NO. 97-3794

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

LIBBIE PESEK,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

FILED

December 9, 1998

CLERK OF
COURT Of APPEALS
OF WISCONSIN

ERRATA SHEET

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PLEASE TAKE NOTICE that the attached opinion is to be substituted for the above-captioned opinion which was released on December 8, 1998, which had the wrong docket number listed as 98-3794.

COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-3794

STATE OF WISCONSIN **IN COURT OF APPEALS**
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LIBBIE PESEK,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Lincoln County: ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Libbie Pesek petitioned for judicial review of an administrative decision denying medical assistance authorization for custom

orthopedic shoes. The trial court reversed the agency and ordered that it authorize payment. No appeal was taken from that judgment.

Pesek, pro se,[1] now appeals three orders denying her post-judgment motions: (1) an October 10, 1997, order denying her motion for costs and fees under §§ 814.245 and 227.485, STATS.; (2) an October 29, 1997, order denying her motion for remedial sanctions and contempt of court; and (3) a December 5, 1997, order denying her motion for reconsideration of the denial of costs and fees. Pesek argues: (1) that the state agency was not substantially justified in denying her request for custom shoes and, as the prevailing party, she should be awarded costs; (2) the court applied the wrong legal standard in denying her costs; and (3) the court erroneously exercised its discretion by not assessing sanctions. We reject her arguments and affirm the orders.

Pesek filed a petition with the Division of Hearing and Appeals for administrative review of the agency decision denying her request for medical assistance for custom molded orthopedic shoes. The division concluded that the bureau correctly denied Pesek's request. It determined that Pesek did not meet the prior authorization criteria under WIS. ADM. CODE § HFS 107.24(4)(f) and the prior authorization guidelines, as amended by *Wisconsin Medicaid Update* 96-13, at 2 (eff. June 1, 1996).[2]

The Division of Hearing and Appeals observed that Pesek's request indicated that she had a hallux valgus on the right foot at twenty degrees and

[1] The record indicates that Pesek was represented by legal counsel before the agency.

[2] Because the parties do not consistently cite to the record, *see* § 809.19(1), STATS., but instead choose to cite to their own appendices, this court will rely on the briefs and appendices for its statement of fact. *See* § 809.83(2), STATS.

minor hammer toe deformities. It determined that the case turned upon whether Pesek had gross foot deformity, because orthopedic shoes shall be provided only when the request describes a post-surgery condition, gross deformity, or attachment to a brace or bar. *See* WIS. ADM. CODE § HFS 107.24(4)(f).[3] The division agreed with the bureau that the degree of significant deformity is considered to be hallux valgus greater than thirty-five degrees and hammer toes with callous, citing *Wisconsin Medicaid Update* 96-13, at 2 (eff. June 1, 1996). Because it was undisputed that Pesek's degree of hallux valgus was twenty, and that she had mild hammer toes without callous, it determined that she failed to meet the necessary criteria to establish a gross foot deformity justifying coverage.

In a decision dated August 18, 1997, the trial court did not reverse the agency's factual findings, but concluded that the department construed its regulations incorrectly and inconsistently with federal case law and state statutes governing medical assistance. It reversed the agency decision and instructed that the department approve the request for payment of the shoes, stating:

> It is undisputed that petitioner qualifies for MA benefits. Petitioner had previously received a pair of orthopedic shoes through the relief program …. [Pesek] now seeks another newer pair because those are worn out.
>
> The medical provider did submit a prior authorization request form setting forth the description of the shoes, and

[3] WISCONSIN ADM. CODE § HFS 107.24(2)(a) requires that to qualify for payment, medical equipment must be prescribed by a physician and provided by a certified vendor. Orthopedic or corrective shoes are a category of medical equipment covered by medical assistance and described as "shoes attached to a brace for prosthesis; mismatched shoes involving a difference of a full size or more; or shoes that are modified to take into account discrepancy in limb length or a rigid foot deformation. Arch supports are not considered a brace. Examples of orthopedic or corrective shoes are supinator and pronator shoes, surgical shoes for braces and custom-molded shoes." ***Id***. The regulations further state that "[o]rthopedic or corrective shoes or foot orthoses shall be provided only for postsurgery conditions, gross deformities, or when attached to a brace or bar. These conditions shall be described in the prior authorization request." WIS. ADM. CODE § HFS 107.24(4)(f).

> their cost which would be five hundred eighty three and 50/100 dollars ($583.50).
>
> ….
>
> … In the instant case the treating physician has prescribed the custom orthopedic shoes. There is no other medical opinion in the record. The Department did not present any medical evidence to the contrary. The courts give great weight to an undisputed medical opinion of a treating doctor.
>
> … [I]t is the opinion of this court that the Department construed their regulations in a manner that is unreasonable, arbitrary and capricious. Further, that [its] decision in this case imposes [its] will and not [its] judgment. I find that the applicant is entitled to the custom orthopedic shoes as a matter of law.

Neither party appealed the August 18 decision. Pesek subsequently filed a motion seeking costs under § 814.245, STATS. She filed a bill of costs and an affidavit indicating that she incurred a total of $347.73 in costs and disbursements, including a $120 filing fee; $41.48 postage; $89.85 for photocopies; $24.01 for "Typewriter Ribbon; Typewriter Paper; Carbon Paper; Envelopes; Clips, staples, penc etc"; and $72.69 for "Telephone". Pesek's affidavit stated that all costs and disbursements listed above were made to the best of her memory and record keeping solely pertaining to this cause of action. After hearing argument, the trial court determined that the department's position was substantially justified and denied costs in an October 10 order.

Pesek next filed a motion for remedial sanctions and contempt of court, contending that the department was not complying with the court's order instructing the department to approve the shoe request. The record, however, discloses that the custom shoes were manufactured, delivered to her footwear provider, and ready for pick up by October 21. After a hearing, the trial court denied her motion in its October 29 order.

Pesek subsequently filed a motion to reconsider the October 10 order denying costs. The court again concluded that the state was substantially justified in its position. As a result, it denied Pesek costs for a frivolous defense in its December 5 order.

Pesek first challenges the October 10 order. Pesek acknowledges that trial court's denial of costs and its determination whether a state agency's position was substantially justified is reviewed under the "erroneous exercise of discretion" standard. *See* ***Stern v. DHFS***, 212 Wis.2d 393, 397, 569 N.W.2d 79, 81 (Ct. App. 1997). In reviewing trial court discretion, we must decide whether discretion was demonstrably exercised and whether the determination was "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

Pesek argues that the department was not substantially justified in its position. Section 814.245(3), STATS., provides that the prevailing party is entitled to costs unless the court determines that the state agency was substantially justified in taking its position.[4] "'Substantially justified' means having a reasonable basis in law and fact. … To satisfy its burden the government must demonstrate (1) a

[4] Section 814.245(3), STATS., provides:

> If an individual, a small nonprofit corporation or a small business 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.

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. DHSS***, 150 Wis.2d 320, 337-38, 442 N.W.2d 1, 9 (1989) (footnote and citation omitted.). Losing a case does not raise the presumption that the agency was not substantially justified. ***Id.***

The Wisconsin medical assistance program is implemented by Title XIX of the Social Security Act and related regulations, along with §§ 49.43 to 49.96, STATS., and WIS. ADM. CODE § HSS 107. *See* ***Rickaby v. DHSS***, 98 Wis.2d 456, 457-58, 297 N.W.2d 36, 37 (Ct. App. 1980). A state has broad discretion in developing standards for determining the extent of coverage provided. *See* ***Charleston Mem'l Hosp. v. Conrad****,* 693 F.2d 324, 326 (4th Cir. 1982). The department has rule making powers consistent with its duties in administering the medical assistance program. Section 49.45(10), STATS. Under § 49.45(2)(a)3, the department must determine eligibility under the statutes and rules it has adopted.

Pesek contends that the department misapplied regulations described in *Wisconsin Medicaid Update* 96-13, which explains revisions for guidelines for "certain orthopedic shoes, hightop orthopedic shoes and mismate shoes." On the next page, the update indicated that it applied to "non-custom adult orthopedic" shoes. Pesek's request was for "Orthopedic footwear, custom shoes, depth inlay, one pair." Pesek claims that the department was not justified in applying regulations for non-custom shoes to a request for custom shoes.

The state responds that a reasonable interpretation of the rules is to consider the deformities listed in *Wisconsin Medical Update* 96-13 as the minimum deformities meeting the "gross deformities" limitation contained in WIS.

ADM. CODE § HSS 107.24(4)(f), regardless whether the requested orthopedic footwear is custom or non-custom. The state responds that Pesek's argument, that she is entitled to custom orthopedic shoes simply because she has arthritis with associated deformity, and therefore does not fit the exclusion of WIS. ADM. CODE § HSS 107.24(5)(a)3, is a misinterpretation of the rules. It contends that under her reading, a person who had arthritis with even the mildest form of foot deformity would be eligible to receive expensive custom shoes, though the deformity was not great enough to entitle the person to presumably less expensive non-custom shoes. Such a result, it argues, is patently unreasonable.

The state also points out that the definition of "medically necessary" in WIS. ADM. CODE § HFS 101.03(96m) consists of ten separate elements, and that a doctor's prescription satisfies only one of the elements. It argues that Pesek's interpretation ignores § HFS 101.03(96m)(b)8 and (b)9:

> With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient and … [i]s the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

It contends that to ignore this provision leads to the absurd result that medical assistance rules require that a recipient is entitled to anything a doctor prescribes. The state claims that the circuit court correctly exercised its discretion by denying costs on the ground that the department was substantially justified in its position.

We conclude that the court's oral decision on Pesek's motion for reconsideration discloses a rational basis for its order denying costs. The court explained its reasons for denying costs at the previous hearing:

> The motion for reconsideration is denied. The reasons I will again summarize. You do start with the federal statutes setting up these programs for medical assistance. Then the state has regulations thereunder. The court's decision that I gave or made in this case was not that the state did not follow its detailed regulations but that the broad statutory intent was to prevent people from suffering and that also in this case there was a medical report from a doctor obtained by the petitioner prescribing these particular shoes and stating that they were needed for relief of pain.
>
> So I construed the general statutes creating this program in giving her the shoes and not the detailed regulations made by the state which possibly prevent—would prevent her from having these shoes. In other words the state was justified in interpreting or applying their detailed regulations as opposed to the broader statutory mandate.

The trial court did not set aside the department's findings of fact. Its decision demonstrates it was satisfied that the department had a reasonable basis for the facts alleged, for the legal theory propounded and a reasonable connection between the two. *See* ***Sheely***, 150 Wis.2d at 337-38, 442 N.W.2d at 9. Additionally, the court also observed that Pesek never paid any filing fees, and therefore she would not be entitled to reimbursement for the $120 filing fee she claimed in her affidavit.[5] Although its prior ruling indicated that the department was arbitrary and capricious in denying authorization, the court, upon Pesek's motion, reconsidered this ruling and consequently ordered that the department was substantially justified in its position. Because the record discloses that the circuit court exercised its discretion, and that the record reflects a rational basis for its decision, we do not disturb it on appeal.

Pesek also contends that the evidence fails to support the hearing examiner's finding of fact that Pesek wears mismated size nine and eleven shoes.

[5] The filing fee was waived on the basis of Pesek's affidavit of indigency. The court also observed that not all the fees and costs claimed may be lawful statutory costs.

Pesek claims that her testimony failed to support this finding. She testified that "I was able to somehow get a size 11 on, on this foot here, my right foot and size 9 on my left foot … but I couldn't stand up on them. … It just hurt too much." The merits of this issue is not properly before us. Whether substantial evidence supports the agency's factual findings was an issue before the trial court upon Pesek's petition for judicial review. In its August 18 decision, the court entered an order reversing the agency on its legal theory, but not on its factual findings. Pesek never appealed the August 18 decision. She merely appeals the orders regarding costs and sanctions arising out of her subsequent motions.

Because Pesek did not appeal the August 18 decision, our review is limited to the three orders from which the appeal is taken. *See* § 809.10(1)(b), STATS. As a result, the agency's findings of fact are not subject to a collateral attack and must stand. *See* ***State v. Bouzek***, 168 Wis.2d 642, 645, 484 N.W.2d 362, 364 (Ct. App. 1992) (A valid judgment is not subject to collateral attack.).

Next, Pesek argues that the trial court erroneously relied on the "arguable merit" formulation of the test articulated in ***Behnke v. DHSS***, 146 Wis.2d 178, 430 N.W.2d 600 (Ct. App. 1988), and disproved in ***Sheely***, 150 Wis.2d at 338 n.10, 442 N.W.2d at 9 n.10. We are not persuaded. When we review a discretionary decision, we look to the record to determine whether it provides a rational basis for the court's decision. The record satisfies us that the ***Sheely*** criteria were met. Although the court referred to the ***Behnke*** test, under the applicable standard of review the court did not commit reversible error.

Finally, Pesek claims that the trial court erroneously exercised its discretion when it denied her motion to assess sanctions. She argues that because the department's position was not well grounded in fact and not warranted by

existing law, it was not substantially justified in its position and she is entitled to sanctions. We reject this argument because as we previously discussed, the department was substantially justified in its position.

Pesek further argues that the department is liable for sanctions because instead of approving the old request, it required her to submit a new request for the purpose of obstructing, resisting or disobeying the court's order. We are not persuaded. The denial of sanctions is reviewed under the "erroneous exercise of discretion" standard. *See* ***Minniecheske v. Griesbach***, 161 Wis.2d 743, 747-48, 468 N.W.2d 760, 762 (Ct. App. 1991). Here, the record supports the trial court's denial of sanctions. The department filed an affidavit in response to Pesek's motion, explaining the process it undertook to comply with the court's order. According to the affidavit, the department had followed its usual and necessary steps to comply with the August 18 order, the request was approved, and the shoes were manufactured, shipped and ready for pick up by October 21. Based upon the affidavit, the trial court could conclude that the department followed the court's order to approve the request for shoes and did not engage in sanctionable conduct.

Last, the record indicates that Pesek has, or at least inadvertently attempted, to use the judicial system to obtain payment of costs she apparently did not incur. At the hearing on her motion for reconsideration, the trial court pointed out that Pesek did not incur a $120 filing fee, yet she included the sum as taxable costs. The record bears out the court's observation; the record reflects that the filing fee was waived based upon Pesek's affidavit of indigency. Neither Pesek's brief nor the record contains any explanation for this glaring inaccuracy. "The signature of [a] party constitutes a certificate that the … party has read the … paper; that to the best of the … party's knowledge, information and belief, formed

after reasonable inquiry, the … paper is well-grounded in fact …." Section 802.05(1), STATS. If the court determines that a party failed to make this determination, it may impose an appropriate sanction. ***Id***. At this time we decline to impose a sanction against Pesek for, at best, failing to comply with § 802.05(1). However, we will not hesitate to impose the appropriate sanctions in the future for similar noncompliance.

Because the record demonstrates a rational basis for the court's decision that the department was substantially justified in its position under the ***Sheely*** standards, we affirm the circuit court's orders denying costs. Also, the record fails to support Pesek's additional claims of error, so that the trial court's other orders are affirmed also.

By the Court.—Orders affirmed.

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