

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KAREN D. KEMPF AND JEREMIAH)	
BROOKS, individually and on)	
behalf of and as parents and)	
natural guardians of TAYLOR)	
BROOKS, a minor,)	
)	
Petitioners,)	
)	
vs.)	Case No. 04-1992N
)	
FLORIDA BIRTH-RELATED)	
NEUROLOGICAL INJURY)	
COMPENSATION ASSOCIATION,)	
)	
Respondent.)	
_____)	

FINAL ORDER

With the parties' agreement, this case was heard on an agreed record.

STATEMENT OF THE ISSUE

At issue is whether Taylor Brooks, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On June 7, 2004, Karen D. Kempf and Jeremiah Brooks, individually and on behalf of and as parents and natural guardians of Taylor Brooks (Taylor), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether Taylor suffered an injury compensable under the

Florida Birth-Related Neurological Injury Compensation Plan (Plan), and whether the physicians who provided obstetrical services during Taylor's birth and the hospital at which the birth occurred complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on June 9, 2004, and on August 20, 2004, following an extension of time within which to do so, NICA gave notice that it was of the view that Taylor did not suffer a "birth-related neurological injury, as defined by Section 766.302(2), Florida Statutes [2002]"¹ and requested that a hearing be scheduled to address the issue of compensability.

By Notice of Hearing dated October 7, 2004, a hearing was scheduled for February 7 and 8, 2005, in Jacksonville, Florida, to address the issue of compensability. However, on February 3, 2005, the parties filed a Joint Pre-Hearing Stipulation, wherein they stipulated to certain facts, agreed to submit the case for resolution on a stipulated record, and requested that the hearing scheduled for February 7 and 8, 2005, be cancelled. The parties' stipulation was approved by Order of February 7, 2005, and the hearing scheduled for February 7, 2005, was cancelled.

The parties filed their Stipulated Record on February 10, 2005, and on February 14, 2005, NICA filed its proposed Final Order, and Petitioners filed their response to NICA's proposed

Final Order. The parties' submittals have been duly considered.

FINDINGS OF FACT

Stipulated facts

1. By their stipulation, the parties agree that Karen D. Kempf and Jeremiah Brooks, are the natural parents and guardians of Taylor Brooks, a minor. The parties also agree that Taylor was born a live infant on December 19, 2002, at Shands Hospital, Jacksonville, Florida, and her birth weight exceeded 2,500 grams.

2. Finally, the parties agree the physicians providing obstetrical services during Taylor's birth were John M. Baten, M.D.; Amy D. Greenwald, M.D.; Kimberly Beth Loar, M.D.; and Monica Joy George, M.D. However, there was no agreement that any of these doctor were participating physicians in the Plan.²

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Regarding compensability, Petitioners contend that Taylor "has a profound and permanent injury as a result of birth-related events, but do not dispute that Taylor's injury is not compensable within the definition of Section 766.302(2), Florida Statutes." (Joint Pre-hearing Stipulation, paragraph B1.) In response, NICA agrees Taylor did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, predicated on its view that the proof fails to support the conclusion that Taylor "suffers from a permanent and substantial mental impairment." (Joint Pre-hearing Stipulation, paragraph B2.)

5. Here, the records related to Taylor's birth and subsequent development, as well as the reports of neurologic evaluation by Michael Duchowny, M.D., demonstrate that Taylor is not substantially mentally impaired, much less permanently and substantially mentally impaired. Consequently, for reasons appearing more fully in the Conclusions of Law, the claim is not compensable, and it is unnecessary to resolve the degree of Taylor's physical impairment, whether Taylor's impairments resulted from a brain injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, or whether obstetrical services were delivered by a participating physician at birth.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

7. The Florida Birth-Related Neurological Injury Compensation 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. § 766.303(1), Fla. Stat.

8. The injured "infant, her or 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. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, 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." § 766.305(3), Fla. Stat.

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. § 766.305(6), Fla. Stat. 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. §§ 766.304, 766.309, and 766.31, Fla. Stat.

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.

§ 766.309(1), Fla. Stat. 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." § 766.31(1), Fla. Stat.

11. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), to mean:

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

12. Here, the proof demonstrated that Taylor was not permanently and substantially mentally impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Taylor does not qualify for coverage under the Plan. See also Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.); Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects

clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

13. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . 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." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Karen D. Kempf and Jeremiah Brooks, individually and on behalf of and as parents and natural guardians of Taylor Brooks, a minor, is dismissed with prejudice.

DONE AND ORDERED this 16th day of February, 2005, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2005.

ENDNOTES

1/ All citations are to Florida Statutes (2002) unless
otherwise indicated.

2/ The medical records related to Ms. Kempf's labor and
Taylor's birth suggest that Isaac Delke, M.D., may also have
participated in Taylor's birth; however, neither the
significance of that participation nor whether Dr. Delke was a
participating physician is of record. Notably, Dr. Delke was
accorded leave to intervene in this proceeding, but subsequently
voluntarily withdrew as a party.

COPIES FURNISHED:
(By certified mail)

C. Rufus Pennington, III, Esquire
Margol & Pennington, P.A.
Suite 1700
One Independent Drive
Jacksonville, Florida 32202-5005

M. Mark Bajalia, Esquire
Volpe, Bajalia, Wickes, Rogerson & Galloway
1301 Riverplace Boulevard, Suite 1700
Jacksonville, Florida 32207

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Tallahassee, Florida 32308

John M. Baten, M.D.
5706 Kristen Avenue
Bossier City, Louisiana 71112

Amy D. Greenwald, M.D.
836 Prudential Drive, Suite 1001
Jacksonville, Florida 32207

Kimberly Beth Loar, M.D.
653-1 West 8th Street
Jacksonville, Florida 32209

Monica Joy George, M.D.
653-1 West 8th Street
Jacksonville, Florida 32209

Shands Jacksonville
655 West 8th Street
Jacksonville, Florida 32209

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275

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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.