

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DAWN VOSE, on behalf of and as )  
parent and natural guardian of )  
ROBERT DONALD VOSE, a minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-0149N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
JILL PRAFKE, M.D. and WOMEN'S )  
HEALTH, P.A., )  
 )  
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 August 29, 2006, by video teleconference, with sites in Tallahassee and Pensacola, Florida.

APPEARANCES

For Petitioner: James R. Barnes, Esquire  
Michles & Booth, P.A.  
240 East Intendencia Street  
Pensacola, Florida 32502

For Respondent: Ronald A. Labasky, Esquire  
Young Van Assenderp, P. A.  
Gallie's Hall  
225 South Adams Street, Suite 200  
Tallahassee, Florida 32301

For Intervenors: Joseph A. Wilson, Esquire  
Wilson, Harrell, Farrington & Ford, P.A.  
307 South Palafox Street  
Pensacola, Florida 32502

STATEMENT OF THE ISSUE

At issue is whether Robert Donald Vose, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On January 12, 2006, Dawn Vose, on behalf of, and as parent and natural guardian of Robert Donald Vose (Robert), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Robert suffered an injury compensable under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on January 12, 2006, and on May 30, 2006, following a number of extensions of time within which to do so, NICA filed its response to the petition, and gave notice that it was of the view that Robert 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, Jill Prafke, M.D., and Women's Health, P.A., were accorded leave to intervene.

At hearing, Respondent's Exhibits 1-3 were received into evidence. No witnesses were called and no further exhibits were offered.

#### FINDINGS OF FACT

##### Stipulated facts

1. Dawn Vose is the parent of Robert Donald Vose, a minor. Robert was born a live infant on August 15, 2001, at Baptist Hospital, Pensacola, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Robert's birth was Jill Prafke, M.D., who, at all times material hereto, was a "participating physician" in the Plan, as defined by Section 766.302(7), Florida Statutes.

##### 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.

4. To resolve whether Robert suffered a "birth-related neurological injury," the parties offered the medical records related to Robert's birth and subsequent development (Respondent's Exhibit 3), as well as the opinions of Donald C. Willis, M.D., a physician who practices maternal-fetal medicine, and Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology. (Respondent's Exhibits 1 and 2).

5. With regard to injury, Dr. Willis was of the opinion that Robert suffered a brain injury (a venous sinus thrombosis and choroid plexus hemorrhage) at or around the time of delivery, that resulted in the development of hydrocephalus. However, he offered no opinion regarding the extent or significance of the brain damage. (Respondent's Exhibit 2).

6. In contrast, Dr. Duchowny evaluated Robert on May 4, 2006, and concluded that his "normal neurological status together with a review of the accompanying medical records does not suggest that he has a substantial mental or motor impairment," as required for coverage under the Plan. (Respondent's Exhibit 1). Dr. Duchowny reported the results of his evaluation, and the basis for his opinion, as follows:

I had the pleasure of evaluating Bobby Vose on May 4, 2006. Bobby is a 4-year-old, left-handed, prekindergarten student who was

brought by his father for evaluation. This was conducted in my office at Miami Children's Hospital.

HISTORY ACCORDING TO THE FATHER: Mr. Vose explained that Bobby was brought in order to "verify his abilities for NICA." He believes that Bobby is developing normally and in fact, is above average in several areas. He will be starting kindergarten in September and has done extremely well in his prekindergarten class setting. In fact, his language abilities are above average for age and he is bilingual with approximately 70 words of Spanish. He is a sociable boy who plays well with other children and his motor milestones have progressed normally. He sleeps through the night. His vision and hearing are intact. There has been no regression and no toxic or infectious exposure. Bobby is on no intercurrent medications.

Bobby's PAST MEDICAL HISTORY is significant for placement of a ventriculoperitoneal shunt as a newborn. He apparently experienced an intercranial hemorrhage into the right ventricle and had a shunt placed from the anterior horn of the right ventricle into the peritoneal cavity. His shunt has functioned well and there have been no complications or revisions . . . .

Otherwise, Bobby enjoys good health. He is not being followed for any chronic illnesses and has not required medical or surgical intervention subsequent to the newborn period.

PERINATAL HISTORY: Bobby was born at Baptist Hospital in Pensacola at 37-weeks gestation. There was an attempt at a vaginal delivery but "the head was wedged" and Bobby was ultimately delivered by emergency cesarean section. He weighed 8 pounds and breathed well at birth. He

remained in the hospital for approximately 11 days.

GROWTH AND DEVELOPMENT: Bobby's father could not recall Bobby's motor or language milestones except to note that all occurred at the normal time. Bobby is fully immunized and has no known drug allergies. He has had a hernia repaired.

\* \* \*

PHYSICAL EXAMINATION reveals an alert, well-developed, pleasant and cooperative 4-year-old boy. Bobby weighs 38 pounds. The skin is warm and moist. Bobby's head circumference measures 51.9 centimeters, which is within standard percentiles for age. The fontanelles are closed. The ventriculoperitoneal shunt reservoir is palpated over the right frontal bone and shunt tubing is noted in the right anterior lateral neck region and across the thorax and abdomen. There is a healed right, upper quadrant abdominal scar. There are no cranial or facial anomalies or asymmetries. No dysmorphic features or cutaneous stigmata are noted. The neck is supple without masses, thyromegaly or adenopathy. The lung fields are clear and the heart sounds are normal. There is no palpable abdominal organomegaly. Peripheral pulses are 2+ and symmetric.

NEUROLOGICAL EXAMINATION likewise discloses no significant findings. Bobby is alert, pleasant and cooperative. He answers all questions fluently with a good fund of information and an age appropriate stream of both thought and attention. He cooperated with all aspects of the evaluation. The cranial nerve examination reveals full visual fields to direct confrontation testing and normal ocular fundi. The optic disc margins are clearly demarcated and there is no optic pallor. There are no significant retinal findings. The

extraocular movements are full and conjugate. The pupils are 3 mm and react briskly to direct and consensually presented light. There is blink to threat from both directions. The tongue is moist and papillated and moves well in all plains. The uvula is midline. The pharyngeal folds are symmetric. Motor examination reveals symmetric strength, bulk, and tone. There are no adventitious movements and no focal weakness or atrophy. The deep tendon reflexes are 2+ throughout. Plantar responses are downgoing. Station and gait are appropriate for age. The arm swing is symmetric. Sensory examination is intact to withdrawal of all extremities to stimulation. Neurovascular examination reveals no cervical, cranial, or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Bobby's neurological examination in detail reveals no significant focal or lateralizing findings. The ventriculoperitoneal shunt is likely to be nonfunctional at this point.

Bobby's normal neurological status together with a review of the accompanying medical records does not suggest that he has a substantial mental or motor impairment. . . . I, therefore, do not believe that he is eligible for compensation under the NICA statute.

#### CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. 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. However, if a dispute exists, as it does 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.



11. 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.

12. 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.

13. Here, the proof demonstrated that any brain injury Robert may have suffered at birth did not render him "permanently and substantially mentally and physically impaired." Consequently, Robert does not qualify for coverage under the Plan. § 766.302(2), Fla. Stat. See also 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).

14. 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 Robert Donald Vose, a minor, does not qualify for coverage under the Plan, and the petition filed by Dawn Vose, on behalf of, and as parent and natural guardian of Robert Donald Vose, a minor, is dismissed with prejudice.

DONE AND ORDERED this 18th day of September, 2006, in Tallahassee, Leon County, Florida.



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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 18th day of September, 2006.

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.