

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NATASHA HINES and ALFONSO HINES )  
on behalf of and as parents and )  
natural guardians of AKEELAH )  
HINES, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 11-1163N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
HOMESTEAD HOSPITAL, INC., d/b/a )  
HOMESTEAD HOSPITAL, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent's Motion for Summary Final Order, served by U.S. Mail on September 15, 2011, and filed with the Division of Administrative Hearings (DOAH) the same date.

STATEMENT OF THE CASE

1. On March 4, 2011, Natasha Hines and Alfonso Hines, on behalf of and as parents and natural guardians of Akeelah Hines, a minor born March 12, 2006, filed a petition (claim) with 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 March 9, 2011; served Mohamad Shamohamady, M.D., on or about March 14, 2011; and served Homestead Hospital on or about June 27, 2011. Only Homestead Hospital, Inc., d/b/a Homestead Hospital, moved to intervene, and that motion was granted by an Order entered July 13, 2011.

3. Following an extension of time in which to do so, Respondent NICA served its response to the petition, which response was filed May 23, 2011, and gave notice that it was of the view that Akeelah had not suffered a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes, which renders an infant "permanently and substantially mentally and physically impaired," per section 766.302(2). NICA's response requested that a hearing be scheduled to resolve the issue of compensability. The case was subsequently scheduled for a final hearing on October 7, 2011.

4. On September 15, 2011, NICA filed its Motion for Summary Final Order. The predicate for NICA's motion was two-fold: first, that although Akeelah had suffered an injury at birth, that injury had not been caused by oxygen deprivation or mechanical injury and did not affect Akeelah's brain or spinal

cord and second, that Akeelah is not permanently and substantially mentally and physically impaired.

5. In support of its motion, NICA attached the affidavit of Michael Duchowny, M.D., a pediatric neurologist, and the affidavit of Donald Willis, M.D., a board-certified obstetrician with special competence in maternal-fetal medicine.<sup>1/</sup>

6. Dr. Duchowny's affidavit rendered opinions within reasonable medical probability, in pertinent part, as follows:

. . . The Florida Birth-Related Neurological Injury Compensation Association ("NICA") retained me as its expert in pediatric neurology to conduct an independent medical evaluation of the minor child AKEELAH HINES in this matter. As part of my evaluation I reviewed the medical records of both the child and her mother NATASHA HINES. The purpose of my review of the medical records and evaluation of AKEELAH HINES and NATASHA HINES was to determine whether she [Akeelah] suffers from an injury which rendered her permanently and substantially mentally and physically impaired, and whether such injury is consistent with an injury caused by oxygen deprivation or a mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

. . . I evaluated AKEELAH HINES on May 11, 2011. A true and accurate copy of my independent medical evaluation is attached hereto. All of the statements and opinions expressed therein are true and correct based upon my review of the records, the history taken, and my opinions from the evaluation of the child.

. . . In summary, AKEELAH HINES' neurologic examination reveals evidence of immature,

impulsive behavioral style and speech articulation deficit. She does not appear to be autistic but her presentation likely reflects underlying emotional issues. She has no focal or lateralizing findings to suggest a focal or structural brain damage.

I reviewed the medical records on Akeelah which were sent on March 28, 2011. They confirm the historical information provided by Akeelah's mother. Of note, Akeelah's Apgar scores were 9 and 9 at 1 and 5 minutes and arterial blood gases drawn approximately 90 minutes after birth were entirely normal. Akeelah never required intubation and her only ventilatory assist was oxygen by mask. She remained in the regular Newborn Nursery for nine days primarily for phototherapy of her jaundice.

I also had an opportunity to review Akeelah's MRI scans of the brain which were performed at Miami Children's Hospital. These studies demonstrate static lesions of the white matter consisting of punctuate areas of increased signal primarily in the frontal lobe. There is no mass effect and the remainder of the MRI examination is normal. There appears to be no evidence of hypoxic or ischemic brain injury.

I, therefore, do not believe that Akeelah has either a substantial or permanent physical impairment and her problems are primarily developmentally based and not the result of a neurological injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury. I, therefore, believe that Akeelah should not be considered for compensation within the NICA Program.

7. Dr. Duchowny's incorporated medical report also provides the following assessment, among other views:

I had the pleasure of evaluating Akeelah Hines on May 11, 2011. . . .

. . . MEDICAL HISTORY: Akeelah is a 5-year-old girl who is developmentally delayed. Her mother stated that she has problems stemming from "brain damage in her white matter" and that she "has global developmental delay." Akeelah suffers from speech articulation problems and learning disabilities. . . . She is said to have trouble learning new information and also has problems paying attention. . . .

\* \* \*

Akeelah has had intermittent problems with leg pain going back at least one year. . . . A possible diagnosis of childhood arthritis is entertained but Akeelah has not yet been evaluated by rheumatology.

Akeelah has suffered from gastroesophageal reflux since infancy. . . .

Akeelah's activity level is high and she often inadvertently "runs into things." A helmet has been recommended to protect her from craniofacial injury.

\* \* \*

Akeelah's vision and hearing are stable. She suffers from reactive airway disease and takes Singulair and Flovent. Zyrtec and Prilosec are prescribed for her gastroesophageal reflux disease.

\* \* \*

GROWTH AND DEVELOPMENT: Akeelah rolled over at six months, sat at seven months, stood at 13 months, and walked at 13-14 months. She did not say single words until age three years and was toilet trained at age three but still has accidents at night.

\* \* \*

PHYSICAL EXAMINATION today reveals an alert, cooperative but impulsive, immature and oppositional, well-developed and well-nourished 5-year-old girl who was clinging to her mother and had difficulty separating throughout the evaluation. The actual physical examination was completed only with difficulty as Akeelah essentially would not cooperate and threw her arms around her mother the whole time. Her attention span is short and it is difficult to engage her in meaningful conversation. She would refuse to answer simple questions. At other times, she asked questions with relatively well-developed sentences. Her speech articulation is poor for lingual, labial and guttural consonants. She did not drool. Head circumference measured 49.3 cm and the fontanels are closed. There are no cranial or facial anomalies or asymmetries. There is one pigmented nevus of the left arm but no other neurocutaneous stigmata. There are no dysmorphic features. The neck is supple without masses, thyromegaly, or adenopathy. The heart sounds are strong and there are no murmurs, shocks or thrills. The lung fields are clear. The abdomen is soft and nontender. There are no audible abnormalities. Peripheral pulses are 2+ and symmetric.

NEUROLOGICAL EXAMINATION reveals Akeelah to be alert, \_\_\_\_\_ to the environment but uncooperative with respect to verbal commands. Her attention span is short and she demonstrates an impulsive behavioral style. Cranial nerve examination reveals full visual fields to direct confrontation testing. A brief funduscopic examination disclosed no abnormalities. The pupils were 3 mm and react briskly to direct and consensually presented light. There is no nystagmus. The facial muscles move symmetrically. The uvula is midline. The pharyngeal folds are symmetric. The tongue

is moist and papillated and moves well in all directions. Motor examination reveals symmetric muscle strength, bulk and tone. There are no adventitious movements and no focal weakness or atrophy. Finger-to-nose maneuvers were accomplished briefly due to poor cooperation. Her gait was stable without lateralized asymmetry. Deep tendon reflexes are 1-2+ bilaterally with flexor/plantar responses. Sensory examination was intact to withdrawal of all extremities to stimulation. The neurovascular examination reveals no cervical, cranial, or ocular bruits and no temperature or pulse asymmetries. The spine is straight without dysmorphism.

In SUMMARY, Akeelah's neurologic examination reveals evidence of immature, impulsive behavioral style and speech articulation deficit. She does not appear to be autistic but her presentation likely reflects underlying emotional issues. She has no focal or lateralizing findings to suggest a focal or structural brain damage.

I reviewed the medical records on Akeelah which were sent on March 28, 2011. They confirm the historical information provided by Akeelah's mother. Of note, Akeelah's Apgar scores were 9 and 9 at 1 and 5 minutes and arterial blood gases drawn approximately 90 minutes after birth were entirely normal. Akeelah never required intubation and her only ventilator assist was oxygen by mask. She remained in the regular Newborn Nursery for nine days primarily for phototherapy of her jaundice.

I also had an opportunity to review Akeelah's MRI scans of the brain which were performed at Miami Children's Hospital. These studies demonstrate static lesions of the white matter consisting of punctuate areas of increased signal primarily in the frontal lobe. There is no mass effect and the remainder of the MRI examinations is

normal. There appears to be no evidence of hypoxic or ischemic brain injury.

I, therefore, do not believe that Akeelah has either a substantial or permanent physical impairment and her problems are primarily developmentally based not the result of a neurological injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury. I, therefore, believe that Akeelah should not be considered for compensation within the NICA Program. (emphasis added).

8. Dr. Willis' affidavit opines, within a reasonable degree of medical probability that:

\* \* \*

. . . The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in maternal-fetal medicine to review the medical records of both the child, AKEELAH HINES, and her mother NATASHA HINES. The purpose of my review of those medical records was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

. . . On April 12, 2011, I issued a Report of my review. A true and accurate copy of my Report is attached hereto. All of the statements and opinions expressed there are true and correct based upon my review of the medical records.

. . . The baby was not depressed at birth. Apgar scores were 9/9. Spontaneous cry and respiratory effort were present at birth. The newborn child was felt to be in no



distress and transferred to the normal newborn nursery. Hospital course was complicated by elevated bilirubin levels due to ABO blood type incompatibility. A small atrial-septal defect of the heart was identified by ECHO.

After hospital discharge, the baby was evaluated for failure to thrive. Chromosome studies, including microarray were negative. Feeding evaluation showed absent chewing skills. By 21 months of age the child was diagnosed with global developmental delay and cerebral palsy. MRI was consistent with static encephalopathy.

In summary, this child was delivery [sic] by repeat Cesarean section prior to the onset of labor. The baby was not depressed at birth. Apgar scores were 9/9. Cerebral palsy and global developmental delay were diagnosed during early childhood. These problems are not birth related.

The mother was not in labor at time of repeat Cesarean section delivery. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during delivery or the immediate post delivery period.

. . . As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital. Further, in that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital, then accordingly, there was no causal event which could have rendered AKEELAH HINES permanently and substantially mentally and physically impaired as a result of same. (emphasis added.)

9. Dr. Willis' attached and incorporated letter is somewhat less precise in the summation but ultimately reaches the same conclusion as follows:

\* \* \*

Elective repeat Cesarean section delivery was done at 39 weeks gestational age. Hospital records indicate that she was not in labor. Amniotic fluid was clear at delivery. Birth weight was 2,886 grams or 6 lbs 9 oz's.

The baby was not depressed at birth. Apgar scores were 9/9. Spontaneous cry and respiratory effort were present at birth. The newborn child was felt to be in no distress and transferred to the normal newborn nursery. Hospital course was complicated by elevated bilirubin levels due to ABO blood type incompatibility. A small atrial-septal defect of the heart was identified by ECHO.

After hospital discharge, the baby was evaluated for failure to thrive. Chromosome studies, including microarray were negative. Feeding evaluation showed absent chewing skills. By 21 months of age the child was diagnosed with global developmental delay and cerebral palsy. MRI was consistent with static encephalopathy.

In summary, this child was delivered by repeat Cesarean section prior to the onset of labor. The baby was not depressed at birth. Apgar scores were 9/9. Cerebral palsy and global developmental delay were diagnosed during early childhood. These problems are not birth related.

The mother was not in labor at time of repeat Cesarean section delivery. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to

the baby's brain during delivery or the immediate post delivery period. (emphasis added).

10. Neither Petitioners nor Intervenor filed a timely response in opposition to the Motion for Summary Final Order<sup>2/</sup> alleging any facts in opposition to NICA's Motion for Summary Final Order of Dismissal.

11. An Order was entered on September 28, 2011, which provided, in pertinent part:

On September 15, 2011, Respondent served a Motion for Summary Final Order. To date, neither Petitioners nor Intervenor have responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nevertheless, and notwithstanding that they have been accorded the opportunity to do so, it is

ORDERED that by October 10, 2011, Petitioners and Intervenor shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted, thereby disposing the case against Petitioners.

12. No timely response to the September 28, 2011 Order, nor to the Motion for Summary Final Order has been filed. Accordingly, nothing has been provided to refute the expert medical opinions tendered by affidavits filed concurrent with the motion.<sup>3/</sup>

13. It is of some concern that at one point Dr. Willis' opinions are couched, in part, in terms of "no brain injury,"

without ruling out a spinal cord injury. However, he is otherwise clear in his affidavit, as is Dr. Duchowny.

14. Given the record, there is no dispute of material fact. Specifically, there is no dispute that although Akeelah Hines suffers some developmental deficits, possibly originating at birth, she did not suffer an injury caused by oxygen deprivation or mechanical injury that affected her brain or spinal cord, and further, that although Akeelah has some disabilities, she is not permanently and substantially physically impaired.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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. (emphasis added).

21. Here, indisputably, Akeelah Hines suffers from some type of disability, probably developmental, but her injury

apparently did not occur during the statutory period for compensability nor was it caused by oxygen deprivation or mechanical injury. Finally, it does not affect her brain or spinal cord. Further, although Akeelah has developmental and physical disabilities, she is not permanently and substantially both physically and mentally impaired. Given the provisions of section 766.302(2), Akeelah 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 liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

#### CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. NICA's Motion for Summary Final Order is granted.
2. The Petition for Benefits Pursuant to Florida Statute Section 766.301, et seq., filed by Natasha Hines and

Alfonso Hines, on behalf of and as parents and natural guardians of Akeelah Hines, a minor, be, and the same, is dismissed with prejudice.

DONE AND ORDERED this 18th day of October, 2011, in Tallahassee, Leon County, Florida.



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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 18th day of October, 2011.

ENDNOTES

1/ See, e.g., Vero Beach Care Ctr v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985) ("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. Gen. Parcel Servs., 646 So. 2d 242, 245 (Fla. 1st DCA 1994) ("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Ins. Co. v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000) ("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

2/ Rule 28-106.103 provides:

In computing any period of time allowed by this chapter, by order of a presiding



officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in these rules, legal holiday means those days designated in Section 110.117, F.S. Except as provided in Rule 28-106.217, F.A.C., five days shall be added to the time limits when service has been made by regular U.S. mail. One business day shall be added when service is made by overnight courier. No additional time shall be added if service is made by hand, facsimile transmission, or electronic mail or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C.

Rule 28-106.204 provides:

(1) All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. The original written motion shall be filed with the presiding officer. When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition. Written motions will normally be disposed of after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The presiding officer shall conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion.

(2) Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service.

(3) Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion.

(4) In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

(5) In cases in which the Division of Administrative Hearings has recommended order authority, a party may file a motion to relinquish jurisdiction whenever there is no genuine issue as to material fact.

(6) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

3/ When, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change that result; that is, evidence to generate an issue of a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Co., Inc. v. Lake Shore Growers Coop. Ass'n, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

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 § 766.311, Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n 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.