

RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000792-MR

BONNIE PARKER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-00740

KENTUCKY RETIREMENT SYSTEMS
AND BOARD OF TRUSTEES OF
KENTUCKY RETIREMENT SYSTEMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Bonnie Parker appeals from the Franklin Circuit Court order that dismissed her appeal of a Kentucky Retirement Systems' order denying her application for disability retirement benefits. The court dismissed the appeal since she had not filed exceptions to the hearing officer's recommended order and,

thus, did not preserve the contested issues. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

Bonnie Parker is a member of the Kentucky Employees' Retirement Systems (hereinafter "KERS"). Her initial employment date was August 16, 1993, and her last day of employment was December 31, 2008. As a result of her employment service, Parker accumulated 15 years and 5 months of total service credit. She worked as a Staff Nurse for the Knox County Health Department.

On September 23, 2008, Parker filed an application for disability retirement benefits with the Kentucky Retirement Systems (hereinafter "Retirement Systems"). The Retirement Systems' Medical Review Board reviewed the application and unanimously recommended denial of benefits. Parker then submitted additional medical evidence. The medical review board, for a second time, considered the original application and the additional medical evidence. Nevertheless, it still unanimously recommended denial of the benefits.

Parker appealed this decision and requested an administrative hearing. After the hearing, the hearing officer issued a report and recommended order on February 15, 2011. The hearing officer found that Parker had failed to establish by a preponderance of the evidence that she was permanently mentally or physically unable to perform the essential duties of her job because of medical problems. At this point, Parker was acting *pro se* and filed no exceptions to the recommended order. On April 20, 2011, the Board of Trustees of the Kentucky Retirement

Systems (hereinafter “the Board”) adopted the hearing officer’s recommended order in its entirety.

Parker appealed the decision to the Franklin Circuit Court. However, the Retirement Systems made a motion to dismiss the appeal because Parker had not preserved any issues for appeal. As noted above, Parker did not file any exceptions to the hearing officer’s recommended order. On March 14, 2012, the Franklin Circuit Court agreed with the Retirement Systems’ argument regarding preservation and dismissed Parker’s appeal. Subsequently, she filed a motion to alter, amend, or vacate the circuit court’s order but the circuit court denied this motion on April 2, 2012. Parker appeals from this order.

STANDARD OF REVIEW

We review an administrative agency’s exercise of adjudicative authority by applying Kentucky Revised Statutes (KRS) 13B.150. That statute articulates specific grounds upon which an agency's final order may be reversed. But in the case at bar, we must first determine whether any reviewable issues exist. In *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), the Kentucky Supreme Court discussed the requirements for seeking judicial review of a final order of an administrative agency. Regarding preservation of issues, the Court held that the filing of exceptions is necessary. Further, under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not accepted to and adopted in the final order. *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). *Cf. United States v. Central Bank & Trust Co.*, 511 S.W.2d 212, 214

(Ky. 1974). Thus, prior to reviewing this case, our primary task is to ascertain whether any reviewable issues exist.

ANALYSIS

On appeal, Parker presents a number of legal arguments in support of her contention that it was not necessary for her to file exceptions to preserve issues for judicial review. Although Parker provides various permutations of her argument regarding preservation, which will be examined later, the issue is whether the Franklin Circuit Court properly determined that the failure to file exceptions resulted in the failure to preserve the issues for judicial review and, thus, whether the circuit court appropriately dismissed the action.

Before addressing this case specifically, we note that this particular issue has previously been discussed and resolved by our Court. Among the cases upholding *Rapier* are cases that have been argued by Parker's attorney. These cases, which are unpublished, include *Risk v. Kentucky Retirement Systems*, 2010 WL 3810852 (Ky. App. 2010)(No. 2009-CA-002358-MR, No. 2009-CA-002395-MR), review denied (Nov. 16, 2011); and, *Faulkner v. Kentucky Retirement Systems*, 2012 WL 4745169 (Ky. App. 2012) (No. 2011-CA-000847-MR), review denied (September 18, 2013).¹

While these cases are unpublished, they represent the legal interpretation of our Court on this exact issue. The holding in these cases indicates that our Court has determined that to preserve issues for review in cases one must

¹ Cited consistent with Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

file exceptions to the report and recommended order of the hearing officer.

Moreover, the Court determined that this factor is implicated in cases where parties are seeking disability benefits from KERS.

In *Risk*, our Court held that pursuant to *Rapier v. Philpot*, if a party fails to file exceptions to the hearing officer's report and recommended order, these issues are not preserved for appeal. In *Faulkner*, our Court observed that Faulkner failed to preserve issues by properly raising them in both her exceptions to the hearing officer's recommended order and in her appeal to the circuit court. Once again we relied on *Rapier* and quoted from it that "[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." *Faulkner v. Kentucky Retirement Systems*, 2012 WL 4745169, 3 citing *Rapier*, 130 S.W.3d at 563. We now direct our attention to the case at hand.

Administrative proceedings concerning the entitlement to disability benefits are conducted pursuant to KRS Chapter 13B. KRS 13B.020. As explained in KRS 13B.110(1), a hearing officer is required to forward a recommended order to the Board and the parties, which includes findings of fact, conclusions of law, and recommendations regarding disposition and "a statement advising parties fully of their exception and appeal rights." Under Chapter 13B, the filing of the requisite exceptions identifies the issues for review initially by the agency, and ultimately, by the court.

In the case at bar, on page 26 of the hearing officer's recommended order, under the heading "Notice of Right to File Exceptions and to Appeal," was the following language:

A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations of the agency head. . . . Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues the party raised in written exceptions.

Thus, as statutorily required, Parker received in the hearing officer's recommended order a statement fully advising her of the requirement to file exceptions to preserve issues for judicial review.

Based on *Rapier* and the agency's compliance with statutory strictures, the Franklin Circuit Court dismissed Parker's appeal because by not filing exceptions to the hearing officer's order, she had not preserved any issues for judicial review. Once again, we note that *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 *and* 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). Consequently, Parker’s only reviewable issues would be any differences between the hearing officer’s findings and conclusions and the agency’s final order. Here, since the Board adopted the hearing officer’s report and recommended order in its entirety, there are no such issues for review. Therefore, Parker’s claims were properly dismissed by the circuit court.

Parker lists eight arguments, which are variations of her contention that it was not necessary for her to file exceptions. As we have already held, it was necessary and, accordingly, her case was properly dismissed by the circuit court. Nonetheless, we will briefly address these arguments in the context of *Rapier* and KRS Chapter 13B.

First, the filing of exceptions is a requirement, which KRS 13B.110(1) acknowledges. The rationale behind preserving issues is to permit a reviewing agency or court to be able to identify contested issues. Additionally, without preservation of issues, the appeal process would allow a party to introduce new arguments. At the appellate level, the task is to review a lower court’s action not to have new argument or evidence.

Next, Parker maintains that KRS 13B.020(6) makes filing exceptions a right that can be waived. The language of KRS 13B.020(6) states that “[e]xcept to the extent precluded by another provision of law, a person may waive any procedural right conferred upon that person by this chapter.” Thus, this argument

is inapposite. The filing of exceptions is a procedural necessity so that a reviewing party is made aware of the issues. It is not, contrary to Parker's contention, a "waiveable right."

Parker's third argument is that KRS 13B.140 does not require the filing of exceptions to preserve issues for appeal. The very first statement in this statute is that "[a]ll final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter." Hence, this argument is not persuasive because, as noted in *Rapier* and referenced in KRS 13B.110(1), exceptions must be filed to preserve issues for review.

Parker then questions whether *Rapier v. Philpot* applies to an administrative hearing conducted under KRS Chapter 13B since *Rapier* involved a case before the personnel board. However, the Kentucky Supreme Court did not expressly limit its conclusions on *Rapier* to personnel claims. Thus, *Rapier* does apply.

Next, Parker argues that because the issues she is contesting are legal rather than factual, *Rapier* does not apply since it concerned evidentiary issues. Therefore, she alleges that it is not necessary for her to file exceptions. However, as noted in *Givens v. Commonwealth*, 359 S.W.3d 454, 465 (Ky. App. 2011):

A party to an administrative hearing, therefore, must except to a recommended order as required by statute and, despite Givens' argument to the contrary, judicial review of the final order specifically is limited to a review of *any factual or legal "findings and conclusions"* which differ from those which were recommended.

(Emphasis added.) In general, “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. 1955). Thus, this argument, too, is without merit. Regardless of whether the issue is legal or factual, Parker must, pursuant to statutory, procedural and case law, file exceptions to the hearing officer’s recommended hearing in order to preserve the issue – factual or legal – for appellate review.

In her sixth argument, Parker contends that it is not necessary to file exceptions to preserve issues for appeal under KRS Chapter 13B. We have already dealt with this issue, and “[u]nder 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” *Rapier*, 130 S.W.3d at 563-64.

Parker’s seventh argument concerns whether KRS 61.600(3) and KRS 61.665(1) require that the objective medical evidence proffered by a claimant be reviewed by a licensed physician rather than a hearing officer. Parker contends that, statutorily, a licensed physician rather than a hearing officer must evaluate the objective medical evidence. In addition, she maintains that this is a legal argument and, therefore, must be reviewed *de novo*. But Parker did not raise this argument in her exceptions and, accordingly, it is not preserved. Therefore, it was not properly before this Court or, for that matter, the circuit court.

Lastly, Parker maintains that the Retirement Systems do not have any statutory authority to participate in retirement disability hearings. This, too, has previously been decided by our Court. We held in *Booker v. Kentucky Retirement Systems*, 2011 WL 1327399 (Ky. App. 2011)(No. 2009-CA-001888-MR), review denied (April 18, 2012), that the Retirement Systems are permitted to participate in the administrative hearing process. Party is defined in KRS 13B.010(3):

“Party” means:

- (a) The named person whose legal rights, duties, privileges, or immunities are being adjudicated in the administrative hearing;
- (b) Any other person who is duly granted intervention in an administrative hearing; and
- (c) Any agency named as a party to the adjudicatory proceeding or entitled or permitted by the law being enforced to participate fully in the administrative hearing.

By the statute itself, the Retirement Systems has authority to participate in administrative hearings.

CONCLUSION

Emphatically, we hold that pursuant to Kentucky law, both case and statutory, in order to preserve issues for appeal following an administrative hearing a party must file exceptions to the hearing officers’ report and recommended order. Parker did not do so, and thus, the circuit court’s dismissal of the action was proper.

Accordingly, we affirm the Franklin Circuit Court orders dismissing this appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Gray
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jennifer A. Steele
Frankfort, Kentucky