

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KRYSTEEN MCCRAY AND JASON)
MCCRAY, on behalf of and as)
parents and natural guardians)
of DAVIN ASIER MCRA Y, a minor,)
)
Petitioners,)
)
vs.) Case No. 04-4341N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
BETTY JANE L. CHIOTA, ARNP;)
CINDA M. BURTON, ARNP; MUNROE)
REGIONAL HEALTH SYSTEM, INC.,)
d/b/a MIDWIVES OF OCALA; and)
MUNROE REGIONAL HEALTH SYSTEM,)
INC., d/b/a MUNROE REGIONAL)
MEDICAL CENTER,)
)
Intervenors)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on July 6, 2005, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioners: George H. Anderson, III, Esquire
Best & Anderson, P.A.
1201 East Robinson Street
Orlando, Florida 32801

For Respondent: George W. (Trey) Tate, III, Esquire
Broad & Cassel
390 North Orange Avenue, Suite 1100
Orlando, Florida 32801

For Intervenors: Matt Bartolomei, Esquire
Hill, Adams, Hall & Schieffelin, P.A.
1030 West Canton Avenue, Suite 200
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STATEMENT OF THE ISSUES

At issue is whether Davin Asier McCray, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On December 6, 2004, Krysteen McCray and Jason McCray, on behalf of and as parents and natural guardians of Davin Asier McCray (Davin), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 7, 2004, and on March 1, 2005, following an extension of time within which to do so, NICA filed its response to the petition for benefits and gave notice that it was of the view

that Davin did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve whether the claim was compensable. Thereafter, a hearing was scheduled for July 6, 2005, to address the issue of compensability, and Betty Jane L. Chiota, ARNP; Cinda M. Burton, ARNP; Munroe Regional Health System, Inc., d/b/a Midwives of Ocala; and Munroe Regional Health System, Inc., d/b/a Munroe Regional Medical Center were accorded leave to intervene.

At hearing, the parties stipulated to the facts set forth in paragraphs 1 and 2 of the Findings of Fact, and Respondent's Exhibits A through I were received into evidence. No witnesses were called, and no further exhibits were offered.

The parties were accorded 10 days from the date of the hearing to file proposed orders. Respondent elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Stipulated facts

1. Krysteen McCray and Jason McCray are the natural parents and guardians of Davin Asier McCray, a minor. Davin was born a live infant on August 29, 2001, at Munroe Regional Medical Center, a hospital located in Ocala, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were provided at Davin's birth by Betty Jane L. Chiota, ARNP, and Cinda M. Burton, ARNP. At the time, nurses Chiota and Burton were certified nurse-midwives and were "participating physicians," as that term is used in the Plan. § 766.314(4)(c), Fla. Stat.

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 or spinal cord . . . 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. Here, the proof demonstrates that Davin, who presents with a diagnosis of periventricular leukomalacia and developmental delay in multiple areas, including language, motor activity, socialization, and behavior, is neither permanently and substantially mentally impaired nor permanently and substantially physically impaired. Consequently, for reasons appearing more fully in the Conclusions of Law, the claim is not compensable, and it is unnecessary to resolve whether Davin's impairments resulted from a brain or spinal cord injury caused

by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, or whether his impairments are attributable to another etiology.

CONCLUSIONS OF LAW

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

6. 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. § 766.303(1), Fla. Stat.

7. 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.

8. 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.

9. 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.

10. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, 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.

11. Here, the proof demonstrated that Davin was neither permanently and substantially mentally impaired nor permanently and substantially physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Davin 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).

12. 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 Krysteen McCray and Jason McCray, on behalf of and as parents and natural guardians of Davin Asier McCray, a minor, is dismissed with prejudice.

DONE AND ORDERED this 9th day of August, 2005, 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 9th day of August, 2005.

COPIES FURNISHED:
(Via 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 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.