

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MISTY MOBLEY AND TAVARIS)
SANDERS, individually and as)
parents of TAVARION SANDERS, a)
minor,)
)
Petitioners,)
)
vs.) Case No. 11-5439N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
HOMESTEAD HOSPITAL, INC., d/b/a)
HOMESTEAD HOSPITAL,)
)
Intervenor.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on May 3, 2012.

STATEMENT OF THE CASE

On October 19, 2011, Petitioners, Misty Mobley and Tavaris Sanders, individually and as parents of Tavarion Sanders (Tavarion), a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301 et

seg. (Petition) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Mohamad Shahmohamady, M.D., and Homestead Hospital.

DOAH served NICA with a copy of the Petition on October 26, 2011. DOAH served copies of the Petition on Homestead Hospital and Dr. Shahmohamady on October 27, 2011. As of the date of this Summary Final Order of Dismissal, Dr. Shahmohamady has not petitioned to intervene in this proceeding. On November 23, 2011, Homestead Hospital, Inc., d/b/a Homestead Hospital filed a Petition for Leave to Intervene. By Order dated December 6, 2011, Homestead Hospital was granted leave to intervene.

On May 3, 2012, NICA filed a Motion for Summary Final Order, asserting that Tavarion did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. No response was filed to the motion.

On May 16, 2012, an Order to Show Cause was entered requiring Petitioners to show cause why the Motion for Summary Final Order should not be granted. On May 16, 2012, Homestead Hospital filed Intervenor, Homestead Hospital, Inc., d/b/a Homestead Hospital's Motion for Extension of Time to Respond to NICA's Motion for Summary Order. The motion was granted, and an Order was entered on May 25, 2012, extending the time for

Homestead Hospital to respond to the Motion for Summary Final Order to July 25, 2012. As of the date of this Summary Final Order of Dismissal, Homestead Hospital has not filed a response to the Motion for Summary Final Order.

FINDINGS OF FACT

1. Tavarion Sanders was born on September 16, 2009, at Homestead Hospital in Homestead, Florida. Tavarion weighed 2,755 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Tavarion. In an affidavit dated April 27, 2012, Dr. Willis stated:

The Florida Birth-Related Neurological Injury Compensation Association retained me as an expert in maternal-fetal medicine to review the medical records from both Tavarion Sanders and his mother, Misty Mobley. The purpose of my review of the medical records of Tavarion Sanders and Misty Mobley 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.

* * *

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or in the immediate post delivery period.

As such, it is my opinion that there was no oxygen deprivation or mechanical injury 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 immediately post-delivery period in the Hospital, then accordingly, there was no causal event which would have rendered Tavarion Sanders permanently and substantially mentally and physically impaired as a result of same.

3. Tavarion was examined and evaluated by Michael S. Duchowny, M.D. (Dr. Duchowny), on January 25, 2012.

Dr. Duchowny found the following on his examination of Tavarion:

NEUROLOGIC EXAMINATION reveals an irritable infant who is prone to temper tantrums and difficult to examine for this reason. Relatively minor perturbations cause Tavarion to cry and kick, and the parents are continually soothing him in order to complete testing. He clearly recognizes and understands his environment and does show curiosity for novel stimuli. However, his attention span remains fixed for just a few seconds after which he begins crying and fidgeting. He understood occasional simple commands but showed no evidence of expressive communication by either verbal or nonverbal means. Cranial nerve examination reveals full visual fields to direct confrontation testing. The pupils are 3 mm and react briskly to direct and consensually presented light. Funduscopic examination was felt to be suboptimal due to poor cooperation but was grossly normal. There remains a subtle alternating esotropia bilaterally. The extraocular movements are otherwise full and there is no nystagmus. There are no facial asymmetries. The uvula is midline. The pharyngeal folds are

symmetric. The tongue movements are poorly coordinated. Motor examination reveals a generalized static hypotonia with slight generalized hypertonicity with activity. There is no focal weakness, fasciculation or atrophy. Tavarion walks across the room in a stable fashion and his arm swing is symmetric. There is slight scissoring of the lower extremities when he walks. Deep tendon reflexes are 1-2+ bilaterally and both plantar responses are downgoing. Tavarion withdraws all extremities to stimulation in a symmetric fashion. 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.

A review of Tavarion's medical records confirms that he was born by cesarean section at Homestead Hospital. His birth weight was 2755 gm and he was judged to be at 37 weeks gestation. Apgar scores were 6 and 9 and Tavarion breathed spontaneously and did not require ventilatory support. He never experienced seizures. An ultrasound examination of the brain performed on September 17 was normal. Bilateral cephalohematomas were recognized and treated conservatively.

Tavarion's neurological examination today reveals findings consistent with a substantial mental impairment. He has a moderate motor impairment which I suspect will improve over time and I do not believe that his motor deficit ultimately will prove to be substantial in nature. Furthermore, the medical records do not provide supporting evidence that Tavarion's neurological problems were acquired intrapartum during labor and delivery due to either asphyxia or mechanical injury. I would however like to review the MRI and CT scans before making a final recommendation.

4. By letter dated April 19, 2012, Dr. Duchowny opined:

I have had an opportunity to review an MR study on Tavarion. This study does not reveal findings to suggest hypoxic ischemic encephalopathy. It therefore provides further corroboration of the opinion that Tavarion should not be considered her [sic] compensation with the NICA Program.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis and Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Tavarion did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or immediate post-delivery period are credited. Additionally, Dr. Duchowny's opinion that Tavarion does not have a substantial and permanent physical impairment is credited.

CONCLUSIONS OF LAW

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

7. 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.

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 DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, 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. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means 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.

12. The evidence, which is not refuted, established that Tavarion did not sustain 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. Therefore, Tavarion is not eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Misty Mobley and Tavaris Sanders, individually and as parents of Tavarion Sanders, is dismissed with prejudice.

DONE AND ORDERED this 14th day of August, 2012, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).