

RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001590-MR

MICHAEL P. SLONE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 09-CI-00424

KENTUCKY RETIREMENT SYSTEMS,
BOARD OF TRUSTEES OF KENTUCKY
RETIREMENT SYSTEMS, KENTUCKY
EMPLOYMENT RETIREMENT
SYSTEMS, DISABILITY APPEALS
COMMITTEE OF THE EMPLOYEES
RETIREMENT SYSTEM

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether the Franklin Circuit Court erred when it dismissed Appellant Michael Slone's appeal from a final order of the

Board of Trustees of the Kentucky Retirement Systems which denied his application for disability retirement benefits. Finding no error, we affirm.

Slone was employed as a Transportation Au/TR Technician III with the Kentucky Department of Transportation. That position afforded Slone membership in the Kentucky Employees' Retirement System. His last day of paid employment was December 31, 2004.

In March 2005, Slone made a claim for duty-related disability retirement benefits, alleging he was disabled due to various problems with his back stemming from a work-related injury in 2003. His application was twice denied by a panel of medical examiners. Slone invoked his right to an administrative hearing pursuant to Kentucky Revised Statutes (KRS) Chapter 13B. After considering the evidence, the hearing officer found Slone was not entitled to disability retirement benefits, and recommended the Board deny Slone's application. The Board adopted the hearing officer's recommended order in its entirety. Slone did not appeal the Board's order to the Franklin Circuit Court.

Instead, Slone filed a second application for duty-related disability retirement benefits on December 13, 2006, again claiming he was disabled due to chronic low back pain, degenerative lumbar disc, disc bulging, radiculopathy, chronic muscle spasms, osteoarthritis, and nerve injury. A panel of medical examiners twice rejected Slone's application. Slone then requested an administrative hearing, which was conducted on August 15, 2008. After receiving and weighing the evidence, the hearing officer concluded Slone had failed to

establish by objective medical evidence of the existence of a permanent mental or physical impairment which would prevent him from performing his prior job duties or holding a like position. The hearing officer recommended Slone's request for benefits be denied. As required by KRS 13B.110(1), the hearing officer's order also notified Slone that "each party shall have fifteen (15) days from the date that this recommended order is mailed within which to file exceptions with the Board[.]" Notably, Slone did not file any exceptions to the hearing officer's report and recommended order.

On February 20, 2009, the Board adopted the hearing officer's recommended order in its entirety. Slone appealed to the Franklin Circuit Court. The Retirement Systems moved to dismiss, arguing that Slone's failure to file exceptions left no issues preserved for judicial review. The circuit court agreed and dismissed the appeal. Slone then appealed to this Court.

Slone concedes he did not file exceptions to the hearing officer's report. He claims, despite notice given, he was not aware of his obligation to file exceptions. Slone asserts he construed the term "shall," as used in the portion of the hearing officer's order notifying the parties of their right to file exceptions, as non-binding. That is, he *may* file exceptions, but was not required to do so.

In *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), our Supreme Court explained that:

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. 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 563-64 (citations omitted). This Court has consistently applied *Rapier's* mandates to appeals from orders of the Board granting or denying disability retirement benefits. *See, e.g., Board of Trustees, Kentucky Retirement Systems v. Grant*, 257 S.W.3d 591, 595 (Ky. App. 2008); *Brown v. Kentucky Retirement Systems*, 2011-CA-000848-MR, 2012 WL 2360493, at *2 (Ky. App. June 22, 2012); *Mask v. Kentucky Retirement Systems*, 2009-CA-000656-MR, 2010 WL 985295, at *2 (Ky. App. Mar. 19, 2010); *Risk v. Kentucky Retirement Systems*, 2009-CA-002358-MR, 2010 WL 3810852, at *2 (Ky. App. Oct. 1, 2010).¹

Here, Slone was fully advised of his right to file exceptions to the hearing officer's report. Despite adequate notice, he failed to file any exceptions. And the Board's final order contains no findings and conclusions that differ from those which were recommended by the hearing officer. The Board did not deviate from the hearing officer's recommended order, but adopted it *in toto*.

Because Slone filed no exceptions capable of preserving error, no issues existed for the circuit court's consideration. Dismissal of Slone's appeal was proper.

¹ We do not cite *Brown*, *Mask*, and *Risk* for their precedential value, but by way of illustration.

We sympathize with Slone’s plight. Despite his *pro se* status, he attempted to comply with all relevant regulations and statutory mandates. However, we are bound by the dictates of *Rapier*. And neither *Rapier* nor its progeny excuse *pro se* parties from the preservation requirement. Indeed, this Court recently recognized that “pro se litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings. However, *pro se* litigants are still required to preserve error.” *Givens v. Commonwealth*, 359 S.W.3d 454, 463 (Ky. App. 2011) (citation omitted).

For the foregoing reasons, we affirm the August 20, 2012 order of the Franklin Circuit Court dismissing Slone’s Complaint and Petition for Judicial Review.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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