COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1954 **Cir. Ct. No. 2008CV12959**

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

LINDA HEINRICH,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Linda Heinrich appeals an order affirming a decision of an administrative law judge (ALJ) for the Division of Hearings and Appeals that denied her request to have Milwaukee County's Family Care

Managed Care Organization ("Managed Care Organization") purchase a power stair lift and install it in her home. We affirm.

I. BACKGROUND.

¶2 Heinrich is a sixty-two-year-old woman who receives benefits through enrollment in the Managed Care Organization, a Medicaid waiver program designed to provide appropriate long-term care services in the community for adults who are elderly and disabled. She currently receives benefits such as home care and physical therapy because her conditions—which include anxiety, arrhythmia, arthritis, carpal tunnel syndrome, chronic pain, coronary artery disease, diabetes, hyperlipidemia, hypertension, obesity, spinal cord fusion, osteomyelitis, neuropathy, and Charcot's joint (in this case disintegration of the right ankle)—have largely confined her to a wheelchair and rendered her unable to walk more than ten feet at a time.

¶3 In November 2007 and again in early 2008, Heinrich requested that the Managed Care Organization purchase a power stair lift and install it in her home. She wanted the lift so that she could more easily access her basement, which houses her washer and dryer, her circuit breaker box, hobby materials, and extra food storage, as well as numerous items from her deceased parents that she would like to sort out. After a nurse and a case manager from the Managed Care Organization interviewed Heinrich and assessed her home, Heinrich's requests

were denied based on safety concerns and on the basis that more cost-effective alternatives were available to meet her needs.

¶4 Heinrich then filed an appeal with the Division of Hearings and Appeals, and a hearing was held on July 9, 2008. At the hearing, the nurse and the case manager who interviewed Heinrich and assessed her home reiterated their concerns about the extensive mold in Heinrich's basement,[1] her ability to safely use a stair lift and make transfers given her physical conditions, including her foot deformity and propensity to fall, and the possibilities of flooding, electrocution and being stranded alone in her basement should an accident occur. They also explained that the program offered Heinrich several options that they found to be safer and more cost-effective than a stair lift, including Managed Care Organization funded Supportive Home Care to assist with her laundry, financial assistance in moving the washer and dryer to the main level of her home, using a Laundromat with assistance from a Managed Care Organization provided volunteer, assistance in moving her hobby materials to unused rooms on her first floor, and sliding on her buttocks to the basement.[2]

[1] The mold on Heinrich's basement walls was so severe that a weatherization service refused to work on her house until it was cleaned.

[2] Like the trial court, we find this final suggestion unreasonable, insulting, and not in keeping with the goals of the Managed Care Organization program.

¶5 In response, Heinrich presented a letter from her treating physician stating that she had no respiratory or allergic conditions as a result of the mold in the basement. She testified that she had water abatement work done in the basement to reduce the mold and had the mold cleaned. Heinrich also submitted a letter from her physician stating that her foot condition was not a safety hazard in the basement, rather it made the stair lift a medical necessity. She further testified that she already inquired about the possibility of losing electricity and was informed by a medical equipment provider that most stair lifts have a battery back-up in case of power failure. Heinrich also presented estimates showing that the cost of a stair lift would be less than the renovations necessary to construct a laundry room on the main floor.

¶6 The ALJ affirmed the denial of Heinrich's request. The ALJ found the "alternative services and supports offered by the Family Care Program to the Petitioner are effective to meet her needs and less expensive than the requested power stair lift," concluding that it would be "patently unsafe for an extremely ambulation-challenged elderly person weighing 290 lbs., … with degenerative foot deformities and multiple serious physical conditions, to be taking a stair lift down to a basement area where flooding may be present, and where power may be lost." The ALJ was not persuaded by Heinrich's cost estimates, which were presented after the program twice denied the lift, and which were estimated by contractors Heinrich selected for modifications that she personally delineated.

¶7 Heinrich then appealed to the trial court, arguing that the finding by the ALJ was not supported by substantial evidence in the record. The trial court affirmed the ALJ's decision, and Heinrich now appeals.

II. ANALYSIS.

¶8 Heinrich's primary basis for appeal is that the ALJ's decision is not supported by substantial evidence. Specifically, Heinrich takes issue with the ALJ's factual finding that, "[t]he alternative services and supports offered by the Family Care Program to the petitioner are effective to meet her needs and less expensive than the requested power stair lift."

¶9 Under WIS. STAT. § 227.57(6) (2007-08),[3] we uphold any action based on an administrative body's findings of fact if it is based on substantial evidence. ***Id.***; ***Knight v. LIRC***, 220 Wis. 2d 137, 149, 582 N.W.2d 448 (Ct. App. 1998). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" ***Hamilton v. DILHR***, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980) (citations and one set of quotation marks omitted). "Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

view of the evidence it wishes to accept." ***Id.*** (citation omitted.) "Generally, this court cannot evaluate the credibility or weight of the evidence on any finding of fact." ***Knight***, 220 Wis. 2d at 149. "Instead, the reviewing court must examine the record for substantial evidence that supports the agency's conclusion." ***Id.*** at 149-50. Reviewing the ALJ's decision as we are required to do, *see* ***Motola v. LIRC***, 219 Wis. 2d 588, 597, 580 N.W.2d 297 (1998) (in an appeal from a trial court arising out of an administrative review proceeding, we review the decision of the agency, not the decision of the trial court), we find that the ALJ's finding was based on substantial evidence, and, for the reasons set forth below, we affirm.

¶10 First, substantial evidence supports the finding that the alternative services offered by the Managed Care Organization are effective to meet Heinrich's needs. As described by the nurse and case manager who explained these alternatives in detail, the proffered alternatives would allow Heinrich to do her laundry, engage in her hobbies, and would provide her with reasonable access to her basement for other purposes. This evidence is more than adequate to support the ALJ's factual finding. Indeed, as pointed out in the ALJ's decision, no evidence was offered—at the hearing or otherwise—to show that options such as having Managed Care Organization support staff move Heinrich's belongings to the main level of her house and/or having Managed Care Organization staff or volunteers assist Heinrich with her laundry would not effectively meet Heinrich's

needs. *See* ***Hamilton***, 94 Wis. 2d at 617. Heinrich's only challenge to these options is that she does not want them.

¶11 Moreover, substantial evidence supports the ALJ's conclusion that installing a stair lift would be "patently unsafe." As the ALJ explained, Heinrich's numerous health conditions, her age, her weight, and the fact that her basement was in disrepair and subject to flooding and power loss—all of which were amply documented in the record—support the conclusion that a stair lift in Heinrich's particular circumstances would be dangerous. Contrary to Heinrich's assertions, there is no evidence that her physician—who stated in a two-sentence letter that a lift was necessary—had knowledge of or considered several of these factors. Even her own occupational therapist, on whom Heinrich relies to prove that the stair lift would be an effective option, stated that a lift is merely an "option to consider." Therefore, the ALJ's conclusion that the stair lift would be unsafe and the finding that other alternatives would be not only effective but also safer are both supported by substantial evidence. *See* ***id.***

¶12 Second, the ALJ's finding that the Managed Care Organization's proposed alternatives would be less expensive than installing a power stair lift is supported by substantial evidence. *See* ***id.*** Heinrich already receives home care from the program in the form of bi-weekly cleaning, lawn mowing, and snow removal services. At least one of the program's proposed alternatives to the stair lift simply adds to the care that she already receives. For example, the Managed

Care Organization suggested that home care staff help with laundry and move hobby items to the main level of Heinrich's house. As the nurse and case manager determined using the "resource allocation decision" method, these alternatives would be less expensive than installing a stair lift. Additionally, one of the options, having a volunteer assist with laundry, would have been effectively free of charge. Indeed, we also observe that unlike an apparently expensive stair lift—which would remain a permanent fixture in Heinrich's house—the proposed alternatives would cease should Heinrich no longer need them.

¶13 As for Heinrich's estimates comparing the cost of installing the stair lift with the cost of installing a washer and dryer on her main floor, we conclude that the ALJ did *not* reject them solely on the basis of timeliness, although they were submitted months after the Managed Care Organization initially denied the lift. Rather, the ALJ found that the estimates lacked credibility based on the fact that they were estimated by contractors that Heinrich selected for modifications that she delineated. *See* ***Knight***, 220 Wis. 2d at 149.

¶14 The ALJ accepted Heinrich's estimates at the administrative hearing without objection, and at no point during the hearing was their timeliness at issue. Additionally, the estimates at issue comprise the only evidence in the record of what a stair lift would cost. Given that the ALJ expressly found other alternatives

to be less expensive than the lift, the ALJ did not ignore Heinrich's estimates, incredible as they were found to be.[4]

¶15 Moreover, when the estimates were first mentioned in the ALJ's opinion, it was their substance, not their timeliness, that was directly attacked:

> [Heinrich] and her representative presented copies of two estimates … the point being made was that these home modifications, *as estimated by contractors [Heinrich] selected for modifications that she* delineated were more expensive than the stair lift, so that the stair lift is the least expensive plan.

¶16 Similarly, when these estimates were discussed at a later point in the ALJ's opinion, it was done primarily in the context of Heinrich's obstinacy and refusal to accept any of the Managed Care Organization's proffered alternatives:

> [Heinrich] offers that she must agree to the proposed alternative, and she clearly does not.
>
> While it is correct to say that the … [Managed Care Organization] … should assist[] the enrollee to be as self-reliant and autonomous "as possible *and* desired" by the enrollee, it is also the long-standing position of the Department, as affirmed in many fair hearing decisions, that the Family Care ***participant does not have 'unfettered***

---

[4] We disagree with the dissent's contention that the ALJ "proclaimed that he *ignored*" Heinrich's estimates in forming his conclusions. The conclusion at issue does not even mention the cost effectiveness of the lift:

> Under the facts presented to the Family Care [Managed Care Organization] as of the time of the denial of March 4, 2008 … I conclude that the alternatives provided by the [Managed Care Organization] … were each sufficient alternatives to meet the activity of daily living need, doing laundry.

Instead, it is clear that the ALJ utilized facts that were submitted prior to Heinrich's estimates only to conclude that the Managed Care Organization's proffered alternatives were sufficient to meet Heinrich's needs. Consequently, the dissent's interpretation of this particular conclusion is far too broad.

> ***choice' in deciding what supports Family Care provides that will serve her***, what living arrangements will be provided by Family Care, and exactly how the care plan is to be configured.
>
> Likewise, ***the petitioner does not get to frame the decision*** with after-acquired estimates of what a new laundry room would cost ***based upon estimates she procures for modifications she decides are necessary, and then compare them to after-acquired estimates she has likewise obtained***… See, Exhibits #5, & # 8.

(Emphasis added to bolded text.)

¶17 Furthermore, even if Heinrich would have somehow shown that the stair lift was in fact the most cost-effective option, the ALJ's finding in its entirety that "alternative services and supports offered by the Family Care Program to be effective to meet her needs and less expensive than the requested power stair lift," is still supported by substantial evidence because it is weighted so heavily on safety concerns. *See* ***Hamilton***, 94 Wis. 2d at 617. Simply put, it does not matter whether the stair lift is a cheaper option than one or more of the other alternatives because, as the ALJ properly found, the other alternatives were effective and much safer than the lift. *See* ***id.***

¶18 The final two bases on which Heinrich presents her appeal are: (1) that the ALJ erred by failing to give her a *de novo* hearing as required by WIS. ADMIN. CODE § DHS 10.55; and (2) that the ALJ's decision does not comply with the overall philosophy of the Managed Care Organization program as listed in WIS. ADMIN. CODE § DHS 10.44(2)(e)2. These two arguments simply reiterate her primary argument—that the ALJ ignored Heinrich's evidence of the cost-

effectiveness of the stair lift and failed to properly weigh her goals and outcomes. For example, to advance her argument that the ALJ did not properly grant her a *de novo* hearing, Heinrich contends that the ALJ wholly ignored the cost estimates she presented at the hearing. However, as we noted, the ALJ's decision makes clear that these estimates were considered, but disregarded on account of their unreliability. Similarly, Heinrich's argument that the ALJ's decision does not comply with the Managed Care Organization program's goals rehashes the alleged ignoring of her cost estimates, and then discusses how the ALJ did not, in her opinion, weigh and balance the evidence concerning Heinrich's "goals and outcomes." This court concludes that contrary to Heinrich's claim, the ALJ admitted, considered, and weighed all evidence presented and exercised statutory authority in doing so. *See* WIS. STAT. § 227.57(6). The ALJ has discretion as the finder of fact to determine the weight of evidence offered, and this court evaluates this discretion with the substantial evidence standard. ***Knight***, 220 Wis. 2d at 149. As we explained above, our role is not to reweigh or reassess the credibility of the evidence. *See* ***id.*** Because the ALJ's action based on its findings of fact is supported by substantial evidence in the record, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2009AP1954(D)

¶19 FINE, J. (*dissenting*). The Majority and the Wisconsin Department of Health Services agree that, under the applicable regulations, Linda Heinrich was entitled to a *de novo* hearing. The Majority asserts that the administrative law judge considered but disregarded as "unreliab[le]" the matters Heinrich says should have been considered at the required *de novo* hearing. The Department contends that we should not even address whether Heinrich was given the required *de novo* hearing because she did not argue that before the circuit court. I respectfully dissent.

¶20 The Record indicates that the administrative law judge limited his consideration to "facts presented to the Family Care CMO [an acronym for Care Management Organization] as of the time of the denial of March 4, 2008, as well as the similar denial dated December 7, 2007," and, *based on those facts*, "conclude[d] that the alternatives provided by the [Care Management Organization] of installing a washer/dryer upstairs; or having Supportive Home Care services perform the laundry; or assisting [Heinrich] in utilizing a laundromat with a voluntary [sic] assistant; were each sufficient alternatives to meet the activity of daily living needed, doing laundry." Indeed, the administrative law judge proclaimed that he *ignored* the evidence submitted by Heinrich after the denials by the Care Management Organization: "[Heinrich] does not get to frame the decision with after-acquired estimates of what a new laundry room would cost based upon estimates she procures for modifications she decides are necessary, and then compare them to *after-acquired estimates* she has likewise obtained from stair lift providers." (Emphasis added.) But that is the whole purpose of a *de novo* hearing—to require the *de novo* tribunal to consider matters that were not presented to the original tribunal. *See* ***Stuligross v. Stuligross***, 2009 WI App 25,

¶12, 316 Wis. 2d 344, 351–352, 763 N.W.2d 241, 245 ("The commonly accepted meaning of a *de novo* hearing is '[a] new hearing of a matter, conducted as if the original hearing had not taken place.'") (quoted source omitted).

¶21 Second, although it is generally true that we will not consider matters not first presented to the circuit court, *see* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997), that rule is of significantly less force (and may not be applicable at all) where, as here, we review that decision of the agency and not that of the circuit court, *see* ***Hilton ex rel. Pages Homeowners' Association v. Department of Natural Resources***, 2006 WI 84, ¶15, 293 Wis. 2d 1, 13, 717 N.W.2d 166, 172 ("When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court."); ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶23, n.13, 252 Wis. 2d 404, 421, n.13, 643 N.W.2d 515, 524 n.13 (When reviewing an agency decision, "we are not precluded from addressing a challenge to the administrative decision … even though the circuit court did not address it.") (certiorari review).

¶22 I would reverse the circuit court's order and remand to the agency for the *de novo* hearing to which Heinrich is entitled. Accordingly, I respectfully dissent.