The record, taken as a whole, clearly demonstrates the Appellant is disabled from performing any occupation from May 14, 2019 to present. Despite the reliable, probative, and substantial evidence included in the record, PEBA has denied his claim for long term disability benefits. PEBA's decision is clearly erroneous because it relied on flawed reviewing physicians' opinions. Those physicians have not seen, treated, or questioned the appellant as to his physical limitations. They did not take into consideration the prescription medications or the side effects of the medications used to treat radiculopathy with neurological abnormalities, when making a determination as to Appellant's eligibility for long term disability benefits. They also did not take into consideration the number of sick days the appellant would need with his condition. Consequently, Appellant sincerely requests that the Court of Appeals reverse the order of Judge S. Phillip Lenski and PEBA's denial of LTD benefits because the decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The record, taken as a whole, clearly demonstrates the Appellant is disabled from performing any occupation from May 14, 2019 to present. The Appellant respectfully requests that this Court award him LTD benefits effective May 14, 2019 to the present.

s/Jerry Arnette
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Date: June 03, 2022

**PROOF OF SERVICE OF
APPELLANT'S BRIEF**

THE STATE OF SOUTH CAROLINA

In The Court of
Appeals

Docket No. 2022-000182

Jerry Arnette,

Appellant.

v.

South Carolina Public Employee
Benefit Authority, Employee
Insurance Program,

Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Brief on South Carolina Public Employee Benefit Authority, Employee Insurance Program by emailing a copy of it, on June 3, 2022, addressed to the attorney of record, Michael T. Brittingham, Nexsen Pruet, LLC, mbrittingham@nexsenpruet.com, 1230 Main Street Suite 700 (29201), Post Office Drawer 2426, Columbia, South Carolina 29202 and James T. Hedgepath, Nexsen Pruet, LLC, jhedgepath@nexsenpruet.com, 104 South Main Street Suite 900, Post Office Drawer 10648, Greenville South Carolina 29603 and The South Carolina Court of Appeals, Post Office Box 11629, Columbia, SC 29211.

June 3, 2022

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Jun 03 2022
SC Court of Appeals