

ATTACHMENT C
RESPONDENT'S ARGUMENT

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Attachment C

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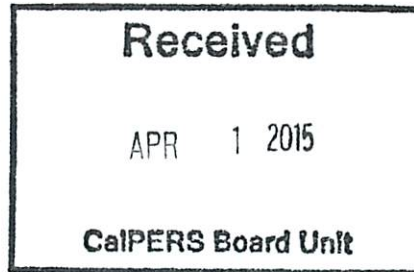
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March 31, 2015

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RE: In the Matter of the Application for Disability Retirement
Of MICHELLE R. MARTIN, Respondent and DEPARTMENT
OF MOTOR VEHICLES, Respondent, Case No. 8089
Our File Number 2499
Respondent Martin's Argument

Honorable Members of the PERS Board:

This office represents Michelle R. Martin, Applicant and Respondent (hereinafter "Applicant") in the above matter, and this letter is written in response, and opposition, to the Proposed Decision of the Administrative Law Judge ("ALJ") in the above matter, dated March 4, 2015. Applicant objects to the Proposed Decision on the grounds that the Proposed Decision is not based on the evidence adduced at hearing, and mechanistically applies certain principles which, while traditionally applied to cases of this nature, ignore certain undisputed and fundamental aspects of the record.

Applicant acknowledges that the ALJ's quotation of Dr. Chauhan's concern with possible future injuries to Applicant, should she be compelled to return to her previous duties, invokes invidious references to Hosford v. Board of Administration (1978) 77 Cal. App. 3d 855, where the court ruled that prophylactic medical concerns did not support a finding of present disability. The ALJ also noted that Dr. Chauhan, a Worker's Compensation specialist, appeared to be submitting records which had been created for the purposes of another proceeding. Given the cost and availability of orthopedic surgeons, especially for people of income which has been limited by forced departure from work, Applicant arrived at hearing less well-armed than a State agency which had taxpayer funds at its disposal, i.e., to hire and produce an expert witness. That economic reality did not change the fact that Appellant bore the burden of proof at hearing but, under the peculiar circumstances of this case, Appellant contends that she met her burden.

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In fact, what distinguishes this case, in a manner which the ALJ seemed not to recognize, or dismissed as insignificant, is that all medical witnesses essentially agreed concerning Appellant's symptomology, namely that Appellant was suffering from carpal tunnel syndrome, cubital tunnel syndrome, tendinitis, and medial and lateral epicondylitis, as well as chronic tenosynovitis. While the medical witnesses differed as to the severity of those conditions, and whether the conditions precluded Appellant from performing the range of duties required by her job classification, their medical findings did not differ significantly.

It likewise was not disputed that Appellant's position as a Motor Vehicle Field Representative primarily involved repetitive keyboard work, and undisputed testimony at hearing revealed that Appellant had sought both an accommodation of her duties to relieve her symptoms and, later, a transfer to a position where repetitive keyboard duties would be minimized, only to be refused both requests by the Department because of the perceived unavailability of suitable positions. In assessing the question of disability entitlement, Appellant contends, the Board must focus on the usual duties performed by the applicant, Mansperger v. Public Employees' Retirement System (1970) 6 Cal. App. 3d 873, 876, and the ALJ appeared to acknowledge that authority.

The Appellant also testified, without contradiction, about her longstanding inability to perform even the simplest manipulations, e.g., picking dishes out of a dishwasher, taking laundry out of a washer or dryer, stating that she could remove only one item at a time because of both the need to contort her wrist to perform those simple functions and the severe pain associated with even those minor tasks: as she demonstrated at hearing, Appellant was unable to brush her teeth or her hair without digital contortion. While the ALJ cited to Smith v. City of Napa (2004) 120 Cal. App. 4th 194, 207, and the citation therein to Hosford, supra, the substance of Appellant's testimony was not that she suffered from the "discomfort" to which those cases alluded, but from severe pain which left her unable to do even menial household or other chores. Here, it is important to recall that Dr. Baldwin reported Appellant to be cooperative, and "without exaggeration of complaints," in his September 6, 2006 report, which reflected the last time Dr. Baldwin last saw Appellant personally. It is also pertinent, in Appellant's view, that since her application, even though she has been removed from daily repetitive keyboarding duties, her physical condition has deteriorated to the point that Appellant testified, again without contradiction, to seven additional surgeries, divided between her left and right arms, which she was compelled to undergo on her wrists and elbows.

While not controlling, Appellant requests that the Board include, in its review of the ALJ's Proposed Decision, the opinion in Hyatt v. Sullivan (4th Cir. 1990) 899 F.2d 329, 337, which analyzed the role of pain in making a determination of disability. The Court in Hyatt noted that

Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motory disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of intensity, severity, degree or functional effect of pain is not determinative.

Dr. Chauhan may not have been artful in his opinion, leaving that opinion open to the ALJ's characterization of his concerns as being solely prophylactic and therefore subject to the defects outlined in *Hosford*, supra. However, what cannot be gainsaid after a review of Dr. Chauhan's reports over 13 years is that Appellant has had a history not of "discomfort," but of constant and severe joint pain in her arms and wrists, which has rendered her unable to perform many normal domestic and life functions. While Dr. Baldwin disagreed, based on what Appellant described at hearing as a 10-15 minute physical examination and, apparently, subsequent reviews of medical records, it is significant that even Dr. Baldwin did not suspect Appellant of fabrication or exaggeration. Indeed, Dr. Baldwin never saw Appellant again, after his initial examination, and could hardly be expected to comment on the increase in Appellant's pain sensations or physical difficulties: Dr. Baldwin's subsequent refusals to alter his opinion seemed focused on the inadequacy of Dr. Chauhan's medical reports.

Appellant contends that what the ALJ should have considered more carefully, and the Board should review, is the undisputed testimony given by Appellant about her inability to perform simple digital manipulations, the pain she experiences when she tries to lift even one dish out of a dishwasher, and the surgeries she has been forced to endure even after being removed from repetitive keyboard work, as her hands, wrists and elbows continue to deteriorate. Appellant's work history, described by her at hearing, demonstrated that she insisted on trying to work even after her initial difficulties and surgeries, finally sought accommodation when she could no longer get through a work day keyboarding, only to be refused accommodation by her Department, and tried to perform the duties of her position even after that refusal, despite the pain. It was only after a second set of surgeries that Appellant sought relief, through Social Security Disability, which she eventually received, and this application for disability retirement. Even this application has been delayed for several years, while Appellant underwent additional surgeries in hopes that she would be able to return to work, but those hopes have been dashed. A worker whose hands and wrists do not permit her to do laundry, wash dishes, empty a dishwasher, or use a laptop for even routine tasks cannot be expected to resume the duties of a position which requires constant repetitive keyboarding. That was the principal task of Appellant's position at DMV, and the only position that was made available to her.

Dr. Chauhan's unfamiliarity with the law regarding disability retirement, and his consequent inability to express his opinion in terms which address the true issue before your Board, should not obscure the fact that Appellant meets all of the criteria stated in the Code, in that she is clearly unable to perform the substantial range of duties of the position of a Motor Vehicle Field Representative and, nine surgeries on her wrists and elbows later, can truly be said to be permanently unable to perform those duties.

WHEREFORE, Appellant respectfully requests that your Board consider the foregoing, reverse the Proposed Decision of the Administrative Law Judge, and award to Appellant the benefits to which she is by law entitled.

Respectfully submitted,

LAW OFFICES OF BENNETT & SHARPE

A handwritten signature in dark ink, appearing to read "Barry J. Bennett", written in a cursive style.

Barry J. Bennett
Attorneys for Appellant

Cc: Michelle Martin