

RENDERED: JULY 22, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001204-MR

BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01916

LINDA HAYWOOD

APPELLEE

OPINION
VACATING, REVERSING, AND REMANDING

** ** * ** * **

BEFORE: DIXON, KELLER, AND VANMETER, JUDGES.

KELLER, JUDGE: The Board of Trustees of the Kentucky Retirement Systems (the Board) appeals from the circuit court's order reversing the Board's finding that Linda Haywood (Haywood) did not qualify for disability retirement benefits. On appeal, the Board argues that Haywood failed to file exceptions to the hearing

officer's recommended order, thus failing to preserve any issues for review; that the circuit court inappropriately relied on evidence outside the record in reversing the Board; that the circuit court impermissibly shifted the burden of proof from Haywood to the Board; that the circuit court incorrectly stated that the Board did not consider Haywood's medical proof as objective evidence; and that the circuit court inappropriately substituted its findings for the Board's. Haywood argues to the contrary and asserts that the Board has a fiduciary duty to her, which it violated. Furthermore, Haywood argues that the Board's role as both fiduciary and fact-finder creates an impermissible and incurable conflict of interest. Having reviewed the evidence and the arguments of the parties, we vacate, reverse, and remand.

FACTS

Haywood sought disability retirement benefits alleging that she was totally disabled because of "reflux esophagus," Lupus, peripheral neuropathy, migraine headaches, loss of muscle mass and/or weight loss, and "hysterectomy." At the time Haywood filed for benefits, she had 246 months of service credit. The medical review board recommended denial of Haywood's application based on a lack of objective evidence to support her claim of permanent total disability, and Haywood requested a hearing. Following that hearing, the hearing officer issued a recommended order finding that Haywood had failed to prove that she suffered from permanent disability related to her medical conditions. Haywood did not file

exceptions to the recommended order, and the Board adopted the recommended order without making any substantive changes.

Haywood sought review of the Board's order in circuit court. The Board filed a motion to dismiss, arguing before the circuit court as it does here, that Haywood's failure to file exceptions to the hearing officer's recommended order acted to bar any further appeal. Haywood argued that the hearing officer's recommended order did not adequately advise her of her appellate rights and responsibilities and that Kentucky Revised Statute(s) (KRS) 13B.110 violates the equal protection provisions of the Kentucky and U.S. Constitutions.¹

Following a hearing on the Board's motion, the circuit court ordered the Board to produce all orders from the preceding three years, wherein the Board disregarded a hearing officer's recommendation of denial of benefits. According to the court, this information was necessary for it to determine if filing exceptions would have been an unnecessary exercise in futility.

The Board then sought writs of prohibition and mandamus from this Court seeking an order prohibiting the circuit court from ordering production of those records and requiring the circuit court to grant the Board's motion to dismiss. This Court granted the writ of prohibition, finding that the circuit court could not order the production of the requested documents. However, this Court denied the writ of mandamus.

¹ We note that Haywood does not specifically argue this equal protection issue before us; therefore, we do not further address it.

The circuit court then issued an order setting a briefing schedule and inviting the parties to discuss whether filing exceptions in this case would have been an exercise in futility. Furthermore, the court invited the parties

to supplement their briefs on the pending motion to dismiss with citation to any case law, or any final administrative decision of the Kentucky Retirement Systems (KRS), in which a KRS hearing officer has recommended denial of disability benefits, but that recommendation was rejected by the final administrative decisionmaker [sic] and benefits were awarded to the claimant at the administrative level.

The parties argued the issue in their briefs, but neither party filed copies of any other final administrative decisions.

After reviewing the briefs, the circuit court issued its opinion and judgment reversing the Board and ordering it to award Haywood benefits. This appeal followed. We set forth additional facts below as necessary to address the issues raised by Haywood on appeal.

STANDARD OF REVIEW

If the party with the burden of proof is denied relief by the fact-finder, “the issue on appeal is whether the evidence in that party’s favor is so compelling that no reasonable person could have failed to be persuaded by it.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). We reverse the Board's findings of fact only upon a showing that the Board acted arbitrarily. *See Bowling v. Natural Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). However, we review questions of law *de novo*. *Carroll v. Meredith*,

59 S.W.3d 484, 489 (Ky. App. 2001). With these standards of review in mind, we analyze the issues raised by Haywood on appeal.

ANALYSIS

1. Failure to File Exceptions

The circuit court found as follows:

The KERS argue that Haywood has failed to preserve any issues on appeal because she failed to file exceptions to the hearing officer's report and recommended order. The hearing officer's report and recommendation included the following notice regarding Haywood's right to file exceptions:

Pursuant to KRS 13B.110, each party shall have fifteen (15) days from the date of the Recommended Order to file exceptions with the Board of Trustees of the Kentucky Retirement Systems.

The KERS' one-page cover memorandum accompanying the hearing officer's report and recommended order stated the following:

Attached please find the Hearing Officer's recommended order regarding your appeal. You may file exceptions as provided for in KRS 13B and outlined in the recommendations.

KRS 13B.110(1) provides that "[t]he Recommended Order shall . . . include a statement advising parties *fully* of their exception and appeal rights." [Emphasis added.] The notices quoted above did not fully advise Haywood of her actual rights relative to the filing of exceptions because it neglected to inform her that the failure to file exceptions would eliminate, or at least severely limit, the issues that may be raised on appeal.

While this Court is familiar with the holding in *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), the circumstances of that case are distinguishable from cases [sic] involving this appeal. *Rapier* involved an appeal of a decision of the Kentucky Personnel Board, a Board that has no contractual or fiduciary relationship to the parties before it beyond a basic constitutional requirement to conduct a fair and impartial hearing. Moreover, the Personnel Board has no pecuniary interest in the outcome of a case.

In contrast, in the case at bar, Haywood, like all other disability claimants, is a member of the Kentucky Retirement Systems to whom the Systems' Board owes a fiduciary duty under KRS 61.650, KRS 61.645 and KRS 61.692. This duty extends to the Board's contract hearing officer, who conducts the administrative hearing as the Board's designated agent.

The KERS has publicly acknowledged that the state pension fund is short of funds. Denial of a disability retirement claim increases the amount of money remaining in the depleted pension fund. Whether or not the Board has been acting in good faith in reviewing disability retirement claims, this current state of affairs raises the specter of a conflict of interest sufficient at least to require the Board to put its own members on clear notice that failure to file exceptions to an adverse hearing officer's report and recommendation will result in denial of the claim and will forfeit any right of judicial review.

Here, the KERS is the agency that adjudicates disability claims. It is also the agency that must pay the benefits from its limited funds appropriated by the legislature and contributed by its members. There is an inherent conflict of interest between the role of KERS as an adjudicator of claims, and its role as payor of claims. The federal courts have noted this inherent conflict of interest in the similar context of decisions in ERISA cases, holding that "where the interpreter of the plan both decides what claims are paid and ultimately pays those claims, 'there is an actual, readily apparent conflict . . . not a mere potential for one.[']" *Killian v. Healthsource Provident Adm'rs.*, 152

F.3d 514, 421 [sic] (6th Cir. 1998). In light of this conflict, in this case, the Court holds that the failure of the KERS to notify the Plaintiff that the failure to file exceptions would preclude judicial review renders the notice here defective, and accordingly, the failure to file exceptions cannot fairly be applied to bar judicial review.

The Court further finds that filing exceptions would have been an exercise in futility in this case. The Court has invited the KERS to present authority in the form of any final order of this agency reversing a hearing officer's recommendation and awarding benefits as [a] result of exceptions filed by the claimant. The KERS has failed to provide any such authority. The Court is forced to conclude that filing exceptions would be an exercise in futility, as the Board has been unable to demonstrate that the filing of exceptions to a hearing officer's report recommending denial of benefits has *ever* resulted [in] awarding benefits to a claimant. In the absence of a single administrative precedent from this agency in which the filing of exceptions has ever resulted in the award of benefits, this Court must conclude that filing of exceptions before this agency is an exercise in futility. See *Kentucky Retirement Systems v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005), *Adkins v. Commonwealth*, 614 S.W.2d 950, 953 (Ky. App. 1981).

Because this Court has jurisdiction over appeals from many state agencies, it is familiar with notices used across state government and there are many examples of notices that do, in fact, fully inform as required by KRS 13B.110, including the Personnel Board, the Kentucky Horse Racing Commission, and many other agencies. Although the Personnel Board's very minimal notice, similar to the notice of the KERS here, was upheld in *Rapier*, subsequently the Personnel Board has voluntarily expanded its notice to let state employees know that the failure to file exceptions will result in a bar to judicial review. Ironically, although the Board of Trustees has a fiduciary duty to its members while the Personnel Board has no fiduciary duty, the Personnel Board . . .

.....

notice informs the parties not only of the time allowed for the filing of exceptions but of the consequences of failing to do so, and also includes a specific citation to the relevant case law. Given the heightened duty the Board of Trustees of the Kentucky Retirement Systems has to its members, including those applying for disability retirement, this Court finds that the notice included by the Personnel Board constitutes the minimum notice that the KERS should give to its members who are pursuing an administrative remedy before the agency. The Court finds that notice used in Ms. Haywood's case is sufficiently defective to preclude striking of Appellant's Brief.

So long as the applicant's arguments were presented to the hearing officer and rejected by the agency, this Court finds those arguments are adequately preserved for review in this Court. The exhaustion of remedies doctrine is designed to require litigant[s] to present their arguments to the agency, and to give the agency a fair opportunity to consider those arguments, not to create a procedural minefield for unwary litigants and counsel. So long as the agency was presented with a fair opportunity to consider all arguments, all issues presented to the agency should be considered on judicial review. Haywood presented all arguments to the hearing officer, who rejected them. The agency, which owes her a fiduciary duty of full disclosure, did not inform her that failure to file exceptions would result in forfeiture of the right of judicial review. The agency, based on the record in this case, has never sustained objections to a hearing officer's report recommending denial of benefits. On these facts it cannot be said that the filing of exceptions is a necessary prerequisite to obtaining judicial review of the agency's final action adopting the hearing officer's report.

We begin our analysis by noting that administrative proceedings regarding issues of entitlement to disability retirement benefits are conducted pursuant to the provisions of KRS Chapter 13B. KRS 13B.020. Pursuant to that Chapter, a

hearing officer is required to forward a recommended order to the Board and the parties, containing findings of fact, conclusions of law, a recommendation regarding disposition, and "a statement advising parties fully of their exception and appeal rights." KRS 13B.110(1). Each party has fifteen days from the date the recommended order is mailed to file exceptions to that order. KRS 13B.110(4). Within ninety days after submission of the recommended order, the Board is required to render a final order, taking into consideration the record, the recommended order, and any exceptions. KRS 13B.120(4). Within thirty days after the Board mails its final order, any party may seek judicial review by filing a petition in circuit court. KRS 13B.140(1). Absent allegations of fraud or misconduct, the circuit court's review is confined to the record. KRS 13B.150(1). The court may not substitute its judgment for the Board's as to the weight of the evidence on questions of fact. However, the court may reverse the Board's final order if it finds that the Board: violated constitutional or statutory provisions; acted arbitrarily, capriciously, or outside its authority; abused its discretion; or rendered a final order not supported by substantial evidence. KRS 13B.150(2).

The Board argues before us that the circuit court acted beyond the scope of its authority because Haywood skipped one step in the above process – filing exceptions to the recommended order. The circuit court determined that step was not necessary because the recommended order did not fully apprise Haywood of her right to file exceptions; and filing exceptions would have been an exercise in futility. We disagree with the circuit court.

a. Adequacy of Notice

The Board argues that the notice in the recommended order regarding Haywood's right to file exceptions was adequate.² As noted by the circuit court in *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), the Supreme Court of Kentucky addressed the adequacy of a Personnel Board hearing officer's notice of the right to file exceptions. In *Rapier*, the hearing officer's recommended order stated that: "Any Exceptions and/or requests for Oral Argument hereto shall be filed within fifteen (15) days hereof and any Response to Exceptions shall be filed with [sic] five (5) days of the date the Exceptions are filed with the Board." *Id.* at 564. The Court concluded that this language "fully advised [the appellant] of his right to file exceptions." *Id.*

The hearing officer's recommended order herein contained the following language: "**EXCEPTIONS** Pursuant to KRS 13B.110, each party shall have fifteen (15) days from the date of this Recommended Order to file to file [sic] exceptions with the Board of Trustees of the Kentucky Retirement Systems." (Emphasis in original.) The circuit court found the hearing officer's statement to be deficient for two reasons: (1) the notice did not set forth the consequences for failure to file exceptions; and (2) the Board has a fiduciary duty to its members and is thus required to provide a more complete notice than the Court required of the Personnel Board.

² In oral argument, counsel for the Board stated that it has altered the notice it provides to claimants, based in part on the circuit court's order herein.

As to the circuit court's first reason, we note that three Justices in *Rapier* argued that the Personnel Board's notice was deficient because it did not address the consequences for failure to file exceptions. The majority of the Supreme Court considered and rejected that argument. While the Court may choose to revisit the argument, we cannot because we are bound to follow precedent. Rules of the Supreme Court (SCR) 1.030(8)(a). Therefore, we hold that, pursuant to the holding in *Rapier*, the notice in this case, in and of itself, was not deficient.

We also decline to accept the circuit court's second reason. The circuit court is correct that the Board has a fiduciary duty to the members and beneficiaries of the retirement system, including Haywood. Part of that fiduciary duty is to impartially take "into account any differing interests of members and beneficiaries." KRS 61.650(1)(c)4. Thus, the Board is required to protect the retirement systems' funds by balancing the interests of those who seek and/or are receiving benefits with those who are paying into the system. By providing notice of the right to file exceptions as set forth by the Supreme Court, the Board, through its hearing officers, is fulfilling that duty. Certainly, the Board could provide information regarding the consequences for failure to file exceptions; however, neither the statute nor the Supreme Court mandate the provision of that information.

Based on the above, we hold that the notice provided by the hearing officer was adequate and the circuit court's finding to the contrary was error. However,

we agree with the circuit court that the Board could provide notice advising parties of the right to file exceptions as well as the consequences for failing to do so.

Finally, on this issue, we note that, in its "cover letter" to Haywood, the Board stated that exceptions "may" be filed. We understand how this could have caused confusion for Haywood; however, because the recommended order contained the required language, we discern no reversible error in the language in the Board's cover letter. If this cover letter is a standard form letter, which we suspect it is, we urge the Board to correct the language therein so that, at a minimum, it is consistent with the language in *Rapier* and recommended orders.

b. Impact of Failure to File Exceptions

Having determined that the notice language in the recommended order was not deficient, we must next determine what impact Haywood's failure to file exceptions had on her claim. In *Rapier*, the Supreme Court held that failure to file exceptions does not preclude final review by an agency. Furthermore, during that review, the agency is not limited to only those issues raised by any exceptions.

However,

[u]nder 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. *Cf. Eiland v. Ferrell*, Ky., 937 S.W.2d 713, 716 (1997) (failure to file objections to a domestic relations commissioner's report adopted by the trial court precluded challenging, on appeal, whether the trial court's order was supported by sufficient evidence). Under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not

excepted to *and* adopted in the final order. *Cf. United States v. Central Bank & Trust Co., Ky.*, 511 S.W.2d 212, 214 (1974). (The failure to file written objections to a commissioner's report precluded aggrieved party from “questioning on appeal the action of the circuit court in confirming the commissioner's [report].”) 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.

Rapier, 130 S.W.3d at 563-64.

Despite the Supreme Court's holding in *Rapier*, the circuit court determined that Haywood was not required to file exceptions to preserve the issues she raised in her petition for review. In doing so, the court found that the filing of exceptions would have been an exercise in futility because the Board had not produced any evidence that its final orders ever varied from hearing officers' orders recommending denial of benefits.

The circuit court's finding is in error because its review is limited to the record. KRS 13B.150. As previously noted, the circuit court ordered the Board to produce evidence on the issue of futility, an order this Court found to be inappropriate. The circuit court invited the Board to produce the evidence, an invitation the Board did not accept. The circuit court then used the Board's failure to produce evidence it had no obligation to produce to support the finding of futility. Thus, the circuit court drew an inference from evidence not in the record, an act it is not permitted to do. *Id.* Because the circuit court's finding of futility was not supported by the record, it was not appropriate and must be vacated.

Having determined that Haywood was not exempt from the requirement to file exceptions, we must determine what consequence that failure had. The Board's final order did not differ from the recommended order, except for the change of a typographical error. Therefore, the circuit court was precluded from addressing the issues Haywood raised in her petition, and it should have affirmed the Board's final order.

Based on the above holding, we need not address the other issues raised by the Board on appeal. However, for the sake of completeness, we briefly do so.

2. Shifting of Burden of Proof

The Board argues that the circuit court impermissibly shifted the burden of proof to it. We agree.

In support of her claim, Haywood testified regarding her work activity. At the time she filed for benefits, Haywood worked as the director of a senior citizens center in Pike County. During the hearing, Haywood testified that through the years the center's budget and staff decreased. As a result, Haywood had to assume responsibility for more and more hands-on job duties, including transporting clients and food, picking up donated items, unloading deliveries of food, stocking and preparing food, and cleaning. Haywood testified that these activities required her to lift up to fifty pounds, stand and walk throughout the majority of the work day, drive, bend, stoop, crouch, kneel, crawl, and climb. Finally, Haywood testified that, because of her medical conditions, she could not perform those duties.

Haywood's employing agency provided a job description that indicated she was required to: frequently handle, finger, feel, push, pull, and lift up to twenty pounds; occasionally kneel, crawl, climb, balance and lift up to fifty pounds; repetitively bend, stoop, and crouch; and sit for two hours a day and walk/stand six hours a day. The agency noted that, when Haywood requested accommodations, it provided a handcart. Haywood agreed that the agency provided a handcart but testified that she still had to lift items onto and off of the cart so it did not do much good.

The record also contains a number of reports/records from various physicians. Dr. Thompson, a neurologist, treated Haywood for complaints of numbness in her extremities, restless leg syndrome, sleep deprivation, and possible Lupus. During the course of his treatment of Haywood, Dr. Thompson changed medications to reflect the waxing and waning of Haywood's symptoms. However, Dr. Thompson did not directly address what impact Haywood's symptoms had on her ability to perform work.

Dr. Cole, a rheumatologist, treated Haywood for joint pain and muscle weakness related to mild peripheral neuropathy. A lumbar MRI performed at Dr. Cole's request revealed evidence of lumbar disc bulging and a herniation; however, that diagnostic test was performed nearly a year after Haywood's last date of employment. As with Dr. Thompson, Dr. Cole did not specifically address what impact Haywood's conditions had on her ability to perform work.

Dr. King made diagnoses of restless leg syndrome, peripheral neuropathy, and degenerative joint disease with what appears to be a provisional diagnosis of Lupus. Based on these conditions and Haywood's related symptoms, Dr. King stated that Haywood could not: lift more than thirty-five pounds occasionally, fifteen pounds frequently; stand/walk/sit for more than three hours per day; and could not climb, balance, kneel, crawl, or push/pull. Additionally, Dr. King stated that Haywood would need to take unscheduled breaks throughout the day and would miss more than four days of work per month because of her symptoms.

An October 2006 functional capacity evaluation report from Pike County Physical Therapy indicated that Haywood could lift thirty-five pounds occasionally, fifteen to seventeen pounds frequently, and perform light to medium work. The therapist noted that, in light of Haywood's Lupus, her functional capacity would likely decrease.

Dr. Keller,³ who performed two medical reviews of Haywood's records, noted that Haywood has a number of health-related problems, including reflux esophagitis, restless leg syndrome, peripheral neuropathy, muscle weakness and weight loss, a history of migraine headaches, paresthesias, and presumptive Lupus. However, he found that these conditions and related symptoms were being or had been treated; that there was no opinion from any physician that Haywood was permanently disabled; and that there was no objective evidence of permanent disability.

³ Dr. William Keller and Judge Michelle M. Keller are not related.

Dr. McElwain, who also reviewed Haywood's medical records, concluded that there was no evidence of total and permanent disability; therefore, he recommended rejection of her application. Dr. Strunk, the final medical records reviewer, also indicated that "there continues to be no evidence of a permanent disabling problem documented in the records in this claim."

Haywood also filed medical records and reports from Dr. Huffnagle, Mountain Comprehensive Care, and the Pain Management Center. Those records/reports, in particular Dr. Huffnagle's, indicate that Haywood has some significant physical and psychological limitations; however, they also post-date Haywood's last date of employment by a year or more.

Faced with this evidence, the hearing officer found that Haywood failed to prove that she had any permanent disability related to her reflux esophagitis, which Haywood had successfully treated for years with over-the-counter medications. The hearing officer found that the record contained no definitive diagnosis of Lupus but, if Haywood has Lupus, she failed to prove it was disabling on the date she last worked. With regard to Haywood's peripheral neuropathy, the hearing officer found that medication helped alleviate any symptoms and that there was no evidence the condition was disabling when Haywood last worked. The hearing officer also found no evidence of permanent disability related to Haywood's migraine headaches, weight loss/loss of muscle mass, degenerative disc/joint disease, or hysterectomy. Finally, the hearing officer noted that Haywood's mental problems, i.e., depression and anxiety, surfaced after her last day of employment

and could not be considered. Based on these findings, the hearing officer recommended denial of Haywood's application for benefits.

The circuit court found that this evidence made a *prima facie* case of Haywood's disability, thus forcing the Board to "rebut that evidence with its own evidence." In support of this finding, the court cited to *City of Louisville, Div. of Fire v. Fire Service Managers Ass'n ex rel. Kaelin*, 212 S.W.3d 89, 94 (Ky. 2006). However, that case has no application herein. In *Kaelin*, the issue before the Court was who had the burden of proving that fire chiefs were employees for salary and wage purposes. The Court determined that the fire chiefs had that burden. Furthermore, the Court held that the city could assert an affirmative defense that the fire chiefs were not employees. However, the city's burden of proving that affirmative defense did not arise until the fire chiefs had made their *prima facie* case. Herein, the Board has not asserted an affirmative defense; therefore, it has no burden under *Kaelin*.

We recognize that the Board may be required to put forth rebuttal evidence. However, the Board is not required to do so until the claimant has met her burden, i.e., proven her disability by a preponderance of the evidence. *See Personnel Board v. Heck*, 725 S.W.2d 13, 17 (Ky. App. 1986). Based on the evidence herein, which was equivocal as to Haywood's diagnoses and the occupational impact of those diagnoses, the Board acted within its discretion in determining that Haywood had not met her burden. Furthermore, the record, which contains the reports from

the medical review panel, is not devoid of rebuttal evidence. To the extent the circuit court's order states otherwise, it is in error.

3. Whether the Board Ignored Evidence

The Board argues that the circuit court incorrectly determined that it ignored evidence. The circuit court found that the Board "held Haywood to a higher standard where an observable abnormality or a laboratory report was the only acceptable objective medical evidence." Furthermore, the court held that "[t]he KERS ignored Haywood's functional limitations, and the demanding requirements of her job." The hearing officer, in his recommended order, listed in great detail the medical records/reports in evidence, including those reflecting conditions that surfaced and treatment that occurred well after Haywood's last date of employment. Furthermore, the hearing officer noted Haywood's testimony regarding her work activities, how those activities had increased with decreasing staff, and the agency's failure to fully accommodate Haywood's requests for assistance. Finally, the hearing officer noted the findings of Drs. Keller, McElwain, and Strunk regarding the dearth of evidence of permanent disability. Therefore, the circuit court's finding that the Board's findings were fatally deficient is not supported by the record.

4. Substantial Evidence

As noted above, the record contains evidence of substance sufficient to support the Board's order and the circuit court's determination to the contrary is in error.

5. Conflict of Interest

Finally, although neither party specifically raised the issue, we note that the circuit court indicated that the Board's fiduciary duty creates an inherent conflict with its authority to act as fact-finder. The legislature, which established the Board and imposed a fiduciary duty upon it, chose not to except the Board from the provisions of KRS Chapter 13B or to designate an independent fact-finder. “The propriety, wisdom and expediency of statutory enactments are exclusively legislative matters.” *Wilfong v. Commonwealth*, 175 S.W.3d 84, 93 (Ky. App. 2004) (citing *Owens v. Clemons*, 408 S.W.2d 642, 645 (Ky. 1966)). Even if we agreed with the circuit court, absent a valid constitutional challenge, removing fact-finding authority from the Board is within the purview of the legislature.

CONCLUSION

While another fact-finder may have found differently, we cannot say that the Board acted arbitrarily, capriciously, or outside its authority. Therefore, we reverse the circuit court, vacate its order, and remand for reinstatement of the Board's order denying Haywood's application for benefits.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

VANMETER, JUDGE, CONCURS IN RESULT AND FILES
SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING IN RESULT: In my view, the trial court correctly distinguished *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), from the instant case based on the inherent conflict under which KERS

operates in administering the plan and in adjudicating and paying claims, as in this case, and on the statutorily imposed fiduciary duty KERS owes to participants such as Haywood. *See* KRS 61.650(1)(c). No similar duty existed on the Personnel Board in *Rapier*. KERS furthermore created an ambiguity by virtue of its cover letter which stated Haywood “may file exceptions[,]” and thereby failed to advise Haywood “fully of [her] exception and appeal rights.” KRS 13B.110(1). I thus would not preclude Haywood from her opportunity to appeal.

However, I concur in the result reached because I am not convinced that the “evidence in [Haywood’s] favor is so compelling that no reasonable person could have failed to be persuaded by it.” *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458 (Ky.App. 2003).

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