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**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0120**

James Freeman,
Appellant,

vs.

Lucinda Jesson,
Commissioner of Human Services,
Respondent.

**Filed June 16, 2014
Affirmed
Hudson, Judge**

Hennepin County District Court
Appeal Panel File No.: AP13-9010

Ronald L. Thorsett, Eden Prairie, Minnesota (for appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Smith, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the denial of his petition to be discharged or transferred from the Minnesota Sex Offender Program. We affirm.

FACTS

This appeal arises from the decision of respondent Commissioner of the Department of Human Services (DHS) to deny appellant James Freeman's petition for transfer or discharge from civil commitment. Since 2009, Freeman has been civilly committed in the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person and sexually psychopathic personality. Freeman was civilly committed after serving a 210-month prison sentence for kidnapping two children from a grocery-store parking lot in 1996. Prior to that conviction, Freeman was sentenced to ten years in prison in South Dakota for sexually abusing his five- and six-year-old sons in 1986. There are numerous other documented instances in which Freeman committed acts of sexual deviance, sexual abuse of children, and sexual violence.

While in prison in both South Dakota and Minnesota, Freeman entered various treatment programs. His South Dakota treatment was "limited." While imprisoned in Minnesota, Freeman bounced in and out of, but did not complete, several courses of treatment. In June 2009, Freeman was admitted to the MSOP and began its three-phase treatment program. In August 2012, Freeman completed Phase I and progressed to Phase II. Freeman then petitioned for either a transfer or provisional discharge from the MSOP under Minn. Stat. § 253D.27, subd. 2 (Supp. 2013).¹ In January 2013, a special review board (SRB) of the DHS heard Freeman's petition. In February 2013, the SRB

¹ Although Freeman's civil commitment began in 2009, we analyze his commitment under the 2013 amendments to the civil commitment statute. *See Coker v. Jesson*, 831 N.W.2d 483, 486 n.2 (Minn. 2013) (explaining that Minnesota courts should apply current civil-commitment statutes that clarify but do not substantively change existing law).

recommended that the petition be denied because, although Freeman was “progressing” in treatment, “he need[ed] to demonstrate continued participation” and “to progress to Phase III prior to transitioning to a less secure setting or eventual[ly] return[ing] to the community.”

Freeman then petitioned the judicial appeal panel for a de novo rehearing and reconsideration under Minn. Stat. § 253D.28, subd. 1 (Supp. 2013). At the October 2013 appeal panel hearing, Freeman presented evidence in his favor from several sources, including his own testimony, his self-authored discharge-and-treatment plan, and a report and personal testimony of the appeal-panel-appointed independent psychological examiner, Dr. Penny Zwecker.

Freeman testified that he had made sufficient progress in treatment to skip the remainder of Phase II and all of Phase III and transition to outpatient treatment. Freeman also introduced into evidence a self-authored discharge-and-treatment plan. The plan sets forth a thorough history of Freeman’s sexual deviancy and abuse victims, documents Freeman’s support system, and contains several bullet points summarizing his proposed plan to live outside of the MSOP. Freeman admitted in his testimony that he had not finalized his living arrangements, spoken with his parole officer, or arranged to receive treatment outside the MSOP. Freeman’s treatment team did not assist in writing the plan.

Dr. Zwecker’s report noted that Freeman had not consistently met the criteria to reach Phase III, and concluded that, although Freeman had made progress in treatment, he was “premature in asking for . . . a [p]rovisional [d]ischarge.” At the hearing, Dr. Zwecker testified that Freeman was doing well in the MSOP, but had minimally

addressed some of his risk factors, made insufficient progress to reach Phase III, exhibited narcissistic personality disorder, had a mixture of psychopathic and sexually deviant traits that signaled a higher likelihood of violent re-offense, and had devised an insufficient and incomplete discharge-and-treatment plan. Dr. Zwecker concluded that a provisional discharge was premature because it would not allow Freeman to receive adequate treatment.

At the close of Freeman's case-in-chief, the DHS moved to dismiss the petition under Minn. R. Civ. P. 41.02(b) on the grounds that Freeman failed to meet his burden of production showing that he was entitled to a transfer or provisional discharge. Respondent Hennepin County joined in the motion. In November 2013, the appeal panel granted the motion and denied Freeman's petition. The appeal panel stated that, "given the Minnesota Supreme Court ruling in [*Coker*, 831 N.W.2d at 483], and in the abundance of caution," it did not consider Freeman's self-authored plan. This appeal follows.

DECISION

I

A person civilly committed as a sexually dangerous person or sexually psychopathic personality may petition the SRB for transfer or provisional discharge. Minn. Stat. § 253D.27, subd. 2. If the SRB denies a petition, the person seeking discharge may petition for rehearing and reconsideration to a judicial appeal panel. Minn. Stat. § 253D.28, subd. 1(a). The appeal panel then conducts a first-phase hearing at which the party petitioning for discharge bears the burden of producing "a prima facie

case with competent evidence to show that the [petitioning party] is entitled to the requested relief.” Minn. Stat. § 253D.28, subd. 2(d) (Supp. 2013).

To meet this burden of production, a petitioning party must produce “competent evidence” that the committed person is “capable of making an acceptable adjustment to open society.” Minn. Stat. §§ 253D.28, subd. 2(d), 253D.30, subd. 1(a) (Supp. 2013). The appeal panel considers two factors to determine whether a committed person is capable of making that adjustment: (a) “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 . . . current treatment setting,” and (b) “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.” Minn. Stat. § 253D.30, subd. 1(b) (Supp. 2013).

If the DHS believes that a petitioner did not satisfy the burden of production at the first-phase hearing, it can move to dismiss the petition under Minn. R. Civ. P. 41.02(b), “on the ground that upon the facts and the law, the [petitioner] has shown no right to relief.” When considering such a motion, the appeal panel “may not weigh the evidence or make credibility determinations.” *Coker*, 831 N.W.2d at 490. “Instead, the Appeal Panel [must] view the evidence produced at the first-phase hearing in a light most favorable to the committed person.” *Id.* at 491. Freeman argues that the appeal panel erred when it held that he did not meet his burden of production for discharge and

dismissed his petition.² On review from the appeal panel's grant of a rule 41.02(b) motion to dismiss a petition for discharge from civil commitment, our review is de novo. *Larson v. Jesson*, ___ N.W.2d ___, ___, 2014 WL 2565834, at *2 (Minn. App. 2014).

Competent evidence of lack of need for treatment and supervision

Freeman points to his own testimony, his self-authored plan, and Dr. Zwecker's report and testimony as competent evidence that he no longer needs the MSOP's treatment or supervision. Dr. Zwecker testified that Freeman was more advanced than other offenders she had previously evaluated; that she was impressed with Freeman's knowledge of his risk factors, honesty, and insight into his offenses; and that he was fully invested in his MSOP treatment. But Dr. Zwecker also presented significant negative testimony on Freeman's risk to the community, knowledge of his own triggers, and narcissistic personality disorder. Dr. Zwecker concluded in both her report and testimony that, although Freeman had made significant progress, he still required MSOP treatment and supervision, and discharging him would be premature.

The appeal panel was required to view the evidence in a light most favorable to Freeman without "weigh[ing] the evidence or mak[ing] credibility determinations." *Coker*, 831 N.W.2d at 490. In *Coker*, the appeal panel granted a rule 41.02(b) motion, relying on a psychiatrist who recommended against discharge despite testifying that the petitioner had made significant progress such that his "sexual deviance ha[d] essentially remitted." *Id.* at 487. The supreme court held that the petitioner met his burden of

² Freeman petitioned the appeal panel for either a transfer or a provisional discharge. On appeal, Freeman only briefed arguments about provisional discharge. We thus consider the transfer arguments waived. See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

production because a trier of fact could reject the less-favorable portions of the psychiatrist's testimony, and the more-favorable testimony that remained established a prima facie case "together with the other evidence [the petitioner] produced." *Id.* at 492.

Here, unlike in *Coker*, the burden is not met. Even if the appeal panel ignored Dr. Zwecker's negative comments completely, Freeman still had the burden to present competent evidence that he was "no longer [in] need [of] treatment and supervision in the . . . current treatment setting." Minn. Stat. § 253D.30, subd. 1(b)(1) (Supp. 2013). Dr. Zwecker's positive testimony only established that Freeman's current treatment was progressing, not that his strides were significant enough to demonstrate credibly that further treatment in the MSOP setting was unnecessary (such as the essential remission in *Coker*). Consequently, Freeman did not meet his burden to produce competent evidence because, even if he proved that Dr. Zwecker's positive testimony was completely true and her negative testimony was completely false, he would still not satisfy the statutory requirements. *See Lewis-Miller v. Ross*, 710 N.W.2d 565, 570 (Minn. 2006) (holding, in the context of analogous two-phase child-custody hearings that also have a "competent evidence" standard, that a petitioner "is entitled to a [second-phase] hearing when the facts alleged, if proven, would satisfy" the statutory requirements).

Absent corroborating neutral testimony, Freeman's own report and testimony about his treatment cannot stand alone as competent evidence of his capacity to live in open society without the treatment and supervision that the MSOP provides. If self-serving testimony could establish a prima facie case, the first-phase hearing would simply

collapse into the petitioner saying certain magic words to trigger the second phase. Freeman did not produce competent evidence that he no longer needs MSOP treatment.

Competent evidence of qualifying discharge plan

The second factor requires the appeal panel to consider “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.” Minn. Stat. § 253D.30, subd. 1(b)(2) (Supp. 2013). A provisional discharge plan must “be developed, implemented, and monitored by the executive director [of the MSOP] in conjunction with the committed person and other appropriate persons.” Minn. Stat. § 253D.30, subd. 2 (Supp. 2013).³ The record shows that Freeman authored his discharge plan without “the assistance of his treatment team.” Because Freeman did not have a qualifying discharge plan under the statute, he did not present a prima facie case for his discharge from the MSOP.

II

The appeal panel did not consider Freeman’s self-authored plan “given the Minnesota Supreme Court ruling in [*Coker*], and in the abundance of caution.” It appears that *Coker* does not preclude consideration of Freeman’s plan, and Freeman now challenges its exclusion.

³ At the time of Freeman’s commitment, Minnesota law required that he develop a treatment plan with the head of his treatment facility, not the director of the MSOP. Minn. Stat. § 253B.185, subd. 13 (2012). Because Freeman did not collaborate with his treatment team or the director of the MSOP, we decline to comment further on the significance of this statutory difference.

It is not reversible error for a trier of fact to “exclude[] evidence [that] was cumulative to other similar evidence that was admitted.” *State v. Turner*, 359 N.W.2d 22, 24 (Minn. 1984). Here, both Freeman’s and Dr. Zwecker’s testimony covered the portions of the plan relevant to Freeman’s contention that he no longer needs treatment and supervision under Minn. Stat. § 253D.30, subd. 1(b)(1). Evidentiary error is not prejudicial if the record contains evidence sufficient to support the decision. *State v. Hull*, 788 N.W.2d 91, 104 (Minn. 2010). Here, even if admitted, Freeman’s self-authored plan was not “developed, implemented, and monitored” by the MSOP’s executive director, *see* Minn. Stat. § 253D.30, subd. 2, and is therefore not competent evidence of a provisional discharge plan sufficient to meet the requirements of Minn. Stat. § 253D.30, subd. 1(b). Because Freeman’s discharge plan is duplicative of other evidence in the record regarding Freeman’s need for continued treatment, and because the self-authored discharge plan does not meet the statutory requirements for a provisional discharge plan, any error was not prejudicial.

Affirmed.