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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2024**

Eugene C. Banks,
Appellant,

vs.

Cal R. Ludeman,
Commissioner of Human Services,
Respondent.

**Filed May 5, 2009
Affirmed
Peterson, Judge**

Judicial Appeal Panel
File No. 19-P6-98-008535

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from the denial of his request for full discharge from his commitment as a sexually dangerous person, appellant argues that (1) he is capable of making an acceptable adjustment to open society and is no longer dangerous to the public and (2) he no longer needs inpatient treatment and supervision. We affirm.

FACTS

In 1998, appellant Eugene C. Banks was indeterminately committed as a sexually dangerous person (SDP) to the Minnesota Sex Offender Program (MSOP). In November 2006, appellant petitioned respondent Commissioner of Human Services for full discharge from civil commitment. The special review board (SRB) made findings and recommended denial of appellant's petition. Based on the SRB's findings and recommendation, the commissioner issued an order denying appellant's petition.

Appellant filed a petition for rehearing and reconsideration before the judicial appeal panel. At the hearing on the petition, appellant testified that he is seeking a full discharge to relocate to property that he owns in Utah. He stated that he had not developed a plan for a provisional discharge and admitted that he has never participated in sex-offender treatment at MSOP. Appellant testified that he did not believe that he needed treatment at the time of his commitment, stating, "I believe if they felt I needed treatment, they would have committed me originally in '95, when I was first paroled for the sex offense." Appellant believes that he was committed because MSOP was undergoing a "building boom" and needed "to fill the beds."

Licensed psychologist Thomas L. Alberg, an independent court-appointed examiner, testified at the hearing that except for some maturation due to age, appellant's present ability to adjust to open society, if he were to return to the community, was not significantly different than when he was committed. Alberg opined that appellant would pose a danger to the public if discharged and that appellant needs inpatient sex-offender and chemical-dependency treatment. In a written report, Alberg concluded that appellant was at a very high risk to reoffend and that appellant had not acted to reduce his risk of re-offending.

Other evidence submitted at the hearing indicates that MSOP has diagnosed appellant with pedophilia, paraphilia, drug and alcohol abuse in a controlled environment, anti-social personality disorder, and narcissistic personality disorder. Since being committed, appellant has refused to participate in sex-offender treatment. Appellant has continued to engage in behavior indicating an interest in children, including possession of a picture of a naked child, possession of letters exploiting sexual violence and physical and sexual abuse of children, and communications with two different 15-year-old boys. During virtually the entire time of his commitment, appellant has threatened and assaulted MSOP staff. In a report dated August 7, 2007, appellant's treatment team at MSOP concluded that he is at high risk for reoffending because of his current level of psychopathy, continued sexual deviancy and rule violations in an institutional treatment setting, failure to participate in treatment, inability to identify his sex-offending risk factors, and the presence of a large number of static risk factors.

At the conclusion of appellant's case, the commissioner moved to dismiss under Minn. R. Civ. P. 41.02(b). Based on the conclusion that appellant failed to present sufficient evidence to establish a prima facie case for discharge, the panel granted the commissioner's motion and also affirmed the commissioner's decision denying appellant's petition. This appeal followed.

D E C I S I O N

Appellant argues that he meets the requirements for a provisional or full discharge. But appellant did not petition for a provisional discharge and raises the issue of a provisional discharge for the first time on appeal. Because a provisional discharge was not considered by the judicial appeal panel, we will not consider the issue. *See Sletten v. Ramsey County*, 675 N.W.2d 291, 302 (Minn. 2004) ("Issues raised for the first time on appeal are not to be considered.").

In reviewing a decision of the judicial appeal panel, the appellate court must determine from an examination of the record whether the evidence as a whole sustains the panel's findings. *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992). "[I]t is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* (quoting *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982)).

A committed person may be discharged only if

it appears to the satisfaction of the commissioner, after a hearing and a favorable recommendation by a majority of the special review board, that the patient 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 commissioner shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community. If the desired conditions do not exist, the discharge shall not be granted.

Minn. Stat. § 253B.18, subd. 15 (2008). As the petitioning party, appellant bears the burden of going forward with the evidence, and as the party opposing discharge, respondent bears the burden of proof by clear and convincing evidence that appellant is in need of commitment. Minn. Stat. § 253B.19, subd. 2(d) (2008).

The evidence as a whole supports the appeal panel's finding that appellant failed to establish a prima facie case for discharge because he is not capable of making an acceptable adjustment to society, he continues to be dangerous to the public, and he continues to need inpatient treatment and supervision. Appellant has refused to participate in treatment, denying that he meets the criteria for diagnosis as a pedophile and maintaining that he was committed because MSOP was undergoing a "building boom" and needed to "fill the beds." Appellant has continued to engage in conduct indicating a sexual interest in children, and both his treatment team and the independent examiner opined that he is at a very high risk to reoffend. Appellant has not offered any reasonable plan to aid in his adjusting to society. Also, during virtually the entire time of his commitment, appellant has threatened and assaulted MSOP staff.

Appellant challenges the credibility of Alberg's testimony. But it is the role of the judicial appeal panel, not this court, to determine the credibility of expert testimony. *See*

Piotter, 490 N.W.2d at 919. Appellant argues that he has not committed a sexual offense since 1991. But except for about 14 months from June 1996 to August 1997, appellant has either been in prison or committed to a secure facility since 1991. Appellant cites Alberg’s testimony that appellant may have achieved some treatment benefit just by being in the MSOP facility and that appellant may have experienced some maturation due to age. However, a slight change or improvement in a person’s condition is insufficient to justify discharge. *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

The panel did not err in denying appellant’s petition for full discharge. *See id.* (“Confinement may continue . . . if . . . the person continues to need treatment for his sexual disorder and continues to pose a danger to the public, which are the reasons for which the person was originally committed.”).

Affirmed.