

**ATTACHMENT E**

**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:

JULIE HAWPE,

Respondent,

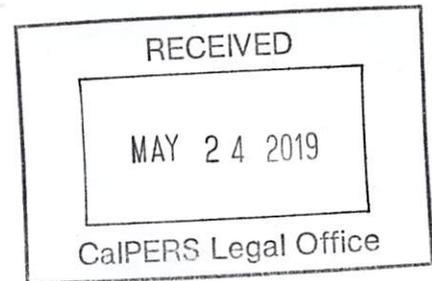
and

IRONWOOD STATE  
PRISON/CALIFORNIA DEPARTMENT  
OF CORRECTIONS AND  
REHABILITATION,

Respondent.

Case No. 2018-0803

OAH No. 2018090213



**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 6, 2019.

Charles Glauberman, Senior Attorney, represented petitioner Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Julie Hawpe, respondent, represented herself.

There was no appearance by Ironwood State Prison/California Department of Corrections and Rehabilitation (Ironwood), respondent. Based on proof of compliance with Government Code sections 11504 and 11509, this matter proceeded as a default against Ironwood pursuant to Government Code section 11520.

On May 6, 2019, the matter was submitted.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED May 24, 2019  
SMS

## PROTECTIVE ORDER SEALING CONFIDENTIAL RECORDS

Information in some of the exhibits is subject to a protective order. Exhibits 14, 15, 16, and 18, Ms. Hawpe's medical records, were received and contained confidential information. It is impractical to redact the information from these exhibits. To protect privacy and the confidential personal information from inappropriate disclosure, Exhibits 14, 15, 16, and 18 were ordered sealed. This sealing order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517, may review the documents subject to this order, provided that the documents are protected from release to the public. No court reporter or transcription service shall transcribe any testimony regarding the information contained in Exhibits 14, 15, 16, and 18.

### ISSUE

Was Ms. Hawpe permanently disabled or incapacitated from performing her usual and customary duties as an Associate Governmental Program Analyst at Ironwood due to her internal (MRSA<sup>1</sup>, hearing, sinusitis, vertigo, tinnitus, headache) conditions when she filed her application for disability retirement?

### SUMMARY OF DECISION

Ms. Hawpe had the burden to prove that she was permanently disabled or incapacitated from performing her usual and customary job duties due to her internal (MRSA, hearing, sinusitis, vertigo, tinnitus, headache) conditions. The competent medical evidence introduced at this hearing did not support her claim that she was permanently disabled or incapacitated from performing the regular and customary duties of an Associate Governmental Program Analyst due to her conditions. Ms. Hawpe's claim for disability retirement is denied.

### FACTUAL FINDINGS

#### *Preliminary Matters*

1. Ms. Hawpe was employed by Ironwood as an Associate Governmental Program Analyst. By virtue of her employment, Ms. Hawpe was a state industrial member of CalPERS subject to Government Code section 21150.

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<sup>1</sup> MRSA is the acronym for Methicillin-Resistant Staphylococcus Aureus, a bacterium with antibiotic resistance.

2. On March 17, 2017, Ms. Hawpe filed a Disability Retirement Election Application with CalPERS. In the "Application Type" section she checked the boxes marked "Service Pending Disability Retirement" and "Service Pending Industrial Disability Retirement." Ms. Hawpe identified her disability as "M.R.S.A.", explained what that meant and that it was an incurable disease that "keeps re-occurring" and "cannot be cured." Her application stated "see attached flyer with details," but no flyer was attached to the exhibit offered at hearing. Ms. Hawpe wrote that she must take "very strong antibiotics" that have "serious side effects and damage to several body parts." In response to the question asking how the disability occurred, she wrote, "Contact with Inmates on daily basis" and stated that supervising inmates led to her contracting MRSA. She claimed there were OSHA violations, non-compliance with MRSA training, substandard working conditions, mold and "audit issues."

Ms. Hawpe stated that the limitations/preclusions due to her injury or illness were: "Loss of taste and smell, tinnitus, vertigo, and sensory nerve damage to inner ears." She stated her ears feel "pressurized all the time" with "ringing and sensitivity." She also wrote that she had balance issues and loss of vision "due to vertigo and inner ear problems." In response to the question asking how her injury or illness affected her ability to perform her job, Ms. Hawpe wrote: "All of the above, plus severe headaches, balance problems, hearing and eye problems, sleep problems due to tinitis [*sic*] – constant ringing, also joint pain especially in legs, arms, and hands. Additional back problems due to falls complications [*sic*] due to MRSA and/or pharmaceutical strength antibiotics necessary to treat MRSA. Back injury worsening as well as immune system." No Physician's Report on Disability was attached to the Application offered at hearing.

3. CalPERS obtained medical records and reports related to Ms. Hawpe's conditions and selected Pierre Giammanco, M.D., a board certified otolaryngologist and board certified facial plastic and reconstructive surgeon, to perform a disability evaluation. Dr. Giammanco provided CalPERS with narrative reports containing his findings and conclusions. After reviewing all of those documents, CalPERS determined that when Ms. Hawpe filed her application for a disability retirement, she was not permanently disabled or incapacitated from performing the usual and customary duties of an Associate Governmental Program Analyst.

4. On September 8, 2017, CalPERS notified Ms. Hawpe that her application for disability retirement was denied. CalPERS advised her of her right to appeal.

5. On October 6, 2017, Ms. Hawpe sent a letter to CalPERS appealing its decision.

6. On August 28, 2018, petitioner filed the statement of issues in his official capacity. The statement of issues and jurisdictional documents were served on respondents.

*Job Description Documents*

7. The Physical Requirements of Position/Occupational Title of an Associate Governmental Program Analyst Ironwood State Prison outlined the physical requirements including the activities and frequency of those activities for that position. The Job Description for an Assistant Appeals Coordinator/Associate Governmental Program Analyst<sup>2</sup> outlined the essential functions and minimum qualifications required. The Job Description noted that “the Associate Governmental Program Analyst is responsible for reviewing screening categorizing and overall tracking [*sic*] of all incoming appeals.”

Dr. Giammanco relied upon these documents when formulating his opinions.

*CalPERS's Initial Medical Evaluation Conducted by Dr. Giammanco and His Report*

8. Dr. Giammanco obtained his Doctor of Medicine degree from Wayne State University in 1964. His curriculum vitae stated that he did an internship in General Surgery, Pediatric Med/Surgery, OB/GYN Surgery, Internal Medicine and residencies in General Surgery and Otolaryngology – Head and Neck Surgery at two hospitals in Michigan. He did a fellowship in Facial Plastic and Aesthetics in California. Dr. Giammanco is board certified in facial plastic and reconstructive surgery, cosmetic surgery and otolaryngology. Dr. Giammanco has a private practice in otolaryngology, facio-plastic surgery and scar revisions.

9. On July 24, 2017, Dr. Giammanco performed an independent medical evaluation of Ms. Hawpe for CalPERS and authored a report.<sup>3</sup> As noted below, many of the responses Dr. Giammanco provided did not address the issues posed by CalPERS to him in its letter retaining him to perform the IME. Dr. Giammanco documented that Ms. Hawpe’s present complaints were:

1. Headaches; constant, dull, and sharp. The pain is better with pain medications and worse all the time.
2. Infection of MRSA, aspergillosis,<sup>4</sup> and sinus problems.
3. Ear pain/sensitivity with hearing loss and tinnitus.
4. Pressure -like sensation in right here.

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<sup>2</sup> Ms. Hawpe testified that she was an Assistant Appeals Coordinator, but the job description listed the job as Assistant Appeals Coordinator/Associate Governmental Analyst and she offered no evidence that a different job position/title document applied to her position.

<sup>3</sup> CalPERS’s letter to Dr. Giammanco set the IME appointment for June 26, 2017. No explanation for why it took place in July was offered at hearing.

<sup>4</sup> Aspergillosis is an infection caused by *Aspergillus*, a common mold (a type of fungus) that lives indoors and outdoors.

5. Loss of balance and vertigo (falls and trips).
6. Loss of taste and smell.

Dr. Giammanco noted that Ms. Hawpe's work history with the California Department of Corrections was "worked as a Supervisor from 1993 until she retired." It was unclear why he noted that her position was a "Supervisor" when it was not, especially as in the next section of his report entitled "Occupational Requirements," Dr. Giammanco documented that he had read the job description and Physical Requirements of Position/Occupational Title and those both contained her correct job title.

In the "History of the Present Injury as Related by the Patient" section of his report, Dr. Giammanco noted that Ms. Hawpe was 56 years old and had worked in the food services building supervising inmates at the prison.<sup>5</sup> As of 2006, three years after she was hired, she "was in the building that had no heating, temperature in the 40s, no hot water, no sink's [*sic*] soap/disinfectant in single bathrooms, and claims that the department was neglected [*sic*], did not comply with mandated MRSA training, at least with regards to the department that she was in which she thinks was overlooked." Ms. Hawpe related that during her first three years on the job she "performed well and advanced in leadership roles often as supervisor of the section assigned. This was a requested assignment to where she had been in charge in 2004." Dr. Giammanco further noted: "Due to no heating in large cement building, temperatures were very cold in the winter, approximately 40-50 degrees all day, and states that everyone had a runny nose all the time and had to blow and wipe it frequently and what she thinks was shared contact with everyone's noses as a result of that exposure." Ms. Hawpe reported that during that time she became very sick and blamed it on contracting MRSA which "was apparently treated by private physicians without the diagnosis of MRSA. She was treated for two years by a doctor who never did any cultures."

"From 2004, she had at least four to five visits and more without cultures and finally in 2007, she developed greenish drainage and MRSA was diagnosed." After the diagnosis, she "was on many different regimens of oral antibiotics, IM [intramuscular] and IV [intravenous] antibiotics, and sinus surgeries since she had findings in her right maxillary sinus and others on the right side." She had two surgeries in 2010 after which she was on vancomycin [an antibiotic] which "she did not tolerate well, but following the unsuccessful surgery she did go on a routine work [*sic*] for more than a year. She was on something every day, having four different PICC lines that were put in and allowed to stay in for three months." Ms. Hawpe reported losing weight and feeling sick "all the time" from the medications. She had more head pain due to sinus infections and taking Norco 10 mg [pain medication] which led to "hearing loss and ringing in the ears" and "dizzy spells on head position changing and positional vertigo." She took medications which caused her to become very nauseated. Since the onset of the diagnosis of MRSA in 2007, she had difficulty working because of her multiple symptoms as well as muscle spasms and tightness in her legs, unsteadiness in her balance and other injuries.

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<sup>5</sup> This is different than the job described in the exhibit offered at hearing.

Ms. Hawpe reported that she “has been told that from all the antibiotics that she has taken that her immunity has been compromised and she would probably never fight off the infection completely even though she has a remission [*sic*] in the last 10 years, she complained it is coming back according to the doctors that she has seen and the doctors who have operated on her . . . [including] an infectious disease expert who followed her in the earlier days also.” Her most recent injury occurred in January 2017 when she “spun around quickly to the point where she had positional vertigo and fell and broke her ‘shoulder’ which was actually her proximal humerus.”<sup>6</sup>

The Past Medical History noted that childhood illnesses were usual, childhood injuries were denied, there was a partial hysterectomy surgery in 2015 and sinus surgeries, but the number of surgeries and the dates of the surgeries were not documented here or in the records review part of the report. The medications Ms. Hawpe took were Norco, Xanax, Wellbutrin, tobramycin, mupirocin, Zofran, and, for allergies, Levaquin,

Dr. Giammanco performed a Systems Review noting that Ms. Hawpe’s was “positive for everything and she elaborately filled out our question and answer pages with involvement in every system. And only 3 out of 40 symptoms as sequelae were left blank while she had all the other 37 symptoms.”

The Physical Examination section of Dr. Giammanco’s report noted that Ms. Hawpe’s head was “normocephalic”<sup>7</sup> with “some tenderness along her occiput which was not tender on the day of” the IME but “is the location of her commonly felt headache which sometimes is at its worst with photophobia and visual disturbance.” Ms. Hawpe’s “extraocular movements were intact with some nystagmoid jerks and extremes of gaze, both right and left.” Both of Ms. Hawpe’s ear canals were clear and both tympanic membranes were intact. The tuning fork tests indicated “weber test in the midline in both Rinne tests were positive.”<sup>8</sup> The examination of Ms. Hawpe’s nose “revealed membranes that were slightly moist and pale with 1+ hypertrophy bilaterally” and Dr. Giammanco “could see into

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<sup>6</sup> The humerus is the long bone in the arm or forelimb that runs from the shoulder to the elbow. It connects the scapula and the two bones of the lower arm, the radius and ulna, and consists of three sections. The humeral upper extremity consists of a rounded head, a narrow neck, and two short processes (tubercles, sometimes called tuberosities). A proximal humerus fracture is a break of the upper part of that bone.

<sup>7</sup> Normocephalic refers to a person whose head and all major organs of the head are in a normal condition and without significant abnormalities.

<sup>8</sup> The Weber test is a screening test for hearing performed with a tuning fork. It can detect unilateral conductive hearing loss and unilateral sensorineural hearing loss. The Rinne test is used primarily to evaluate loss of hearing in one ear. It compares perception of sounds transmitted by air conduction to those transmitted by bone conduction through the mastoid, allowing one to quickly screen for the presence of conductive hearing loss.

the right maxillary sinus and through the inferior meatus<sup>9</sup> where it appeared hollow and the coloring grayish base posterior wall.” Her throat examination was normal.

In the Review of Records portion of his report, Dr. Giammanco noted that he “reviewed approximately four inches of records and reports” and he identified the various physicians whose records he reviewed, and the dates of some of those reports. But he did not summarize the contents of those reports other than noting that some were “detailed and informative and that hemodynamic studies conducted by separate physicians “evaluating [Ms. Hawpe] for affects [*sic*] of her hypertension condition specifically looking for HCVD which the studies concluded that she did not have as a problem and an echocardiogram with the same conclusion.” Dr. Giammanco wrote that his “review of x-rays [*sic*] reports suggested that there was more inflammation, more hypertrophy to the turbinates<sup>10</sup> and the septal lining and described more what looked like rhinitis that I saw visibly.” Dr. Giammanco reported that during his history taking Ms. Hawpe “attempted to emphasize the frontal maxillary headaches which she attributed to her chronic sinus condition and ringing in her ears that affected her balance and loss at times when she was more tired describing tubotympanitis [inflammation of the middle ear] as well as fluctuation in her hearing secondary to her chronic rhinosinusitis.”

Based upon his IME, Dr. Giammanco diagnosed (1) MRSA colonization and infection and (2) chronic rhinosinusitis. In his Discussion and Conclusion section, Dr. Giammanco wrote: “Before I go on I know that I am to comment on and answer the questions that proposed [*sic*], I would like to just make a statement with regards to causation asking whether the patient is a misfortunate victim.”

Dr. Giammanco then identified seven questions and his response to each. The first three questions were contained in the retention letter CalPERS sent Dr. Giammanco setting the IME appointment; the source of questions four through seven was unclear from the evidence presented. Many of Dr. Giammanco’s responses did not answer the questions at issue in this matter and some of his answers were nonsensical and quite concerning. Below in bold are the questions Dr. Giammanco listed in his report after which are Dr. Giammanco’s responses.

**1. Based on your objective findings, are there specific job duties that you feel the member is unable to perform because of a physical or mental condition? If so, please explain in detail for each disabling condition. (In order to answer this question, we have enclosed for your review the**

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<sup>9</sup> A nasal meatus is a nasal passage of the nasal cavity, of which there are three; the superior meatus, middle meatus and inferior meatus.

<sup>10</sup> The inside walls of the nose have three pairs of long thin bones covered with a layer of tissue that can expand called nasal turbinates.

**member's duty statement / job description and physical requirements of his/her current position.)**

The patient Julie Hawpe was more or less pushed out of her positions by the people around here [*sic*] who didn't think she was helpful and could be replaced by someone better. Before leaving to be treated for MRSA in 2009 she was sure her supervisor disliked her and was turning in bad reports to her supervisor and the warden. Because she is aware of that she is not anxious to return to work. On our history forms she listed her complaints to include pain (moderate) in every part of her body but her ankle. Listed headaches as the worst pain and the only one that she took medication for, taking Norco or Percocet as needed. She calls herself stigmatized by her coworkers and listed physical handicaps such as unable to lift, reach, stretch, as a problem, with flexing, bending, pulling, coughing, standing, sneezing, carrying, sitting, driving, walking on uneven ground, stooping, squatting, lifting, extending, walking long distance, gripping, twisting, and fine manipulation as things she has difficulty doing. She was bothered by changes in the weather, temperature, and humidity. She must walk slowly and carefully when getting up specially [*sic*] changing head level [*sic*] since she had positional vertigo whenever her head was turned to the right and lifted forward. When asked whether she would be able to perform critical physical activities, she acclaims [*sic*] that she is fully capable given enough time and no problem especially doing an investigatory report. Her present condition is very normal appearing in presenting herself well groomed, but somewhat humiliated by having to have a boss that would talk about her badly to a colleague. Her diagnoses are MRSA and Chronic Rhinosinusitis. She can't return to earlier days with lacking confidence because she feels impaired and unable to do as well as use to. I recommend that you agree to her request, but keep in mind that she brought her hereditary allergic constitution to the Department for a job. The job did not change her and the job would not have bothered her if she were like most employees who had better health to start with. How many kinds of employees turned out like her? The same job done well [*sic*] by most people suggest that her constitution did not measure up to the job demands and she could not help that but neither could the correctional facility. The only valid criticism she has: the conditions for the food handling section with only one bathroom with no heat and with a wet leaking ceiling and dampness all around and people with runny noses and wiping in a prison where there is an incidence of MRSA did not comply

with what should have been required for the employees. One bathroom and no soap dispenser. The leaks and constant temperature in the 40's had effects on her allergic constitution that she brought to the workplace.

**2. In your professional opinion is the member presently, substantially incapacitated for [sic] the performance of his/her duties? Please explain in detail.**

I think she is substantially incapacitated because of the dour deterioration in her condition with a disease without a cure and treatment which requires integrating her immunity and obligates her to take Ototoxic drugs (antibiotics affecting her hearing and balance with some degree of vertigo, mostly positional but basically the only choice.<sup>11</sup> I think she is unstable and anxious for free ride to some extent in return for what she is cursed with. In her own words "I can do everything it will just take me longer.["]

**a. If yes, on what date did the disability begin? Please refer to the attachment, section titled "MEDICAL QUALIFICATIONS FOR DISABILITY RETIREMENT".**

Her disability began when her fellow workers pointed her out as not doing her job and not being capable anymore, and when she was demoted by her boss.

**b. If incapacitated, is the incapacity permanent or temporary? If temporary, will the incapacity last longer than 12 months? Please explain in detail.**

I think the incapacitation is permanent and her desire to retire, stronger than any other desire. If forced to go back to work in some lesser demanding job, she might be capable of handling it, but would do it unhappily, clumsily and with further complications developing.

**3. Is the member cooperating with the examination and putting forth their [sic] best effort, or do you feel there is exaggeration of complaints.**

I believe she was exaggerating when she listed every part of her body except her ankle as a locus of pain and claimed that

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<sup>11</sup> The parens did not close.

the pain was moderate as was every pain listed. I think she thinks she's being cooperative in supplying whatever she can that might help her request to be granted.

**4. What part of the disability, if any, is due to non-industrial or pre-existing conditions? Please explain.**

One half of the cause is her hereditary childhood allergy<sup>12</sup> that left her hypersensitive to things that the majority of us are unaffected by like most functional endoscopic sinus surgery patients underlying problem is allergy, which tends to become polypoid and obstructive when sinus membranes are involved interfering with adequate aeration of the sinus cavity. Everything that happened to her from 1995 on would not have happened if she did not have that allergic tendency. She would not have needed the surgery and she would not gone on [sic] to have the problems that she did when she joined the food handling part of the job. I consider having the personal makeup that she had was equally significant in her contracting MRSA and had she been normal in this regard beyond that she would have never gotten MRSA. The other half of the cause was a cold environment she was exposed to with runny noses and a temperature of 45 degrees and no heat and only one bathroom and the Departments [sic] possible non compliance [sic]. I realize that large scale maintenance requires almost continuous refrigeration of the food right up to its being cooked and I'm sure that much of that coldness was necessary to prevent spoilage, waste and disease or food poisoning from spoiled food.

Causation is 50% to the environment and 50% of the constitution that she brought with her. The worst part of getting MRSA for the patient was the fact that she had to take ototoxic drugs to get rid of it and it was resistant to so many other antibiotics. The ototoxic drugs induced tinnitus and neurosensory hearing loss and vertigo. All of which made her life much more complicated. The vertigo caused her to fall and injure herself which led to her needing crystalloid repositioning exercises as therapy. Recently, on January 27, 2017, she fell

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<sup>12</sup> This was the first reference in Dr. Giammanco's report to "hereditary childhood allergy"; the Past Medical History section under Childhood Illnesses stated "Usual" and Childhood Injuries were "Denied." There was no notation in the Past Medical History section of Ms. Hawpe having a "hereditary childhood allergy."

again and broke her proximal arm; what she referred to as shoulder and did not have to be operated but had to wear a sling.

**5. Is a condition either caused, aggravated, or accelerated by his/her employment? Please explain. Would these complaints be present if the member had not been employed in this job?**

What she did not mention was that when she had sinus problems and did have sinus surgery in 1995 using prior insurance and off the record no mention of the procedure no documentation was ever sent to the county. It was never mentioned in anything that she spoke about or wrote down. Could she have developed MRSA from the procedures and exams of the record or even leading up to the 1995 sinus surgery? I think it is possible to become a carrier at any time later become infected in a surgical wound. She did see multiple doctors following multiple treatments with antibiotics and no cultures being taken until 2004 but some of her history is left out. Following that she went to [physician] who was the first person to operate on her sinuses and who at the time of the surgeries on both sides, removed the content of the right maxillary antrum, which was full of disease probably not cultured pre-op and unclear whether cultured post-op including part of the right ethmoid and part of the right sphenoid. Her condition then was treated when the first culture de facto was positive for MRSA and she was treated for the aspergillosis as well, which did not turn out to be a chronic ongoing problem existing until today, unlike the MRSA which the patient is convinced she will never get over and has been told by doctors that she will not recover from it. For many patients it is incurable. A remission for 4 to 6 months for her is possible but eventually it will come back as she was told. This is based on the result of having had several sinus procedures by several different doctors with coinciding opinions along that same direction.

Two operations by [physician] in 2011 where he operated both right and left sides the first time, and the second time and concentrate on the right side only. There are possible documentations of the findings and procedures carried out by multiple people including [physicians, with allusions to additional surgeries in 1995 and 2010]. The patient had sinus problems, bad enough for surgery back in 1995. In that period

in time that she blames of the onset of the MRSA positive cultures not done at that time.

Julie was continually writing and was not speaking very fast within three sentences she wanted to get to the subject that she contracted MRSA a long way [sic] and that it was because of several failings on the part of her employer who had her in a situation where the temperature was only 45 degrees and very moist. Everybody had a runny nose and was wiping nose [sic] and were close to other [sic] and had a lot of pain [sic] with food packages [sic] and doing so much exchange of and opportunity to transmit this MRSA if anybody in the group had it and many checked themselves. An interesting thing that she skipped over was the fact that in 1995, in her past medical history, she had a history of asthma as a child that she eventually grew out of. Had allergic tendencies that had persisted into adulthood and she did not mention the fact that she had sinus surgery as a PVT patient using her own insurance and going outside of the Workers [sic] Comp rulings.<sup>13</sup> The next two years after having the sinus surgery, she began to have sinus trouble all over again and was seen by several doctors and had x-rays and reports from several radiologists that I reviewed. Supposedly, this attack of sinusitis in 1995 two years after joining the Department of Corrections and being [sic] California as an Office Technician, she managed to come down with a condition bad enough to require surgery, which did not respond to medical treatment at once. Following the surgery, she did well and did not have recurrence of sinusitis for another almost two years and when she began to have treatment for this, she get [sic] only partial improvement and along the way, she had cultures which did not show MRSA at first and showed other pathogens which were treatable, but she's has still stayed with one doctor to [sic] decided that she should stay on antibiotics for a whole year and she did that and at the end of the year she still had trouble with sinusitis and increasing pain in her sinuses. During that time, she was cared for by infectious disease expert [physician] who this area [sic] and [that physician] stopped taking Workers [sic] Comp and referred her to an ENT surgeon recommending surgery because use of antibiotics had failed. She saw [physician], the ENT specialist. Managements [sic] consisted of saline nasal rinses and use of [medications] and in the process of being cared for by ENT, she did have vertigo that was diagnosed and was confirmed on EMG, showing a right canal

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<sup>13</sup> It was unclear what "Workers Comp rulings" Dr. Giammanco was referencing.

weakness and was examined by [physician] who eventually was the first person to operate on her sinuses in 2011. She had another surgery unrelated, another medical problem that involved the thoracic spine and ended up with the fusion with the cage that was visible on x-ray in 1999.

Prior to being diagnosed with MRSA, she was found to have aspergillosis which was blamed on the continuous use of antibiotics over the one-year period, and from there, she was started with medical management using Diflucan for it. And there was a need for thoracic spine fusion surgery performed by [physician] in 1999 on her back went well and she had no further problems with that. There was a period from 2001 to 2004 when no cultures were taken at all and during that period of time, the amount of symptomatology increased with more pain and after finding the black fungus aspergillosis, she went on VFEND which is one of the conazoles [antifungal drugs] that is [sic] used for fungus and developed secondary illness from taking the VFEND which while it helped get rid of the fungus temporarily, it aggravated the vertigo and tinnitus and gave her worse balance problems. The balance problems lead to some physical injuries falling into a bathtub and striking her head injuring her foot which required surgery for fractured metatarsal. The medication she took contributed to the vestibulopathy<sup>14</sup> but the head injuries two, time and effect too, and she was followed by another doctor to [sic] who explained to her positional vertigo in terms of crystalloids being disturbed in the labyrinth of her in her ear and the need for resting, avoiding neck turning, and to avoid positional vertigo. She complained of ear pain and hearing loss in 2011 and tinnitus that increased in 2012 because she took ototoxic meds like [medications]. She complained about injury to her rotator cuff in 2017, and she has not worked in the past six years but has had multiple cultures taken that were positive for MRSA.

These cultures along with cultures that were free of MRSA as well including films became more frequent in 2011 which is when [physician] decided to operate. Pre-op films including films back from Palm Springs on surgery done by the hospital in 1995. Subsequent films showed that there was correction of opacification in the maxillary sinus and cells missing from the ethmoid area on the right side and that

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<sup>14</sup> Vestibulopathy refers to an abnormality of the vestibular apparatus, the sensory system that aids in balance and spatial orientation.

sphenoidotomy accomplished. [Physician's] operative report described a fairly normal nasal lining with ostiomeatal complexes that appeared to be undisturbed. Persistent disease showed up postoperatively bringing her back to the OR approximately three months later.

In the past, the patient had tried to file a claim but the claims were turned down. During the time, she was under [physician's] care. He was able to write a letter which enabled the claim to be filed and accepted by Workers [sic] Comp. In the period of time after the surgery had been accomplished and irrigation and cleansing of the nose with saline was advised and the use of prescriptions for antibiotics continued, the aspergillosis completely cleared up and there were many cultures that were negative for MRSA which could either meant [sic] that the wrong area was swiped (swabbed) or that there actually was a complete disappearance (less likely) of MRSA from her system. At that point, she was labeled not contagious. Her problems became worse in terms of her balance and her strength and the amount of pain she had to put up with which all were disabling in terms of her returning to work after being off, starting in 2015. At this point, in her history giving, she seemed somewhat rattled about that and not wanting to ever go back to work, not being strong enough to do it, unable to handle it, and particularly upset that her fellow employees including one of her immediate boss [sic] had stigmatized her and she had become labeled as unfit, not capable, and "contagious", and was treated poorly by everybody leading up to the time when she finally took off from work.

The patient emphasized that she had been determined to have 42% whole person disability based on her bad back which had accounted for some time off in 2010.

Causation is 50% to the environment provided and 50% the constitution that she brought with her. There was part of getting MRSA for the patient [sic] was the fact that she had to take ototoxic drugs to get rid of it and was resistant to so many other antibiotics. The ototoxic drugs induced tinnitus and neurosensory hearing loss and vertigo. All of which made her life much more complicated. The vertigo caused her to fall and injured [sic] herself which lead to her needing crystalloid repositioning exercises as therapy. Recently, on January 27, 2017, she fell again and broke her proximal arm and [sic] she

referred to as shoulder and did not have to be operated but had to wear a sling.

**6. Is the member mentally able to handle his/her own financial affairs and enter into legally binding contracts?**

The patient seemed very anxious and was talking excessively. For an expert opinion however I would defer to a qualified psychologist or psychiatrist.

**7. Ins [sic] the member competent to endorse checks with the realization of the nature and consequence of the act?**

My answer to the questions [sic] would be the same as noted above in #6. However, I would defer to a qualified psychologist or psychiatrist for an expert opinion in this matter.

*CalPERS's Response to Dr. Giammanco's IME Report*

9. On August 11, 2017, not surprisingly, CalPERS sent Dr. Giammanco a letter stating: "Clarification of the IME report is needed." CalPERS attached its retention letter "for your reference listing questions 1 through 3." CalPERS's letter further stated:

Your responses to question #1 and #2 are not listed in your IME report. You list her complaints of physical handicaps but we are specifically looking for job duties that she is unable to perform based on your medical record review, and objective findings. Based solely on the medical records review, your interview of the patient and objective findings, we are asking for specific job duties that the member was unable to perform since her last day on pay of 06/30/13 [sic]. You also respond that her disability began "when her fellow workers pointed her out as not doing her job and not being capable anymore and when she was demoted by her boss". However, we are specifically asking the actual date her disability began.

Please note that for determination purposes, we ask the IME specialist give his or her opinion of whether a member can return to full duty based on the review of medical records, and the interview and examination of the patient, not the member's subjective findings.

In accordance with your IME Agreement, you are required to submit a report that clearly answers each of the specific

disability questions in our initial appointment confirmation letter. **If you do not provide a complete report, we may delay your payment or remove your name from the approved CalPERS' IME list of physicians.** (Emphasis in original.)

At this time, please clarify your opinion to the following questions listed below. The report must document and discuss the specific medical reports. Please clearly substantiate your opinion by providing detailed and complete explanations for your findings. If there are limitations, please quantify them: constant, frequent, occasional, etc.

The CalPERS letter then provided questions 1 and 2 for Dr. Giammanco to answer as follows:

1. Based on your objective findings, are there specific job duties that you feel the member is unable to perform because of a physical or mental condition? If so, please explain in detail for each disabling condition. Please refer to the member's job description and physical requirements form listing the specific job duties that she is precluded from.

2. You list that the member is permanently incapacitated. Therefore, please opine on what date her disability began. Please be specific.

*Dr. Giammanco's Supplemental Report*

10. On August 16, 2017, Dr. Giammanco sent CalPERS a Supplemental Report, answering both questions. In response to question 1, he wrote, "The patient is able to perform all job duties that were listed on her current job description." In response to question 2, Dr. Giammanco wrote, "To clarify, the patient feels that she is substantially incapacitated but based on her [*sic*] objective findings the patient is not incapacitated and therefore can perform her full job functions as listed."

*Witness Testimony*

11. Dr. Giammanco testified about his findings, IME and records review. When he first entered the examination room, Ms. Hawpe was sitting on the floor, writing notes. He described her moving like "a normal person." She did not seem "mentally affected by her condition." He described the tuning fork testing for hearing and the vertigo/balance testing he performed, all of which were normal. He found no evidence of sinus surgery on the left side although she did have "pretty extensive" right side sinus findings that corresponded with her history. He found no sign of information that would lead him to suspect MRSA. He

explained that cultures taken by treating physicians showed colonization, not infection, and he had concerns about the antibiotics Ms. Hawpe had been prescribed for her condition.

In response to petitioner's counsel's question, Dr. Giammanco testified that he did think Ms. Hawpe was substantially incapacitated. He then explained that he did not believe she could do any multitasking, although she could perform individual tasks. He then testified that there was "no incapacitated medical condition keeping her from doing any of those individual tasks" identified in the job description documents. He then stated that he saw "no reason why she could not multitask at a given speed but she might be slower than she used to be." He then explained that he based his opinions that she was "incapacitated" in his report and at hearing on what Ms. Hawpe told him but he added that "to be substantially incapacitated there would have to be something that could be identified for that and I could not find that." He saw "no reason" for her not to be able to perform her job duties. Reviewing the job description documents, Dr. Giammanco "did not feel there was anything Ms. Hawpe could not do"; he believed "she can do all." He was unsure as to whether her injury was due to an attack by an inmate.

On cross examination, Dr. Giammanco denied that Ms. Hawpe had ever complained about the heat at the prison, she complained to him about the cold. He also explained that the medical records show a colonization, meaning Ms. Hawpe is a MRSA carrier, but do not show she has a MRSA infection. He explained that a physician does not have to treat a colonization and he was concerned that she was continuing to take such strong antibiotics in light of her findings. In response to her question, Dr. Giammanco stated, "I don't think anyone should doubt the truth of what you're saying," but it did not change his opinions that she was not substantially incapacitated from performing her job duties.

Dr. Giammanco made a poor witness. His explanations were difficult to follow given his opinion that Ms. Hawpe "was substantially incapacitated." Although he did appear to possess an extensive ENT knowledge, he also seemed to have difficulty understanding the definitions at issue here and offered opinions and commentary in his report that were simply not relevant. However, as noted below, petitioner did not have the burden of proof in this proceeding and Ms. Hawpe offered no competent medical opinion evidence.

12. Ms. Hawpe testified in detail about her medical condition, the numerous issues and injuries she has had because of her condition, and that all of her medications and surgeries have been prescribed or recommended by her physicians. She underwent the various surgeries and treatment prescribed hoping they would "cure me." Ms. Hawpe described her prior job duties and why she believed she could no longer perform them. She also described her prior back injury, the hard work she underwent to come back from that injury, as well as the effort she made to overcome her internal injuries which were the subject of this hearing.

While Ms. Hawpe's testimony was heartfelt and sincere, she appeared to be exaggerating her condition and presented as one who believes she has every possible side effect from every medication or procedure she has undergone, which was consistent with her

complaining of 37 out of 40 systems that were reviewed during the IME. Moreover, as noted below, although she is convinced of her condition, her testimony did not constitute a “competent medical opinion.”

Ms. Hawpe denied sitting on the floor writing notes in the IME room. She credibly testified that Dr. Giammanco entered the room, began asking questions, realized it was a CalPERS IME, left the room, returned with a new set of questions, and told her that those questions were not what he was supposed to ask her and to “forget” what he had previously said. Ms. Hawpe denied that Dr. Giammanco performed any type of physical examination; he did not use a tuning fork or perform any other auditory testing. She explained that he did not touch her, he just asked her questions. Given Dr. Giammanco’s presentation in this hearing, as well as a review of his two reports, Ms. Hawpe’s testimony about what occurred during the IME is accepted over that of Dr. Giammanco.

Ms. Hawpe was also critical of Dr. Giammanco’s report, noting it was incomplete as to the surgeries that she underwent, was “a total misrepresentation of my medical history” and was “inconclusive and contradictory.” She correctly noted that “even his clarification was not clear.”

#### *Documents Introduced by Ms. Hawpe*

13. Ms. Hawpe submitted her voluminous medical records, both those reviewed by Dr. Giammanco as part of his IME, as well as additional records he had not reviewed. Those records were received as administrative hearsay pursuant to Government Code section 11513, subdivision (d). Dr. Giammanco reviewed those additional records during the hearing and testified that they did not change his opinions.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

2. “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.] . . . The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

### *Purpose of CalPERS's Laws*

3. The court in *Lazan v. County of Riverside* (2006) 140 Cal App 4th 453, examined the purpose of CalPERS legislation, noting it serves two objectives: inducing persons to enter and continue in public service, and providing subsistence for disabled or retired employees and their dependents. A disability pension is intended to alleviate the harshness that would accompany termination of an employee who became medically unable to perform his or her duties. Generally, CalPERS legislation is to be construed liberally in favor of the employee to achieve these objectives. Moreover, eligibility for retirement benefits does not turn upon whether the employer dismissed the employee for disability or whether the employee voluntarily ceased work because of disability. (*Id.* at p. 459.)

### *Applicable Code Sections*

4. Government Code section 20021 defines "Board" as "the Board of Administration of the Public Employees' Retirement System" (CalPERS).

5. Government Code section 20026 provides:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.

6. Government Code section 21150, subdivision (a), provides that a member who is "incapacitated for the performance of duty shall be retired for disability . . ."

7. Government Code section 21151, provides that a state industrial member, such as Ms. Hawpe, who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . ."

8. Government Code section 21152 sets forth who may make the disability retirement application.

9. Government Code section 21154 states:

The application 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, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, 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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

10. Government Code section 21156 states:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) in determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

*Interplay between CalPERS's Disability Retirement and Workers' Compensation*

11. Government Code section 21166 provides:

If a member is entitled to a different disability retirement allowance according to whether the disability is industrial or nonindustrial and the member claims that the disability as found by the board, or in the case of a local safety member by the governing body of his or her employer, is industrial and the claim is disputed by the board, or in case of a local safety member by the governing body, the Workers' Compensation Appeals Board, using the same procedure as in workers' compensation hearings, shall determine whether the disability is industrial.

The jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation, and this section shall not be construed to authorize the Workers' Compensation Appeals Board to award costs against this system pursuant to Section 4600, 5811, or any other provision of the Labor Code.

12. Although the Public Employees' Retirement Law and the Workers' Compensation law are aimed at the same general goals with regard to the welfare of employees and their dependents, they represent distinct legislative schemes. Courts may not assume that the provisions of one apply to the other absent a clear indication from the Legislature. (*Pearl v. W.C.A.B.* (2001) 26 Cal.4th 189, 197.)

13. Receipt of any type of disability in a related workers' compensation proceeding does not establish qualification for a disability retirement. (*Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.) Nor does the issuance of prophylactic work restrictions or a reasonable fear of injury justify granting an industrial disability retirement. (*Hosford, supra*, at p. 863-864.) Workers' compensation appeal board determinations do not apply to industrial disability retirement proceedings. (*English v. Board of Administration of the Los Angeles City Employees' Retirement System* (1983) 148 Cal. App. 3d 839, 844-845; *Hawpe v. City of Napa* (2004) 120 Cal.App.4th 194, 207.)

14. Generally, a Workers' Compensation Appeals Board proceeding concerns whether the employee suffered *any* job-related injury, and if that injury resulted in some permanent residual loss, the Workers' Compensation Appeals Board awards the employee a permanent disability rating. Retirement boards, on the other hand, focus on a different issue: whether an employee has suffered an injury or disease of such magnitude and nature that he is incapacitated from substantially performing his job responsibilities. Because of the differences in the issues, "[a] finding by the [Workers' Compensation Appeals Board] of

permanent disability, which may be partial for the purposes of workers' compensation, does not bind the retirement board on the issue of the employee's incapacity to perform his duties." (*Bianchi v. City of San Diego* (1989) 214 Cal App 3d 563, 567, citations omitted.)

15. A Workers' Compensation Appeals Board's finding that an injury is work related is res judicata in a later application for benefits made to a City Employees' Retirement Fund. (*Greator v Board of Admin* (1979) 91 Cal.App.3d 54.)

16. Although the schemes of the retirement boards and the Workers' Compensation Appeals Board are independent and serve different functions, their purposes are in harmony rather than in conflict and applying workers' compensation laws by analogy to retirement board cases may be appropriate as it seems clear that the tendency is to view the two bodies of law as compatible rather than the opposite. (*Heaton v. Marin County Employees' Retirement Bd.* (1976) 63 Cal.App.3d 421, 428.)

17. Workers' Compensation laws and the Public Employees' Retirement Act are not coordinated in all respects, are administered by independent boards, but do supplement each other. The jurisdiction of each is exclusive only in relation to its own objectives and purposes but overlaps on a single issue of fact only - whether an injury or disability is service-connected. The retirement board does not lose its inherent power to retire a city employee who "is physically or mentally incapacitated for the performance of duty" simply because the employee may also be eligible for workers' compensation benefits. (*Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 213.) There, although the court agreed that the injured employee had correctly pointed out that only workers' compensation laws prohibited an award if the employee unreasonably refused surgery, and that the Public Employees' Retirement Act contained no such provision, the *Reynolds* court held that neither the California Constitution nor the Labor Code restricted a retirement board from exercising its authority to determine eligibility and the board could apply workers' compensation laws by analogy when making its finding of eligibility or non-eligibility. (*Ibid.*)

#### *Incapacitated from Performance of Duty*

18. "Incapacitated" means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, even though doing so may be difficult or painful, the public employee is not "incapacitated" and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873; *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1057.)

19. Unlike the right to a widow's or widower's pension that accrues upon the employee spouse's death, the right to a disability retirement does not automatically arise upon the happening of an injury. Rather, the injury must result in the employee being so physically or mentally disabled as to render retirement from active service necessary. The illness or injury is not the controlling factor, but, rather, the resulting inability to perform the work. The employer's duty to find the disability does not attach nor is the right to a

disability finding created until that further point of time is reached. The disability finding cannot be made without a determination of the results of the injury, the condition of the employee, and the necessity for the retirement. (*Tyra v. Board of Police and Fire Pension Commissioners of City of Long Beach* (1948) 32 Cal.2d 666, 671, citations omitted.)

### *Competent Medical Opinion*

20. CalPERS makes its determination whether a member is disabled for retirement purposes based upon "competent medical opinion." That determination is based on the evidence offered to substantiate the member's disability. (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 461, distinguished on other grounds.)

21. Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

22. The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the trier of fact in the search for the truth, and "no hard and fast rule can be laid down which would be applicable in every circumstance." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.)

23. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact but the expert's opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.)

24. Government Code section 11513, subdivision (d), provides in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but

over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”

25. Unless admissible over objection in civil actions, hearsay evidence shall not be sufficient in itself to support a finding in an administrative proceeding. (*Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 Cal.App.3d 365, 371.)

26. Hearsay evidence is not competent evidence that can independently support a finding. (*McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688.)

27. Determining both the nature of Ms. Hawpe’s medical condition, and whether that condition incapacitated her physically or mentally for the performance of her duties, is sufficiently beyond common experience that expert testimony is required. None of Ms. Hawpe’s treating physicians testified in this hearing and all of her medical records were received solely as administrative hearsay. Thus, they were only considered to the extent they supplemented and/or explained other non-hearsay evidence.

#### *Precedential Decision*

28. CalPERS asked that Official Notice be taken of a precedential decision. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain “a significant legal or policy determination of general application that is likely to recur.” Precedential decisions may be expressly relied upon by the administrative law judge and the agency. Official Notice was taken of *In the Matter of the Application for Reinstatement from Industrial Disability Retirement of Ruth A. Keck* (OAH No. L-1990 9120097).

This decision involved an injured school district clerk typist and stands for the proposition that the difficulty performing a task is insufficient to prove eligibility for disability retirement, competent medical evidence is required to establish disability, and an employer cannot terminate a CalPERS member for medical reasons after CalPERS has denied a disability retirement.

#### *Evaluation*

29. In order to qualify for a disability retirement, Ms. Hawpe must demonstrate, based on competent medical opinion, that she was permanently disabled or incapacitated from performing the regular and customary duties of an Associate Governmental Program Analyst when she filed her application. The evidence demonstrated that Ms. Hawpe has several internal conditions, has received treatment for them, and is currently undergoing treatment, but no competent medical opinion was offered that established that she was permanently disabled or incapacitated from performing her regular and customary job duties because of her internal conditions.

Ms. Hawpe did not introduce any competent medical opinions to support her claim. None of her treating physicians testified and all of her medical records were received as administrative hearsay. Hearsay evidence is not sufficient to support a finding. Those medical records, alone, do not constitute competent medical opinion. As such, Ms. Hawpe failed to meet her burden of proof and her application must be denied.

Despite the serious concerns raised about Dr. Giammanco's reports and opinions, and his inability to adequately address the disability questions posed to him in those reports, petitioner did not have the burden of proof in this proceeding. The only medical opinion offered at this hearing was Dr. Giammanco's and he testified that Ms. Hawpe was not incapacitated from performing her job duties. Ms. Hawpe offered no competent medical opinion to the contrary. Accordingly, because she bore the burden of proof, and failed to meet her burden, her application must be denied. Petitioner's determination that she was not permanently disabled or incapacitated from performance of her duties is affirmed.

*Cause Exists to Deny the Application*

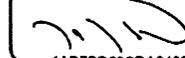
30. Cause exists to deny Ms. Hawpe's application for a disability retirement. Ms. Hawpe failed to prove by a preponderance of the evidence that her disability was of a permanent or extended duration that incapacitated her for performance of her duties as an Associate Governmental Program Analyst as a result of her internal (MRSA, hearing, sinusitis, vertigo, tinnitus, headache) conditions when she filed her application for disability retirement with CalPERS.

ORDER

The application for disability retirement filed by Julie Hawpe with the California Public Employees' Retirement System is denied. CalPERS's denial of Ms. Hawpe's application is affirmed.

DATED: May 23, 2019

DocuSigned by:



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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings