

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRANCE DRAKE, JR., a minor
child, by and through his next
friends, natural guardians and
natural parents, DESIREE LITTLE
and TERRANCE DRAKE; DESIREE
LITTLE, individually and as
mother of TERRANCE DRAKE, JR.;
and TERRANCE DRAKE et al.,

Petitioners,

vs.

Case No. 15-4433N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION (NICA),

Respondent,

and

FOUNDATION FOR A HEALTHY ST.
PETERSBURG, INC., f/k/a BAYFRONT
MEDICAL CENTER, INC.; RICHARD
CRAIG BROWN, D.O.; DANIELO J.
ESCOTO, M.D.; WEST COAST
NEONATOLOGY, INC.; ALL
CHILDREN'S HOSPITAL; WOMEN'S
CARE FLORIDA, LLC; THOMAS
MCNEILL, M.D.; CARLOS REYES; AND
LUCINDA BOSLEY, CNM,

Intervenors.

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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 Association (NICA), on June 24, 2016.

STATEMENT OF THE CASE

On August 5, 2015, Petitioner, Terrance Drake, Jr. (Terrance), a minor, by and through his next friends, natural guardians and natural parents, Desiree Little and Terrance Drake, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition), with the Division of Administrative Hearings (DOAH). The Petition alleged that Terrance suffered brain damage as the result of a birth-related neurological injury.

The Petition named Richard Craig Brown, D.O., as the physician providing obstetric services at the birth of Terrance at Bayfront Medical Center, Inc., a/k/a Bayfront Baby Place, in St. Petersburg, Florida, on April 27, 2012.

DOAH served NICA with a copy of the Petition on August 12, 2015. DOAH served Richard Craig Brown, D.O., on August 13, 2015. DOAH served Bayfront Medical Center with a copy of the Petition on August 17, 2015.

Motions to Intervene were filed by Danielo J. Escoto, M.D.; West Coast Neonatology, Inc.; All Children's Hospital, Foundation for a Healthy St. Petersburg, Inc., f/k/a Bayfront Medical Center, Inc.; Richard Craig Brown, D.O.; Women's Care Florida, LLC; Thomas McNeill, M.D.; Carlos Reyes, M.D.; and Lucinda Bosley, CNM, which were granted by Orders dated September 9 and 10, 2015.

On October 29, 2015, NICA filed a Response to Petition, giving notice that the injury does not "meet the definition of a

'birth-related neurological injury' as that term is defined in section 766.302(2), Florida Statutes, which specifically requires an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or the immediate post delivery period as well as permanent and substantial mental and physical impairment." NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On June 20, 2016, Intervenors filed a Response to ALJ Order indicating that Intervenors do not oppose NICA's determination that this is not a compensable claim and that it does not appear that a hearing is necessary. Petitioners' Response to ALJ Order was filed on June 29, 2016, similarly stating that they do not oppose NICA's determination that this is not a compensable claim and agree that a hearing to determine compensability is not necessary.

On June 24, 2016, NICA filed a Motion for Summary Final Order, asserting that Terrance did not sustain a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes.

FINDINGS OF FACT

1. Terrance Drake, Jr., was born on April 27, 2012, at Bayfront Medical Center in St. Petersburg, Florida.

2. Respondent retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Terrance. Dr. Sigurdardottir reviewed Terrance's medical records, and performed an independent medical examination on him on October 14, 2015. In a neurology evaluation based upon this examination and an extensive medical records review, Dr. Sigurdardottir made the following findings and summarized her evaluation as follows:

Summary: Here we have a 3-year-5-month-old boy with a near miraculous recovery after a near fatal bradycardia due to likely placental abruption during delivery. He is at this time physically healthy but has a mild microcephaly. He has no obvious motor impairment and likely but not established mild language delay. The patient is doing well compared to his extremely dire situation at birth.

Results as to question 1: The patient is found to have no substantial physical or mental impairment.

Results as to question 2: There is evidence of near terminal hypoxia at birth resulting in infant being declared deceased, but self resuscitation occurred followed by a period of critical illness. Presumed hypoxic neurologic injury is plausible and timing of injury is in immediate perinatal period. No evidence suggests his injury having occurred apart from the immediate perinatal period.

Results as to question 3: We expect a full life expectancy and an excellent prognosis, although mild mental delays relating to attention span, language, and/or behavior cannot be ruled out at this time.

In light of the above-mentioned details, and with lack of substantial physical and motor impairment, I do not recommend Terrance being included into the Neurologic Injury Compensation Association (NICA) Program and would be happy to answer additional questions.

3. Dr. Sigurdardottir's opinion was affirmed in her affidavit dated March 29, 2016.

4. In order for a birth-related injury to be compensable under the NICA Plan, the injury must meet the definition of a birth-related neurological injury and the injury must have caused both permanent and substantial mental and physical impairment.

5. Dr. Sigurdardottir's opinion that Terrance does not have a substantial physical or mental impairment is credited.

6. 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. Sigurdardottir that Terrance does not have a substantial physical or mental impairment.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2014).

8. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The

Plan applies only to a birth-related neurological injury, which 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

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 DOAH.

§§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, 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 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 determinations based upon all 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. 766.302(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. In the instant case, Petitioners' parents filed a claim on his behalf alleging that Terrance did suffer a birth-related neurological injury that is compensable under the NICA Plan. As the proponent of the issue of compensability, the burden of proof is upon Petitioners. § 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

13. To be compensable under the NICA Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate post delivery period, resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

14. The evidence, which is not refuted, established that Terrance does not have a substantial mental or physical impairment. Thus, Terrance is not entitled to benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

That the Petition filed by Terrance Drake, Jr., a minor, by and through his next friends, natural guardians and natural parents, Desiree Little and Terrance Drake, is dismissed with prejudice.

DONE AND ORDERED this 30th day of June, 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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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).