

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHERYL LAMBRIGHT AND PAUL)
VINCENT LAMBRIGHT, individually)
and as parents and natural)
guardians of PATRICK LAMBRIGHT,)
a minor,)
)
Petitioners,)
)
vs.) Case No. 05-2153N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

With the parties' agreement, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on June 28, 2006, by teleconference.

APPEARANCES

For Petitioners: Philip Freidin, Esquire
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For Respondent: Donald H. Whittemore, Esquire
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STATEMENT OF THE ISSUES

1. Whether Patrick Lambright, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. If so, whether the hospital and the participating physician gave the patient notice, as contemplated by Section 766.316, Florida Statutes, or whether notice was not required because the patient had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On June 13, 2005, Cheryl Lambright and Paul Vincent Lambright, individually, and as parents and natural guardians of Patrick Lambright (Patrick), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Patrick qualified for compensation under the Plan and, if so, whether the healthcare providers complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on June 14, 2005, and on August 25, 2005, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view Patrick 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. In the interim, Naples Community Hospital, Inc., d/b/a North Collier Hospital (the hospital at which the infant was born) and Jeffrey Heitmann, M.D. (the participating physician who provided obstetrical services at the infant's birth) were granted leave to intervene.

A hearing to address compensability and notice was initially scheduled for March 14 and 15, 2006, however, at the parties' request, the hearing was rescheduled for June 28 and 29, 2006. Notably, by notice filed June 19, 2006, and June 26, 2006, respectively, North Collier Hospital and Dr. Heitmann withdrew from these proceedings.

At hearing, Respondent's Exhibit 1 was received into evidence. No witnesses were called and no further exhibits were offered.

FINDINGS OF FACT

Stipulated facts

1. Cheryl Lambright and Paul Vincent Lambright are the natural parents and guardians of Patrick Lambright, a minor. Patrick was born a live infant on September 25, 2001, at North Collier Hospital, a hospital located in Naples, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Patrick's birth by Jeffrey Heitmann, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Further findings related to compensability

3. The only proof offered at hearing on the issue of compensability was a report of neurology evaluation prepared by Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who, based on his review of Patrick's birth records and his evaluation of Patrick on August 3, 2005, concluded that Patrick's abnormalities were most likely developmentally based, as opposed to birth-related, and, regardless of the etiology of his abnormalities, Patrick was not substantially mentally or physically impaired. (Respondent's Exhibit 1) Dr. Duchowny noted the results of his evaluation, as follows:

NEUROLOGICAL EXAMINATION reveals Patrick to have difficulty with the evaluation as his attention span wanders and he does not make good eye contact. His speech output is diminished and there is marred lingual and labial disarticulation. The tongue movements are poorly coordinated. The uvula is midline and the pharyngeal folds are symmetric. Motor examination reveals symmetric strength and bulk. There is generalized hypotonia and bilateral SMO's are inserted into Patrick's shoes. He can build a tower of seven cubes but his fine

motor coordination is poor and there is a mild intention tremor. There are no other adventitious movements. No focal weakness or atrophy is noted. Sensory examination is intact to withdrawal of all extremities to stimulation. The deep tendon reflexes are 2-3+ and plantar responses are downgoing. Patrick walks in a consistent fashion with symmetric arm swing and turns crispy. He gets up from a standing position without difficulty and his head control is well-developed. There are no pathological reflexes. The neurovascular examination reveals no cervical, cranial, or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Patrick's neurological examination reveals developmental abnormalities in multiple domains consistent with a diagnosis of pervasive developmental disorder. He is clearly most affected in the area of language but has problems in motor coordination, social development, and attention. Patrick is developmentally abnormal, I do not believe that he has a substantial mental or motor impairment and I suspect that he will improve considerably in the future. A review of his birth records does not support the contention that Patrick's problems were acquired during labor and delivery. His MRI scan of April 14, 2004 reveals periventricular leukomalacia and thalamic gliosis. They are most likely to be acquired prenatally. I therefore do not believe that Patrick is compensable under the NICA statute.

CONCLUSIONS OF LAW

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

5. 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.

6. 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(4), Fla. Stat.

7. 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(7), 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.

8. 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.

9. 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.

10. Here, the proof failed to support a conclusion that, more likely than not, Patrick, suffered a "birth-related neurological injury," as defined by the Plan. Consequently, Patrick does not qualify for coverage under the Plan, and it is unnecessary to address whether the hospital and the participating physician complied with the notice provisions of the Plan. See § 766.309, Fla. Stat.

11. 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 petition for compensation filed by Cheryl Lambright and Paul Vincent Lambright, individually, and as parents and natural guardians of Patrick Lambright, a minor, is dismissed with prejudice.

DONE AND ORDERED this 7th day of July, 2006, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2006.

COPIES FURNISHED:

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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.