

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARON COLEMAN and SEAN)
COLEMAN, as parents and natural)
guardians of SEAN TAYLOR)
COLEMAN, a minor,)
)
Petitioners,)
)
vs.)
)
FLORIDA BIRTH-RELATED) Case No. 01-3063N
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Judgement and/or Motion to Dismiss, filed August 15, 2001, and the Order to Show Cause rendered August 16, 2001.

STATEMENT OF THE CASE

1. On August 2, 2001, Petitioners, Sharon Coleman and Sean Coleman, as parents and natural guardians of Sean Taylor Coleman (Sean), a minor, filed a petition with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan). Pertinent to the pending motions, the petition affirmatively averred that on August 6, 1996, Sean was born at Helen Ellis Hospital, Tarpon Springs, Florida, and that the

physician who provided obstetrical services at birth was Lynn Davidson, M.D.

2. DOAH served Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), with a copy of the claim on August 2, 2001. In response, NICA filed a Motion for Summary Judgement and/or Motion to Dismiss on August 15, 2001. The predicate for Respondent's motions was its assertion that, indisputably, the physician who provided obstetrical services during Sean's birth (Doctor Lynn Davidson) was not a "participating physician" as defined by law, since such physician had not paid the assessment required for participation or was not exempt from payment at the time of the alleged injury. Attached to the motions was an affidavit attesting to the fact that Dr. Lynn Davidson was not, at the time of Sean's birth, a "participating physician," as defined by Section 766.302(7), Florida Statutes.

3. By order of August 16, 2001, Petitioners were accorded 14 days to respond to Respondent's motions and to show good cause in writing, if any they could, why the requested relief should not be granted.

4. Petitioners responded to Respondent's motions on August 22, 2001, as follows:

It is the position of petitioners that Lynn Davidson, M.D. was not a participating physician as defined by law when she

provided obstetrical services during the course of the birth Sean Taylor Coleman. Petitioners take the position that there is no cognizable claim by petitioners against the Florida Birth Related Neurological Injury Compensation Association. The petition was filed in this instance because the hospital where the delivery took place, Helen Ellis Memorial Hospital, has claimed in a lawsuit against it that it was entitled to the exemption under the Neurological Injury Compensation Act because it was a "member" of NICA. Petitioners request the administrative law judge to find that Dr. Davidson was not a participating physician and a claim based on a hospital being a participating member of NICA where the treating obstetrician was not a participating physician fails to provide a cognizable basis for a claim against the Florida Birth Related Neurological Injury Compensation Association. Adjudication of that issue has been placed within the exclusive jurisdiction of the administrative law judge.

Petitioners are otherwise in agreement that respondent's motion for summary judgment and/or motion to dismiss is well taken.

5. Given the record, there is no genuine issue of fact regarding the status of the physician who provided obstetrical services during Sean's birth on August 6, 1996, and that she was not, at the time, a "participating physician," as that term is defined by Section 766.302(7), Florida Statutes. Consequently, Respondent's Motion for Summary Judgment and/or Motion to Dismiss is, for reasons appearing more fully in the Conclusions of Law, meritorious.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

7. The Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. Section 766.303(1), Florida Statutes.

8. The injured "infant, his personal representative, parents, dependents, and next of kin" may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

9. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award

compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

10. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

11. Pertinent to this case, "participating physician" is defined by Section 766.302(7), Florida Statutes, to mean:

. . . a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempted from payment at the time of injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred.

12. Here, it is undisputed that the physician alleged to have provided obstetrical services during the birth of the infant, Sean Taylor Coleman, was not a "participating physician" as that term is defined by Section 766.302(7), Florida Statutes, and as that term is used in Sections 766.301 through 766.316, Florida Statutes. Consequently, Respondent's motion for a final summary order of dismissal should be granted. Sections 766.309(1) and (2) and 766.31(1), Florida Statutes.

13. Where, as here, the administrative law judge determines that ". . . obstetrical services were not delivered by a participating physician at the birth, he [is required to] enter an order [to such effect] and . . . cause a copy of such

order to be sent immediately to the parties by registered or certified mail." Section 766.309(2), Florida Statutes. Such an order constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the petition for compensation filed by Sharon Coleman and Sean Coleman, as parents and natural guardians of Sean Taylor Coleman, a minor, be and the same is hereby dismissed with prejudice.

DONE AND ORDERED this 29th day of August, 2001, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2001.

COPIES FURNISHED:
(By certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.