

**ATTACHMENT A**  
**THE PROPOSED DECISION**

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

In the Matter of the Application for Disability  
Retirement of:

ANGIE WESCO-ALEXANDER,

and

STATE COMPENSATION INSURANCE  
FUND,

Respondents.

Case No. 2014-0561

OAH No. 2014101006

**PROPOSED DECISION**

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, on July 15, 2015, in Los Angeles, California. The California Public Employees' Retirement System (CalPERS) was represented by Staff Attorney Preet Kauer. Angie Wesco-Alexander (Respondent) was present and was represented by Thomas J. Wicke, with Lewis, Marenstein, Wicke, Sherwin & Lee, LLP. No appearance was made on behalf of State Compensation Insurance Fund.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on July 15, 2015.

On July 27, 2015, CalPERS filed and served a Motion to Reopen the Record (Motion) requesting an additional hearing day to address whether Respondent's application for disability retirement is precluded by law. The bases for the failure to address this issue until after the hearing were: that CalPERS purportedly did not receive in discovery any documentation of Respondent's separation from service; having seen the documents for the first time at hearing, CalPERS was therefore unable to investigate the ramifications of the separation documentation until after the hearing concluded; and consequently, prior to the hearing, CalPERS could not make any determination of Respondent's alleged legal preclusion from applying for disability. The Motion was marked as Complainant's Exhibit C12, and lodged.

The ALJ ordered that Respondent submit any opposition to the Motion by August 3, 2015. Additionally, the parties were ordered to submit written statements setting forth a list of

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their available days to attend an additional hearing day within the next four months and an estimate of the number of additional hearing days required. On August 3, Respondent filed and served her "Objection to CalPERS' Motion to Reopen the Record" and a written statement entitled "Respondent's Potential Dates for Second Day of Hearing," which were marked for identification as Respondent's Exhibits 92 and 93, respectively, and lodged as argument. On August 5, 2015, CalPERS filed and served a letter setting forth CalPERS's available dates for hearing; the letter was marked for identification as Complainant's Exhibit C13, and lodged.

The motion and opposing papers indicated that CalPERS was either unaware of, or disregarded, Respondent's separation from employment prior to submission of her application for disability retirement. Having accepted submission of Respondent's application, CalPERS then focused on whether her medical records supported her assertions. Apparently inquiry into Respondent's separation from employment was prompted only by CalPERS' counsel's review of the evidence at the hearing. Based on the moving and opposing papers, the ALJ ordered the record be reopened for an additional hearing day to take evidence clarifying the circumstances surrounding Respondent's separation from employment and CalPERS's knowledge and processing of that information.

The hearing reconvened for a second day of hearing on December 21, 2015. CalPERS was represented by Staff Attorney Christopher C. Phillips. Respondent was present and was represented by Thomas J. Wicke. Oral and documentary evidence was received. The ALJ ordered post-hearing briefing to address issues including: whether Respondent's prior separation from employment legally bars her from submitting an application for disability retirement (i.e. whether the facts of this case fall within the holdings of *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, and *Smith v. Napa* (2004) 120 Cal.App.4th 194); and if so whether CalPERS waived its right to assert the legal bar to disability retirement.

Complainant timely filed and served a Post Hearing Brief, which was marked as Complainant's Exhibit C14, and lodged. Respondent timely filed and served her Reply to CalPERS' Closing Brief, which was marked as Respondent's Exhibit 96, and lodged. The record was reclosed, and the matter was submitted for decision on February 3, 2016.

## FACTUAL FINDINGS

### *Jurisdiction and Issue*

1. Anthony Suine, Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues while acting in his official capacity.
2. At the time she filed her application for disability retirement, Respondent was employed as a Program Technician with State Compensation Insurance Fund (SCIF). By virtue of her employment, Respondent is a "state miscellaneous member" of CalPERS. She has the minimum credit necessary to qualify for retirement.

3. On March 7, 2013, Respondent signed, and subsequently filed, an application for disability retirement (application), claiming disability on the basis of orthopedic conditions (neck, cervical spine, bilateral wrists, shoulders and elbows). In the application, Respondent claimed that her disability occurred on July 31, 2009, while “working on scan machine when neck and shoulders locked up.” (Exhibit C3.) Respondent indicated in the application that her injury resulted in the following limitations/preclusions: “No lifting or reaching above head, no repetitive motion to shoulders/neck and no prolonged standing.” (Exhibit C3.) Respondent noted that her injury affected her ability to perform her job in that she “had to take 5 minute breaks every hour to get relief from pain.” (Exhibit C3.)

4. After review of medical reports submitted by Respondent in support of her application, CalPERS determined that Respondent was not substantially incapacitated for performance of her duties as a Program Technician with SCIF at the time the application was filed.

5. In a letter dated April 7, 2014, CalPERS notified Respondent of its determination that she was not substantially incapacitated for the performance of her duties as a Program Technician and that her application was denied.

6. In a letter dated April 22, 2014, Respondent timely appealed the denial and requested an administrative hearing.

7(a). The issue on appeal is whether, at the time of the application, on the basis of orthopedic conditions (neck, cervical spine, bilateral wrists, shoulders and elbows), Respondent is permanently disabled or substantially incapacitated from the performance of her duties as a Program Technician for SCIF.

7(b). CalPERS also asserts that, despite its consideration and denial of Respondent’s application on the merits, Respondent’s voluntary layoff and separation from state service had already precluded her disability retirement.

#### *Respondent’s Job Duties*

8. Respondent worked for over 20 years at SCIF, first as a seasonal clerk (1990-1992), then as a permanent employee working as an office assistant (from August 1992-March 1999) until her promotion to Program Technician (March 1999 until her last day of work on March 3, 2010).

9. When she became a permanent employee in 1992, she took a physical examination and had no injuries or medical restrictions.

10. Respondent worked as an office assistant in the West Los Angeles office from August 1992 through October 1998, and in the same position at the Woodland Hills Office from October 1998 through March 1999. Her duties as office assistant included copying and

filing documents, answering telephones, and relieving people at the switchboard. In March of 1999, she was promoted to Program Technician and began working at the Burbank office.

11. According to Respondent's Job Description and confirmed by her detailed testimony, Respondent's daily duties as a Program Technician included: three hours of "pre-scanning" documents; two hours of scanning documents; and two to two and one half hours indexing documents on a computer. The three hours of "pre-scanning" consisted of the following: opening envelopes with documents which were sent the office; placing the documents in their appropriate areas (e.g. medical reports, legal documents, bills, or general documents); creating cover sheets; and making seven to 10 "batches"/stacks of 20 to 22 documents; taking the batches to the scanning room and storing them in chronological order on one of four shelves ranging from floor level to six feet high. If a batch belonged on the top shelf, Respondent had to reach up to place it there. The two hours of scanning involved the following: taking batches in a crate to a scanner; removing staples and feeding each page of the documents into the scanner; and stacking the documents again to make a "batch." The two to two and one half hours of indexing involved sitting at a computer with two monitors, a keyboard and a mouse. Respondent opened scanned documents on the computer and confirmed that they were filed in the correct electronic file folder.

12. According to CalPERS document entitled "Physical Requirements of Position/Occupational Title," which Respondent completed on April 23, 2013, the physical requirements of Respondent's job as a Program Technician included: sitting (over six hours); standing (up to three hours); walking (up to three hours); bending and twisting at the neck (up to three hours); bending and twisting at the waist (up to three hours); reaching above and below the shoulder (up to three hours); pushing and pulling (up to three hours); grasping (up to three hours); fine manipulation (over six hours); repetitive use of hands (over six hours); keyboard and mouse use (over six hours); and lifting/carrying up to 10 pounds (up to three hours).

*Injury and Treatment; Employment with SCIF*

13. In April 1994, while working as an office assistant, Respondent developed significant pain in both wrists and sought medical care. She was initially prescribed medication, physical therapy and wrist splints. She continued working while receiving treatment for her wrist pain, with varying work restrictions throughout the years (e.g. preclusion from typing in January 1996; preclusion from prolonged typing, repetitive motions of both wrists and forceful strength activities in October 1996; total temporary disability from May 1997 through August 1997; no lifting over 15 pounds in September 1997).

14. In August 2000, Respondent was injured at work when a shelf fell and struck her left hand. She sought medical treatment and was prescribed medication and physical therapy. She continued working with a restriction of no lifting over 10 pounds. However, she continued to experience pain in her left shoulder and lower back.

15. In November 2000, she sought treatment from Dennis Ainbinder, M.D. After an MRI of her left shoulder, Dr. Ainbinder recommended and subsequently performed arthroscopic surgery on her left shoulder in February 2001. Respondent was off work until August of 2001, when she returned and performed her usual job duties.

16. However, Respondent continued to experience pain in her left shoulder and developed pain in her right shoulder. After an MRI of her right shoulder, Dr. Ainbinder recommended and subsequently performed arthroscopic surgery on her right shoulder in September of 2002. Respondent was off work until July of 2003, when she returned and worked four hours per day. She increased her hours to six hour per day in October of 2003. Respondent resumed working eight hours per day in February 2004.

17. Respondent's shoulders continued hurting, and she began experiencing pain in her wrists, neck, and back. She sought treatment from Dr. Ainbinder, who prescribed medications and physical therapy. In 2006, Simon Lavi, D.O., took over Respondent's care. He performed carpal tunnel release surgery on Respondent's left wrist in March 2006 and on her right wrist in July 2006. Respondent was off work from December 2005 until after her July 2006 surgery.

18. Following her July 2006 surgery, Respondent continued to experience pain in both shoulders and both wrists, as well as neck pain and migraines. In November 2007 (following a discogram and MRI), Dr. Lavi performed an anterior micro-cervical discectomy and cervical fusion at C5-6 and C6-7 on Respondent. Respondent returned to modified work duty in July 2009.

19(a). When Respondent returned to modified work duty in July 2009, her work restrictions ordered by Dr. Lavi were: decreased hours (four hours per day); no lifting over 10 pounds; no repetitive bending or reaching, including no repetitive use of the scanning machine; and no work above shoulder level.

19(b). The Agreed Medical Examiner (AME) in Respondent's workers' compensation case, Richard M. Siebold, M.D., noted in his September 10, 2009 report that Respondent was back at work with residual complaints of headaches and pain in her neck, back and bilateral upper extremities. He reported, "She is advised to avoid the scanner if at all possible, since this repetitive motion of the neck with the scanner apparently aggravates her underlying cervical spine condition." (Exhibit 79.) Respondent mentioned that Dr. Lavi had suggested another cervical spine surgery. However, Dr. Siebold opined that there was nothing in her "last EMG of the upper extremities to suggest this patient would benefit from further surgery. The MRIs of the shoulders fail to reveal significant findings that would benefit from surgery." (*Id.*) Dr. Siebold's recommended treatment included medication and continued home exercise.

20(a). Respondent eventually resumed regular work duty, including repetitive use of the scanning machine. She continued to experience bilateral shoulder pain, bilateral wrist pain with numbness and tingling, neck pain and spasms, and lower back pain. Scanning

duties aggravated her pain. Respondent was treated conservatively with medications and home exercises. Due to her unresolved pain, Dr. Lavi advised Respondent to undergo surgery.

20(b). In a May 26, 2010 report, Dr. Siebold's comments and recommendations were as follows:

The patient is examined. She indicates she cannot do her job. She states that she has a surgery scheduled for June 25th.

This is a relatively impressive surgery for minor findings. Please note that there is nothing in the EMG or nerve study that indicates that the patient would benefit from this procedure. The patient, however, states she wants to go back to work but she cannot do the job. . . .

Objectively, I think she needs another MRI of the neck to further evaluate her condition. I do not know what is going to be accomplished by a simple metal removal or placement of a metallic disc spacer for someone with a normal EMG and only minimal 1 to 2 mm of bulging at C4-5. Overall, I cannot recommend this surgery based on the current clinical examination and the EMG reported.

(Exhibit 80.

21. In June 2010, Dr. Lavi performed surgery on Respondent's spine at C4-5 and removed the previously placed hardware from C5-7. Following surgery, Respondent was treated with medication, acupuncture and chiropractic therapy.

22. Respondent stopped working in March 2010 and has not worked for any other employer since then. Dr. Lavi has never released her to return to work.

23. In a June 28, 2011 report, one year post-surgery, Dr. Siebold noted that Respondent complained of worsening pain, especially in both elbows. He made the following observations and recommendations:

[Respondent] indicated she could no longer do her old job. She complained that she was worse than on her last visit, rather than improving. . . .

Her last EMG . . . in March of 2011 fails to reveal significant abnormality coming from the neck, though there are ulnar neuropathy type findings at both elbows. . . .

[T]he nerve studies do not suggest any abnormality coming from the neck. The patient, I think, might be further evaluated either by a CT scan or an MRI to evaluate both the disc and the fusion. I think she is

rapidly approaching a Permanent and Stationary level, though she states she is worsening. Based on the EMG findings, I would not advise further surgery. . . .

[Respondent] indicates she has been continued on [total temporary disability (TTD)]. She states she is worsening, and to give her the benefit of the doubt, I would continue her on TTD.

(Exhibit 84.)

24(a). On July 5, 2011, Respondent signed a SCIF form entitled “Notice of Voluntary Transfer and Options.” (Exhibit 87.) All of the employees at the Burbank SCIF office were sent the notices, which indicated that the Burbank SCIF office was closing and relocating to Fresno and Redding. According to the notice, if employees, including Respondent, chose to relocate to either of those Northern California locations, they would be required to report to work on September 26, 2011. Employees, including Respondent, were given several options: continuing employment with SCIF at one of the Northern California locations; retiring; resigning; or electing to be laid off. Respondent checked the box next to the option, “I elect to be laid-off on the date of the final move, which is on or about September 23, 2011.” (*Id.*) The form also noted: “If you choose not to relocate, you may be eligible to postpone your date of separation up to twelve (12) months by using available leave credits to extend service time, or going on unpaid leave, or using leave credits then unpaid leave. . . .” (*Id.*)

24(b). At the administrative hearing, when asked why she elected layoff, Respondent testified that she was “still off work” with an injury and “because of [her] family.” It was Respondent’s understanding that if “the doctor said [she] could return to work and she did not return on the [required reporting date], she] would be terminated,” so she believed it was better to elect layoff. She also noted that the offered job opportunities were in Northern California and she lived in Los Angeles with her husband and child and did not want to “uproot [her] family” to relocate. She admitted that, at the time she agreed to be laid off, she was “probably not planning on returning to work.” When asked if she was planning on not returning to work even if her medical condition improved, Respondent did not answer directly, but instead asserted, “but it got worse.” She admitted that, at the time she signed the election form, she did not know if her medical condition was going to improve or get worse.<sup>1</sup>

24(c). According to a July 2011 report by Dr. Lavi, and a March 2011 report by Dr. Siebold, which were issued at around the time of Respondent’s layoff election, Respondent continued to complain of pain and remained temporarily totally disabled at that time. This

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<sup>1</sup> At first day of hearing, CalPERS did not assert that Respondent’s election to be laid off legally precluded Respondent from later seeking disability retirement. This area of inquiry on Day One was apparently intended to discount Respondent’s assertion of disability and to highlight another potential motivation for her subsequent disability retirement application.

would support her assertion that, at time she submitted her layoff election, she still believed her medical condition was preventing her from returning to work.

25. In a January 2012 report, Dr. Lavi noted that Respondent's condition had "plateaued," and was "permanent and stationary." He stated, "I defer all factors of permanent disability to Dr. Siebold, the Agreed Medical Examiner." (Exhibit 59.)

26. Effective June 20, 2012, Respondent was separated from State service. Respondent's employment records included a form entitled "Notice of Personnel Action, Report of Separation." (Exhibit 88.) The form indicated that Respondent's "separation type" was "resignation in lieu of layoff," effective June 20, 2012. (*Id.*) The form also stated, "This separation reflects your decision to resign in a layoff or involuntary transfer situation rather than accept another position which was offered to you." (*Id.*)

27. In June 2012, Respondent remained under her physician's care and had not yet been released to return to work.

28. In November 21, 2012 and October 8, 2013 reports, Dr. Lavi noted that Respondent was "permanently partially disabled." (Exhibit 61.)

29. In January of 2013, Dr. Siebold (to whom Dr. Lavi had previously deferred "all factors of permanent disability") conducted a comprehensive re-examination of Respondent and review of records and issued a report of his findings. At that time, Respondent complained of worsening pain in her neck, shoulders, thoracic and lumbar spine (radiating to bilateral lower extremities), wrists, hands, elbows (with left pain greater than right), and knees. Respondent reported that she was in pain constantly and depressed. Dr. Siebold's comments and recommendations included the following:

[MRI's] have been attempted post surgery, but have been limited due to the metallic devices in place in her neck. Based on this, unfortunately at this late date, I think a high-quality CT scan for the cervical spine is necessary to evaluate her for final rating purposes.

I will order this. The last EMG does not reveal any radicular component coming from the neck; and thus, I think a simple high-quality CT study will suffice at this point.

A supplemental report with final ratings will be applied following a review of this study.

From an orthopedic standpoint, I do not believe she will benefit from any further surgical intervention. . . . [¶] . . .

The patient has not worked since March of 2010. I think it is unlikely she will return to her employment. She indicates she was accepted to Social Security in about 2008. (Exhibit 85.)

30(a). On March 3, 2013, Dr. Siebold wrote a Special Supplemental AME Report with his findings from the January 2013 clinical examination and further review of records.

30(b). On clinical examination, Dr. Siebold found that Respondent had limited range of motion in her cervical spine, with complaints of neck pain at the extremes of motion. However, he noted that the 2011 EMG was normal and the recent CT scan did not reveal any significant disc herniation or protrusion into the central canal, no evidence of cord compression, and no evidence of residual cervical radiculopathy. According to Dr. Siebold, the CT findings were consistent with the prior EMG findings "suggesting there was no residual radicular component coming from the neck," "no evidence of any extrusion or intrusion into the spinal canal area of the cervical spine," and "no evidence of any cord compression." (Exhibit 86.)

30(c). Clinical examination also revealed that Respondent had limitations in both shoulders' range of motion, with complaints of pain in both. Additionally, Respondent complained of pain in her elbows, hands and wrists. Objective testing indicated full range of motion in her wrists, but low grip strengths on the right, with the left decreased somewhat as well. However, Dr. Siebold noted that nerve studies did not show carpal tunnel findings. He further noted that the prior EMB suggested "residual ulnar neuropathy in the bilateral upper extremities." (*Id.*)

30(d). Dr. Siebold found that Respondent was "permanent and stationary," and recommended the following work restrictions: "no work at or above shoulder level;" "no repetitive motion [of the neck/cervical spine,] . . . no prolonged positioning [of the neck/cervical spine];" "no heavy lifting;" and "no repetitive fine manipulation." (*Id.*)

30(e). The evidence did not establish when Respondent received Dr. Siebold's March 3, 2015 report.

31. Respondent signed her application for disability retirement in March 7, 2013 (See Factual Finding 3), and CalPERS received it by March 9, 2013.

#### *Independent Medical Evaluation*

32(a). On February 28, 2014, Ramin Rabbani, M.D., conducted an Independent Medical Evaluation (IME) of Respondent at the request of CalPERS. The IME included a medical records review, patient history and clinical examination. Dr. Rabbani noted that Respondent was cooperative during the examination and put forth her best effort.

32(b). At the evaluation, Respondent complained of pain in her neck (9/10 on pain scale), lower back (8/10 on pain scale), knees, and shoulders (8.5-10/10 on pain scale), with

intermittent numbness and tingling in her hands. When Dr. Rabbani asked Respondent which of her essential job functions she could not perform, she stated that she could not sit for more than 30 minutes and needed to take a break due to lower back pain. She also had difficulty writing.

32(c). On physical examination, Dr. Rabbani noted no tenderness to palpation of the cervical paravertebral musculature. Cervical and shoulder range of motion were somewhat limited. On examination of Respondent's elbows, there was no tenderness to the lateral epicondyle. There was also no tenderness on palpation of both wrists and both knees. There was mild paraspinal spasms and tenderness on examination of Respondent's lumbar spine.

32(d). Dr. Rabbani reviewed Respondent's voluminous medical records and her Physical Requirements of Position/Occupational Title. In an introductory paragraph of his report where he indicated Respondent's past medical history, Dr. Rabbani noted only Respondent's surgeries for "anterior cervical discectomy and fusion of C5-6 and C6-7, bilateral shoulder arthroscopic surgeries, and bilateral carpal tunnel releases," and omitted the June 2010 cervical spine surgery. However, in at least two references in his 55-page summary of Respondent's medical records, he noted "06/25/10, date of surgery, Dr. Lavi, inspection, fusion C5-6 and C6-C7, with anterior C4-C5 discectomy and insertion of ProDisc implant, with removal of hardware, C5-C6 and C6-C7." (Exhibit 8, p. 55; see also p. 47.)

32(e). Dr. Rabbani opined:

It is clear that [Respondent] has sustained injuries to her cervical spine, bilateral shoulders, and bilateral wrists to necessitate the above surgeries, including anterior cervical discectomy and fusion at C5 through C7, bilateral shoulder arthroscopic surgeries, and bilateral carpal tunnel releases[. H]owever in reviewing the specific essential job functions, I feel that [Respondent] is able to perform these essential job duties, despite her previous interventions to the cervical spine, bilateral shoulders, and bilateral wrists. Her EMG and nerve conduction studies of the upper and lower extremities after her surgeries have been normal. On physical examination, she does not have any tension root signs in the upper and lower extremities, and she does not have any residual nerve pathology from her carpal tunnel release.

(Exhibit 8.)

32(f). Dr. Rabbani concluded that Respondent was not substantially incapacitated for the performance of her usual duties.

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33(a). On July 3, 2015, Dr. Lavi wrote a "Primary Treating Physician's Supplemental Report for CalPERS Disability Retirement Decision" at Respondent's counsel's request. Dr. Lavi opined:

[I] do not agree with the opinion of Dr. Rabbani as it pertains to [Respondent's] ability to perform her usual and customary duties. First, Dr. Rabbani failed to consider all surgeries [Respondent] has undergone. Specifically, [Respondent] has required two separate cervical spine procedures. As a result of these significant surgeries, the patient has been left with a fairly substantial loss of motion. Dr. Rabbani indicated there was no palpable pain at the time of his evaluation; however, when I examined this patient in April 2014, just two months subsequent to his examination, she exhibited significant tenderness in both her neck and low back as well as spasms. Because of these symptoms she was referred for pain management to include epidural injections versus facet blocks. My medical records show a consistent problems [sic] with tenderness and spasms in her low back for several years. I find it is difficult to believe there was absolutely no palpable tenderness on examination when the patient presented with 8-9 pain out of 10. Furthermore, Dr. Rabbani confirmed [Respondent] appeared credible and cooperative. His physical examination does not correlate with the subjective complaints or his comment that [Respondent] was cooperative and put forth her best efforts on examination. Because of her ongoing symptoms, she is unable to work in any capacity at this time. I continue to believe this incapacity will be permanent. This is due to the fact despite her undergoing surgeries to her neck, shoulders and wrists, she continues to experience substantial symptoms which are quite limiting.

Due to her residuals in her neck, low back and upper extremities, she is unable to hold her head in a fixed position for any length of time. She is not able to sit for prolonged periods of time. She is unable to perform repetitive motions or prolonged positioning of either her neck or low back. The patient is not able to perform repetitive or prolonged activities with her upper extremities. This includes scanning for hours at a time, which is required in her position of Program Technician. She is unable to type or keyboard.

(Exhibit 72.)

33(b). Dr. Lavi's observations were flawed in that, contrary to his assertions, Dr. Rabbani noted Respondent's June 2010 cervical spine surgery and the tenderness and spasm in her lower back on palpation. Additionally, Dr. Lavi's opinion was not persuasive regarding Respondent's incapacity to perform her work duties. Although he characterized Respondent's recommended work restrictions as an inability to perform certain actions (e.g. "unable to perform repetitive motions or prolonged positioning" of her neck and upper

extremities), it was not established that Respondent was physically unable to perform these actions. Instead, the evidence indicated that work restrictions were recommended to avoid aggravating her underlying conditions.

*Additional Information re: Respondent*

34. Respondent remains under Dr. Lavi's care, and last saw him in May 2015. She continues to experience neck pain and spasm and pain in both shoulders and wrists. She disagrees that she could return to work with restrictions, due to her continued pain. She testified that she violated the recommended work restrictions from July 2009 through March 2010 by lifting in excess of 10 pounds, and this increased the pain in her neck, shoulders and wrists. She admitted that she never asked SCIF to provide her with a position to accommodate any restrictions and that SCIF never offered her a position consistent with recommended work restrictions.

35(a). From at least October 2011 through the present, Respondent has been on a general State employment list of potential employees who receive "Employment Inquiry" forms regarding open employment opportunities at various state agencies. Respondent received numerous Employment Inquiry forms for Program Technician openings in the Southern California area at various agencies, including SCIF, the California State Lottery, the Department of Social Services, the Employment Development Department, the Department of Corrections and Rehabilitation, and the State Air Resources Board. The Employment Inquiry forms noted that if she wished to be interviewed for the listed job, she should fill out the sections on the form indicating interest in employment and return the completed Employment Inquiry form together with a completed State employment application form. The notices provided no guarantee of employment.

35(b). At the administrative hearing, Nicole Simon, SCIF Human Resources Manager in the Budget and Audit Unit, testified credibly and explained the ramifications of Respondent's voluntary layoff election as follows:

(1). In the Burbank SCIF relocation, if the employee elected voluntary layoff prior to the move date, this would be considered voluntary separation from state service and the employee would have permissive reinstatement rights. Permissive reinstatement rights allow a former state employee to apply for state jobs and compete to be hired like any other candidate. The former employer cannot be required to take back former employee, as it would with mandatory reinstatement rights. The employee would be placed on the general reemployment list for five years under her proper classification and for the counties of her choosing. Former state employees placed on the general reemployment list would likely have a higher ranking on the list than someone applying for first-time state employment.

(2). Respondent elected voluntary layoff as of the office move date, which would mean that she had permissive reinstatement rights and would be placed on the general reemployment list for five years under her classification and for the counties of her choosing. SCIF was not required to rehire her after the layoff, so she would have to compete with other

potential candidates for any open state employment position including any position with SCIF.

(3). After voluntary layoff in lieu of relocation, Respondent would have typically been considered a separated employee as of the move date (i.e. September 23, 2011), and she would attain re-employment status on the same date. For employees not relocating, their re-employment status would go into effect on the move date, and they would be placed on the reemployment list as of that date. However, the Notice of Voluntary Transfer and Options allowed employees to extend the time for separation by using leave credits or unpaid leave. This extension of the separation date would not affect their re-employment status date, which would still be the same date as the move date. Re-employment status and placement on a state employment list does not mean that a person is no longer employed by the state (e.g., employee may be placed on the employment list when the employee takes a demotion). Consequently, an employee, like Respondent, could have re-employment status and be placed on the re-employment list as of the office move date, but have a later separation date than that of the move date. In this case, Respondent was still a state employee after September 23, 2011, but she had re-employment status as of the move date.

#### LEGAL CONCLUSIONS

1. Respondent has not established that she is entitled to retirement for disability, as set forth in Factual Findings 2 through 35, and Legal Conclusions 2 through 10.
2. Respondent has the burden of proof regarding her entitlement to the retirement benefits for which she has applied. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) She has not met that burden.

#### *Inapplicability of Holdings in Haywood, Smith and Vandergoot*

3. Government Code section 21154 provides, in pertinent part:

The application [for disability retirement] shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion. On receipt of an application for disability retirement of a member . . . the board shall . . . order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. . . .

4. Respondent voluntarily agreed to layoff and remained employed until her separation from state service in June 20, 2012. Thereafter, as envisioned by section 21154, subdivision (d), Respondent was allowed to file her application during the time she was physically “incapacitated to perform duties from the date of discontinuance of state service to the time of application.” (Gov. Code, § 11254, subd. (d).)

5(a). CalPERS asserts that Respondent’s voluntary layoff and separation from state service precludes her disability retirement. CalPERS compared Respondent’s case to the holdings in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), and the CalPERS precedential decision, *In the Matter of the Application for Disability Retirement of Robert C. Vandergoot* (Case No. 2012-0287, OAH No. 2012050989) (*Vandergoot*), which barred employees’ disability retirement. Respondent argued that those rulings do not apply to the facts in this case. As set forth more fully below, the holdings in *Haywood*, *Smith* and *Vandergoot* do not bar Respondent’s disability retirement.

5(b)(1). In *Haywood*, an employee filed of application for disability retirement after his involuntary termination from state service. He argued that “an employee is entitled to disability retirement so long as he files a timely application under section 21154, regardless of the reason for leaving employment.” (*Haywood*, *supra*, 67 Cal.App.4th 1292, 1306.) The *Haywood* Court disagreed, noting:

We reject a construction of section 21154 that would establish eligibility for disability retirement whenever a timely application is submitted. The section simply reflects a legislative intent that a claimed disability bear a causal relationship to the discontinuation of service by providing outside time limits, referenced to the cessation of service, within which an application must be filed or need not be considered. Notably, section 21154 specifies that when a timely application is filed, the employee must be both “otherwise eligible to retire for disability” and “incapacitated for the performance of duty” in order to be granted disability retirement. In this respect, the section provides a procedural time limit within which an application for disability retirement must be filed, but does not provide for substantive eligibility whenever a timely application is filed.

As to whether *Haywood* is “eligible to retire for disability” [Citation], the disability provisions of the PERS law contemplate a potential return to active service. Those provisions are not intended to abrogate or restrict an employer’s right to discharge an employee for cause . . . (*Id.* at p. 1307.)

5(b)(2). The *Haywood* Court noted that “there is an obvious distinction between an employee who has become medically *unable* to perform his usual duties and one who has

become *unwilling* to do so. Disability retirement laws address only the former.” (*Id.* at p. 1304.) The Court further pointed out:

Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. “The pension roll is a roll of honor – a reward of merit, not refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior.” (*Id.* at p. 1305 (citing *MacIntyre v. Retirement Board of S.F.* (1941) 42 Cal.App.2d 734, 736).)

5(b)(3). In determining whether an employee is “otherwise eligible to retire for disability” under section 21154, the *Haywood* Court concluded:

[W]here, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed. (*Id.* at p. 1307.)

5(c). In *Smith*, a government employee filed an application for disability retirement on the effective date of his dismissal for cause. His application was rejected, and he was informed that his termination for cause rendered him ineligible for disability retirement. On appeal, the *Smith* Court, noted, “[O]ur conclusion [in *Haywood*] that a dismissal for good cause unrelated to a medical disability disqualifies an employee for a disability retirement was essential to the dispute before us and our analysis.” (*Smith, supra*, 120 Cal.App.4th at p. 204.) The Court further noted that “The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.” (*Id.* at p. 205.) The Court in *Smith* held that the employee’s dismissal for cause extinguished his right to a disability retirement. (*Id.* at p. 208.)

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5(d). In *Vandergoot*, the employee received a Notice of Adverse Action (NOAA) to terminate his employment, but prior to the hearing on that NOAA, the employee entered into a Stipulation for Settlement. The parties agreed that the NOAA would be withdrawn and that the employee would resign “for personal reasons.” (*Vandergoot, supra*, p. 6.) According to the settlement agreement, the employee would not “seek, transfer to, apply for or accept any employment in any capacity with [the employing agency] at any time in the future,” and if he returned to agency employment in violation of the settlement agreement, the agency could dismiss him. The *Vandergoot* decision concluded that the employee was precluded from disability retirement under *Haywood*. However, the *Vandergoot* decision clarified its holding stating:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the [employer] if it ultimately is determined that respondent is no longer disabled. [Citation.] Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. (*Id.* at p. 7.)

5(e). *Haywood, Smith* and *Vandergoot* all find that the termination of employment without any right to return (either by way of termination for cause or via stipulation to never return) precludes eligibility for disability retirement. However, in this case, unlike in *Haywood, Smith* and *Vandergoot*, Respondent was not terminated for cause nor did she stipulate never to return. Respondent retained a potential for reinstatement of the employment relationship. Although her potential for reemployment required her application, interview, and securing of another advertised position, Respondent’s potential employment relationship was not completely severed as of the date of her separation on June 20, 2012. Moreover, the language of Government Code section 21154 anticipates situations where there has been a “discontinuance of state service,” and *Haywood* and *Smith* held only that discontinuation of service by way of termination for cause rendered the employee ineligible for disability retirement. No cited authority has extended the holdings in *Haywood* and *Smith* to include an employee’s voluntary layoff in lieu of relocation, thus rendering that employee ineligible for retirement. Consequently, this Decision will not hold that Respondent is ineligible for retirement under Government Code section 21154 based on her voluntary layoff due to relocation.<sup>2</sup>

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<sup>2</sup> One of the issues the parties addressed in briefing was whether CalPERS waived its right to assert a legal bar to disability retirement under the holdings of *Haywood, Smith* and *Vandergoot*. Since those holdings have been found inapplicable, the issue of waiver will not be addressed in this decision.

*Respondent was Not Incapacitated for Performance of Her Duty*

6. Government Code section 21150 provides, in pertinent part:

Any 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 . . .

7. Government Code section 20026, states, in pertinent part:

“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.

8. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform her usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) The increased risk of further injury is not sufficient to establish current incapacity; the disability must exist presently. Restrictions which are imposed only because of a risk of future injury are insufficient to support a finding of disability. (*Hosford, supra*, 77 Cal.App.3d 854, 862 - 863.)

9. The totality of the evidence did not establish that Respondent’s medical conditions rendered her substantially unable to perform her usual duties, as opposed to performing the duties with discomfort and/or difficulty. As noted above, Dr. Lavi’s opinion was not persuasive regarding Respondent’s incapacity to perform her work duties. Additionally, Dr. Siebold (to whom Dr. Lavi had previously deferred for determining Respondent’s permanent disability - see Factual Finding 25), never opined that Respondent was unable to perform her usual work duties. Instead, he recommended work restrictions to avoid aggravation of her underlying conditions. While these work restrictions included avoiding movements which were part her scanning duties, the restrictions were prophylactic to avoid future re-injury. Although, given Respondent’s medical history, the risk of her repeating the cycle of pain and injury aggravation was high, the holdings in *Mansperger* and *Hosford* preclude a finding in this case of current incapacity to perform her usual duties.

10. Given the foregoing, the evidence did not establish that Respondent was substantially incapacitated to perform her usual duties as a Program Technician with SCIF based on orthopedic conditions (neck/cervical spine, bilateral wrists, shoulders and elbows).

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ORDER

The appeal of Respondent Angie Wesco-Alexander, seeking retirement for disability as a state miscellaneous member of CalPERS, is denied.

DATED: February 26, 2016

DocuSigned by:  
*Julie Cabos-Owen*  
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JULIE CABOS-OWEN  
Administrative Law Judge  
Office of Administrative Hearings