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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0332**

In the Matter of the Civil Commitment of: Joseph Edwin Harju

**Filed July 17, 2017
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69DU-PR-08-665

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Considered and decided by Ross, Presiding Judge; Worke, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant, who is committed as a sexually dangerous person (SDP), petitioned for a transfer, provisional discharge, or discharge. A judicial appeal panel dismissed his petition. Appellant challenges the dismissal, arguing that the panel (1) failed to make sufficient findings, (2) erred by dismissing his petition for transfer because he established that a transfer is appropriate, and (3) erred by dismissing his petition for provisional discharge or discharge because he established a prima facie case for both. We affirm.

FACTS

Appellant Joseph Edwin Harju “has a long history of engaging in harmful sexual conduct,” and in 2009, he was indeterminately civilly committed to the Minnesota Sex Offender Program (MSOP) as a SDP. *In re Civil Commitment of Harju*, No. A09-1619, 2010 WL 431593, at *1-2 (Minn. App. Feb. 9, 2010), *review denied* (Minn. Apr. 20, 2010).

In November 2015, Harju petitioned the special review board (SRB) for a transfer to Community Preparation Services (CPS), provisional discharge, or discharge, and the following month a hearing was held before the SRB. Harju proposed entering a treatment program in Duluth if released, and the SRB held the record open so that he could submit information on that placement, but no submission was received. The SRB ultimately recommended denying Harju’s petition.

Harju petitioned for rehearing and reconsideration, pursuant to what is now Minn. Stat. § 253D.28, subd. 1 (2016), and in August 2016, a hearing was held before a three-judge panel. The panel received 17 exhibits by stipulation, as well as a report from a court-appointed examiner, Dr. Robert Riedel, Ph.D, who also testified as an expert.

In his report, Dr. Riedel concluded that Harju was not a danger to the public and that a transfer or provisional discharge was reasonable. However, Dr. Riedel concluded that Harju was “still considered [an] untreated sex offender and thus full discharge is not possible.” Dr. Riedel testified before the panel and noted adjustments to his report, including changes to Harju’s Static-99R scores (a sex offender risk assessment instrument). He acknowledged that he had not accounted for all of Harju’s convictions, Harju’s risk category was actually moderate to high, and if impending changes to the Static-99R format

were accounted for, Harju would be in the high-risk category. These changes increased the likelihood of recidivism listed in Dr. Riedel's report. Despite these changes, Dr. Riedel opined that Harju met the criteria for a transfer to CPS. He felt that "provisional discharge, under the terms and conditions that were provided, was sufficient to adequately protect the public," and he supported discharge if certain statutorily imposed aftercare provisions were fully implemented.

Following Harju's case-in-chief, the state moved to dismiss Harju's petition pursuant to Minn. R. Civ. P. 41.02(b). The panel granted the state's motion. The panel concluded that Harju failed to meet his burden of persuasion for a transfer and did not make a prima facie case for either provisional discharge or discharge. Harju appeals.

D E C I S I O N

Harju's petition was dismissed pursuant to Minn. R. Civ. P. 41.02(b), which allows a defendant to move, after the plaintiff's presentation of evidence, for dismissal on the grounds that the plaintiff's claim is legally or factually deficient. We review such a dismissal of a transfer petition for clear error and a petition seeking discharge or provisional discharge de novo. *Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014).

Harju argues that the panel (1) failed to make sufficient findings to allow for meaningful review; (2) erred by concluding that he failed to establish that a transfer is appropriate; and (3) erred by dismissing his petition for provisional discharge or discharge. We address each of these arguments in turn.

The judicial appeal panel made sufficient findings of fact.

Harju first argues that the panel failed to make sufficient findings to allow for meaningful review because the panel's findings were mere recitations of the evidence presented and not meaningfully tied to the panel's conclusions of law. *See In re Civil Commitment of Spicer*, 853 N.W.2d 803, 810-12 (Minn. App. 2014) (reversing and remanding because district court made insufficient findings). We disagree. The panel's findings are sufficient.

In dismissing Harju's petition, the panel was required to address the statutory factors pertaining to transfer, provisional discharge, and discharge of a SDP. *See In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017) (concerning provisional discharge), *review denied* (Minn. June 20, 2017); *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992) (concerning transfer), *review denied* (Minn. Nov. 17, 1992).

The findings of fact section in the panel's order contains a recitation of evidence presented. However, the conclusions of law section contains findings addressing the applicable statutory factors. *See Graphic Arts Educ. Found., Inc. v. State*, 240 Minn. 143, 145-46, 59 N.W.2d 841, 844 (1953) ("[A] fact found by the court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact."). These findings are broken into separate paragraphs covering transfer, provisional discharge, and discharge.

As to Harju's requested transfer, the panel was required to make findings on the following factors: (1) Harju's "clinical progress and present treatment needs"; (2) his "need for security to accomplish continuing treatment"; (3) his "need for continued institutionalization"; (4) the facility that can best meet Harju's needs; and (5) "whether

transfer can be accomplished with a reasonable degree of safety for the public.” Minn. Stat. § 253D.29, subd. 1(b) (2016).

The panel found, in part, that (1) Harju has made slow clinical progress and has not completed sex offender programming despite multiple attempts; (2) he has significant treatment needs, blames drugs and alcohol for his actions, minimizes his impact on his victims, and has “been found to show an inability to control his sexual impulses”; (3) he has a high need for continued institutionalization at a secure facility; (4) Moose Lake is the most appropriate facility; and (5) a transfer cannot be accomplished with a reasonable degree of safety for the public. The panel’s findings are sufficient to allow for meaningful review.

The findings on Harju’s request for provisional discharge are also sufficient. A person seeking provisional discharge bears the burden of presenting a prima facie case with competent evidence. Minn. Stat. § 253D.28, subd. 2(d) (2016). Under Minn. Stat. § 253D.30, subd. 1 (2016), covering provisional discharge of a SDP, the committed person must be “capable of making an acceptable adjustment to open society,” and the following factors must be considered:

(1) whether the committed person’s course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person’s current treatment setting; and

(2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.

The panel found that Harju “presented little to no evidence to show that he is capable of making an acceptable adjustment to open society,” and no competent evidence “that his course of treatment and present mental status indicate there is no longer a need for treatment and supervision within the secure perimeter of the MSOP.” The panel also found that Harju’s “own suggested provisional discharge plan” did not constitute competent evidence. The findings show that the statutory factors were considered and indicate the perceived evidentiary shortcomings. Therefore, the findings are sufficient.

Likewise, the panel’s findings on Harju’s request for a discharge are sufficient. Harju was required to present a prima facie case with competent evidence. Minn. Stat. § 253D.28, subd. 2(d). The following criteria for discharge of a SDP are set forth under Minn. Stat. § 253D.31 (2016):

A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.

In determining whether a discharge shall be recommended, the special review board and judicial appeal panel shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community. If the desired conditions do not exist, the discharge shall not be granted.

The panel found that Harju offered insufficient evidence that he is able to make an acceptable adjustment to open society, is no longer dangerous, and is no longer in need of

inpatient treatment and supervision. The panel also found that he presented no competent evidence of specific conditions that would provide a reasonable degree of protection to the public and assist him in adjusting to the community. Again, the panel's findings are sufficient because they address the applicable statutory factors and the perceived evidentiary deficiencies.

The judicial appeal panel properly concluded that Harju failed to establish that a transfer was appropriate.

Harju next argues that the panel clearly erred in dismissing his transfer petition. We disagree. The judicial appeal panel, acting as the trier of fact, rendered findings that are supported by the record taken as a whole and sufficient to support the panel's conclusion that a transfer is inappropriate. *See Foster*, 857 N.W.2d at 548.

A petition seeking a transfer “imposes the burdens of production *and* persuasion on the petitioner at the hearing before the judicial appeal panel.” *Id.* at 548. The applicable burden of persuasion is “by a preponderance of the evidence.” Minn. Stat. § 253D.28, subd. 2(e) (2016). In determining whether a petitioner has demonstrated that a transfer is appropriate, the judicial appeal panel must address the five factors set forth under Minn. Stat. § 253D.29, subd. 1(b). *Foster*, 857 N.W.2d at 549.

The record, taken as a whole, supports the panel's findings. Harju has a long history of harmful sexual conduct with minor males dating from the early 1970s through 2000. Although Dr. Riedel nominally supported a transfer, his report characterized Harju's treatment progress as “slow but steady,” noted that Harju is an “untreated sex offender,” and that Harju “has not completed the program at Moose Lake or any other program”

despite multiple attempts. Dr. Riedel testified that Harju's risk category under the Static-99R was moderate to high, and if impending changes to the format were accounted for, Harju would be in the high-risk category. Assessments and reports entered into the record support the findings that Harju blames drugs and alcohol for his actions, minimizes his impact on his victims, and has ongoing and significant treatment needs best addressed at the secure MSOP facility in Moose Lake. For example, Rachel Mack, Psy.D, LP, submitted a 2015 report concluding that Harju had a "need for sex offense specific treatment" and that there had been a "lack of a significant reduction of risk toward the community." The record taken as a whole supports the panel's findings and conclusion that a transfer is inappropriate. See *Foster*, 857 N.W.2d at 549.

The judicial appeal panel did not err by dismissing, pursuant to Minn. R. Civ. P. 41.02(b), Harju's petition for provisional discharge or discharge.

Lastly, Harju argues that the panel erred by dismissing his petition for provisional discharge or discharge because the panel imposed additional burdens of proof, improperly weighed evidence, and made credibility determinations. We first address whether the panel imposed additional burdens of proof.

Harju argues that the panel imposed additional burdens of proof for provisional discharge because the panel noted that "[a] provisional discharge is not appropriate if a transfer, a lesser custody reduction, is not appropriate." Likewise, Harju contends that the panel imposed additional burdens for discharge because the panel noted that "[a] full discharge is not appropriate if transfer or a provisional discharge, lesser custody reductions, are not appropriate." Harju argues that these statements are "contrary to the plain

language” of Minn. Stat. §§ 253D.30, subd. 1, .31. Harju’s argument is unavailing for two reasons.

First, the panel set forth grounds independent of the aforementioned statements for denying Harju’s request for a provisional discharge or discharge, concluding that he failed to put forth a *prima facie* case for both. Second, the panel’s statements regarding the appropriateness of a discharge are consistent with prior caselaw. In *Larson v. Jesson*, 847 N.W.2d 531, 535-36 (Minn. App. 2014), we noted that “the criteria for a provisional discharge are more lenient than the criteria for a discharge” and concluded that because the petitioner failed to produce evidence sufficient to support a provisional discharge, a discharge was inappropriate. In sum, the panel did not commit reversible error by imposing additional burdens of proof.

We next address whether the panel improperly weighed evidence and made credibility determinations. Harju essentially contends that he put forth a *prima facie* case for both provisional discharge and discharge, and any other conclusion shows that the evidence was improperly analyzed by the panel. We disagree. The panel properly concluded that Harju failed to make a *prima facie* showing.

A person committed as a SDP shall not be provisionally discharged or discharged unless certain statutory criteria are met. See Minn. Stat. §§ 253D.30, subd. 1, .31. And a person seeking provisional discharge or discharge bears the burden of presenting a *prima facie* case with competent evidence. Minn. Stat. § 253D.28, subd. 2(d). If the petitioner satisfies the burden of production at the “first-phase hearing,” the proceeding moves to a

“second-phase hearing,” and the burden shifts to the commissioner, who bears a burden of persuasion on the merits. *Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013).

When considering a motion to dismiss under Minn. R. Civ. P. 41.02(b) after the first-phase hearing, as occurred here, the judicial appeal panel “may not weigh the evidence or make credibility determinations,” and the panel must “view the evidence produced at the first-phase hearing in a light most favorable to the committed person.” *Id.* at 490–91. But dismissal may still be appropriate when the committed person does not meet his burden of production. *Id.* at 491.

The panel found that Harju’s provisional-discharge plan did not constitute competent evidence. We agree. “[A] provisional discharge plan is a necessary step before the judicial appeal panel could even begin to consider a provisional discharge.” *Larson*, 847 N.W.2d at 536. A “provisional discharge plan” is to be “developed, implemented, and monitored” by the executive director of the MSOP or his or her designee. Minn. Stat. §§ 246B.01, subd. 2c, 253D.02, subd. 7, .30, subd. 2 (2016).

Harju’s provisional-discharge plan was developed by his attorneys with Harju’s assistance. Harju would ordinarily develop a provisional-discharge plan as part of his programming, “but he was not yet to the point in the program where this is done.” Because Harju failed to submit a provisional-discharge plan to the SRB that complied with section 253D.30, subd. 2, he did not present a prima facie case for provisional discharge. *See* Minn. Stat. § 253D.28, subd. 3 (2016) (“The judicial appeal panel may not grant a transfer or provisional discharge on terms or conditions that were not presented to the [SRB].”); *cf.* *Kropp*, 895 N.W.2d at 649 (involving judicial appeal panel that denied motion to dismiss,

ordered the executive director of MSOP to develop a provisional-discharge plan, and remanded the matter back to the SRB).¹

Further, the judicial appeal panel found that Harju presented no competent evidence “that his course of treatment and present mental status indicate there is no longer a need for treatment and supervision within the secure perimeter of the MSOP.” We agree that Harju failed to meet his burden of production on this factor. *See* Minn. Stat. § 253D.30, subd. 1(b)(1). Although Dr. Riedel nominally supported provisional discharge, he considered Harju to be an untreated sex offender, conceded that Harju was in a moderate-to high-risk category, noted that Harju failed to complete programming despite multiple attempts, recommended supervised treatment for Harju’s remaining problems, and testified that he would not support unsupervised provisional discharge or discharge. The record supports the panel’s conclusion that Harju failed to present competent evidence to establish a *prima facie* case for provisional discharge. *See* Minn. Stat. §§ 253D.28, subd. 2(d), .30, subd. 1.

The panel also properly concluded that Harju failed to present a *prima facie* case for discharge. Harju needed to present competent evidence that he is “capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.” Minn. Stat. §§ 253D.28, subd. 2(d), .31. The panel was also required to consider whether specific conditions existed to provide a

¹ It is unclear if Harju submitted any provisional-discharge plan to the SRB; however, the record does indicate that Harju failed to submit information on his proposed placement at a Duluth treatment program, despite the record being held open by the SRB.

reasonable degree of protection to the public and to assist Harju in adjusting to the community. Minn. Stat. § 253D.31.

Dr. Riedel, in his report, concluded that Harju is an untreated sex offender, and there was no evidence to support a discharge. At the hearing, he opined that Harju could meet the criteria for discharge if aftercare support was provided, and he discussed the possibility of Harju receiving certain statutorily required aftercare services. *See* Minn. Stat. § 253D.35, subd. 2 (2016) (requiring the development of an aftercare plan and post-discharge case management services). But he conceded that he had “never seen one of those [aftercare] plans” and raised concerns about “treading into unknown territory.”

In sum, Dr. Riedel’s report stated that discharge was not appropriate, and his testimony on the appropriateness of a discharge was inconsistent and based on suppositions. For example, he testified that he supported a discharge “if the conditions of [Minn. Stat. § 253D.35, subd. 2] . . . were fully implemented.” But moments later he conceded that a discharge would be problematic, stating:

[A]ll of a sudden we’re going to discharge him and all of a sudden the director is going to put together a discharge plan, and the discharge plan, if it’s done properly, will take weeks to put together. One has to do all sorts of research about locations, research about support services, and that. But he’s already out. He’s been discharged.

Given Dr. Riedel’s report, which noted the inappropriateness of a discharge, and the inconsistent and suppositional nature of his testimony, the panel did not err in concluding that Harju failed to put forth a *prima facie* case with competent evidence. Moreover, given

Harju's failure to present a prima facie case for provisional discharge, a full discharge is inappropriate. *See Larson*, 847 N.W.2d at 535.

The judicial appeal panel did not err in dismissing Harju's petition seeking a transfer, provisional discharge, or discharge. The panel's findings are sufficient to allow for meaningful review and address the applicable statutory factors. The record taken as a whole is sufficient to support the panel's findings and conclusion that a transfer is inappropriate. And the panel did not err in concluding that Harju failed to establish a prima facie case for provisional discharge or discharge.

Affirmed.