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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1532**

In the Matter of the Civil Commitment of:
Terry Lee Branson

**Filed March 11, 2019
Affirmed
Johnson, Judge**

Judicial Appeal Panel
File No. AP17-9178

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Anthony C. Palumbo, Anoka County Attorney, Anne M. Zimmerman, Assistant County Attorney, Anoka, Minnesota (for respondent Anoka County)

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Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Terry Lee Branson is civilly committed as a sexually dangerous person and a sexual psychopathic personality. He petitioned for a transfer, a provisional discharge, or a full discharge. The special review board recommended that his petition be denied. He requested rehearing and reconsideration by the judicial appeal panel with respect to his

requests for a provisional discharge or a full discharge. After the first phase of an evidentiary hearing, the judicial appeal panel granted a motion to dismiss his petition. We conclude that the judicial appeal panel did not err because Branson did not produce evidence during the first-phase hearing that is sufficient to establish a *prima facie* case that he is entitled to a provisional discharge or a full discharge. Therefore, we affirm.

FACTS

Branson is a 64-year-old man who is civilly committed as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). Between 1976 and 1993, Branson was convicted of six felonies arising from four separate incidents of criminal sexual conduct or sex-related assaults. Branson has admitted to treatment providers that he has committed 20 to 30 sexual assaults or attempted sexual assaults.

In the late 1980s, Branson participated in a prison-based sex-offender treatment program for 17 months before he withdrew. In 1991, he started a prison-based sex-offender treatment program and completed an after-care program following his release from prison. In the early 2000s, Branson refused to participate in a prison-based sex-offender treatment program on four occasions.

In 2008, Anoka County petitioned for his commitment as an SDP and an SPP. The Anoka County District Court granted the petition in 2009 and ordered his initial commitment. In October 2013, Branson was released from prison and transferred to the Minnesota Sex Offender Program (MSOP). The district court later conducted a review hearing, and the district court ordered his indeterminate commitment in January 2015. Since arriving at MSOP, Branson has refused to participate in sex-offender treatment.

In January 2017, Branson petitioned the special review board for a transfer to Community Preparation Services (CPS), a provisional discharge, or a full discharge from MSOP. The special review board reviewed various records, including a report prepared by Branson's treatment team and a sexual-violence risk assessment prepared by a forensic psychologist. The treatment report stated that Branson's petition was "premature" and that Branson "has not demonstrated he has gained any knowledge or skills related to his sexual offending to indicate he is capable of managing his risk for re-offense." It further stated that Branson has "portrayed no intent to follow MSOP policy and procedures" and described Branson as a "nonparticipant" in treatment and "resistant to meeting with treatment staff." Similarly, the risk assessment stated that Branson "continues to require treatment for his sexual sadism disorder and antisocial personality disorder" and has significant risks for re-offending. It further stated that "there is no indication Mr. Branson resolved the underlying issues related to his sexual offending" and that his "current risk and remaining treatment needs . . . indicate he continues to pose a danger to the public, and requires inpatient treatment and supervision." The risk assessment concluded that Branson does not meet the criteria for a transfer, a provisional discharge, or a full discharge.

In November 2017, the special review board recommended that Branson's petition be denied. Branson petitioned the judicial appeal panel for rehearing and reconsideration. The judicial appeal panel held an evidentiary hearing in June 2018. At the beginning of the hearing, Branson withdrew his request for a transfer to CPS but proceeded with his requests for a provisional discharge or a full discharge. Branson called one witness, Nadia

Donchenko, Psy.D., a court-appointed psychologist, who had prepared a detailed 13-page report, which was admitted into evidence at the hearing.

Dr. Donchenko's report agreed with Branson's previous psychological diagnoses and stated that Branson's sexual sadism and alcohol-use disorder were of "primary and continued concern" and that he may also meet the criteria for narcissistic personality disorder. Dr. Donchenko agreed with Branson's scores on two psychometric assessments administered in September 2017, which indicated that Branson is at an above-average risk for sexual re-offense as a result of several static and dynamic risk factors. She expressed particular concern about one of the risk factors, deviant sexual preference, due to the circumstances of Branson's sexual assaults, and stated, "There is no evidence his deviant arousal pattern and preferences have diminished as Mr. Branson is not transparent and has refused to cooperate with sex offender treatment." Dr. Donchenko stated further that it "would be ill-advised to consider a less secure treatment setting" for Branson because of his threats of self-harm. She concluded in her report that Branson "continues to require sex offender and chemical health treatments" and that Branson "has chosen to refuse participation in the very services that would provide him an avenue to discharge." Dr. Donchenko further concluded in her report that Branson's condition remains "unchanged" and that "there is no documentation to suggest his risk to the community has been reduced since the initial commitment."

At the first-phase hearing, Dr. Donchenko's testimony was consistent with her report, although she clarified that she believes sexual sadism is a more precise diagnosis than a generalized diagnosis of paraphilic disorder. She testified that Branson's records

show that he meets the criteria for sexual sadism and that his continued hostility toward women supports this diagnosis. When asked on direct examination whether Branson's hostility presently creates sexual arousal, which is an element of sadism, Dr. Donchenko could not say, stating only that Branson is unwilling to talk about sexual arousal. Dr. Donchenko testified about one incident of inappropriate behavior by Branson at MSOP but stated that she was not aware of any others. Concerning Branson's risk for recidivism, Dr. Donchenko reiterated her opinion that Branson is at risk for re-offending but stated that, although his last crime in 1993 was sexually motivated, he has not committed a sex crime or, to her knowledge, engaged in any overtly sexual violence since 1983.

With regard to treatment, Dr. Donchenko testified that Branson is "untreated" and "has not addressed the root causes of what had led him to offend to begin with" and has not "modified his behaviors in any way." She stated that Branson's needs "can certainly be met within MSOP" but pointed to Branson's unwillingness to cooperate and his lack of treatment progress. She further testified that Branson "requires the treatment that can be offered at MSOP" and that she did not know of any settings in which his behaviors could be managed better than MSOP. Dr. Donchenko stated that Branson did not provide her with a discharge-prevention plan, a relapse-prevention plan, or any other written documentation. Dr. Donchenko ultimately opined that Branson does not meet any of the statutory criteria for either a full discharge or a provisional discharge and that Branson is not "inclined to provide the information" necessary to determine whether he would be able to adjust to open society.

Branson did not testify on his own behalf. He did not submit a provisional-discharge plan to the judicial appeal panel. After Branson rested his case, the commissioner of human services moved to dismiss Branson's petition on the ground that he had not stated a *prima facie* case that he is entitled to a provisional discharge or a full discharge. The county joined in the motion. In July 2018, the judicial appeal panel filed a six-page order in which it granted the motion to dismiss. Branson appeals.

D E C I S I O N

Branson argues that the judicial appeal panel erred by granting the motion to dismiss his petition with respect to his request for a provisional discharge or a full discharge.

A person who is committed as an SDP or an SPP may petition the special review board for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2018). A person committed as an SDP or an SPP "shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a) (2018). The judicial appeal panel must consider two statutory factors:

(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.

Id., subd. 1(b).

Similarly, a person committed as an SDP or an SPP “shall not be [fully] discharged unless . . . 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 treatment and supervision.” Minn. Stat. § 253D.31 (2018). In determining whether a full discharge is appropriate, the special review board and judicial appeal panel must 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.” *Id.* “If the desired conditions do not exist, the discharge shall not be granted.” *Id.*

In a proceeding before the judicial appeal panel on a petition for a provisional discharge or a full discharge, the petitioner “bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief.” Minn. Stat. § 253D.28, subd. 2(d) (2018); *see also Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013); *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650-51 (Minn. App. 2017), *review denied* (Minn. June 20, 2017). This burden is merely a burden of production. *Coker*, 831 N.W.2d at 486. If the petitioner satisfies the burden of production at the first-phase hearing before the judicial appeal panel, “the party opposing discharge or provisional discharge bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied.” Minn. Stat. § 253D.28, subd. 2(d); *see also Coker*, 831 N.W.2d at 486; *Kropp*, 895 N.W.2d at 651.

If the commissioner wishes to challenge a petitioner’s entitlement to relief after the petitioner rests his case, the commissioner may move to dismiss the petition pursuant to

rule 41.02(b) of the rules of civil procedure. *Coker*, 831 N.W.2d at 489-91. That rule provides, in relevant part: “After the plaintiff has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief.” Minn. R. Civ. P. 41.02(b); *see also Coker*, 831 N.W.2d at 490-91 (holding that subsequent sentences of rule 41.02(b) do not apply to proceedings before judicial appeal panel because of conflict with commitment statute). If the commissioner moves to dismiss a petition pursuant to rule 41.02(b), the judicial appeal panel “may not weigh the evidence or make credibility determinations.” *Coker*, 831 N.W.2d at 490-91. “Instead, the Appeal Panel is required to view the evidence produced at the first-phase hearing in a light most favorable to the committed person.” *Id.* at 491. This court applies a *de novo* standard of review to a judicial appeal panel’s grant of a rule 41.02(b) motion to dismiss a petition for a reduction in custody. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

Branson’s arguments for reversal with respect to his request for a provisional discharge are the same as his arguments for reversal with respect to his request for a full discharge. Because the criteria for a provisional discharge are more lenient than the criteria for a full discharge, we will begin by analyzing whether the evidence introduced by Branson at the first-phase hearing is sufficient to satisfy his burden of production with respect to a provisional discharge.

As stated above, a person committed as an SDP or an SPP may obtain a provisional discharge only if he “is capable of making an acceptable adjustment to open society.”

Minn. Stat. § 253D.30, subd. 1(a). That question must be answered based on two factors: “(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.” *Id.*, subd. 1(b).

In this case, the judicial appeal panel concluded that, viewing the evidence in the light most favorable to Branson, he “has not produced any competent evidence to meet his initial burden of establishing a *prima facie* case for provisional discharge, and he cannot avoid judgment as a matter of law.” The judicial appeal panel noted that Branson “only offered the court appointed examiner’s report and testimony” and that the examiner did not support a provisional discharge. The judicial appeal panel also pointed to Branson’s lack of a provisional-discharge plan.

Branson contends that he is entitled to a provisional discharge because he does not need treatment for a sexual disorder or a paraphilia and is not likely to re-offend. He contends that his diagnoses and Dr. Donchenko’s conclusions are inaccurate because they are based on an outdated historical record rather than his current functioning and that “a causal connection between the conduct involved in [his] offenses and sexual arousal . . . is pure speculation.” The county responds by contending that Branson’s failure to cooperate with assessments and treatment should not be construed as evidence that he no longer has a sexual disorder requiring treatment.

The only evidence Branson presented at the first-phase hearing concerning whether he has a continued need for treatment and supervision at MSOP was Dr. Donchenko's report and testimony. Dr. Donchenko determined that Branson is untreated, that he continues to require sex-offender treatment, and that he "has chosen to refuse participation in the very services that would provide him an avenue to discharge." Dr. Donchenko acknowledged that Branson's offenses were long ago but stated that "there is no documentation to suggest his risk to the community has been reduced since the initial commitment." Dr. Donchenko also stated that it "would be ill-advised to consider a less secure treatment setting" and that Branson "requires the treatment that can be offered at MSOP." Although Branson now challenges the diagnoses and assessments underlying Dr. Donchenko's conclusions, he did not provide any evidence at the first-phase hearing to contradict them. Thus, the only evidence in the record on the first factor indicates that Branson continues to need treatment and supervision in his current treatment setting.

Furthermore, there is no evidence in the record that Branson presented a provisional-discharge plan to the judicial appeal panel during the first-phase hearing. 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. Thus, Branson also failed to meet his burden of production with respect to the second factor.

Therefore, the judicial appeal panel did not err by determining that Branson did not present a *prima facie* case that he is entitled to a provisional discharge. In light of that conclusion, we need not separately analyze the question whether Branson satisfied his

burden of production with respect to his request for a full discharge, which is governed by more rigorous criteria. *See id.* at 535-36.

In sum, the judicial appeal panel did not err by granting the motion to dismiss Branson's petition.

Affirmed.