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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0761**

In the Matter of the Civil Commitment of:
Ronald Erwin Schmidt.

**Filed September 23, 2019
Affirmed
Cleary, Chief Judge**

Commitment Appeal Panel
File No. AP18-9031

Keith Ellison, Attorney General, Anthony R. Noss, Assistant Attorney General, St. Paul, Minnesota (for appellant Commissioner of Minnesota Department of Human Services)

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Considered and decided by Cleary, Chief Judge; Ross, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Minnesota Commissioner of Human Services appeals a decision by the Commitment Appeal Panel (CAP) to grant respondent Ronald Erwin Schmidt a provisional discharge from his commitment to the Minnesota Sex Offender Program (MSOP). The commissioner argues that the CAP misread Schmidt's proposed provisional-discharge plan (PPDP), improperly altered that plan, and based its decision on an erroneous credibility

determination. On this record, we reject the commissioner's arguments, and affirm the CAP.

FACTS

Previously, this court affirmed the district court's commitment of Schmidt to MSOP as a sexually dangerous person. *In re Civil Commitment of Schmidt*, No. A10-1588, 2011 WL 781343 (Minn. App. Mar. 8, 2011), *review denied* (Minn. May 17, 2011). In June 2017, Schmidt petitioned the Special Review Board (SRB) for, among other things, a provisional discharge from his commitment. As part of that process, Schmidt prepared a PPDP, and MSOP assigned Dr. Carr to write a sexual violence risk assessment of Schmidt. To prepare her assessment, Dr. Carr administered certain tests, including the Stable-2007 test.¹ Dr. Carr's assessment recommended against a provisional discharge. In March 2018, the SRB recommended denying relief, and Schmidt sought review by the CAP.

The CAP appointed Dr. Gilbertson to make recommendations in the case, and he submitted a report stating Schmidt was a candidate for a provisional discharge. At the first-phase hearing before the CAP, Dr. Gilbertson testified in favor of granting Schmidt's petition for provisional discharge. At the end of that first-phase hearing, the commissioner moved to dismiss Schmidt's petition, asserting that he did not make a prima facie case for the relief sought. The CAP denied the part of the motion addressing a provisional discharge.

¹ The Stable-2007 test addresses the likelihood of future sexual offenses by the subject of the test.

Dr. Carr and Dr. Gilbertson then updated their respective reports, but neither changed their position regarding whether Schmidt was a candidate for a provisional discharge. At the second-phase hearing before the CAP, Dr. Carr testified that Schmidt was not a candidate for a provisional discharge. The MSOP Clinical Courts Services Director, who worked with Schmidt three to five years earlier, testified similarly. Dr. Gilbertson disagreed, and testified that Schmidt could meet his treatment needs in an outpatient program.

A significant difference between the views of Schmidt by Dr. Carr and Dr. Gilbertson was that Dr. Carr put great weight on Schmidt's "negative emotionality," and on what she saw as parallels between his current "negative emotionality" and his conduct at the time of the offenses prompting his commitment. Dr. Gilbertson admitted to Schmidt's "argumentativeness," "testiness," and "resentful[ness]," and that these matters could be involved in his sexual offense cycle. Dr. Gilbertson stated, however, that he gave these matters less weight than Dr. Carr, because, while Schmidt could "become argumentative and have words with you and . . . be angry," these incidents did not manifest themselves in Schmidt's therapy ratings, which showed "emotional dysregulation – emotional regulation, Satisfactory, Enhanced, Satisfactory, Enhanced. [Schmidt] [d]oes not receive any ratings as Needs Improvement or still needs to be addressed." As a result, Dr. Gilbertson testified that "overall, [Schmidt is] doing well in the program, he's meeting the standards of the program." Dr. Gilbertson also testified that Schmidt's record shows that while he may "immediately take offense at a recommendation or a comment that staff will make . . . at a later point, he'll come in to submission with it; he'll give it a try."

In its resulting order, the CAP found Dr. Carr’s testimony not credible, mentioned the aspects of Dr. Gilbertson’s testimony quoted above, found Dr. Gilbertson’s testimony credible, and granted Schmidt a provisional discharge. The commissioner appeals.

D E C I S I O N

I

When addressing whether to grant a provisional discharge, the CAP considers, among other things, “whether the conditions of the [PPDP] 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) (2018). Schmidt’s PPDP states that he “will reside at a residence which contains those conditions and structure deemed necessary by the [CAP] after review by the [SRB].” Other provisions of the PPDP have similar phrasing. Noting that, by statute, the CAP reviews the SRB’s decisions, the commissioner asserts that Schmidt’s PPDP is defective because it requires the SRB to review the decisions of the CAP. *See* Minn. Stat. § 253D.28, subd. 1 (2018) (allowing MSOP patients to ask the CAP to review an SRB’s decision on a reduction in custody).²

The relevant provisions of Schmidt’s PPDP could be read as the commissioner suggests but, in context, they could also be read to say that the CAP will address the conditions of Schmidt’s residence but only “after review [of those matters] by the [SRB].” Schmidt states that this was his intended meaning, and acknowledges that the CAP reviews

² The parties agree that this question is properly before this court.

decisions of the SRB. The parties agree on what the law requires. In the proceedings before the CAP, the commissioner argued that Schmidt’s PPDP was defective because a different provision misstated the role of the MSOP director or the CAP. The CAP rejected that argument, stating that the commissioner’s proposed reading of that provision was “not how provisional discharge works. Although [Schmidt’s PPDP] could have been more artfully worded, it will be implemented in conjunction with MSOP policies” When addressing this different, awkwardly phrased, PPDP provision, the CAP read that provision to render its implementation consistent with the relevant authorities. On this record, we conclude that, by granting Schmidt’s petition for a provisional discharge despite the PPDP’s awkward language about the relationship between the SRB and the CAP, the CAP once again interpreted that language to result in implementation consistent with MSOP policies. Thus, we conclude that relief on this point is unnecessary.

II

A CAP “may not grant a . . . provisional discharge on terms or conditions that were not presented to the [SRB].” Minn. Stat. § 253D.28, subd. 3 (2018). The commissioner asserts that the CAP violated this statute because its grant of the provisional discharge is based on two changes it made to Schmidt’s PPDP.

A. **Independent living**

Schmidt’s PPDP proposes a range of possible supervision of his living arrangements “from independent living through 24 hours per day supervision.” The CAP noted that “[i]ndependent living is not an appropriate option,” and eliminated that option from Schmidt’s PPDP. The commissioner argues that, by doing so, the CAP was “considering

conditions not submitted to the [SRB].” The CAP rejected the argument, stating that it was “not considering a term or condition that was not presented to the [SRB]” but was “eliminating the option of independent living at this time.”

On appeal, the commissioner asserts that, “[w]hen the [CAP] eliminated the independent living language from the plan it, in effect, revised the [PPDP] by creating a new term or condition that was not presented to the SRB,” and that doing so “goes beyond the [CAP’s] statutory authority” under Minn. Stat. § 253D.28, subd. 3.³ This argument is unpersuasive because it ignores the distinction between eliminating a provision that the SRB considered and adding a provision that the SRB did not consider.⁴ Thus, we affirm the CAP’s removal of the independent living provision from Schmidt’s PPDP, and we need not address the commissioner’s argument that independent living is not appropriate for Schmidt.

B. Policy 230-5600

The commissioner also argues that the CAP altered Schmidt’s PPDP by reading it to “incorporat[e] by reference” MSOP Policy 230-5600, regarding supervision of provisionally discharged MSOP patients by a “reintegration agent.” The commissioner further asserts that the CAP cannot base its grant of a provisional discharge on its amending

³ To support this argument, the commissioner cites an unpublished opinion of this court. That opinion is factually distinguishable. Additionally, unpublished opinions are not precedential. Minn. Stat. § 480A.08, subd. 3 (2018).

⁴ We note that a CAP’s elimination of a provision considered by the SRB could have a cascade effect on other PPDP provisions, possibly rendering a PPDP unworkable. The commissioner, however, does not make that argument here.

of Schmidt's PPDP to include this policy because the policy was not a part of the PPDP presented to the SRB.

Schmidt "signed [his PPDP] on September 26, 2017," but the relevant version of MSOP Policy 230-5600 was "issued August 7, 2018, and [was] effective September 4, 2018." Thus, the relevant version of the policy did not exist when Schmidt signed his PPDP, and was not effective until five months after the SRB's April 2018 proceeding. Schmidt could not have included it in the PPDP he submitted to the SRB, and we decline to penalize him for failing to include a then-nonexistent policy in his PPDP. Also, Schmidt candidly presented Policy 230-5600 to the CAP. How the commissioner is prejudiced by the CAP's statement that Schmidt's PPDP would be implemented in a manner consistent with MSOP's own policy is unclear. Absent prejudice, any error on this point does not merit reversal. *See In re Civil Commitment of Poole*, 921 N.W.2d 62, 67 (Minn. App. 2018) (applying harmless error analysis to CAP's decision to consider certain evidence), *review denied* (Minn. Jan. 15, 2019).⁵

III

After an extensive review of the testimony and submissions of Dr. Carr, the CAP "did not find [Dr. Carr's] analysis of [Schmidt's] current functioning and risk credible." The CAP then thoroughly reviewed the testimony and submissions of Dr. Gilbertson. After

⁵ The commissioner's reply brief asserts that the CAP erred when it made Policy 230-5600 a part of Schmidt's PPDP because the policy can change without notice to the CAP, meaning that the terms of Schmidt's PPDP could change without notice to the CAP. The commissioner raises this argument for the first time in the reply brief. Questions first raised in a reply brief are not properly before this court. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291 n.3 (Minn. App. 2007). Therefore, we do not address it.

comparing the testimony and submissions of Dr. Carr and Dr. Gilbertson, the CAP found “Dr. Gilbertson’s analysis and opinion very credible and [found] that [Schmidt] meets the statutory criteria for provisional discharge. Dr. Gilbertson’s opinion was the more well-reasoned and credible interpretation of the facts and [Schmidt’s] current functioning and risk.”

The commissioner argues that Schmidt’s provisional discharge must be reversed because the CAP’s determination that Dr. Gilbertson’s analysis is credible is unsupported by the record. Specifically, the commissioner notes that Dr. Carr and Dr. Gilbertson each based their analysis, in part, on Schmidt’s results on the Stable-2007 test and that Dr. Carr had “up-to-date training” on that test while Dr. Gilbertson ““was not qualified on the [Stable-]2007,”” and was ““not certified to use that instrument.”” Consequently, the commissioner argues, the CAP erred in ruling that Dr. Gilbertson’s testimony was credible.

Appellate courts “defer to a district court’s evaluation of expert testimony.” *In re Civil Commitment of Fugelseth*, 907 N.W.2d 248, 256 (Minn. App. 2018) (quotation omitted), *review denied* (Minn. Apr. 17, 2018); *see In re Civil Commitment of Duvall*, 916 N.W.2d 887, 894 (Minn. App. 2018) (applying *Fugelseth* on appeal from a CAP’s decision), *review denied* (Sept. 18, 2018); *see also In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (stating that “[w]here the findings of fact rest almost entirely on expert testimony, the [district] court’s evaluation of credibility is of particular significance”). When reviewing a CAP’s findings of fact, appellate courts “will not reweigh the evidence, and it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Duvall*, 916 N.W.2d at 894 (quotation omitted).

Here, at both the first- and second-phase hearings, Dr. Gilbertson testified to his lack of expertise on the Stable-2007 test but noted that he was qualified on the 2002 version of the test. When the CAP found Dr. Gilbertson credible, it was aware of his lack of certification on the Stable-2007 test. Additionally, when asked whether the Stable-2007 test would help analyze Schmidt's emotionality, which Dr. Carr found to weigh against a provisional discharge, Dr. Gilbertson stated: "No, I don't think so . . . I don't believe that [Schmidt's emotionality] alone can be utilized as a concern of the type that Dr. Carr was giving it." Thus, a critical distinction between the opinions of Dr. Carr and Dr. Gilbertson goes to the weight given the result of the Stable-2007 test, rather than the use and scoring of the test itself. Dr. Gilbertson admitted that there was no disagreement on the administration and scoring of Schmidt's Stable-2007 testing. Because Dr. Gilbertson does not disagree with the scoring of Schmidt's Stable-2007 tests, his lack of certification in the scoring of that test has limited bearing on his analysis of Schmidt's condition. Accordingly, we reject the commissioner's assertion that the CAP erred in ruling Dr. Gilbertson to be credible.

Finally, we note that even if we adopted the commissioner's position and ruled that Dr. Gilbertson was not credible, that fact would not address the CAP's separate finding that it "did not find [Dr. Carr's] analysis of [Schmidt's] current functioning and risk credible."

Affirmed.