STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0312

In the Matter of the Civil Commitment of:
Wayne Joseph Averett.

Filed August 21, 2017
Affirmed
Peterson, Judge

Judicial Appeal Panel
File No. AP16-9015
Hennepin County File No. 27-PO-97-060036

Michael C. Hager, Minneapolis, Minnesota (for appellant Wayne Joseph Averett)

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

Lori Swanson, Attorney General, Brandon Boese, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Appellant, who is civilly committed as mentally ill and dangerous (MID), challenges the judicial appeal panel's decision denying his petition for discharge from the state security hospital or transfer to a less-secure facility and granting respondents' motion to dismiss the petition. We affirm.

FACTS

During a psychotic episode in 1996, appellant Wayne Joseph Averett attempted to set his mother's boyfriend on fire and eventually set the boyfriend's house on fire. Appellant was charged with first-degree arson, but was found not guilty by reason of mental illness. Appellant was civilly committed as MID to the Minnesota Security Hospital (MSH) on August 11, 1997. Appellant was transferred to Forensic Transition Services (FTS), a lower-security facility, in July 2006. He was provisionally discharged to a community facility in February 2009, but returned to FTS two weeks later after he stopped taking his medications and his symptoms returned. Several months later, after he walked away from FTS, appellant was returned to MSH.

In October 2015, appellant filed a petition for full discharge from civil commitment or a transfer to FTS. Following a hearing, the Special Review Board (SRB) issued findings recommending that appellant's petition be denied. Based on this recommendation, the assistant commissioner of the Minnesota Department of Human Services (DHS) issued an order denying the petition. Appellant petitioned for rehearing and reconsideration before the Judicial Appeal Panel (the appeal panel). The appeal panel reviewed stipulated exhibits submitted by the parties and heard testimony from the court-appointed examiner and from appellant.

In a psychological/risk assessment report presented to the appeal panel, a court-appointed examiner, Dr. James Gilbertson, diagnosed appellant with bipolar disorder with manic features, in current and sustained remission, and specified personality disorder (antisocial and paranoid traits). The bipolar disorder is "well-stabilized" with medication.

According to Gilbertson, although the manic feature of the bipolar disorder is in remission, appellant's underlying personality disorder is "intertwined" with that disorder. Gilbertson testified that appellant's "bipolar disorder is colored by an underlying oppositional and antisocial personality structure with . . . some paranoid features, so he takes offense easily." Gilbertson stated that if the personality disorder is "activated by a . . . combination of bipolar, untreated bipolar illness, [it] can make [appellant] at high risk to aggress against somebody to teach them a lesson, to show that he won't . . . truckle [to] . . . any behavior toward him or what he perceives as behavior toward him." Gilbertson said that the overt manic symptoms of bipolar disorder were in remission but "[i]t's the underlying instabilities caused by his personality structure that he's not managing well at the current time." Gilbertson concluded that appellant did not meet the standards for either full discharge or transfer to a less-restrictive setting.

In a report for the SRB, clinical psychologist Raymond Knutson noted that when he assessed appellant in November 2015, appellant was rated at a 4B security level; generally, a patient is not considered for transfer to a less-restrictive setting until he has achieved a security-level 5 for several months. In a supplementary report in September 2016, Knutson wrote that appellant's security level had been downgraded to 3A because of many instances of rule violations.

Dr. Adam Milz, a forensic psychologist for the state, interviewed appellant and issued a report in December 2015. He found that appellant knew that he needed to take his bipolar medication to remain symptom-free. Appellant told Milz about his discharge plans: he intended to live with a Canadian woman with whom he had corresponded; and he

identified a brother, who lived in Chicago and was reportedly homeless, as a source of personal support. Milz noted that although appellant was compliant with medication, "he has demonstrated difficulties remaining compliant with other aspects of his treatment program, has been resistant to staff redirection, and has engaged in intimidating and potentially inappropriate behavior." Milz felt that appellant had an elevated risk for violent behavior. He also commented on appellant's "repeated rule violations that have resulted in a reduction in his privileges." Milz concluded that appellant was not an appropriate candidate for transfer to a less-restrictive setting or for discharge.

Appellant presented to the appeal panel two letters from patients or former patients praising him for helping them during life-threatening situations. Appellant maintained that he did well while in FTS in 2006-2009 because it was less restrictive and he "flourished . . . without all the restrictions." He said that some of his earlier behavioral problems resulted from medication side effects. Appellant did not consider himself to be "aggressive" and, instead, described himself as "assertive."

Appellant denied having a personality disorder, which he described as "criminal thinking" or being "against authority on purpose," or preying on others. Appellant denied currently breaking rules; he said that reports made about him were based on past incidents. Appellant described his desire to return to Chicago, but he had no concrete plans, including any means to get medication and therapy. Appellant disagreed that it was important to remain in his current placement until he earned his level-5 security rating. He thought that being in FTS would enable him "to organize a plan for [his] discharge."

Appellant described his approved relapse-prevention plan, which provides him with strategies and outlines his risk factors. Appellant felt his current placement in Bartlett Hall was more restrictive than one in the main security hospital. He believed that he was disciplined because he was not afraid to speak up if he felt staff violated its own rules. He claimed to be "passionate" rather than "argumentative."

On rebuttal, Dr. Gilbertson explained that appellant had both paranoid and antisocial traits to his personality disorder. This causes appellant to be "activated emotionally" by what he perceives as unfairness and to break rules, for which he "has good rationalizations." Gilbertson testified that a patient's ability to follow rules in one program is a good predictor of ability to do so in another situation, and he indicated that appellant had not been able to do so.

At the close of appellant's presentation of evidence, respondents DHS and Hennepin County moved for dismissal of appellant's petition for rehearing and reconsideration under Minn. R. Civ. P. 41.02(b). The appeal panel granted this motion and issued findings, conclusions, and an order denying appellant's request for a transfer or discharge and dismissing appellant's petition for rehearing and reconsideration.

D E C I S I O N

I.

Appellant requested a full discharge from commitment. Under Minn. Stat. § 253B.18, subd. 15 (2016), "[a] patient who is mentally ill and dangerous shall not be discharged unless . . . 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 considering a discharge request, "the special review board and commissioner [of DHS] 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." *Id.* The supreme court has clarified that a patient may be released only if the evidence shows both that the patient does not need continued inpatient treatment for his illness and that he is not a danger to the public. *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

Before the appeal panel, "[t]he petitioning party seeking 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." Minn. Stat. § 253B.19, subd. 2(c) (2016). If the petitioning party meets the burden of production, the party opposing discharge has the burden of proving by clear and convincing evidence that the discharge should be denied. *Id.* In *Coker v. Jesson*, the supreme court held that the appeal panel "may not weigh the evidence or make credibility determinations when considering a motion to dismiss under Rule 41.02(b) made at the close" of petitioner's case. 831 N.W.2d 483, 490-91 (Minn. 2013).[1] "Instead, the Appeal Panel is required to view the evidence produced [by petitioner] in a light most favorable to the committed person." *Id.* at 491. We review an appeal-panel decision granting a rule 41.02(b) motion de novo. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014).

[1] "The proceeding in which a committed person produces evidence is commonly referred to as a 'first-phase hearing.'" *Coker*, 831 N.W.2d at 486.

Appellant was required to produce evidence that demonstrates that he 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. *See* Minn. Stat. § 253B.18, subd. 15. Even under a de novo standard of review that includes viewing the evidence in the light most favorable to appellant, he did not satisfy his burden of production because he produced no competent evidence that he could make an acceptable adjustment to open society or that he is no longer in need of inpatient treatment and supervision. *See* Minn. Stat. § 253B.18, subd. 15. Appellant offered his opinion that he would do better if he were discharged. Countering this, Dr. Gilbertson opined that appellant "continue[d] to have significant adjustment problems that will require him to remain under treatment, a continued institutional placement and appropriate supervision upon transitioned placement in the community." Gilbertson also noted that appellant had no discharge plan and there had been "no discussion of how [appellant] would address his mental illness or living needs if released." The record also contained exhibits documenting an extensive list of rule infractions, and a risk assessment by Dr. Milz that appellant had a heightened risk of future violence and needed relapse-prevention programming.

Citing *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992), appellant argues that he must be discharged because his mental illness is resolved. In *Foucha*, the Supreme Court reversed a lower court decision that the patient should remain institutionalized even though he was in remission from his underlying mental illness, because his antisocial personality, something that could not be treated, made him a possible danger to himself or others. 504 U.S. at 74-75, 112 S. Ct. at 1782-83. The Supreme Court concluded that to

continue his commitment, the state needed to show that the patient was both mentally ill and dangerous. *Id.* at 77, 112 S. Ct. at 1784.

There are significant differences between *Foucha* and this matter. Foucha was institutionalized without any hearing when he was found not guilty of a crime by reason of insanity. *Id.* Appellant was committed after a hearing. Foucha's mental illness was most likely "a drug induced psychosis," which had resolved, and his examiners described him as "in 'good shape' mentally," and as "not suffering from a mental disease or illness." *Id.* at 75, 79, 112 S. Ct. at 1782, 1785. Appellant has an underlying and continuing serious mental illness that is in remission, but his examiners explained how the personality disorder and the bipolar disease are "intertwined." Finally, Foucha had not had "constitutionally adequate procedures to establish the grounds for his confinement." *Id.* at 79, 112 S. Ct. at 1785. Appellant had hearings before both the SRB and the appeal panel, as well as a hearing at the time of his commitment.

Appellant did not meet his burden of presenting a prima facie case that he is entitled to be discharged. The appeal panel did not err by denying appellant's request for discharge and granting respondents' motion to dismiss appellant's petition for rehearing and reconsideration.

II.

Appellant also requested a transfer to FTS, a less-restrictive setting. A patient committed as MID may request a transfer out of a secure treatment facility. Minn. Stat. § 253B.18, subd. 6 (2016). The SRB considers the following factors when determining whether a transfer is appropriate: "(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.* A patient seeking a transfer "must establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253B.19, subd. 2(c).[2]

We review the appeal panel's dismissal under rule 41.02(b) de novo, *Larson*, 847 N.W.2d at 534, and its finding of facts for clear error. *Foster*, 857 N.W.2d at 548. Findings are not clearly erroneous if "the record as a whole sustains the findings." *Rydberg v. Goodno*, 689 N.W.2d 310, 313 (Minn. App. 2004).

In its conclusions, the appeal panel considered the five transfer factors. It found:

> [Appellant] has been unable to demonstrate an ability to sustain himself in his present program. Since the issuance of the SRB Findings in January 2016, [appellant] has had numerous instances of rule violations and arguments with staff. He has continued to exhibit antisocial behavior by selling things to other patients to make a profit, making derogatory statements toward staff, and denying doing those things. When asked why he continued to break rules, [appellant] discussed how the "system is oppressive," and that the rules are biased and "go against [his] moral beliefs." [Appellant's] baseline risk for future violence is considered elevated, and his confrontation/challenging behavior deemed an early linkage to his capability for aggression. [Appellant's] present treatment needs and need for continued institutionalization, in addition to the assistance he appears to be deriving from his present skills program, indicate that transfer is not appropriate at this time.

[2] Transfer requests are subject to a different standard because the commitment statute places the burden of proof on the petitioning party; there is no conflict between rule 41.02(b) and this statute as there is with a discharge request. *See Foster v. Jesson*, 857 N.W.2d 545, 548 (Minn. App. 2014) (contrasting standards for discharge and transfer requests).

The appeal panel's transfer findings are supported by the record, and its decision to deny appellant's request for transfer to FTS is supported by those findings. The appeal panel did not err by denying appellant's request for transfer and granting respondents' motion to dismiss appellant's petition for rehearing and reconsideration.

Affirmed.