COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP146 **Cir. Ct. No. 2006CV777**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JUDITH A. VAN HANDEL,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Judith Van Handel appeals an order denying her motion for attorney fees against the Department of Health and Family Services

(the Department) under WIS. STAT. § 814.245[1] after prevailing on her claim that she was entitled to a hearing before the Department of Administration's Division of Hearings and Appeals (the Division). Van Handel contends the circuit court erred when determining that the Department had a reasonable basis in law and fact for its position. We affirm the order.

BACKGROUND

¶2 Van Handel suffers from post-polio syndrome and receives Medical Assistance benefits through the Community Options Program-Waiver (COP-Waiver). This dispute began when Van Handel requested an increase in supportive home care services from ten to twenty-four hours per day. The Outagamie County Department of Human Services denied her request on March 7, 2006.

¶3 Van Handel sought review of this decision with the Division. Relying on previous Division decisions, an administrative law judge concluded, sua sponte, that the Division did not have jurisdiction to review the decision. As the administrative law judge interpreted those decisions, the Division only has jurisdiction to review denials of eligibility, terminations of eligibility, or reductions in services.

¶4 Van Handel appealed the Division's decision to the circuit court. She relied primarily on 42 U.S.C. § 1396a(a)(3), which states that medical assistance plans must "provide for granting an opportunity for a fair hearing before

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." She also relied on WIS. STAT. § 49.45(5)(a), which states that "[a]ny person whose application for medical assistance is denied or is not acted upon promptly … may file an appeal with the department.…"

¶5 The Department's argument was based on state statutes and federal regulations that define the hearing right created by 42 U.S.C. § 1396a(a)(3). The Department relied on WIS. STAT. § 46.27(7m), which states that "[a] person who is denied eligibility for services or whose services are reduced or terminated under this section may request a hearing from the department under s. 227.44 ...." Because Van Handel's services were not reduced or terminated, the Department focused on whether she was "denied eligibility for services." The Department argued that this language referred to eligibility for the program, relying on a distinction between applicants and recipients in 42 C.F.R. § 431.220(a) (2007), which states in part:

> The State agency must grant an opportunity for a hearing to the following:
>
> (1) Any *applicant* who requests it because his [or her] claim for services is denied or is not acted upon with reasonable promptness.
>
> (2) Any *recipient* who requests it because he or she believes the agency has taken an action erroneously.… (Emphasis added.)

The Department argued that Van Handel was not an applicant, but was instead a recipient because she was already receiving medical assistance benefits. Under 42 C.F.R. § 431.220(a)(2), an agency "action" means a "termination, suspension, or reduction of Medicaid eligibility or covered services." 42 C.F.R. § 431.201

(2007). Thus, as a recipient, Van Handel would not be entitled to a hearing before a state agency because her services were not terminated, suspended, or reduced.

¶6 Under the Department's view, recipients of medical assistance are only entitled to hearings before the Division for determinations terminating, suspending, or reducing benefits, while other determinations are adequately addressed through local procedures. Specifically, the Department argued that Van Handel was entitled to dispute the determination regarding her supportive care hours through a county grievance procedure. This distinction between procedures available for different determinations was supported by the Department's Medicaid Home & Community-Based Waivers Manual (Waivers Manual), which the Department contended was approved by the federal government.[2]

¶7 The Waivers Manual's "Model Rights Notification" states, "You have a right to disagree with your service plan. You have a right to ask the county to change the things with which you disagree. If you disagree with any decision that is made about your services, you have a right to file a grievance."[3] The Department also relied on language in the Waivers Manual stating, "You have the right to be told how to file a county grievance or state appeal. This includes being told what waiver agency action you can grieve or appeal.…"

[2] The Department's assertion that the Waivers Manual was approved by the federal government is not supported by citation to authority or the record. However, Van Handel does not dispute the Department's assertion.

[3] A revised version of the manual was released on March 17, 2008. *See* http://dhs.wisconsin.gov/bdds/waivermanual/intromemo_08%20.pdf. While the Department's brief to the circuit court refers to the above-quoted language as being in Appendix G of the manual, that information has been moved to Appendix M, entitled Participant Rights and Responsibilities.

¶8 The court rejected the Department's arguments and reversed the Division's decision.[4] The court concluded that Van Handel was an applicant and therefore entitled to a hearing before a "State agency" under 42 U.S.C. § 1396a(a)(3).

¶9 Van Handel moved for an award of costs and attorney fees under WIS. STAT. § 814.245(3). That statute required the court to award costs against the Department unless its position was not substantially justified. *See* ***id.*** The court concluded the Department was substantially justified in taking its position and therefore denied Van Handel's motion.

DISCUSSION

¶10 Under WIS. STAT. § 814.245(3):

> [I]f an individual … is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485(6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

A position is "substantially justified" if it has a reasonable basis in law and fact. WIS. STAT. § 814.245(2)(e). A position has a reasonable basis in law and fact if there is: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. ***Sheely v. Department of Health & Soc. Servs.***, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989). Losing a case does not

[4] The Department did not appeal the court's decision that Van Handel was entitled to a hearing before the Division.

raise a presumption that the agency's position was not substantially justified. ***Id.*** at 338. The underlying agency conduct at issue and the totality of the circumstances present before and during the litigation are relevant to whether an agency's position is substantially justified. *See* ***Bracegirdle v. Department of Reg. & Lic.***, 159 Wis. 2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990).

¶11 A court's determination of whether an agency's position was substantially justified is an exercise of discretion. ***Stern v. Department of Health & Fam. Servs.***, 212 Wis. 2d 393, 397, 569 N.W.2d 79 (Ct. App. 1997). We uphold discretionary determinations if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

¶12 We conclude the court did not erroneously exercise its discretion. Regarding whether there was a reasonable basis in truth for the facts alleged, the court noted that the underlying facts here were undisputed. *See* ***Sheely***, 150 Wis. 2d at 337. The court then considered whether there was a reasonable basis for the theory advanced and a reasonable connection between that theory and the facts. *See* ***id.*** The court concluded that the Department's position, which was based on a strict reading of the statutes, had a reasonable basis in law. In reference to the connection between the facts and the theory advanced, the court concluded this case was not similar to ***Sheely*** and ***Stern***, where the Department's position was held not substantially justified, *see* ***Sheely***, 150 Wis. 2d at 338-39 and ***Stern***, 212 Wis. 2d at 402-03, because there was "absolutely no reasonable basis for their legal theories in the facts of their cases."

¶13 Van Handel contends the Department's interpretation of the statutes and regulations was unreasonable. We, however, agree with the Department that there was a legitimate dispute as to whether Van Handel was an "applicant" under 42 C.F.R. § 431.220(a) and WIS. STAT. § 49.45(5)(a) and whether her eligibility for services had been denied under WIS. STAT. § 46.27(7m). Based on these statutes and regulations, the Department reasonably argued Van Handel was a recipient whose services were not reduced, suspended or terminated, and she arguably was not denied "eligibility" for services. Strictly speaking, her eligibility for the program had previously been established. As a result, the Department was substantially justified in arguing that she was not entitled to a hearing under these statutes and regulations defining the hearing right created by 42 U.S.C. § 1396a(a)(3).

¶14 Van Handel also argues that the Department's "position that Ms. Van Handel's access to a local grievance procedure satisfied her right to a hearing was plainly contrary to federal law." She argues that a local grievance cannot satisfy her hearing right because 42 U.S.C. § 1396a(a)(3) requires a hearing before a "State agency." However, her characterization of the Department's argument is not supported by the portions of the Department's brief to which she cites. The cited portions of the Department's brief do not argue the grievance procedure satisfied the hearing right under § 1396a(a)(3). The Department's argument, as discussed above, was that Van Handel was not entitled to a hearing under the language of various state statutes and federal regulations that implement the hearing right created by § 1396a(a)(3). If the Department had prevailed on these arguments, then she arguably would not have been entitled to a hearing under § 1396a(a)(3). The Department's discussion of the grievance procedure

merely demonstrated that a broader scheme was in place that provided a mechanism for addressing the type of dispute at issue here.

¶15 Van Handel also argues the court failed to consider the totality of the Department's conduct. She argues the court erred by only addressing the Department's strongest argument, while ignoring its weaker ones. First, she relies on the purported Department position that local grievance procedures satisfied her hearing right. As discussed previously, Van Handel's citations to the record do not support her contention that the Department argued local grievance procedures satisfied her hearing right.

¶16 Also, Van Handel relies on a portion of the administrative law judge's decision suggesting that the hearing requirement can be "waived" under the COP-Waiver program. However, Van Handel fails to explain how this would render the Department's position not substantially justified. She relies on ***Stern***, where we considered an agency's reliance on an indefensible position at the prelitigation stage through an agency review and two circuit court reviews. ***Stern***, 212 Wis. 2d at 399-403. However, Van Handel points to no part of the record where the Department actually argued the hearing requirement was waived. In its brief to the circuit court, the Department stated that the waiver issue was irrelevant given its position that Van Handel was not entitled to a hearing under the statutes. At both the Division and the circuit court, it appears the issue of waiving the hearing requirements emanated from Van Handel's arguments, not the Department's.

¶17 Van Handel also contends the court applied the wrong standard of law, relying on the court's comment stating that this case was "not similar to the situations in Stern and Sheely, wherein the respondents in those matters had

absolutely no reasonable basis for their legal theories in the facts of their cases." Van Handel claims that the court erroneously applied an "absolutely no reasonable basis" standard instead of considering whether there is a reasonable basis in law for the theory advanced. This argument is without merit.

¶18 The court clearly articulated that it was applying the standard articulated in ***Sheely***. The comment relied upon by Van Handel merely characterizes the facts in ***Sheely*** and ***Stern***. In ***Stern***, we stated that the "total lack of factual and legal basis for DHFS's position supports an award of attorney's fees under § 814.245, STATS." ***Stern***, 212 Wis. 2d at 403. Van Handel does not suggest this statement in ***Stern*** demonstrates that we applied the wrong legal standard there. Similarly, the statement relied upon by Van Handel does not indicate the circuit court applied the wrong standard here.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.