

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARKEISHA JENKINS, ON BEHALF OF)
AND AS PARENT AND NATURAL)
GUARDIAN OF LAMARIYA REDFORD, A)
MINOR,)
)
Petitioner,)
)
vs.) Case No. 07-0872N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed March 22, 2007.

STATEMENT OF THE CASE

1. On February 13, 2007, Markeisha Jenkins, on behalf of and as parent and natural guardian of Lamariya Redford (Lamariya), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on February 20, 2007,¹ and on March 22, 2007, NICA filed a Motion

for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was its assertion that, indisputably, the physician (Christ-Ann A.E. Magloire, M.D.) named in the petition as having provided obstetrical services at Lamariya's birth was not a "participating physician," as defined by law, since she had neither paid the assessment required for participation nor was she exempt from payment of the assessment. § 766.302(7), Fla. Stat. See also § 766.314(4)(c), Fla. Stat. Attached to the motion was an affidavit of the Custodian of Records for NICA attesting to the fact that Dr. Magloire had not paid the assessment required for participation in the year 2004, the year in which Lamariya was born, and that she was not exempt from payment of the assessment.

3. Petitioner did not respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on April 5, 2007, which provided:

On March 22, 2007, Respondent served a Motion for Summary Final Order. To date, Petitioner has not responded to the motion. Fla. Admin. Code R. 28-106.204(4). Accordingly, it is

ORDERED that within 10 days of the date of this Order, Petitioner show good cause in writing, if any she can, why the relief requested by Respondent should not be granted.

4. Petitioner responded to the Motion for Summary Final Order and Order to Show Cause on April 13, 2007, and stated:

Petitioner realizes that the obstetrician attending to Petitioner was not a member of the Florida Birth-Related Neurological Injury Compensation Association. However, Petitioner filed an independent action against the hospital involved in the labor and delivery, Tenant Health System North Shore Inc., d/b/a North Shore Medical Center. The hospital raised as a defense that it was a member of NICA and had given Petitioner notice of the same during her hospitalization which necessitated the filing of the Petition.

5. Given the record, there is no dispute that the physician who provided obstetrical services during Lamariya's birth was not a "participating physician," as that term is defined by Section 766.302(7), Florida Statutes. Consequently, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.

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), and 766.305(1), 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.

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(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.

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 postdelivery 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 postdelivery 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, "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 exempt from payment at the time of the injury the assessment required for participation in the birth-related

neurological injury compensation plan for the year in which the injury occurred.

12. Here, indisputably, the physician alleged to have provided obstetrical services during Lamariya's birth 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, Lamariya does not qualify for coverage under the Plan.

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." § 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent's Motion for Summary Final Order is granted, and the petition for compensation filed by Markeisha Jenkins, on behalf of and as parent and natural guardian of Lamariya Redford, a minor, is dismissed with prejudice.

DONE AND ORDERED this 17th day of April, 2007, in
Tallahassee, Leon County, Florida.

S

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 17th day of April, 2007.

ENDNOTE

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (Christ-Ann A.E. Magloire, M.D.) named in the petition as having provided obstetrical services at Lamariya's birth, as well as the hospital (North Shore Medical Center) named in the petition as the facility at which Lamariya's birth occurred. To date, neither the physician nor the hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

COPIES FURNISHED:
(Via Certified Mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7099 3400 0010 4399 2109)

Jeffrey S. Hirsh, Esquire
Goldberg & Hirsh, P.A.
One Southeast Third Avenue
Suite 1280
Miami, Florida 33131
(Certified Mail No. 7099 3400 0010 4399 2093)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7099 3400 0010 4399 2086)

North Shore Medical Center
1100 Northwest 95th Street
Miami, Florida 33150
(Certified Mail No. 7099 3400 0010 4399 2079)

Christ-Ann A.E. Magloire, M.D.
5361 Northwest 22nd Avenue
Miami, Florida 33142
(Certified Mail No. 7099 3400 0010 4399 2062)

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.