

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GINELLE THOMAS, as mother and
natural guardian of TRISTAN N.
THOMAS, a minor,

Petitioner,

vs.

Case No. 13-4174N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on February 25, 2014.

STATEMENT OF THE CASE

On October 23, 2013, Petitioner, Ginelle Thomas, as mother and natural guardian of Tristan N. Thomas (Tristan), a minor, filed a Petition for Benefits Pursuant to Florida Statutes 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 Felicia Fox,

M.D., as the physician providing obstetric services at the birth of Tristan at Baptist Medical Center in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on October 28, 2013. DOAH served Dr. Fox with a copy of the Petition on October 29, 2013. On December 23, 2013, DOAH received a receipt from the United States Postal Service showing that Baptist Medical Center had been served with a copy of the Petition. As of the date of this Summary Final Order of Dismissal, neither Baptist Medical Center nor Dr. Fox has petitioned to intervene in this proceeding.

On February 25, 2014, NICA filed a Motion for Summary Final Order, asserting that Tristan did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On February 26, 2014, Petitioner filed Petitioner's Unopposed Motion for Extension of Time to Respond to Respondent's Motion for Summary Final Order, which was granted by Order dated February 26, 2014, extending the time for responding to the Motion for Summary Final Order to April 18, 2014.

On April 17, 2014, the parties filed a Joint Response to Order of February 7, 2014, in which they stated:

1. The parties have conferred and they do not believe that a hearing is needed at this time.

2. The parties will await the Administrative Law Judge's ruling on the pending Motion for Summary Final Order filed by the Respondent, as well as the ALJ's review of the underlying records filed by the Petitioner in conjunction with the Petition for Benefits.

Other than the joint response filed on April 17, 2014, Petitioner has made no response to the Motion for Summary Final Order. Any underlying medical records filed by Petitioner with her Petition would have been forwarded to Respondent, and would not be retained by DOAH. Thus, the undersigned has no medical records to review other than those filed by Respondent in support of its Motion for Summary Final Order.

FINDINGS OF FACT

1. Tristan N. Thomas was born on August 12, 2009, at Baptist Medical Center in Jacksonville, Florida. Tristan weighed in excess of 2,500 grams.

2. Donald Willis, M.D., was requested by NICA to review the medical records of Tristan. Based on his review of the medical records, Dr. Willis opined as follows:

In summary, labor was complicated by hypertension and a placental abruption. This resulted in a depressed baby at birth. Full resuscitation was required. The initial blood gas after birth was consistent with severe acidosis with a pH of 6.6. Seizures developed shortly after birth. EEG and MRI were consistent with HIE.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing

into the immediate post delivery period. This oxygen deprivation resulted in brain injury. I am not able to comment about the severity of the brain injury.

3. Michael S. Duchowny, M.D., was requested by NICA to perform an independent medical evaluation of Tristan. The evaluation was done on January 22, 2014. Based on his evaluation, Dr. Duchowny opined as follows:

In summary, Tristan's neurologic examination reveals evidence of multiple developmental delays in the social, communication and behavioral domains. His findings are consistent with a clinical diagnosis of autism spectrum disorder and there are no specific focal or lateralizing findings to suggest structural brain damage.

I had an opportunity to review medical records supplied to me which confirmed the history obtained from Tristan's mother. Tristan was delivered at term at Baptist Medical Center. His mother suffered from preeclampsia and was treated with magnesium sulfate. Tristan was delivered by emergency cesarean section due to placental abruption, required resuscitation at birth and had Apgar scores of 0, 3, and 7 at 1, 5, and 10 minutes. His cord blood gases revealed severe acidosis and he was placed in a head cooling protocol for 72 hours following stabilization. However, an ultrasound of the brain on August 17, 2009 was negative as was an MRI scan performed on August 18, 2009.

In summary, the findings on examination today together with the medical history did not provide evidence of significant brain damage and Tristan does not suffer from a substantial motor impairment. Furthermore, his neurological problems did not, in my opinion result from either mechanical injury or oxygen deprivation acquired in the course

of labor and delivery. His autism spectrum disorder is a primary developmental disability of prenatal origin. I, therefore, believe that Tristan should not be considered for admission into the NICA program.

4. A review of the file does not show any contrary opinion to Dr. Willis' opinion that Tristan did sustain oxygen deprivation during labor, delivery, and resuscitation in the immediate post-delivery period Plan. Dr. Willis could not comment on the extent of any brain injury that resulted from the oxygen deprivation. Dr. Duchowny opines that Tristan does not suffer from significant brain damage and that Tristan does not have a substantial motor impairment. These opinions are not disputed and are 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. §§ 766.304, 766.309, and 766.31, Fla. Stat.

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 while Tristan may have sustained oxygen deprivation during labor, delivery, and resuscitation in the immediate post-delivery period, such oxygen deprivation has not resulted in an injury which renders Tristan permanently and substantially mentally and

physically impaired. Thus, Tristan has not sustained a birth-related neurological injury and 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 Ginelle Thomas, as mother and natural guardian of Tristan N. Thomas, is dismissed with prejudice.

DONE AND ORDERED this 24th day of April, 2014, 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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this 24th day of April, 2014.

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).