

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL DAVID MASTERTON, ON BEHALF)
OF AND AS PARENT AND NATURAL)
GUARDIAN OF TYLER LEE)
MASTERTON, A MINOR,)
)
Petitioner,)
)
vs.) Case No. 08-6032N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

Upon due notice, the Division of Administrative Hearings, by Administrative Law Judge Ella Jane P. Davis, held a hearing in the above-styled case on December 7, 2009, via videoconference with sites in Tallahassee and St. Petersburg, Florida.

APPEARANCES

For Petitioner: Paul David Masterton, pro se
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For Respondent: Tana D. Storey, Esquire
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STATEMENT OF THE ISSUE

At issue is whether Tyler Lee Masterton, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On December 5, 2008, a Petition was filed with the Division of Administrative Hearings (DOAH) for compensation under the Plan by Paul David Masterton, on behalf of and as parent and natural guardian of Tyler Lee Masterton (Tyler), a minor.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 8, 2008. On May 28, 2009, NICA filed its response to the Petition for Benefits, giving notice that NICA was of the view that Tyler 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 December 7, 2009, to address the issue of compensability.

At hearing, Petitioner Paul David Masterton testified and presented the oral testimony of James Masterton. Joint Exhibit A, consisting of the medical records relating to the delivery and subsequent care of Tyler, was stipulated into evidence. Petitioner's Exhibits P-1 (School Board of Pinellas County Progress Report, School Year 2009-2010) and P-2 (Pinellas County

Schools, Pre-Kindergarten Assessment Team, Multidisciplinary Team Report) were admitted in evidence subject to the limitations set forth in Section 120.57(1)(c), Florida Statutes. Respondent's Exhibit 1 (Affidavit of Raymond J. Fernandez, M.D.), also was received in evidence, over objection, but subject to the limitations set forth in Section 120.57(1)(c), Florida Statutes.¹

A transcript was filed on December 28, 2009. Only Petitioner timely filed a Proposed Final Order, which has been considered.

FINDINGS OF FACT

1. The parties stipulated as fact that:
 - a. Paul David Masterton is the parent and natural guardian of Tyler Lee Masterton, a minor;
 - b. Tyler was born a live infant on August 4, 2004, at Bayfront Medical Center, a licensed hospital located in St. Petersburg, Florida;
 - c. Tyler's weight at birth exceeded 2,500 grams;
 - d. Obstetrical services were delivered at Tyler's birth by Manuel A. Reyes, 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;
 - e. Tyler suffered oxygen deprivation during labor, delivery and resuscitation in the immediate postdelivery period in a hospital;

f. The oxygen deprivation resulted in injury to Tyler's brain;

g. Such injury rendered Tyler permanently and substantially mentally impaired.

2. The record evidence supports the facts stipulated to by the parties.

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 § 766.31, Fla. Stat.

4. Here, the parties have stipulated, and the proof is otherwise compelling, that Tyler suffered a brain injury during the delivery process which resulted in his suffering a permanent and substantial mental impairment. What remains to be resolved is whether Tyler also suffers from a permanent and substantial physical impairment as a result of the brain injury sustained at birth.

5. As the proponent of the issue, the burden rested on Petitioner to demonstrate and prove that, in addition to the issues stipulated, Tyler suffered a permanent and substantial

physical impairment. Petitioner presented no expert medical witnesses to speak to that issue.

6. Petitioner presented his own lay testimony and the lay testimony of James Masterton, Tyler's grandfather. Their testimony and Tyler's School Progress Report and Pre-Kindergarten Assessment, which supplement the testimony, demonstrate observable physical activities below average for Tyler's age and learning deficits attributable to cerebral palsy. However, these observations do not demonstrate substantial physical impairment within reasonable medical certainty.

7. To address the nature and significance of Tyler's physical impairment, the parties had admitted in evidence the medical records from Tyler's delivery and subsequent care.

8. The Affidavit of Raymond J. Fernandez, M.D., a pediatric neurologist, who evaluated Tyler on March 19, 2009, was admitted only to explain or supplement non-hearsay evidence, but to the extent it may be considered, it also does not support a finding that Tyler is permanently and substantially physically impaired. Together with Dr. Fernandez's report, the medical records show that, although Tyler may evidence some physical impairment, Tyler sits independently, stands independently, walks, runs, and jumps on his own, and is able to interact with people and his environment. The medical records further

indicate that Tyler scores within the range of average, albeit at the low-end of average, for the physical activities for which he was tested. Further, Dr. Fernandez's opinion, as expressed in his Affidavit and accompanying report, supplements the information in the medical records and supports a finding that Tyler is not permanently and substantially physically impaired. Dr. Fernandez is of the opinion "that Tyler did not sustain a permanent and substantial physical impairment as a result of oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate postdelivery period in the hospital," even though his mental impairment will be permanent. In so concluding, Dr. Fernandez documented the results of his examination, as well as his conclusions, in pertinent part, as follows:

PHYSICAL EXAMINATION: Weight 38 pounds. Height 39 inches. Head circumference 47.75 cm. Pulse rate 88. Respiratory rate 18. There were no dysmorphic features or significant skin abnormalities. Heart, lungs, and abdomen were normal. There were no orthopedic abnormalities. He was active and his attention span was short. He was able to draw circles but could not intersect lines even when demonstrated to him. He named 3 of 3 colors correctly (green=gee, blue=bu, red=re). He pointed to several body parts (nose, eye, and belly) but not his ears. He pointed correctly to pictures of animals and he named them although his words were not clear. At times he became restless and wanted to leave the room and when frustrated he bit his hand and tried to hit his father. Mr. Masterton was able to

calm Tyler down by speaking gently and holding him. Tyler was not able to follow prepositional requests (I asked him to put an object on a chair, under a chair, and behind a chair but he did not understand these directions). He named a pencil but could not tell me what you do with one. Pupils were equal and briskly reactive to light. I was unable to visualize his optic nerves in detail but there was no gross abnormality noted. He had a subtle right esophoria. Face was symmetric. Palate and tongue midline. Muscle tone normal and there was no focal or lateralized weakness. He walked well independently, ran and jumped and hopped in place. He reached accurately with either hand and without tremor. He is left-handed but he also has good use of his right hand. He stacked five 1-inch cubes using either hand. He built a bridge with cubes when this was demonstrated to him. He climbed onto the examining table without assistance. Deep tendon reflexes 2+. There are no pathological reflexes.

* * *

Tyler's motor and cognitive development has been delayed but he is improving. At this time I do not find evidence for substantial physical impairment. He appears to have substantial cognitive impairment but he is improving and the ultimate outcome with regard to cognitive function is indeterminate at this time.

* * *

This addendum follows review of the All Children's Hospital medical record.

* * *

IMPRESSION: Based on record review there was evidence for perinatal encephalopathy probably due to oxygen deprivation. Tyler's early hypotonia was possibly due at least in

part to hypermagnesemia but this does not explain the seizures that occurred on day 1. Also, there was brain MRI evidence for cerebral ischemia consisting of signal abnormality on the diffusion-weighted images and in addition there was MRI evidence for intracranial hemorrhage. Subsequent brain MRIs showed evidence for diffuse white matter injury that probably correlates with the early ischemic change seen on the initial MRI.

As previously stated, there is evidence for substantial mental or cognitive impairment and while improving it is likely that this will be permanent. Tyler has secondary microcephaly with postnatal impairment of brain growth, likely due to ischemic brain injury. This is highly predictive of permanent mental or cognitive impairment. Also, as previously stated I did not find evidence for substantial motor impairment based on my examination of March 19, 2009, in spite of Tyler's ischemic brain injury.

9. Consequently, for reasons appearing more fully in the Conclusions of Law, the claim is not compensable.

CONCLUSIONS OF LAW

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

11. 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.

12. 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.

13. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant(s), 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.

14. In discharging this responsibility, the Administrative Law Judge must make the following determination based on 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. 766.302(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 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.

15. 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 . . . 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.

16. As the claimant, the burden rests on Petitioner to demonstrate entitlement to compensation under the Plan. See § 766.309(1)(a), Fla. Stat.; see also Balino v. Dep't of Health and Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." (citation omitted)).

17. Here, the proof failed to demonstrate that Tyler was rendered both "permanently and substantially mentally impaired" and "permanently and substantially physically impaired." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Tyler does not qualify for coverage under the Plan. See also Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. 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 Fla., 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 liability, it should be strictly construed to include only those subjects clearly

embraced within its terms."), approved, Fla. Birth-Related Neurological Injury Comp. Ass'n, 668 So. 2d 974, 979 (Fla. 1996).

18. Where, as here, the Administrative Law Judge determines that "the injury alleged is not a birth-related neurological injury . . . she or 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 Paul David Masterton on behalf of and as parent and natural guardian of Tyler Lee Masterton, a minor, is hereby denied and dismissed with prejudice.

DONE AND ORDERED this 28th day of January, 2010, in
Tallahassee, Leon County, Florida.

Ellajane P. Davis

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2010.

ENDNOTE

1/ Subsection 120.57(1)(c) provides: Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

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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.