

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TE'YANI ALBURY, a minor, by and
through her natural parents and
legal guardians, KATREKA
WASHINGTON and THOMAS ALBURY;
and KATREKA WASHINGTON and
THOMAS ALBURY, Individually,

Petitioners,

vs.

Case No. 13-2114N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

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 September 19, 2013.

STATEMENT OF THE CASE

On June 10, 2013, Petitioners, Katreka Washington and Thomas Albury, individually and on behalf of and as parents and natural guardians of Te'Yani Albury (Te'Yani), a minor, filed a Petition for Compensation Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the

Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Mark Tomback, M.D., and Sandria Fearon-Hardy as the physicians providing obstetric services at the birth of Te'Yani at Plantation General Hospital in Plantation, Florida.

DOAH served NICA with a copy of the Petition on June 14, 2013. Dr. Tomback was served a copy of the Petition on June 17, 2013. Dr. Fearon-Hardy and Plantation General Hospital were served copies of the Petition on September 23, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Tomback, Dr. Fearon-Hardy, and Plantation General Hospital have not petitioned to intervene.

NICA filed a Motion for Summary Final Order, asserting that Te'Yani did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served by email on September 19, 2013. As of the date of this Summary Final Order, Petitioners have not filed a response. However, in a Response to Order of September 3, 2013, NICA advised that Petitioners did not dispute that their claim was not compensable under the NICA Plan.

FINDINGS OF FACT

1. Te'Yani was born on April 26, 2012, at Plantation General Hospital located in Plantation, Florida. Te'Yani weighed 3,505 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Te'Yani. In an affidavit dated September 16, 2013, Dr. Willis opined the following:

It is my opinion that the medical records suggest that baby did not suffer significant oxygen deprivation during labor or delivery. Anemia due to blood loss occurred just prior to delivery and the newborn anemia resulted in oxygen deprivation and multisystem failure. However, there are no studies to indicate the oxygen deprivation resulted in brain damage.

As such, it is my opinion that there was an apparent obstetrical event that occurred prior to delivery that caused anemia. The anemia resulted in oxygen deprivation during the immediate post delivery period. There is no documentation in the medical records to suggest the oxygen deprivation resulted in brain damage.

3. Michael S. Duchowny, M.D., a pediatric neurologist, was retained by NICA to examine Te'Yani. Dr. Duchowny examined Te'Yani on August 14, 2013. In an affidavit dated September 18, 2013, Dr. Duchowny opined as follows:

It is my opinion that Te'Yani's neurological examination disclosed no significant findings. She is functioning at age level with respect to her mental and physical abilities and there is little evidence of left-sided motor disability.

I had an opportunity to review medical records which were sent to me on June 27, 2103, and supplementary records faxed on July 2013. The records document Te-Yani's [sic] birth at Plantation General Hospital which was complicated by vaginal bleeding thought to represent placental abruption or a

velamentous insertion. Te'Yani was born at 30 weeks gestation and weighed 7 pounds 12 ounces at birth. Her Apgar scores were 4, 5, and 7 at 1, 5, and 10 minutes. Arterial blood gases revealed a pH of 7.17 and a base excess of -17.2. Te'Yani breathed initially then became cyanotic and apneic and required assisted ventilation with CPAP bag and mask. Her neonatal course was complicated by anemia and thrombocytopenia which required transfusions. She was placed on a hyperthermia protocol for three days. Suspected sepsis and pneumonia were both treated vigorously with antibiotics. Cultures were remarkable.

As such, it is my opinion that Te'Yani's normal neurological status documents that she is not suffering from either a permanent or substantial mental or physical impairment. For this reason, I do not recommend that she be considered for compensation with the NICA program.

4. A review of the file does not show any contrary opinions to those of Dr. Willis and Dr. Duchowny. The opinions of Dr. Willis and Dr. Fernandez that Te'Yani did not suffer a brain injury due to oxygen deprivation during labor and delivery are credited. Dr. Duchowny's opinion that Te'Yani does not have substantial and permanent mental and physical impairments is credited.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. The evidence, which is not refuted, established that Te'Yani did not sustain an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. The evidence also established that Te'Yani does not suffer from substantial and permanent mental and physical impairments. Therefore, Te'Yani 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 Katreka Washington and Thomas Albury, individually and as parents and natural guardians of Te'Yani Albury is dismissed with prejudice.

DONE AND ORDERED this 4th day of October, 2013, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
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Filed with the Clerk of the
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this 4th day of October, 2013.

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).