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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000848-MR

ROGER LEE BROWN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-01971

KENTUCKY RETIREMENT SYSTEMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Roger Lee Brown appeals from an order of the Franklin Circuit Court dismissing his appeal from a final order denying his application for disability retirement services from the Kentucky Retirement Systems (Retirement Systems). We affirm.

Brown applied for Retirement Systems' disability benefits on November 23, 2005. After Retirement Systems denied his application, he requested and received an evidentiary hearing. On September 17, 2007, in a recommended order, the hearing officer recommended that Brown not receive disability benefits. The recommended order and accompanying letter from Retirement Systems were mailed to both Brown and his counsel via certified mail on September 18, 2007, and received by both on September 19, 2007. On the final page of this recommended order, under the heading "Exceptions" was the following language: "Pursuant to KRS 13B.110, each party shall have fifteen (15) days from the date of this Recommended Order to file exceptions with the Board of Trustees of the Kentucky Retirement Systems." The letter, in contrast, specified that Brown had fifteen days from the receipt of the recommended order in which to file exceptions.

Brown failed to timely file exceptions under either deadline. Brown does not dispute that he did not attempt to file his exceptions until October 12, 2007. A Retirement Systems administrator wrote to Brown that same day explaining that his untimely exceptions would not be made part of the KRS administrative record.

On November 9, 2007, Retirement Systems issued its final order and notice of right to appeal final order adopting the recommended order and denying Brown's disability claim. The final order made no substantive changes to the recommended order.

Brown timely filed an appeal with the circuit court. Retirement Systems moved to dismiss arguing that because Brown failed to timely file exceptions to the recommended order, and the final order had adopted the recommended order without substantive changes, he failed to preserve any issues for appeal.

The circuit court granted the motion to dismiss finding that although it had jurisdiction, no issues were preserved for review. The circuit court determined that pursuant to *Rapier v. Philpot*, 130 S.W.3d 560, 562 (Ky. 2004), the failure to file exceptions, where the final order did not differ in substance from the recommended order, meant that no errors were preserved for review. The circuit court further found that any errors in the recommended order and accompanying letter were harmless.

Brown claims as follows: (1) filing exceptions is not required to preserve issues for appeal and, therefore, the reviewing court can consider the case based upon issues previously raised in the administrative process and its record; (2) the errors in the recommended order and accompanying letter were not harmless and Retirement Systems should be required to strictly comply with the notice requirements of the statute; and (3) because an appeal is limited to review of the administrative record, the record as a whole preserves all issues for appeal.

In reviewing the circuit court's dismissal of Brown's case based upon its determination that no issues were preserved for appeal, it is appropriate that we review it under the summary judgment review standard. *See Smith v. O'Dea*, 939

S.W.2d 353, 355 (Ky.App. 1997). “The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

We agree with the circuit court that *Rapier* is controlling and necessitates the dismissal of Brown’s case. *Rapier* states in relevant part:

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. *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.

In the case at bar, Philpot did not seek judicial review of any portion of the Personnel Board's final order that differs from the hearing officer's recommended order. Therefore, there are no issues before the Franklin Circuit Court that it can decide. Dismissal was proper.

Rapier, 130 S.W.3d at 563-564. Since *Rapier*, this Court has consistently required that exceptions be filed in order to preserve issues under KRS 13B.140. *See e.g. Bd. of Trustees, Kentucky Ret. Sys. v. Grant*, 257 S.W.3d 591, 595-596 (Ky.App. 2008).

The parties agree that Brown did not file his exceptions in a timely manner and that the final order of the agency adopted the recommended order. Retirement Systems was not obligated to accept or consider untimely exceptions. Because no exceptions were filed and the final order did not differ from the recommended order, *Rapier* mandates dismissal.

Brown is correct that the recommended order and accompanying letter did not precisely follow the statutory requirements. KRS 13B.110(1) specifies that, “The recommended order shall also include a statement advising parties fully of their exception and appeal rights.” The recommended order failed to advise Brown that he had the right to appeal from the subsequent final order. Further, the recommended order and accompanying letter stated two different and inaccurate methods for calculating the fifteen day deadline for filing exceptions. According to the statute, the fifteen day period in which to file exceptions runs from the mailing of the recommended order and not from either its filing or receipt date. KRS 13B.110(4). However, omission of the “right to appeal” language and the deadline errors are properly subjected to a harmless error analysis.

Virtually all errors that do not impact a substantive right and are not structural errors that “undermine the fundamental legitimacy of the judicial

process” are subject to the harmless error analysis. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 418 (Ky. 2011). *See also* CR 61.01 and RCr 9.24. Brown cannot demonstrate that he was harmed by the omission of the notice of his appellate rights. He does not claim that this omission caused the late filing of the exceptions or, that in the absence of the omission, he would have timely filed his exceptions.

Similarly, the erroneous information as to when the fifteen day period to file exceptions began to run did not result in harm. Brown did not file exceptions within any of the deadlines provided to him by the recommended order, accompanying letter, or statute. Any delay in Brown filing his exceptions was the result of his neglect and not the result of any actions by Retirement Systems. Therefore, Retirement Systems’ errors were harmless.

Additionally, in the administrative process, Brown did not request an extension of time or leave to file his exceptions late or challenge Retirement Systems’ decision not to consider his late exceptions. Indeed, on appeal, Brown also fails to object to Retirement Systems’ failure to consider these exceptions beyond his assertion that the improper statutory notice excuses his neglect.

Brown’s proposal that the circuit court review the record as a whole and find issues to reevaluate Retirement Systems’ final decision, which Retirement Systems did not have notice to evaluate pursuant to exceptions, would require us to disregard the *Rapier* rule. Here, where there are no preserved issues, dismissal was clearly appropriate and required by the law.

For the foregoing reasons, the Franklin Circuit Court's order dismissing Brown's appeal is affirmed.

ALL CONCUR.

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