

RENDERED: OCTOBER 1, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002358-MR

PATRICIA RISK

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS WINGATE, JUDGE  
ACTION NO. 09-CI-00325

KENTUCKY RETIREMENT  
SYSTEMS AND BOARD OF TRUSTEES  
OF THE KENTUCKY RETIREMENT SYSTEMS

APPELLEES

AND

NO. 2009-CA-002395-MR

JANET BRYANT

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS WINGATE, JUDGE  
ACTION NO. 08-CI-02103

KENTUCKY RETIREMENT  
SYSTEMS AND BOARD OF TRUSTEES  
OF THE KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Patricia Risk appeals from a Franklin Circuit Court order, entered on November 23, 2009, dismissing her appeal of a Kentucky Retirement Systems (KRS) denial of her application for disability retirement benefits. The court dismissed Risk's appeal based upon of her failure to file exceptions to the hearing officer's report and recommended order. Janet Bryant also appeals from a Franklin Circuit Court order, entered on November 23, 2009, dismissing her appeal of a KRS denial of her application for disability retirement benefits. The court dismissed Bryant's appeal for failure to file exceptions.

Both Bryant and Risk claim that failure to file exceptions is not fatal to an appeal. Although Risk and Bryant have based their claims upon different disabilities, the procedural history of their claims, appeals, and briefs are virtually identical. Therefore, these appeals have been assigned to this panel to be decided collectively.

I. Disability Claims

On September 23, 2005, Risk applied for disability benefits with the Kentucky Employment Retirement Systems, of which she was a member. Risk's claim for benefits was based upon complications from her artificial hip and

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degenerative arthritis. Three retirement systems medical examiners reviewed her claim. Each examiner recommended that the claim be denied. On November 16, 2005, KRS denied her claim. On October 3, 2007, Risk reapplied for disability retirement benefits. On December 13, 2007, KRS denied her second application for benefits. Risk requested that her claim be heard by an administrative hearing officer. The hearing officer questioned whether Risk had been permanently mentally or physically incapacitated since her last date of paid employment preventing her from performing her former job or a job of similar duties from which she received her last paid employment. The officer concluded that she was not incapacitated to such an extent and denied her claim.

Proceeding *pro se*, Risk did not file exceptions to the hearing officer's report. The KRS appeals committee adopted the hearing officer's report and entered a final order denying Risk's claim. Risk appealed the decision to the Franklin Circuit Court. On appeal, Risk moved the court to allow her to conduct the discovery process in an effort to show that filing exceptions would have been a futile act because KRS does not deviate from the hearing officer's recommendation. Meanwhile, KRS filed a motion to dismiss Risk's appeal on the grounds that Risk did not preserve issues for judicial review by failing to file exceptions to the report. In an order, entered on November 23, 2009, the Franklin Circuit Court denied Risk's request for discovery and granted KRS's motion to dismiss. This appeal follows the Circuit Court's dismissal.

On January 16, 2006, Bryant filed for disability retirement benefits based upon complications from a mechanical heart valve, two strokes, arthritis, carpal tunnel syndrome, heel spurs, asthma, and bladder problems. Although one medical examiner recommended that Bryant's claim be approved, the other examiners recommended that the claim be denied. Thus, Bryant's claim was denied on February 2, 2007. Bryant also reapplied for benefits and was once again denied on August 17, 2007. Bryant requested an administrative hearing and the hearing officer subsequently denied her claim.

Also proceeding *pro se*, Bryant did not file exceptions to the hearing officer's report. Bryant appealed the ruling to the KRS appeals committee, who adopted the hearing officer's report and entered a final order denying Bryant's claim. Bryant appealed the committee's decision to the Franklin Circuit Court. Like Risk, Bryant requested the opportunity to complete the discovery process in order to show that the act of filing exceptions is futile. KRS filed a motion to dismiss, which was granted by the Circuit Court in an order entered on November 23, 2009. This appeal follows the court's dismissal.

## II. Preservation

In both cases, the Franklin Circuit Court based its dismissal on the failure of Risk and Bryant to properly preserve any issues for review by filing exceptions to the hearing officer's order, under *Rapier v. Philpot*, 130 S.W.3d 560 (Ky.2004). *Rapier* provides:

Under [KRS] Chapter 13B, the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review. . . . Under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not excepted to an adopted in the final order. . . . Thus, when a party fails to file exceptions, the issues the party can raise on judicial review under KRS 13B.140 are limited to those findings and conclusions contained in the agency head's final order that differ from those contained in the hearing officer's recommended order.

*Id.* at 563-564 (internal citations omitted). Since Risk and Bryant failed to file exceptions to the hearing officer's conclusions, they can only raise issues concerning findings and conclusions that differed between the hearing officer's report and the agency's final order. Neither appellant raised such an issue. Therefore, their claims were properly dismissed by the Circuit Court.

Risk and Bryant claim that *Rapier* only applies to claims involving the personnel board. This argument is without merit. In *Rapier*, the administrative proceeding was governed under KRS Chapter 13B. *See Id.* at 563. Retirement systems claims are also governed under KRS Chapter 13B. *See* KRS 61.665. Further, we note that the Kentucky Supreme Court did not expressly limit its conclusions in *Rapier* to personnel claims. Therefore, we conclude that *Rapier* is applicable to the cases at hand.

In addition, we disagree with the contention that Risk and Bryant should have been given the opportunity to proceed with discovery in an effort to show that filing exceptions would have been futile due to administrative fraud and

misconduct. Risk and Bryant rely on *Maggard v. Commonwealth*, 282 S.W.3d 301 (Ky. 2008), and contend that they are entitled to discovery because claims of fraud and misconduct within a state agency overcome the requirement for particularity in pleadings. *Id.*

While Risk and Bryant only make blanket allegations of fraud, the lack of specific allegations are not the fatal flaws in their appeals. By not filing exceptions, Risk and Bryant failed to preserve or provide notice of the factual findings and conclusions to which they objected. Whether the agency acted fraudulently had no bearing on the appellants' disagreements with and objections to the hearing officer's rulings.

Accordingly, we affirm the Franklin Circuit Court opinions and orders dismissing the appeals.

ALL CONCUR.

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