

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000754-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP S. SHEPHERD, JUDGE
ACTION NO. 16-CI-00672

JAY CAUDILL

APPELLEE

OPINION
REVERSING

** ** * * * **

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Kentucky Retirement Systems (Agency) appeals from a Franklin Circuit Court order remanding Jay Caudill's application for disability retirement benefits to the Agency to allow Caudill another opportunity to file exceptions to the Hearing Officer's Recommended Order, which was adopted by the Board of Trustees of the Agency (Board) in its final order denying Caudill's application for disability benefits. Upon review, we reverse.

Caudill is a member of the County Employees Retirement System (CERS), which the Agency administers. Caudill was employed as a school bus driver from 1980 through 2000. His contributions to CERS for his employment from 1980 to 1982 were refunded to him. Thus, he was not attributed service credit for this period of employment. Caudill's most recent membership date in CERS was November 15, 2001. His last day of paid employment was March 13, 2014, giving him more than 202 months service credit.

Caudill applied for disability retirement benefits pursuant to KRS¹ 61.600 on March 19, 2014. Caudill's claim for benefits was based on the effects of a stroke; short term memory problems; Alzheimer's disease; osteoarthritis of the joints; arthritis of the neck; shoulder, and back; or any such condition's combined effects with any other injury, illness or disease. The Agency's medical review board denied Caudill's application for disability on two occasions. Caudill requested an evidentiary hearing at which he represented himself.

An evidentiary hearing was held on December 15, 2015. As Caudill's service credits exceeded 16 years, pursuant to KRS 61.600(3)(d), he was not required to prove his alleged medical conditions did not predate his membership in CERS. The hearing officer characterized Caudill's previous employment as sedentary to light work. Based on the objective medical evidence, testimony of

¹ Kentucky Revised Statutes.

Caudill, and Caudill's wife, the hearing officer determined whether Caudill had been permanently mentally or physically incapacitated since his last date of paid employment, preventing him from performing his former job or a job of similar duties. After considering the evidence, the hearing officer recommended denial of Caudill's application for disability benefits.

In the recommended order dated March 24, 2016, the hearing officer found Caudill had not established by a preponderance of the evidence he was disabled based on the effects of a stroke, short-term memory problems or Alzheimer's. Based on the objective medical evidence and testimony by Caudill's wife that he suffered a stroke in May 2014, the hearing officer concluded Caudill's medical problems escalated *after* his last day of paid employment on March 13, 2014. In rejecting Caudill's claim of disability based on osteoarthritis of the joints, the hearing officer cited medical records from near Caudill's last date of paid employment, indicating his osteoarthritis had improved through physical therapy, and medical records shortly after Caudill's last date of paid employment stating, "no joint tenderness to palpitation; knee brace in place; hip, knee and ankle stability normal; range of motion normal, no joint crepitations present, no pain on motion." In rejecting Caudill's allegation of disability based on arthritis of the neck, shoulder, and back, the hearing officer stated Caudill's medical records had few, if any, reports of pain other than for Caudill's knees. Further, the hearing

officer found Caudill's medical records did not indicate any medical service provider imposed physical restrictions on Caudill's activities due to arthritis of the neck, shoulder, or back.

The hearing officer's conclusions of law state:

(4) The Kentucky Court of Appeals in *Rains v. Kentucky Retirement Systems*, (Ky. App. 2011) (2010-CA-000441-MR) confirmed the meaning of KRS 61.600(3)(c) and KRS 61.600(5)(a)(1):

“By definition, an incapacity which becomes totally disabling after the employee's last day of paid employment cannot be the reason for the incapacity . . . When read in context, the phrase “since the last day of paid employment” clearly anticipates that the totally disabling condition exists from the last day of paid employment forward.”

(5) The Kentucky Court of Appeals subsequently upheld its ruling in *Rains*, in the case of *Robinson v. Kentucky Retirement Systems*, (Ky. App. 2015) (2014-CA-000152-MR):

“The statute is clear that both the condition and the incapacity arising out of that condition must both be present on the last day of paid employment.”

(6) Claimant has not shown by a preponderance of the objective medical evidence, that as a result of **his Effects of a Stroke, Short Term Memory Problems, or Alzheimer's, Osteoarthritis of joints, Arthritis of the neck, shoulder, and back**, or any such condition's combined effects with each other, or with any other injury, illness or disease, physically or mentally incapacitated him on a permanent basis since his last day

of paid employment, and prevented him from performing his job as a School Bus Driver, or a job of like duties.

Recommendation

Based upon the foregoing, it is hereby recommended that Claimant's application for disability retirement benefits be denied.

(Emphasis in original). As required by KRS 13B.110, the hearing officer's order provided Caudill notice of his right to file exceptions and to appeal, stating:

NOTICE OF RIGHT TO FILE EXCEPTIONS AND TO APPEAL

Pursuant to KRS 13B.110(4), a party has the right to file exceptions to this Recommended Decision.

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 with the agency head. Transmittal of a Recommended Order may be sent by regular mail to the last known address of the party. 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 a party raised in written exceptions.

A party also has the right to appeal the Final Order of the agency pursuant to KRS 13B.140(1-2), which states:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within

thirty (30) days after the final order of the agency is mailed or delivered by personal service.

Caudill did not file exceptions to the hearing officer's recommended order. The Disability Appeals Committee of the Board adopted the hearing officer's report and entered a final order denying Caudill's claim. Caudill appealed to the Franklin Circuit Court. The Agency moved to dismiss Caudill's petition, arguing pursuant to *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004), Caudill's failure to file exceptions precluded judicial review of his claims. On October 21, 2016, the circuit court denied the Agency's motion to dismiss and remanded the case back to the Agency to allow Caudill the opportunity to file exceptions to the hearing officer's recommended order. In remanding the Board's final order, the circuit court reasoned:

In most KRS 13B.140 appeals, this Court agrees that strict compliance requires dismissal of Petitioner's appeal for failure to preserve issues for judicial review; however, this Court recognizes that this case was a *pro se* appeal through the administrative agency, and given the pleadings tendered before the Court, it is clear that the *pro se* Petitioner did not fully comprehend the procedural minefields of 13B Appeals. The Hearing Officer's Recommended Order contained a notice regarding the filing of exceptions stating in pertinent part, "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 a party raised in written exceptions." To an attorney this language may be unambiguous, but to a *pro se* Petitioner, the language is complex and confusing. It is well established that Kentucky courts "will not hold a *pro se* litigant to the

same standard as legal counsel, treating the *pro se* litigant with leniency.” *Harris v. Dunlap*, 2008 WL 5191445 (Ky. App. 2008), *see also Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967).

Petitioner drafted a letter to the Court responding to the Systems’ Motion to Dismiss explaining that Petitioner has a high school diploma, and that he does not understand the meaning of the order. Petitioner also explains that he does not have the money to hire an attorney to appeal this decision. Petitioner has been living on Social Security Disability and can barely make ends meet. Accordingly, this Court is compelled to overrule the Respondent’s Motion to Dismiss. While this Court recognizes the well-established doctrine of strict compliance in administrative appeals, the Court finds that because the Petitioner was *pro se*, he did not comprehend the procedural requirements necessary to preserve his issues for judicial review and should have been afforded greater leniency.

CONCLUSION

Accordingly, the Court hereby **OVERRULES** the Respondent’s Motion. Further the case is hereby **REMANDED** to the Commission to allow the Petitioner additional time to file his exceptions to the Hearing Officer’s Recommended Decision. The Hearing Officer is to explain the Petitioner’s appeal rights, including the filing of exceptions, in layman’s terms. *Pro se* petitioners should be afforded more leniency in judicial proceedings. After the Petitioner understands and is afforded the opportunity to file exceptions, the Board of Trustees is to consider the entire administrative record and the Recommended Order, as well as the Petitioner’s exceptions and issue a new Final Order. This is a final and appealable order. There is no just cause for delay.

(Emphasis in original).

The Agency moved to alter, amend, or vacate the order, arguing the circuit court erred in denying its motion to dismiss pursuant to *Rapier*. Further, the Agency argued the circuit court failed to follow this Court's guidance in *Givens v. Cabinet for Health and Family Services*, 359 S.W.3d 454 (Ky. App. 2011), and in its unpublished opinions discussed below. The circuit court denied the Agency's motion to alter, amend or vacate. This appeal followed.

We review an administrative agency's exercise of adjudicative authority under KRS 13B.150, which articulates specific grounds on which an agency's final order may be reversed. We must first determine whether any reviewable issues exist. In *Rapier*, the Supreme Court of Kentucky discussed the requirements for seeking judicial review of an administrative agency's final order. Regarding preservation of issues, the Court held 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). Prior to reviewing this case, we must ascertain whether any reviewable issue is before us.

Rapier states, in relevant part:

[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.

Rapier, 130 S.W.3d at 563. The notice language at issue here advised Caudill

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. . . . 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 a party raised in written exceptions.

In *Rapier*, the Supreme Court found less specific language “fully advised” the claimant “of his right to file exceptions.” *Id.* at 564. Pursuant to the principles set forth in *Rapier*, Caudill was fully advised of his right to file exceptions. The hearing officer provided notice to Caudill comporting with the requirements mandated by KRS 13B.110 and *Rapier*. Accordingly, by not filing exceptions, Caudill failed to preserve any issues for judicial review by the circuit court.

On appeal, for the first time, the Agency argues Caudill’s administrative file shows Caudill received more than sufficient notice of his right to file exceptions, as—according to the file notes—Caudill was orally informed about the exceptions process by an appeals coordinator. However, because this argument was not preserved for appeal, we need not further address it in this Opinion.

The circuit court found the notice provided insufficiently advised Caudill, as a *pro se* claimant, of his right to file exceptions. As the Agency points out, the circuit court erred in finding Kentucky’s policy of leniency towards *pro se*

litigants would excuse Caudill’s failure to file exceptions in this case. *Rapier* clearly instructs “filing exceptions is necessary to preserve issues for further judicial review.” *Rapier*, 130 S.W.3d at 563. This principle has been held applicable to claimants who appeared *pro se* during administrative proceedings before the Board, but all are unpublished. *See, e.g., Mask v. Kentucky Retirement Systems*, 2010 WL 985295 (Ky. App. March 19, 2010) (2009-CA-000656-MR); *Risk v. Kentucky Retirement Systems*, 2010 WL 3810852 (Ky. App. Oct. 1, 2010) (No. 2009-CA-002358-MR, No. 2009-CA-002395-MR), discretionary review denied (Nov. 16, 2011); *Slone v. Kentucky Retirement Systems*, 2013 WL 4400289 (Ky. App. Aug. 16, 2013) (2012-CA-001590-MR); and *Mitchell v. Board of Trustees of the Kentucky Retirement Systems*, 2013 WL 6198472 (Ky. App. Nov. 27, 2013) (2012-CA-001979-MR).² In *Givens*, this Court noted “*pro se* litigants are still required to preserve error” and concluded *pro se* claimants are obligated to file exceptions identifying specific errors to preserve them for judicial review. *Givens*, 359 S.W.3d at 463.

We are bound to follow the precedent established by our Supreme Court in *Rapier*. *Pro se* claimants are not exempt from preservation requirements. *See id.* Caudill did not file exceptions to the recommended order; consequently, his claims of error were not preserved for judicial review. *Rapier*, 130 S.W.3d at

² Cited consistent with Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

563. After careful review, we conclude the circuit court erred in remanding this disability action to the Agency to permit Caudill additional time to file exceptions, far exceeding the time permitted under KRS 13B.110(4).

For the reasons stated herein, we reverse the order remanding this matter to the Agency and direct the Franklin Circuit Court to enter a new order denying the requested relief.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND DOES NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

Carrie Bass
Frankfort, Kentucky

BRIEF FOR APPELLEE:

No brief filed