

RENDERED: OCTOBER 5, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000847-MR

PEGGY FAULKNER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 10-CI-00889

KENTUCKY RETIREMENT SYSTEMS  
AND BOARD OF TRUSTEES OF  
KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Peggy Faulkner appeals from the “Opinion and Order” of the Franklin Circuit Court upholding the decision of the Kentucky Retirement Systems to deny her claim for disability retirement benefits. After careful review of the record and the parties’ briefs, we affirm.

## **Facts and Procedural History**

Faulkner was a member of the County Employees Retirement System with a membership start date of August 24, 1992. She was employed by the Whitley County Board of Education as a special-needs assistant with the county's preschool program until her last day of paid employment on May 22, 2007. Faulkner's job involved working with, supervising, and giving care to three- and four-year-old children.

In July 2007, Faulkner filed an application for disability retirement benefits in which she alleged permanent disability as a result of diabetes, coronary artery disease, anxiety, and depression. Faulkner's application was evaluated by the Kentucky Retirement Systems' Medical Review Board in August 2007, and all three reviewing physicians recommended denial. In July 2008, Faulkner submitted a second application for disability retirement benefits, but the Medical Review Board again recommended denial.

Faulkner subsequently filed an appeal, and an evidentiary hearing was held on August 20, 2009. Following the hearing, the hearing officer issued "Findings of Fact, Conclusions of Law, and Recommended Order" that extensively set forth the medical evidence presented by the parties and found that Faulkner had not met her burden of proving that she qualified for disability retirement benefits under Kentucky Revised Statutes ("KRS") 61.600.

In a final order dated May 3, 2010, the Disability Appeals Committee of the Systems' Board of Trustees adopted the hearing officer's "Findings of Fact,

Conclusions of Law, and Recommended Order” with some minor modifications.

Of particular note, the final order provided the following findings of fact:

6. The objective medical evidence does not support Claimant’s application for disability retirement benefits. She has failed to show through objective medical evidence that as of the last day of her paid employment and for a period of not less than 12 months thereafter that her conditions would prevent her from performing her job as an instructional assistant. She was not seeking psychiatric treatment as of the last day of her paid employment or any significant treatment for the 12 months thereafter. Dr. Durham’s records are inconsistent and unreliable. In one report he indicates Claimant’s disability began in August of 2007, after Claimant’s last day of paid employment and in another he indicates she was disabled as of her last day of paid employment. Some of the conditions on which he bases this opinion are not those [for] which Claimant claims disability. Claimant was gainfully employed after her last day of paid employment and was seeking employment in the area of child care or clerical work. This is contrary to her assertion that she could not work around children. She further completed multiple applications and reviews for Unemployment where she indicated she was not disabled and was able to work an 8 hour workday. Shortly after her last date of paid employment, Claimant’s duplex scan indicated no stenosis. She recovered, by all reports, from her 2001 heart surgery without incident or problems until after her last day of paid employment. Her nerve conduction studies were normal indicating no neuropathy. Claimant’s diabetes has been noted to be poorly controlled, but it is also noted she does not follow her medication management.

7. The claimant did not meet her burden of proving by a preponderance of evidence that her conditions did not pre-exist her membership date. The Medical Review Board raised the issue [of] pre-existing conditions, and once that issue is raised the claimant bears the burden of disproving it. The claimant herein submitted no medical information pertaining to the onset date of her diabetes.

(Her cardiac disease has been noted by numerous physicians to be the result of her diabetes.) She recounted a longstanding history of chronic panic attacks. Furthermore, in 2001 she was noted to have a twenty (20) year smoking history and has been described by her doctors as “morbidly obese” on more than one occasion. These facts, taken together, prove that the issue of pre-existence is a reasonable concern in this particular case. In response, the claimant submitted no medical records whatsoever that predated her membership date. She did state at the hearing that her diabetes began in 1998. However, since she also repeatedly stated on state and federal unemployment forms that she was fully capable of working, her credibility is suspect.

Based on these findings, the Disability Appeals Committee concluded that Faulkner had failed to prove by a preponderance of the evidence that she was entitled to disability retirement benefits under KRS 61.600 or that her allegedly disabling conditions did not exist before her membership date in the Systems.<sup>1</sup> Therefore, Faulkner’s claim was rejected.

On June 1, 2010, Faulkner filed a “Complaint and Petition for Review and Appeal” in the Franklin Circuit Court. In support of her claim that she was entitled to disability retirement benefits, Faulkner submitted a one-page brief that provided, in its entirety, as follows:

Pursuant to KRS 61.665 Peggy Faulkner is entitled to retirement disability benefits provided that substantial evidence shows that she has been disabled from

---

<sup>1</sup> Before an award of disability retirement benefits may be had, it must be determined that “[t]he incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent.” KRS 61.600(3)(d); *see also Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 13 (Ky. 2011). The party seeking benefits “must prove to the trier of fact that his or her condition was not pre-existing membership by a preponderance of the evidence.” *Brown*, 336 S.W.3d at 14; *see also* KRS 13B.090(7).

performing her former job as a Pre-school Instructional Assistant for a continuous 12 month[s] since her last date of paid employment and provided that her disability is not related to conditions that pre-exist her membership date.

The attached Report of Examination and Treatment from Dr. William Durbin; the attached Report of Examination and Treatment from the Cumberland River Comprehensive Care Center; and the attached Medical Opinion Re: Ability To Do Work-Related Activities provide conclusive evidence that Ms. Faulkner has indeed been disabled from performing her former job as a Pre-school Instructional Assistant for a continuous 12 month[s] since her last date of paid employment and that her disability is not related to conditions that pre-exist her membership date.

On April 13, 2011, the circuit court entered an “Opinion and Order” affirming the denial of Faulkner’s claim for disability retirement benefits. This appeal followed.

### **Analysis**

On appeal, Faulkner presents a number of arguments in support of her contention that the Kentucky Retirement Systems erred in denying her claim for disability retirement benefits. However, preservation issues exist as to *all* of those arguments, as a result of which we decline to consider them on the merits.

Kentucky Rules of Civil Procedure (“CR”) 76.03(8) explicitly provides that “[a] party shall be limited on appeal to issues in the prehearing

statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” The only issue raised by Faulkner in her prehearing statement – and, therefore, the only issue that stands before us as potentially reviewable – is: “Did the Retirement Systems apply the correct rule of law to the facts found in this case?” The other six issues presented in Faulkner’s brief were not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for “good cause shown.”

Consequently, they are not properly before this Court for review. CR 76.03(8); *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008); *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004).

We further note that Faulkner failed to preserve those issues by properly raising them in both her Exceptions to the hearing officer’s “Findings of Fact, Conclusions of Law, and Recommended Order,” *and* in her appeal to the circuit court. In her Exceptions, Faulkner raised three challenges to the hearing officer’s recommended decision: (1) that Kentucky Retirement Systems should not have been allowed to participate in the administrative hearing; (2) that the hearing officer was not qualified to review medical evidence because he/she was not a licensed physician; and (3) that the hearing officer erred in failing to find that she was permanently disabled. “Under 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.” *Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004). Since the Disability Appeals

Committee adopted the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order" with only minor typographical changes, judicial review by the circuit court was limited to the issues raised in those Exceptions. *See id.* at 563-64; *see also* KRS 13B.140; *Givens v. Commonwealth*, 359 S.W.3d 454, 465 (Ky. App. 2011).

Before the circuit court, however, Faulkner submitted a one-page brief that presented only two general contentions: that "conclusive evidence" supported her argument that she was disabled from employment and that her disability was not related to conditions that pre-existed her membership date. Both of these contentions related solely to Faulkner's claim in her Exceptions that the hearing officer had erred in failing to find that she was permanently disabled. As a result, the other issues raised in Faulkner's Exceptions regarding the Systems' right to participate in the administrative hearing and whether the hearing officer had the authority to review medical evidence were effectively abandoned for purposes of appellate review by the circuit court and this Court. *See Personnel Bd. v. Heck*, 725 S.W.2d 13, 18 (Ky. App. 1986).

As to the issue actually raised in Faulkner's prehearing statement, we note that the statement does not elaborate on the "rule of law" to which Faulkner is referring. Indeed, the question, "Did the Retirement Systems apply the correct rule of law to the facts found in this case?" is so vague as to be effectively meaningless. In her brief, Faulkner clarifies the matter somewhat and contends that "[t]he Retirement Systems failed to apply the correct rule of law to the facts in this case"

by improperly applying KRS 61.600(3)(a) in determining whether she had shown incapacity “since [her] last day of paid employment[.]”

However, while this specific argument was – viewing the question generously – arguably presented in Faulkner’s prehearing statement, it was not raised beforehand in the circuit court *or* before the Disability Appeals Committee. “If the specific ground complained of on appeal is not given at the trial court, then the movant has failed to preserve his thinking should the trial court rule against him, and there will be no record to establish that the court did not rely on other grounds that might suffice.” *Fischer v. Fischer*, 348 S.W.3d 582, 588-89 (Ky. 2011). Moreover, the issues actually raised by Faulkner before the circuit court were not similar or broad enough to encompass this new issue. Thus, it, too, is unpreserved for our review. *See id.* at 591.

Faulkner suggests that since the issues raised on appeal involve questions of law, which are generally reviewed *de novo*, this Court can consider them despite a lack of preservation. However, “it is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time.” *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1954); *see also Fischer*, 348 S.W.3d at 589. “Most simply put, ‘[a] new theory of error cannot be raised for the first time on appeal.’ ” *Fischer*, 348 S.W.3d at 588, quoting *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).



Moreover, preservation issues aside, a cursory examination of the record reveals that the decisions of the Disability Appeals Committee and the circuit court regarding Faulkner's entitlement to disability retirement benefits were supported by the medical evidence. Because the Committee denied relief to Faulkner, who had the burden of proof, the question is whether she presented evidence "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). In considering this question, we must bear in mind that "[i]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998); *see also McManus*, 124 S.W.3d at 458. The evidence presented in this case was not so compelling that it demanded an award of disability retirement benefits. Thus, no error occurred in this regard.

### **Conclusion**

For the foregoing reasons, the "Opinion and Order" of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John H. Gray  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Joseph P. Bowman  
Frankfort, Kentucky

