ATTACHMENT A

THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for Disability Retirement of:	Case No. 8089
MICHELLE R. MARTIN,	OAH No. 2009120579
Respondent,	
and	
DEPARTMENT OF MOTOR VEHICLES,	
Respondent.	

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, State of California, Office of Administrative Hearings, on February 19, 2015, in Sacramento, California.

Christopher Phillips, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Barry Bennett, Attorney at Law, represented Michelle R. Martin (respondent) who was present at the hearing.

There was no appearance by or on behalf of the Department of Motor Vehicles (Department). The Department was duly served with Notices of Hearing. The matter proceeded as a default against the Department, pursuant to California Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on February 19, 2015.

ISSUE

The issue on appeal is whether, on the basis of rheumatoid arthritis, carpal tunnel, epicondylitis and/or tendonitis conditions (orthopedic conditions), respondent is permanently disabled or incapacitated from performance of her duties as a Motor Vehicle Field Representative (Field Representative) for the Department.

PROCEDURAL FINDINGS

1. On October 29, 2004, respondent signed and thereafter filed with CalPERS an application for disability retirement (application). At the time, respondent was employed as a Field Representative with the Department. By virtue of her employment, respondent is a state miscellaneous member of CalPERS subject to Government Code section 21150.

2. In filing the application, respondent claimed disability on the basis "epicondylitis, tendonitis, and Carpal Tunnel Syndrome." Respondent also indicated that she had rheumatoid arthritis in all of her joints.

3. CalPERS obtained reports concerning respondent's orthopedic conditions. After reviewing the reports, CalPERS determined that respondent was not substantially incapacitated from performance of her duties as a Field Representative with the Department, at the time she filed her application.

4. On February 6, 2007, CalPERS notified respondent that the application for disability retirement was denied. Respondent was advised of her appeal rights. Respondent filed an appeal and request for hearing by letter dated March 5, 2007.

5. On December 30, 2009, Mary Lynn Fisher, in her official capacity as Chief, Benefit Services Division, Board of Administration, CalPERS, signed and thereafter filed the Statement of Issues.

FACTUAL FINDINGS

Background

1. In 1995, respondent was hired to work as a Field Representative for the Department, in Visalia, California. She remained in that position until she took a leave of absence on approximately October 23, 2003. She was 37 years old when she filed her application.

Duties of a Representative

2. As set forth in the Department's position statement, effective January 1995, as a Field Representative for the Department, respondent was expected to be able to "use and interpret available resources (VC [Vehicle Code], Registration and Driver License Manuals, Neoware software.)" Respondent was also expected to communicate with customers, determine fees due, issue appropriate documents, accurately key transactions, and collect money.

3. The Department submitted to CalPERS a completed "Physical Requirements of Position/Occupational Title" (Physical Requirements) for respondent's position, signed by respondent and her supervisor Larry Johnson, on April 18, 2005.

According to the Physical Requirements, when working as a Field Representative, respondent: (1) constantly (over six hours per day) sat, repetitively used her hands, used a keyboard and a mouse; (2) occasionally (up to three hours) stood, walked, kneeled, squatted, bent at the neck and waist, twisted her neck and waist, reached above and below her shoulders, simple grasped, lifted between 11 and 25 pounds, drove; and (3) never crawled, climbed, pushed and pulled, used fine manipulation, power grasped, walked on uneven ground, worked with heavy equipment, was exposed to excessive noise, extreme temperatures, dust, gas, fumes or chemicals, worked at heights, operated foot controls or repetitive movement, used special visual or auditory protective equipment, or worked with bio-hazards.

4. Respondent worked in the registration and driver license section of the Department. At hearing, respondent testified that the Physical Requirements form was inaccurate in some respects. Respondent had to occasionally climb onto step stools to reach higher items. She also frequently used fine manipulation and constantly had to use simple grasping. She was required to handle documents and tear staples from documents.

Physician's Report on Disability

5. On March 9, 2006, respondent's neurologist Sanjay J. Chauhan, M.D. signed a "Physician's Report on Disability" form which was filed with CalPERS in support of respondent's application. On the form, Dr. Chauhan listed respondent's medical diagnosis as carpal tunnel syndrome, shoulder and elbow. He also wrote that respondent had tendonitis.

6. Dr. Chauhan marked the "yes" box in response to Section 5, question 1 on the form: "Is the member currently, substantially incapacitated from performance of the usual duties of the position for their current employer?" He also wrote in response to the question regarding specific work activities respondent was not able to perform: "no repetitive use of hands."

Respondent's Testimony

7. In September 1997, respondent began to experience numbness in the fingertips of her left hand and up to the bicep of her left arm. She reported the incident to her supervisor. Respondent was evaluated by Dr. Tan, who recommended she take medication and wear a brace on her left hand. Respondent participated in physical therapy for several months. Respondent continued to work as a Field Representative without any modifications to her assignment. At some point, respondent began to experience numbness and tingling in her right hand. Respondent did not seek treatment.

8. Respondent's symptoms continued to worsen. She experienced numbness, tingling and pain in her hands. She could not maintain a grip "on anything." In 2003, respondent obtained an attorney. He sent her to be evaluated by Dr. Chauhan, who recommended that she take a nerve conduction study. In June or July 2003, the nerve conduction study was performed. Thereafter, Dr. Chauhan recommended that respondent undergo surgery on her left wrist.

9. In October 2003, respondent had left carpal tunnel release surgery performed by Scott Rosenzweig, M.D. In February 2004, respondent had right carpal tunnel release surgery performed. Her symptoms improved for approximately six months to one year after her surgeries. Respondent testified that Dr. Chauhan recommended that she not return to work because he believed if she did so, she would need additional surgeries within a year. Respondent did not return to work after her October 2003 surgery.

10. Eventually, respondent's symptoms returned. In 2010, respondent began to have pain in her elbows. Between 2008 and 2012, respondent had several surgeries performed by Ricardo Avena, M.D., including re-release surgeries on her wrists, and cubital tunnel releases. The surgeries provided temporary pain relief. In 2012, respondent underwent a compartmental release to her left wrist to improve her ability to grip and to repair a "popping sensation" in her wrist. Respondent felt that the compartmental release surgery was not successful, and she does not plan to have the surgery on her right wrist.

11. Respondent testified that her daily living is affected by her pain and inability to grip items. Respondent has three children. In 2003, they were three, seven and 14 years of age. Respondent needed their assistance with house chores. Respondent has difficulty gripping items such as a hairbrush or toothbrush. Respondent is able to drive, but her hands fall asleep if she places them high up on the steering wheel. Respondent is able to perform some typing at home. She takes medication for joint pain, uses topical skin gel for pain and prescription pain medication. None of the medications provide respondent complete relief from the pain.

Independent Medical Evaluation

12. On August 29, 2006, at the request of CalPERS, Kenneth Baldwin, M.D., conducted an independent medical evaluation (IME) on respondent and thereafter prepared

reports dated September 5, 2006, September 22, 2006, November 15, 2013 and April 28, 2015.[1] Dr. Baldwin obtained his medical degree in 1976 from the University of California, Los Angeles, School of Medicine (UCLA). He completed his residency at UCLA, in the Division of Orthopaedic Surgery. In 1984, he became certified by the American Board of Orthopaedic Surgery.

13. As part of the IME, Dr. Baldwin reviewed respondent's duty statement and the physical requirements of her position. He also interviewed respondent, obtained a personal and medical history, conducted a physical and neurologic examination, and reviewed respondent's medical records related to her orthopedic conditions.

RESPONDENT'S COMPLAINTS AND EXAMINATION

14. Respondent informed Dr. Baldwin that she last worked for the Department on October 23, 2003. She was placed on disability by her physician due to carpal tunnel syndrome. She explained that in September 1997, she began to have gradual numbness, tingling and pain in both of her wrists and forearms. She was evaluated and referred to "orthopedic management of carpal tunnel syndrome and tendonitis." Respondent reported that surgical releases were performed on her wrist, but she had a recurrence of numbness and pain associated with hand activities. She explained that it was determined that she had chronic overuse injuries and she was placed on modified activities by her physician.

15. Respondent informed Dr. Baldwin that her complaints included: (1) nocturnal discomfort; (2) awaking with her arms being "asleep"; (3) pain that extends to her elbows; and (4) occasional swelling. Respondent stated that her symptoms varied depending on the activities she performed. She indicated that her condition had been stable for the last two years.

16. Dr. Baldwin conducted a physical examination of respondent. Respondent preformed a grip strength test which demonstrated that without pain, she had grip strength between 12 and 16 kilograms for both hands. Respondent had tenderness and "moderate exaggerated pain symptoms with light palpations around right and left elbows."

Respondent's neurologic examination demonstrated that her deep tendon reflexes were "present and equal at the biceps, triceps, and brachioradialis." Respondent's motor function was "5/5 in all motor groups of the upper extremities without any associated pain and/or tenderness when pressure was applied over the areas of the wrists and hands during the performing of muscle strength testing." "Light touch" was slightly decreased in the left hand ring and middle fingers. Respondent had normal sensation in her right hand. "Two-point" discrimination was slightly decreased in the right hand middle and left fifth digit.

[1] Dr. Baldwin's reports were received into evidence at hearing. Dr. Baldwin did not testify.

REVIEW OF MEDICAL RECORDS

17. Dr. Baldwin reviewed respondent's medical records related to her orthopedic conditions from Daniel Watrous, M.D., D. Sharbaugh, M.D., Murray Barry, M.D., Richard Pantra, M.D., C. Tanner, M.D., Dr. Chauhan, and Dr. Rosenzweig.

18. Dr. Baldwin noted that the medical records he reviewed began with a rheumatology consultation record from August 16, 1995, from Dr. Watrous. The note indicated that Dr. Watrous diagnosed respondent with "hypermobility syndrome with mild osteoarthritis secondary to probable mild palindromic rheumatoid arthritis."

19. Dr. Baldwin also review a neurology consultation record dated December 15, 1998, from Dr. Sharbaugh, which noted that respondent complained of numbness in her fourth and fifth fingers of her right hand, right thumb and pain and swelling in her right wrist. Dr. Sharbaugh noted that respondent had "rare nocturnal paresthesias." Dr. Sharbaugh's impression was "bilateral wrist pain and paresthesias of uncertain etiology, possible underlying causation due to rheumatoid arthritis." Dr. Sharbaugh noted that respondent was able to continue to work, with no disability.

20. On June 8, 1999, Dr. Pantra conducted a nerve conduction study on respondent and found no evidence of carpal tunnel syndrome.

21. On November 8, 1999, Dr. Tanner saw respondent for "bilateral upper extremity discomfort." He diagnosed respondent with "overuse syndrome." Dr. Tanner noted that respondent was performing her "usual customary work activity and wishes to continue to do so."

22. Dr. Baldwin also reviewed a "Doctor's First Report of Occupational Injury" dated July 17, 2003. The report indicated that respondent complained of "bilateral hand, left greater than the right with pain and numbness." There is a medical note the same day from Dr. Chauhan, which indicated that respondent was evaluated for "bilateral wrist and hand pain, left greater than right, bilateral elbow pain, and bilateral shoulder and upper arm pain, with left being greater than the right." Dr. Chauhan diagnosed respondent with "overuse syndrome of the upper extremities and tendonitis." [2]

23. The medical records indicated that respondent was referred to Dr. Rosenzweig, for an orthopedic consultation and evaluation. Dr. Rosenzweig diagnosed respondent with

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[2] At hearing, the only medical records that were submitted from Dr. Chauhan were dated from July 2012 through December 2014. The reports from Dr. Chauhan were addressed to the State Compensation Insurance Fund and related to respondent's workers compensation claim. The medical records post-dated respondent's application by over eight years. As a result, they are not relevant to the issue of whether respondent was substantially incapacitated from performance of her duties as a Field Representative at the time she filed her application.

"bilateral carpel tunnel syndrome." On October 24, 2003, Dr. Rosenzweig performed a left carpal tunnel release on respondent. On February 27, 2004, he performed a right carpal tunnel release on respondent.

24. On March 27, 2004, respondent had MRI's performed on her left and right shoulder. She was diagnosed with right shoulder "moderate supraspinatus tendinitis." Her left shoulder showed "no significant abnormalities."

25. On August 19, 2004, Dr. Chauhan issued a "Permanent and Stationary Report." He noted that respondent had "continuing complaints of bilateral hand pain, left greater than right and bilateral shoulder pain." He diagnosed respondent with "overuse syndrome status post bilateral carpal tunnel release and bilateral shoulder tendinitis." Dr. Chauhan also wrote that respondent "is to avoid repetitive use of both upper extremities, avoid repetitive forcible gripping, and avoid very heavy use of left wrist and hand." The same day, respondent had a nerve conduction study performed, which found her "negative for compressive neuropathy of either wrists or elbows. Resolution of bilateral carpal tunnel syndrome is noted."

IMPRESSION AND OPINION

26. Under the "Impression" section of Dr. Baldwin's report, he listed the following:

(1) Bilateral wrist and hand pain;

(2) Status post bilateral carpal tunnel release;

(3) Moderate pain dysfunction

27. In response to the question posed by CalPERS to Dr. Baldwin concerning whether there were specific job duties that respondent was unable to perform because of a physical or mental condition, Dr. Baldwin answered "No." He explained that:

> [Respondent] does not present with any musculoskeletal evidence of impairment noted on the physical examination that would preclude her from performing the usual customary activities of daily living and that of her occupation. Supported documentation based upon nerve conduction studies reveal normal nerve studies without evidence of ongoing median or ulnar nerve entrapment.

28. Dr. Baldwin also answered "No" to the question of whether respondent was "substantially incapacitated for the performance" of her duties. He explained that:

> [Respondent] does not present with musculoskeletal impairment that would in any way preclude her ability to perform usual customary activity required for [sic] position as a Field Representative for the Department of Motor Vehicles. [Respondent's] condition, though it may cause mild pain and/or discomfort, would not lead to further injury or create any risk of developing further injury by continuing with her job activities. [Respondent] does not present with any musculoskeletal impairment that would likely cause such severe symptoms to preclude effective performance of her job duties nor would it make further injury a medical probability.

SEPTEMBER 22, 2006 SUPPLEMENTAL REPORT

29. On September 22, 2006, Dr. Baldwin issued a Supplemental Report, in which he addressed the issue of a possible diagnosis of rheumatoid arthritis. Dr. Baldwin stated that based upon his evaluation of respondent on August 29, 2006, he did not identify any "physical evidence of rheumatoid arthritis which would interfere with her ability to perform physical activities." He also opined that respondent was not precluded from performing her usual and customary occupation.

NOVEMBER 15, 2013 SUPPLEMENTAL REPORT

30. On November 15, 2013, Dr. Baldwin issued a Supplement Report based upon his review of medical records provided to him by CalPERS, from Dr. Avena, a doctor with the Regional Hand Center of Central California.[3] Dr. Baldwin noted in his Supplemental Report, that the first medical record from he reviewed from Dr. Avena was dated April 1, 2008. Dr. Avena diagnosed respondent with "recurrent bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, bilateral medial/lateral epicondylitis and left greater than right de Quervain's stenosing tenosynovitis." [4]

31. Dr. Baldwin noted that on June 19, 2008, Dr. Avena wrote in a progress report that respondent had "negative compression tests for carpal tunnel syndrome." Dr. Avena diagnosed respondent with "advanced cubital tunnel syndrome and mild left carpal tunnel syndrome."

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[3] At hearing, respondent submitted medical records and reports from Dr. Avena. The medical records and reports from Dr. Avena are dated from April 1, 2008, through May 2, 2013, and appear to be the same records described by Dr. Ball in his Supplemental Report.

[4] The Merriam-Webster MedLinePlus online medical dictionary defines "epicondylitis" as "inflammation of an epicondyle or of adjacent tissues--compare tennis elbow." http://www.merriam-webster.com/mobilemedlineplus/epicondylitis.

32. Dr. Baldwin also noted that on October 10, 2008, Dr. Avena performed a left cubital tunnel release on respondent. On May 13, 2009, Dr. Avena performed a right cubital tunnel release.

33. On July 24, 2009, respondent reported to Dr. Avena that she was not experiencing any numbness or tingling her hands. She had some "discomfort on the inside area of her right elbow."

34. Dr. Baldwin noted in his report that on May 11, 2010, Dr. Avena opined that respondent was doing "great" without numbness or tingling in her little and ring fingers. Dr. Avena diagnosed respondent with "recurrent bilateral carpal tunnel syndrome and bilateral de Quervain's stenosing tenosynovitis."[5] Dr. Baldwin recommended that respondent under bilateral carpal tunnel surgery release.

35. On December 9, 2011, respondent had re-release carpal tunnel surgery on her left hand. On March 12, 2012, she had re-release carpal tunnel surgery on her right hand. On October 25, 2012, respondent had first extensor compartment release for "chronic de Quervain's stenosing tenosynovitis."

36. Dr. Baldwin opined that the information in respondent's medical records as reported by Dr. Avena did not change his opinions set forth in his September 5, 2006 report.

APRIL 28, 2014 SUPPLEMENTAL REPORT

37. On April 28, 2014, Dr. Baldwin issued a Supplement Report in which he opined that carpal tunnel syndrome and de Quervain's stenosing tenosynovitis "would not interfere with the ability to perform [respondent's] usual and customary work activities either before or after surgery." He further opined that there was "no substantial medical evidence the [respondent] is substantially incapacitated from her upper extremity symptoms for which medical disability is indicated."

Discussion

38. When all the evidence is considered, Dr. Baldwin's opinion that respondent was not permanently disabled or substantially incapacitated from performance of the duties of a Field Representative based upon her orthopedic conditions was persuasive. Dr. Baldwin found no evidence of musculoskeletal impairment that would preclude her ability to perform usual customary activity required for her position with the Department. Though continuing her job duties may cause mild pain or discomfort, there is no evidence to suggest her job duties would lead to further injury or create any risk of developing further injury.

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[5] The Merriam-Webster MedLinePlus online medical dictionary defines de Quervain disease as "inflammation of tendons and their sheaths at the styloid process of the radius that often causes pain in the thumb side of the wrist." http://www.merriam-webster.com/mobilemedlineplus/deQuervain's.

39. Dr. Chauhan's contrary opinion that respondent is permanently disabled or substantially incapacitated from performance of the duties was not supported by the medical evidence. On the "Physician's Report on Disability" completed by Dr. Chauhan, the only specific work activities that he indicated respondent was unable to perform was repetitive use of her hands. Respondent had carpal tunnel surgery in October 2003 and February 2004. She filed her application eight months after her second surgery. Her symptoms had improved, but Dr. Chauhan recommended that she not return to work because he believed if she did so, she would need additional surgeries within a year. As a result, the evidence established that Dr. Chauhan's restriction that respondent avoid repetitive use of her hands was designed to prevent further injury and was not based on any current disability.

40. Respondent failed to present competent medical evidence to support her assertion that at the time she filed her application she was substantially incapacitated for the performance of her usual duties as a Field Representative based upon the legal criteria applicable in this matter. Consequently, respondent failed to establish that her disability retirement application should be granted based upon her orthopedic conditions.

LEGAL CONCLUSIONS

1. Respondent seeks disability retirement pursuant to Government Code section 21150, subdivision (a), which provides in pertinent part, that "[a] member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age..."

2. To qualify for disability retirement, respondent must prove that, at the time she applied, she was "incapacitated physically or mentally for the performance of his or her duties..." (Gov. Code, § 21156, subd. (a)(1).) As defined in Government Code section 20026,

> "Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. "Incapacity for the performance of duty" under Government Code section 21022 [now section 21151] "means the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.) Substantial inability to perform usual duties must be measured by considering applicant's abilities. Discomfort, which makes it difficult to perform ones duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862.)

4. In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 855, a state traffic sergeant employed by the CHP had suffered injuries to his left ankle and knee, and had strained

his back. The court noted that the sergeant "could sit for long periods of time but it would 'probably bother his back;' that he could run but not very adequately and that he would probably limp if he had to run because he had a bad ankle; that he could apprehend persons escaping on foot over rough terrain or around and over obstacles but he would have difficulty and he might hurt his back; and that he could make physical effort from the sedentary state but he would have to limber up a bit." (*Id.* at p. 862.) The court in *Hosford* found that the sergeant:

> is not disabled unless he is substantially unable to perform the usual duties of the job. The fact that sitting for long periods of time in a patrol car would "probably hurt his back," does not mean that in fact he cannot so sit; ...[¶] As for the more strenuous activities, [a doctor] testified that Hosford could run, and could apprehend a person escaping over rough terrain. Physical abilities differ, even for officers without previous injuries. The rarity of the necessity for such strenuous activity, coupled with the fact that Hosford could actually perform the function, renders [the doctor's conclusion that Hosford was not disabled] well within reason. (*Ibid.*)

In *Hosford*, the sergeant argued that his condition increased his chances for further injury. The court rejected this argument, explaining that "this assertion does little more than demonstrate that his claimed disability is only prospective (and speculative), not presently existing." (*Hosford, supra*, 77 Cal.App.3d at p. 863.) As the court explained, prophylactic restrictions that are imposed to prevent the risk of future injury or harm are not sufficient to support a finding of disability; a disability must be currently existing and not prospective in nature. (*Ibid.*)

5. In *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 697, the court determined that a deputy sheriff was not permanently incapacitated for the performance of his duties, finding, "A review of the physician's reports reflects that aside for a demonstrable mild degenerative change of the lower lumbar spine at the L-5 level, the diagnosis and prognosis for the appellant's condition are dependent on his subjective symptoms."

6. Furthermore, findings issued for the purposes of worker's compensation are not evidence that respondent's injuries are substantially incapacitating for the purposes of disability retirement. (*Smith v. City of Napa, supra*, 120 Cal.App.4th at 207; *English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal.App.3d 839, 844; *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.)

7. The burden of proof is on respondent to demonstrate that she is permanently and substantially unable to perform her usual duties such that she is permanently disabled. (*Harmon v. Board of Retirement of San Mateo County, supra*, 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1980) 214 Cal. App. 3d 1327, 1332.) To meet this burden, respondent must submit competent, objective medical evidence to establish that, at the time of her application, she was

permanently disabled or incapacitated from performing the usual duties of her position. (See *Harmon v. Board of Retirement, supra,* 62 Cal.App.3d 689, 697.)

8. When all the evidence in is considered in light of the courts' holdings in *Hosford* and *Harmon*, respondent did not establish that her disability retirement application should be granted. Although respondent complained that working as a Field Representative caused her pain, there was not sufficient evidence based upon competent medical opinion that she is permanently and substantially incapacitated for the performance of the usual duties of her job, based on her orthopedic conditions. Consequently, her disability retirement application must be denied.

ORDER

The application of Michelle Martin for disability retirement is DENIED.

DATED: March 4, 2015

MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings