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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1219**

Leon James Preston,
Appellant,

vs.

Lucinda Jesson,
Commissioner of Human Services,
Respondent.

**Filed December 17, 2012
Affirmed
Kalitowski, Judge**

Judicial Appeal Panel
File No. AP089030

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Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Leon James Preston challenges the judicial appeal panel's order denying
and dismissing his petition for transfer to a nonsecure facility or full or provisional

discharge from his indeterminate commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). We affirm.

D E C I S I O N

Preston has been civilly committed as an SDP and SPP for assaulting numerous juvenile females and a juvenile male. After the district court adjudicated him delinquent of fifth-degree criminal sexual conduct (CSC) in 1993, Preston failed to complete both outpatient and inpatient treatment programs. The district court then committed Preston to a correctional facility, where he again failed to complete his treatment program. In 1996, Preston pleaded guilty to first- and second-degree CSC and received an 81-month sentence. When he reached his supervised release date in December 1999, he was committed to the Minnesota Sexual Offender Program (MSOP) as an SDP and SPP.

In December 2009, Preston petitioned the special review board (SRB) for transfer to a nonsecure facility or full or provisional discharge. The SRB recommended denial of Preston's petition, and Preston sought reconsideration by a judicial appeal panel (the panel). A hearing was held before the panel in April 2012. Preston and an independent court-appointed examiner testified. Respondent Commissioner of Human Services moved to dismiss the petition under Minn. R. Civ. P. 41.02(b), and the panel granted the motion, concluding that Preston did not establish a prima facie case for full or provisional discharge and did not establish by a preponderance of the evidence that transfer was appropriate.

We review the panel's legal determinations de novo. *Coker v. Ludeman*, 775 N.W.2d 660, 663 (Minn. App. 2009), *review dismissed* (Minn. Feb. 24, 2010). Findings

of fact are reviewed under a clearly erroneous standard. *Jarvis v. Levine*, 364 N.W.2d 473, 474 (Minn. App. 1985). And we will not weigh the evidence as if trying the matter de novo, but 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).

When seeking a full or provisional discharge, the petitioner “bears the burden of going forward with the evidence.” Minn. Stat. § 253B.19, subd. 2(d) (2012).¹ To meet that burden, the petitioner must present some competent testimony to show that he meets the statutory criteria for the requested relief. *Coker*, 775 N.W.2d at 665. Thus, “the petitioner need not actually prove anything, but instead must only present evidence on each element sufficient to avoid judgment as a matter of law.” *Id.*; *see also Braylock v. Jesson*, 819 N.W.2d 585, 590-91 (Minn. 2012) (reaffirming that the petitioner carries the burden of production, and thus bears the burden of going forward with the evidence). “[T]he ultimate burden of persuasion remains at all times with the party opposing the petition to prove, by clear and convincing evidence, that a full or provisional discharge should be denied.” *Braylock*, 819 N.W.2d at 591. As to his request for transfer to a nonsecure facility, Preston “must establish by a preponderance of the evidence that the transfer is appropriate.” Minn. Stat. § 253B.19, subd. 2(d).

¹ The panel applied the statutes in effect at the time that Preston petitioned for discharge or transfer. The applicable statutes have not changed. For ease of reference, we refer to the current version of the statutes in this opinion.

Transfer to a nonsecure facility

An individual committed as an SDP or SPP cannot be transferred unless the panel decides “that the transfer is appropriate.” Minn. Stat. § 253B.185, subd. 11(a) (2012). The panel must consider 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)(1)-(5) (2012).

Here, the panel determined that Preston had not met his burden because (1) his clinical progress and treatment needs cannot be met in a nonsecure setting; (2) he needs security to accomplish continuing treatment; (3) he needs continued institutionalization; (4) MSOP is the facility best suited to meet his needs; and (5) transfer cannot be accomplished while providing a reasonable degree of safety for the public. We agree.

The evidence as a whole sustains the panel’s findings. Although Preston progressed in his treatment program, he failed to show that a transfer would be appropriate. The panel found—and the record supports—that his treatment needs cannot be met in a nonsecure setting. The independent examiner testified that it would be “premature” to transfer Preston to a nonsecure setting, and that he “can’t recommend that [Preston] move to the transition program at this time.” In addition, the examiner did not support a transfer because Preston has not finished “the sex offender phase of the treatment.” Moreover, the evidence shows that a transfer cannot be accomplished while providing a reasonable degree of safety for the public. The examiner testified that

Preston's sexual-violence risk-assessment score of 27.5 is a high score that correlates with recidivism.

Nonetheless, Preston asserts that “[h]e should be given one of the remedies that he has requested” because (1) he is unlikely to reoffend; (2) he provided a discharge plan; (3) he can provide his own care and treatment; (4) he can live with his father; (5) he can attend Pathfinders or Alpha House; (6) he can wear a monitoring bracelet; (7) he can obtain employment; and (8) he can participate in a transition program. But the record does not support these assertions.

The evidence shows that Preston is likely to reoffend—his high sexual-violence risk-assessment score correlates with recidivism. And the record shows it is unlikely he can provide his own care and treatment—the independent examiner recommended that Preston be moved to “Phase II” of the treatment program. No evidence supports Preston's assertion that he could provide this type of treatment on his own. The examiner testified that Preston is “[p]robably not realistically” ready for Phase III, which is the quasi-independent portion of the treatment program: “I think he's certainly ready to go to Phase II. . . . I think he should be able to move through Phase II fairly quickly. Whether that will happen or not certainly is questionable[,] but I think he could.” Finally, Preston's remaining assertions do not address the statutory transfer factors in Minn. Stat. § 253B.185, subd. 11(b)(1)-(5).

The panel's findings are supported by the record and are not clearly erroneous. Because Preston failed to establish by a preponderance of the evidence that transfer was appropriate, the panel did not err in denying and dismissing his petition.

Full or provisional discharge

Preston alternatively seeks a full or provisional discharge from commitment. An individual committed as an SDP or SPP may be provisionally discharged only if “it appears to the satisfaction of the judicial appeal panel . . . that the patient is capable of making an acceptable adjustment to open society.” Minn. Stat. § 253B.185, subd. 12 (2012). The panel considers

(1) whether the patient’s course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the patient’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 patient to adjust successfully to the community.

Id. Likewise, an individual cannot be fully discharged unless the panel determines that the individual “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.” *Id.*, subd. 18 (2012). The panel also considers whether “specific conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community.” *Id.*

The panel found that full discharge could not be granted because Preston (1) is not capable of adjusting to open society; (2) continues to be dangerous to the public; and (3) needs inpatient treatment and supervision. The panel also found provisional discharge could not be granted because Preston needs inpatient treatment and supervision

and because his provisional discharge plan was not realistic, would not enable him to adjust successfully, and would not protect the public.

The record supports the panel's findings. Preston essentially argues that he is unlikely to reoffend, and therefore he "does not need the lock-up to continue to be successful." But the record is persuasive that Preston would not be capable of adjusting to open society and that he continues to be dangerous to the public. Although Preston's discharge plan is "relatively well-developed," the examiner testified that provisional or full discharge would be "premature." And Preston's high sexual-violence risk-assessment score has a significant correlation with recidivism, supporting the panel's conclusion that he remains dangerous to the public. In addition, Preston continues to be diagnosed with pedophilia and personality disorder, diagnoses that the independent examiner found appropriate. And Preston has yet to complete Phase II of the treatment program, which requires inpatient treatment and supervision.

Because Preston failed to provide sufficient evidence to raise a question of fact as to the statutory factors for full or provisional discharge, the panel did not err in denying and dismissing his petition.

Affirmed.