

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTAVEUS HAMPTON AND EDWARD
DRUMMOND, individually and on
behalf of D'TAVEUS DRUMMOND, a
minor,

Petitioners,

vs.

Case No. 15-1532N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION, a/k/a NICA,

Respondent,

and

HAINES CITY HMA, LLC, d/b/a
HEART OF FLORIDA REGIONAL
MEDICAL CENTER,

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 February 23, 2016.

STATEMENT OF THE CASE

On March 12, 2015, Petitioners, Artaveus Hampton and Edward Drummond, individually and on behalf of D'Taveus Drummond (D'Taveus), 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). Petitioners filed an Amended Petition Under Protest on July 30, 2015. The Amended Petition named Mark Alkass, M.D., as the physician providing obstetrical services at the birth of D'Taveus on September 3, 2010, at Heart of Florida Regional Medical Center located in Davenport, Florida.

DOAH served NICA and Heart of Florida Regional Medical Center with a copy of the Petition on March 23, 2015. DOAH served Mark Alkass, M.D., with a copy of the Petition on March 30, 2015.

On March 31, 2015, Haines City HMA, d/b/a Heart of Florida Regional Medical Center, filed a Petition to Intervene which was granted by Order dated April 8, 2015.

As of the date of this Summary Final Order of Dismissal, Mark Alkass, M.D., has not petitioned to intervene in this proceeding.

On February 23, 2016, NICA filed a Motion for Summary Final Order, asserting that D'Taveus did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On December 23, 2015, the parties filed a Joint Response to Order stating that the parties conferred and agreed that the parties were not requesting a

hearing on the issue of compensability or notice, and that there was no need to set this case for final hearing.

FINDINGS OF FACT

1. D'Taveus Drummond was born on September 3, 2010, at Heart of Florida Regional Medical Center located in Davenport, Florida. D'Taveus weighed more than 2,500 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for D'Taveus to determine whether an injury occurred 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 medical report dated May 12, 2015, Dr. Willis described his findings in part as follows:

Spontaneous vaginal delivery was complicated by a shoulder dystocia. Birth weight was 3,766 grams or 8 lbs 5 oz's. The baby was depressed at birth, but responded quickly to resuscitation. There was no respiratory effort at birth. Apgar score at one minute was 5. Bag and mask ventilation was given for one minute and an injection of narcan was given to reverse the respiratory depression effects of narcotics given during labor. The baby responded to resuscitation efforts and the Apgar score was 8 by five minutes.

The baby did not move the right arm after birth. Erb's palsy was diagnosed. Otherwise, the newborn hospital course was uncomplicated and the baby was discharged home with the mother two days after birth.

MRI of the spine at 4 months of age identified a traumatic neuroma of the right,

but no abnormalities of the cervical spine. MRI of the brain was normal. Nerve graph was done at about 6 months of age. Neurology evaluation at that time stated the child was developmentally on target at 6 months of age.

In summary, delivery was complicated by a shoulder dystocia and resulting brachial plexus injury. The baby did not have problems related to birth hypoxia. Newborn course was complicated only by the brachial plexus injury.

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

3. Dr. Willis reaffirmed his opinion in an affidavit dated December 11, 2015.

4. NICA retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to examine D'Taveus and to review his medical records. Dr. Sigurdardottir examined D'Taveus on November 4, 2015. In an affidavit dated February 19, 2016, Dr. Sigurdardottir opined as follows:

Summary: Here we have a 5-year 1-month old boy with known shoulder dystocia leading to right brachial plexopathy which occurred at birth. He has required multiple procedures to address his traumatic neuromas as well as increase his functional ability but yet has significant disability in the functional abilities of his right upper extremity. There is no history given or relayed to us regarding his mental abilities, but on observation during his visit, he is noted to be verbal and have no clear major mental impairment.

Result as to question 1: The patient is found to have mild or no mental impairment.

* * *

In light of the above-mentioned details including his normal or near normal mental capacity and limited motor disability to his upper extremity, I do not recommend D'Taveus to be included into the Neurologic Injury Compensation Association (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 opinion of Dr. Willis that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery, or the immediate post-delivery period. Dr. Willis' opinion is credited. There are no contrary expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that D'Taveus has mild or no mental impairment with normal to near normal mental capacity. Dr. Sigurdardottir's opinion 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 D'Taveus did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor and delivery, which rendered him permanently and substantially mentally impaired. Therefore, D'Taveus is not eligible for benefits under the Plan. §§ 766.302(2) and 766.309(1), Fla. Stat.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Artaveus Hampton and Edward Drummond, individually and on behalf of D'Taveus Drummond, is dismissed with prejudice.

DONE AND ORDERED this 7th day of March, 2016, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of March, 2016.

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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).