

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKYSHA ENGRAM AND MARCO ANDRE
BRYANT, on behalf of and as
parents and natural guardians of
MARCO DE'ANDRE BRYANT, a minor,

Petitioners,

vs.

Case No. 14-1929N

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 October 13, 2014.

STATEMENT OF THE CASE

On April 22, 2014, Petitioners, Lakysa Engram and Marco Andre Bryant, on behalf of and as parents and natural guardians of Marco De'Andre Bryant (Marco), a minor, filed a Petition Under Protest 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 Joan McCarthy, M.D., as the physician providing obstetric services at the birth of Marco at Tampa General Hospital in Tampa, Florida.

DOAH served NICA with a copy of the Petition on May 1, 2014. DOAH served Dr. McCarthy with a copy of the Petition on April 30, 2014. DOAH served a copy of the Petition on Tampa General Hospital on April 30, 2014.

On October 13, 2014, NICA filed a Motion for Summary Final Order, asserting that Marco did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the motion that Petitioners have no objection to the granting of the motion.

FINDINGS OF FACT

1. Marco De'Andre Bryant was born on May 22, 2007, at Tampa General Hospital in Tampa, Florida. Marco weighed 3,250 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Marco. In a medical report dated May 12, 2014, Dr. Willis opined:

Summary: The baby was healthy at birth and had a normal newborn hospital course. Unfortunately, the child developed viral (HSV) encephalitis at 17-days of age, which resulted in brain injury. The HSV or viral

encephalitis was not present during labor, delivery or the immediate post-delivery period. Brain injury did not occur until the HSV infection at 17-days of age.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period. The child's brain injury resulted from viral encephalitis that occurred over two weeks after birth.

Thank you for allowing me to review this case. Please contact my office if there are any questions.

3. A review of the file does not show any contrary opinions, and Petitioners have no objection to the issuance of a summary final order finding that the injury is not compensable under the Plan. The opinion of Dr. Willis that Marco did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or the immediate post-delivery period is credited.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. The evidence, which is not refuted, established that Marco 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 post-delivery period in a hospital. Therefore, Marco 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 Lakysa Engram and Marco Andre Bryant on behalf of and as parents and natural guardians of Marco De'Andre Bryant, is dismissed with prejudice.

DONE AND ORDERED this 15th day of October, 2014, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2014.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7014 1200 0002 3336 4693)

Maria D. Tejedor, Esquire
Diez-Arguelles and Tejedor, P.A.
505 North Mills Avenue
Orlando, Florida 32803
(Certified Mail No. 7014 1200 0002 3336 4709)

Jeffrey P. Brock, Esquire
Smith Stout Bigman and Brock PA
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118
(Certified Mail No. 7014 1200 0002 3336 4716)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7014 1200 0002 3336 4723)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7014 1200 0002 3336 4730)

Tampa General Hospital
Attention: Risk Management
1 Tampa General Circle
Tampa, Florida 33606
(Certified Mail No. 7014 1200 0002 3336 4747)

Joan McCarthy, M.D.
5 Tampa General Circle, Suite 440
Tampa, Florida 33606
(Certified Mail No. 7014 0150 0002 0389 7748)

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). (