

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 2, 1995

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(1), STATS.

NOTICE

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No. 94-1366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BETTY PFISTER,

Petitioner-Appellant,

v.

CITY OF MADISON,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County:
ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Betty Pfister appeals from an order affirming the decision of the City of Madison regarding her classification for use of the bus system. We affirm.

The City has adopted standards, pursuant to the Americans With Disabilities Act, for determining who is entitled to paratransit services and who must use regular fixed route bus service. Pfister seeks to be classified for paratransit eligibility pursuant to 49 C.F.R. § 37.123(e)(3), known as "category 3." The rule provides in relevant part that a person is paratransit eligible if she is:

[An] individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on [a fixed route] system.

(i) Only a specific impairment-related condition which prevents the individual from traveling to a boarding location or from a disembarking location is a basis for eligibility under this paragraph. A condition which makes traveling to [a] boarding location or from a disembarking location more difficult for a person with a specific impairment-related condition than for an individual who does not have the condition, but does not prevent the travel, is not a basis for eligibility under this paragraph.

By a letter from the Metro Plus operations manager dated August 10, 1992, the City informed Pfister that she had been certified under an eligibility category different from the one cited above. Pfister appealed that decision to the Madison Metro Transit System Manager, Paul Larrousse, seeking eligibility under category three. Larrousse denied that classification, and Pfister appealed to the City's Americans With Disabilities Act Paratransit Plan Oversight Committee Appeals Hearing Panel. The panel also denied Pfister's request. Pfister sought review of that decision by a petition for certiorari in the circuit court. The circuit court affirmed, and Pfister now appeals.

Review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. *Coleman v. Percy*, 96 Wis.2d 578, 588, 292 N.W.2d

615, 621 (1980). On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the agency. *State ex rel. Richards v. Traut*, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988).

Pfister argues that the panel did not act according to law because it failed to provide "separation of functions," that is, a decision by a person not involved with the initial decision to deny eligibility, as required by 49 C.F.R. § 37.125(g). Her argument is based on the fact that the panel considered the letter by Paul Larrousse from which Pfister appealed. We reject the argument. Larrousse did not sit on the panel. No member of the panel was involved in the initial decision.

Pfister argues that the record returned by the City in response to the writ of certiorari is defective. First, she argues that certain medical exhibits she introduced at the hearing were not included in the return. Pfister did not make this argument in the trial court, but simply attached the exhibits to her briefs. The City did not object. Certiorari review of issues not raised in the trial court is discretionary. *Westgate Hotel, Inc. v. Krumbiegel*, 39 Wis.2d 108, 112 n.1, 158 N.W.2d 362, 364 (1968). Because the City did not object and the exhibits are available for our review, there appears to be little point in remanding. We will consider those exhibits in addressing Pfister's argument concerning sufficiency of the evidence.

Pfister also argues that the record was defective because there are a number of places in the transcript where comments by Pfister or her advocate are described as "unintelligible." Pfister does not argue that the missing portions affect our ability to review the matter. Rather, she notes that most of the omissions are in passages during which she or her advocate was speaking, and that the omissions "raise serious questions as to whether the panel members were listening only to Madison Metro and were not particularly interested in whether Ms. Pfister's case was being presented in an intelligible or audible manner. This leads to an inference of prejudgment or bias on the part of the panel members." We reject the argument. It is not reasonable to infer that the panel was biased.

Pfister argues that the committee should not have relied on Larrousse's earlier decision letter because parts of it were read to the panel by the City's representative during his closing argument, rather than being introduced as an exhibit, and closing arguments are not evidence. Pfister also argues that the City's advocate made other comments, amounting to testimony, during closing argument. However, even if we were to disregard this material, we would still conclude, as we do below, that the panel's decision was supported by substantial evidence.

Pfister argues that the panel's findings and conclusions regarding her vision impairment, mobility impairment, and migraines and seizures were not supported by the evidence. The panel found that Pfister has impaired vision, impaired mobility, and migraines and seizures. The panel then addressed each of the conditions separately.

The panel's finding as to vision was: "People with more severe vision impairments than Ms. Pfister have to use the fixed route buses." The panel concluded: "Ms. Pfister[']s visual impairment does not qualify her for category 3, because people with more severe impairments are category 2 and are riding the fixed route buses." We note that it is irrelevant what other riders do, since the question is whether *Pfister* is prevented from traveling to a boarding location. However, the implied finding is that Pfister is not so prevented. This finding was supported by testimony from a paratransit driver that on several occasions Pfister had asked to be dropped off at one location and would then make her way to her ultimate destination on her own, and that this involved traveling several blocks in downtown Madison. The panel could reasonably conclude that Pfister is not prevented from going to a boarding location.

Regarding Pfister's impaired mobility, the panel found: "Many people with similar mobility impairments will ride accessible fixed route buses." It concluded: "The fact that Ms. Pfister uses a power wheelchair or three wheeled scooter does not qualify her for category 3." As above, it is irrelevant what others do. However, the implied finding is again that Pfister's impairment does not prevent her from traveling to a boarding location. Based on the above evidence, the panel could reasonably make this finding.

Regarding migraine headaches and seizures, the panel found: "Anything can trigger migraines. Ms[.] Pfister's are triggered by sunlight and extreme heat or cold. The letters presented to the panel as evidence do not address the frequency or intensity of the migraines and/or seizures." It concluded: "The panel has decided that the migraines and seizures were not presented as being chronic and do not present a barrier to Ms[.] Pfister's ability to get to and from a bus stop. This criteria comes from both the Madison ADA Compliance Plan and the Federal Regulations." The panel could reasonably conclude that migraine headaches do not prevent travel to a boarding location. Pfister did not submit evidence as to the nature, frequency or cause of her seizures.¹

By the Court.—Order affirmed.

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

¹ The letter from her neurologist states that she has "severe migraine headaches and seizures," but the remainder of the letter discusses only the cause of the headaches.