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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2248**

James Allen Barber,  
Appellant,

vs.

Lucinda Jesson,  
Commissioner of Human Services,  
Respondent.

**Filed June 11, 2012  
Affirmed  
Schellhas, Judge**

Judicial Appeal Panel  
File No. AP109040

Lance R. Heisler, Lampe Law Group, LLP, Northfield, Minnesota (for appellant)

Lori Swanson, Attorney General, Max Kieley, Ricardo Figueroa, Steven H. Alpert,  
Assistant Attorneys General, St. Paul, Minnesota (for respondent Commissioner of  
Human Services)

Paul Beaumaster, Rice County Attorney, Meredith Erickson, Assistant County Attorney,  
Faribault, Minnesota (for respondent Rice County)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and  
Schellhas, Judge.

## UNPUBLISHED OPINION

SCHELLHAS, Judge

Following a judicial appeal panel's dismissal of his petition for reconsideration of the recommendations of a special review board, appellant argues that the judicial appeal panel erred by dismissing his petition because he met his burden of producing competent evidence to support his petition. We affirm.

### FACTS

In 2003, before appellant James Barber completed his 12-year prison term for his conviction of first-degree criminal sexual conduct, Rice County Social Services petitioned for his civil commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). On November 5, 2003, Barber consented to the district court ordering that he be confined at the Minnesota Security Hospital in St. Peter pending a full hearing on the merits of his commitment proceeding. Based on Barber's written waiver, on November 7, the court ordered that he be held at the Minnesota Security Hospital in St. Peter for observation, evaluation, care, treatment, and confinement until the court's decision on the merits of the petition. On May 5, 2004, the court initially committed Barber as an SDP and SPP, subject to a final determination. On September 13, after Barber's 60-day review hearing, the court indeterminately committed Barber as an SDP and SPP to the Minnesota Sex Offender Treatment Program (MSOP) at St. Peter and Moose Lake. Barber appealed his commitment to this court, and we affirmed. *In re Civil Commitment of Barber*, No. A04-2089 (Minn. App. Apr. 5, 2005), *review denied* (Minn. June 14, 2005).

During his commitment, Barber has intermittently passed between Phases I and II of the three phases of MSOP. He has unsuccessfully petitioned for transfer, provisional discharge, or discharge three times. In 2008, a special review board recommended denial of Barber's petition, and a judicial appeal panel adopted the special review board's recommendation. In 2009 and 2010, Barber petitioned for transfer to a nonsecure facility, provisional discharge, or discharge. In September 2010, a special review board recommended denial of those petitions. Barber sought a hearing and reconsideration from a judicial appeal panel. In the spring of 2011, prior to his hearing before the appeal panel, MSOP moved Barber from Phase II to Phase I.

At the evidentiary hearing before the judicial appeal panel in September 2011, Barber, one of his mentors, and Dr. Thomas L. Alberg testified. Dr. Alberg testified that Barber had "a moderate likelihood" of reoffending and that his "likelihood to reoffend is slightly higher than" but "not much more than" the sexual recidivism rate for the average sex offender who is "coming out of the Minnesota incarceration system." He testified that although Barber had not committed any sexual misconduct during his confinement, that was "not necessarily" a plus factor because Barber had not had access to his victim pool—young children—during his confinement. But Dr. Alberg acknowledged that Barber had little to no likelihood of committing any kind of offense in a less-secure facility, assuming his victim pool was absent. Dr. Alberg also testified that Barber's psychopathy was average for all types of offenders, but he did not recommend that Barber "be moved forward in his treatment program at this time."

Barber's long-time prison mentor, age 80, testified that Barber took his treatment seriously, that he had seen improvement in Barber, and that he would be a support person for Barber if he were transferred or discharged.

Barber testified that in the past 20 years of confinement, he had not engaged in any inappropriate sexual conduct with any other inmate or patient, he had been "actively participating" in the programs, and he had been completing "as many as they're letting [him] complete." He expressed his frustration with frequent changes in MSOP and in his treatment providers. He admitted that he had victimized children, stating that he had "abused [his daughter] in [his] mind" and conceding that he "could have and probably would have offended with [his daughter] had [he] been given the right time and opportunity." He testified that he had gotten his problems under control so that he did not need as much supervision and that he would not reoffend if he were in a less-secure setting. He explained that, even though the results of his recent polygraph at MSOP indicated that he was deceptive in answering one question in a three-question test, the recorded deception resulted from his confusion about the question.

At the conclusion of the hearing, the state moved to dismiss Barber's petition under Minn. R. Civ. P. 41.02(b), and the appeal panel granted the state's motion, denied Barber's petition for full discharge and transfer, and summarily denied Barber's petition for a provisional discharge because that issue was not before the special review board.

This appeal by writ of certiorari follows.

## DECISION

This court reviews the judicial appeal panel's legal determinations de novo. *See Coker v. Ludeman*, 775 N.W.2d 660, 663 (Minn. App. 2009) (noting that determining whether appeal panel applied the proper evidentiary burden was a legal issue that this court reviews de novo), *review dismissed* (Minn. Feb. 24, 2010). We will not reverse the appeal panel's findings of fact if the record as a whole sustains them. *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004).

An individual committed as an SDP or SPP cannot be "transferred out of a secure treatment facility" unless the appeal panel decides "that the transfer is appropriate." Minn. Stat. § 253B.185, subd. 11(a) (2010). "[I]n determining whether a transfer is appropriate," the appeal panel must consider the following five factors:

- (1) the person's clinical progress and present treatment needs;
- (2) the need for security to accomplish continuing treatment;
- (3) the need for continued institutionalization;
- (4) which facility can best meet the person's needs; and
- (5) whether transfer can be accomplished with a reasonable degree of safety for the public.

*Id.*, subd. 11(b) (2010). A person seeking transfer "must establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253B.19, subd. 2(d) (2010). "The preponderance of the evidence standard requires that to establish a fact, it must be more probable that the fact exists than that the contrary exists." *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004). Here, the appeal panel determined that Barber's clinical progress and treatment needs could not be met in a nonsecure setting; Barber required security to accomplish treatment; Barber presented a need for continued

institutionalization; MSOP was most suited to meet his treatment needs; and Barber's transfer could not be accomplished while providing a reasonable degree of public safety. The appeal panel therefore granted the state's motion to dismiss and denied Barber's transfer petition.

Barber argues that he submitted to the appeal panel "competent" evidence on all five factors. He cites *Coker*, 775 N.W.2d at 665, arguing that the party petitioning for transfer only bears the burden of going forward with competent evidence that he meets the statutory criteria for transfer and that the party opposing the transfer must then show by clear-and-convincing evidence that the petitioning party should not be transferred. But Barber advocates for the wrong standard.

After this court decided *Coker*, the legislature amended section 253B.19, subdivision 2(d), specifying that a "petitioning party seeking discharge or provisional discharge 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." 2010 Minn. Laws ch. 300, § 27 at 764. "A party seeking transfer under section 253B.18, subdivision 6, or 253B.185, subdivision 11, must establish by a preponderance of the evidence that the transfer is appropriate." *Id.* Barber's appeal panel applied the wrong burden of proof to his petition for a transfer, requiring only that he meet the burden of going forward with the evidence. But in this appeal, we may disregard the appeal panel's error because the panel found that Barber failed to meet even the lower burden and therefore Barber was not prejudiced by the error. *See* Minn. R. Civ. P. 61

(“The court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”).

But, before we proceed with our analysis, we note our concern about inaccurate information that has persisted in Barber’s file and the appeal panel’s reliance on it. For example, Barber’s file includes a 2008 diagnosis of “Alcohol Abuse By History, In a Controlled Environment,” but that diagnosis was erroneous and therefore removed in Barber’s February 2010 Psychological Assessment Update. Nevertheless, after the removal of the erroneous diagnosis, it reappeared in a June 2010 Sexual Violence Risk Assessment that was conducted as part of Barber’s petition to the special review board for transfer to a nonsecure facility and again in a July 2010 Special Review Board Evaluation Report. Additionally, Barber’s psychopathy score has been noted inconsistently in his records. A November 2010 Annual Treatment Assessment reported that Barber scored 29 on the Hare Psychopathy Checklist–Revised, which indicated a high degree of psychopathic traits. But a June 2010 Sexual Violence Risk Assessment reported Barber’s score as 24, and five months later someone changed that score by hand to 29. Similarly, we are concerned about the tests MSOP staff used to determine Barber’s risk of reoffending. As to the ACUTE-2007, Dr. Alberg testified that he had repeatedly told the appeal panel “a variety of times in the past” that it is a test “inappropriate to use on people who are institutionalized.” As to the STATIC-99, Dr. Alberg wrote that the authors of the test “recommended using the STATIC-99R, which considers the aging process more fully in making predictions of sexual recidivism. Using the STATIC-99R,

Mr. Barber would score a 3, which would place him in the low moderate range for sexual reoffending.”

For individuals, such as Barber, who face long-term civil commitments, we expect MSOP to take greater care to ensure that patients’ records are accurate, and MSOP must use appropriate tests to determine individuals’ risk of reoffending. Yet, even in light of the inaccuracies in Barber’s records, after reviewing the record as a whole, we conclude that because Barber failed to provide sufficient evidence to raise a question of fact as to the statutory transfer factors, he did not satisfy his burden of persuasion and the appeal panel did not err in denying and dismissing his petition for transfer to a nonsecure facility.

***Clinical progress and present treatment needs***

This factor required the appeal panel to consider “the person’s clinical progress and present treatment needs.” Minn. Stat. § 253B.185, subd. 11(b)(1). Barber argues that he offered evidence of positive and consistent participation in MSOP’s treatment program since his initial commitment. Although Barber did show some progress in his treatment program, he did not show that a transfer would meet his “present treatment needs.” The appeal panel found, and the record supports, that Barber had recently been moved from Phase II to Phase I because he was not meeting his goals; that he had not been meeting some of his Phase I skills; and that although he recently began progressing again in Phase I, his treatment team believed that his requests for discharge or transfer were “premature.” And Dr. Alberg did not recommend that Barber be moved forward in his treatment program. Dr. Alberg observed that Barber

needs to resolve some issues before this will happen. He needs to become more open to feedback and less defensive in his group setting. He also needs to work through the issue of the sexual abuse of his daughter and be able to pass a polygraph examination to the satisfaction of the treatment staff. It appears that the issue about his sexual offenses regarding his daughter is a major stumbling block for Mr. Barber. This issue needs to be resolved before he can advance in the program.

***The need for security and continued institutionalization and whether transfer can be accomplished with a reasonable degree of safety for the public***

Barber addresses three factors in combination because each concerns public safety: “(2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; . . . [and] (5) whether transfer can be accomplished with a reasonable degree of safety for the public.” Minn. Stat. § 253B.185, subd. 11(b)(2)–(3), (5). He argues that a number of his diagnoses no longer apply and that he has decreased his risk to society because he has internalized and applied the tools he learned in treatment to modify his behavior. He argues that his relapse-prevention plan and his mentors make him less of a danger to the community and that his risk of reoffending is no more than other offenders being released from incarceration. Barber’s arguments are unpersuasive.

Dr. Alberg acknowledged that “Barber’s risk of reoffending is no more than a moderate level of reoffense,” but he concluded that Barber should not be moved to a less-restrictive level of programming because Barber had several unresolved issues to work through, such as the sexual abuse of his daughter and the failure of his polygraph test. Dr. Alberg also noted that Barber’s relapse-prevention plan “has not been approved by the

treatment staff and although Mr. Barber has obviously put considerable effort into this plan, there needs to be more work done on the plan and staff approval needs to be gained before this could be considered a completed plan.”

Barber argues that he has not shown violent or sexual behaviors during the 20 years of his confinement. But Dr. Alberg testified that for the past 20 years, Barber has not had contact with his victim pool—young children—so the fact that he has not committed sexual misconduct during that period is “not necessarily” a plus factor. Barber also asserts that transfer to a less-secure facility without any children would not pose an increased risk to the public, but the record shows that Barber is seeking transfer to a nonsecure facility.

***Which facility can best meet the person’s needs***

Barber argues that Dr. Alberg’s recommendation that he continue at the Moose Lake facility was “luke warm at best” because the Moose Lake facility is the only facility available for those who are in Phase I and Phase II of MSOP. He argues that the statute does not require sex offenders to complete a particular program, and he generally attacks the structure of MSOP. He also argues that he produced “competent evidence” that “he can be safely treated without secure confinement.” We are not convinced.

The statute directs that a person committed as an SDP or SPP “not be transferred out of a secure treatment facility,” Minn. Stat. § 253B.185, subd. 11(a), and “the Minnesota Security Hospital and the Minnesota sex offender program facility in Moose Lake” are secure treatment facilities. Minn. Stat. § 253B.02, subd. 18a (2010). Dr. Alberg testified that Barber’s treatment needs are best met at Moose Lake because “realistically

that's the only program available so I guess it's best met there." Barber notes the existence of 35 other less-restrictive treatment options, but he offers no argument about why those facilities would meet his needs better than Moose Lake.

We therefore conclude that Barber did not show that another facility would best meet his needs. We further conclude that Barber failed to provide sufficient evidence to raise a question of fact as to the statutory transfer factors, he did not satisfy his burden of persuasion, and the appeal panel did not err by denying and dismissing his petition for transfer to a nonsecure facility.

### ***Discharge***

Barber asks in his brief that we reverse the appeal panel's conclusion that he did not produce any competent evidence to meet the statutory criteria for discharge. But he does not address any of the statutory factors for discharge in his brief. *See* Minn. Stat. § 253B.185, subd. 18 (2010) (listing factors the appeal panel must consider and determinations it must make for a civilly committed person to be discharged). "[M]ere assertion[s]" that are not supported by argument and authority are waived on appeal unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). We see no prejudicial error in the appeal panel's determination that Barber did not produce competent evidence to meet the criteria for discharge.

**Affirmed.**