

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARGARET PEASAH and SETH PEASAH,
Individually and on behalf of
LETICIA PEASAH, a minor,

Petitioners,

vs.

Case No. 15-3926N

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

Respondent,

and

ADVENTIST HEALTHCARE
SYSTEM/SUNBELT, INC., d/b/a
FLORIDA HOSPITAL ORLANDO,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's
Motion for Summary Final Order, filed on August 10, 2015.

STATEMENT OF THE CASE

On July 9, 2015, Petitioners, Margaret Peasah and
Seth Peasah, individually and on behalf of Leticia Peasah
(Leticia), 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 determination of
compensability under the Florida Birth-Related Neurological

Injury Compensation Plan (Plan). On July 10, 2015, Petitioners filed an Amended Petition Under Protest (Amended Petition). The Amended Petition named Lawrence Decker, D.O., as the physician who provided obstetric services at the birth of Leticia at Florida Hospital^{1/} on May 11, 2008.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on July 17, 2015. DOAH served Lawrence Decker, D.O., on July 18, 2015.

On August 12, 2015, Adventist Healthcare System/Sunbelt, Inc., d/b/a Florida Hospital Orlando filed a Petition to Intervene which was granted by Order dated August 20, 2015. As of the date of this Summary Final Order of Dismissal, Dr. Decker has not petitioned to intervene in this proceeding.

On August 10, 2015, NICA filed a Motion for Summary Final Order, stating that, at the time of Leticia's birth, Dr. Decker was not a "participating physician" as that term is defined by section 766.302(7), Florida Statutes (2014). No response to the Motion for Summary Final Order was filed by Petitioners.

An Order to Show Cause was issued on August 28, 2015, requiring Petitioners and Intervenor to show cause in writing on or before September 11, 2015, as to why the Motion for Summary Final Order should not be granted. No response was filed to the Order to Show Cause.

FINDINGS OF FACT

1. The Amended Petition named Dr. Decker as the physician providing obstetric services at Leticia's birth on May 11, 2008.

2. Attached to the Motion for Summary Final Order is an affidavit of NICA's custodian of records, Tim Daughtry, attesting to the following, which has not been refuted:

One of my official duties as Custodian of Records is to maintain NICA's official records relative to the status of physicians as participating physicians in the Florida Birth-Related Neurological Compensation Plan who have timely paid the Five Thousand Dollar (\$5,000.00) assessment prescribed in Section 766.314(4)(c), Florida Statutes, and the status of physicians who may be exempt from payment of the Five Thousand Dollar (\$5,000.00) assessment pursuant to Section 766.314(4)(c), Florida Statutes. Further, I maintain NICA's official records with respect to the payment of the Two Hundred Fifty Dollar (\$250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, by all non-participating, non-exempt physicians.

* * *

As payments of the requisite assessments are received, NICA compiles data in the "NICA CARES" database for each physician. The "NICA CARES physician payment history/report" attached hereto for Dr. Lawrence Decker, indicates that in the year 2008, the year in which Dr. Lawrence Decker participated in the delivery of Leticia Peasah, as indicated in the Petitioner's Petition for Benefits, Dr. Lawrence Decker did not pay the Five Thousand Dollar (\$5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan.

Further, it is NICA's policy that if a physician falls within the exemption from payment of the Five Thousand Dollar (\$5,000) assessment due to their status as a resident physician, assistant resident physician or intern as provided in Section 766.314(4)(c), Florida Statutes, annual documentation as to such exempt status is required to be provided to NICA. NICA has no records with respect to Dr. Lawrence Decker in relation to an exempt status for the year 2008. To the contrary, the attached "NICA CARES physician payment history/report shows that in 2008, Dr. Lawrence Decker paid the Two Hundred and Fifty Dollar (\$250) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt licensed physicians.

3. The physician payment history/report for Dr. Decker supports Mr. Daughtry's affidavit.

4. Neither Petitioners nor Intervenor have offered any exhibits, affidavits or any other evidence refuting the affidavit of Mr. Daughtry, which shows that Dr. Decker had not paid his \$5,000 assessment for 2008.

5. At the time of the birth of Leticia, Dr. Decker was not a participating physician in the Plan.

6. The Petition was filed on July 9, 2015, and the Amended Petition was filed on July 10, 2015, which is more than five years after Letitia's birth.

CONCLUSIONS OF LAW

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

8. 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.

9. 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 the Division of Administrative Hearings. §§ 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.

10. 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.

11. 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.

12. Pertinent to this case, "participating physician" is defined by section 766.302(7), to mean:

[A] physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred.

13. Dr. Decker had not paid his assessment of \$5,000 at the time Leticia was born; therefore, he was not a participating physician at the time of Leticia's birth. No evidence was submitted that, at the time of Leticia's birth, Dr. Decker was excluded from paying the \$5,000 assessment required for participating physicians. To the contrary, the physician payment history/report shows that in 2008, Dr. Decker paid the \$250 assessment required by section 766.314(4)(6)1., for non-participating, non-exempt licensed physicians.

14. The obstetrical services provided during Leticia's birth were not provided by a participating physician. Thus, the claim on behalf of Leticia is not compensable under the Plan.

15. Moreover, the Petition and the Amended Petition were filed more than five years after Leticia's birth. This is beyond the five-year statute of limitations set forth in section 766.313, Florida Statutes, and is, therefore, barred.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's Motion for Summary Final Order is granted, and the Amended Petition is dismissed with prejudice.

DONE AND ORDERED this 5th day of October, 2015, in Tallahassee, Leon County, Florida.

Barbara J. Staros

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2015.

ENDNOTE

^{1/} The Amended Petition did not contain the address of the hospital as required by section 766.305(1)(c). Due to the intervention of Adventist Healthcare System/Sunbelt, Inc., d/b/a Florida Hospital Orlando, it is presumed that Leticia was born in Orlando.

COPIES FURNISHED:
(via certified mail)

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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).