

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASIA ADGER and DONTAE BESS, SR.,
on behalf of and as parents and
natural guardians of DONTAE
BESS, JR., a minor,

Petitioners,

vs.

Case No. 16-4253N

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 February 2, 2017.

STATEMENT OF THE CASE

On July 15, 2016, Petitioners, Asia Adger and Dontae Bess, Sr., on behalf of and as parents and natural guardians of Dontae Bess, Jr. (Dontae), a minor, filed a Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition), with the Division of Administrative Hearings (DOAH).

The Petition named Jennifer Ivy, ARNP; Sheri Small, ARNP; and Jill Hendry, CNM, as the persons providing obstetric services at

the birth of Dontae at Lakeland Hills Medical Center in Lakeland, Florida, on July 21, 2011.

DOAH served NICA with a copy of the Petition on August 1, 2016. DOAH served Jill Henry, ARNP, with a copy of the Petition on August 1, 2016. DOAH served Lakeland Regional Hospital with a copy of the Petition on August 4, 2016. DOAH served Sheri Shree Small, ARNP, with a copy of the Petition on August 23, 2016. DOAH mailed copies of the Petition to Jennifer Ivey, ARNP, on August 1 and 19, 2016. However, these envelopes were returned to DOAH stamped "Return to Sender, Unable to Forward."

On October 21, 2016, NICA filed a response to the Petition, giving notice that the injury does not "meet the definition of a 'birth-related neurological injury' as defined in section 766.302(2), Florida Statutes, which specifically requires that the injury render 'the infant permanently and substantially mentally and physically impaired.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On February 2, 2017, NICA filed a Motion for Summary Final Order, asserting that Dontae did not sustain a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes. While no response to the motion was filed by Petitioners, it is noted that the Petition was filed under protest and asserted that Petitioners are not claimants.

FINDINGS OF FACT

1. Dontae Bess, Jr., was born on July 21, 2011, at Lakeland Regional Medical Center in Lakeland, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Dontae's medical records. In a medical report dated August 19, 2016, Dr. Willis made the following findings and expressed the following opinion:

Spontaneous vaginal delivery was without difficulty. Birth weight was 3,220 grams. The baby was not depressed. Apgar scores were 9/9. No resuscitation was required at birth. The baby went to the normal newborn nursery and had an uncomplicated newborn hospital course with discharge on DOL 2.

The child had developmental delays. MRI was done at 5 years of age and was "unremarkable."

In summary, pregnancy was induced for hypertension at term. There was no fetal distress during labor and the baby was not depressed at birth. The newborn hospital course was benign. MRI at 5 years of age did not suggest brain 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 January 26, 2017.

4. Dr. Willis' opinion that there was no obstetrical event that resulted in loss of oxygen or mechanical trauma to the

baby's brain or spinal cord during labor, delivery or in the immediate post-delivery period is credited.

5. Respondent retained Laufey Y. Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Dontae. Dr. Sigurdardottir reviewed Dontae's medical records, and performed an independent medical examination on him on September 21, 2016. Dr. Sigurdardottir made the following findings and summarized her evaluation as follows:

Summary: Dontae is a 5-year 2-month-old African-American male who is brought to the visit for an independent medical examination on his developmental delays. On review of his prenatal and birth history, I do not see any evidence of a likely hypoxic injury. He was born healthy and had no complications in the immediate postnatal period. He has then progressed to have mild gross motor delay and a quite significant language delay, although he is at this time in a regular education kindergarten. Neuroimaging did not show evidence of significant ischemic injury.

Result as to question 1: The patient is found to have no substantial physical impairment, but to have a substantial language impairment at this time.

Results as to question 2: There is no evidence in the medical record review of a substantial hypoxic event during labor or delivery, the infant had no signs of an encephalopathy in the immediate post natal period and no evidence of ischemic injury on neuroimaging. His language delay is not felt to be birth-related.

Results as to question 3: Dontae's prognosis for life expectancy is excellent and for full recovery is good.

In light of the above-mentioned details and the lack of any evidence to suggest a birth related hypoxic injury, I do not recommend Dontae being included in the Neurologic Injury Compensation program, and I would be happy to answer additional questions.

6. Dr. Sigurdardottir reaffirmed her opinions in an affidavit dated January 20, 2017.

7. In order for a birth-related injury to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (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.

8. Dr. Sigurdardottir's opinion that while Dontae has a substantial language impairment, he has no substantial physical impairment, is credited.

9. 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 Dontae does not have a substantial physical impairment.

CONCLUSIONS OF LAW

10. 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).

11. 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.

12. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

13. 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.

14. 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.

15. In the instant case, Petitioners filed a claim seeking a determination of whether Dontae sustained 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 & Rehabilitative 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.").

16. Dr. Willis established that there was no apparent obstetrical event which resulted in oxygen deprivation or mechanical trauma to the baby's brain or spinal cord during labor, delivery and the immediate post-delivery period.

17. Further, had there been a birth-related neurological injury, the remaining issue to be determined is whether any such injury resulted 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).

18. The evidence, which is not refuted, established that Donte does not have a permanent and substantial physical

impairment. Thus, Dontae 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 Asia Adger and Dontae Bass, Sr., on behalf of and as parents and natural guardians of Dontae Bass, Jr., is dismissed with prejudice.

DONE AND ORDERED this 17th day of February, 2017, 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 17th day of February, 2017.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 2120 0003 1053 2030)

Brent R. Bigger, Esquire
Knopf Bigger
Suite 450
511 West Bay Street
Tampa, Florida 33606
(eServed)
(Certified Mail No. 7014 2120 0003 1053 2047)

Robert J. Grace, Esquire
The Bleakley Bavol Law Firm
15170 North Florida Avenue
Tampa, Florida 33613
(eServed)
(Certified Mail No. 7014 2120 0003 1053 2054)

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 2120 0003 1053 2061)

Justin Senior, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 2120 0003 1053 2078)

Lakeland Regional Medical Center
Attention: Risk Management
1324 Lakeland Hills Boulevard
Lakeland, Florida 33805
(Certified Mail No. 7014 2120 0003 1053 2085)

Jennifer Ivy, ARNP
Suite 205
1118 South Orange Avenue
Orlando, Florida 32806
(Certified Mail No. 7014 2120 0003 1053 2092)

Sheri Shree Small, ARNP
Central Florida Health Care
1729 Lakeland Hills Boulevard
Lakeland, Florida 33805
(Certified Mail No. 7014 2120 0003 1053 2108)

Jill Hendry, ARNP
Lakeland OB/GYN
1733 Lakeland Hills Boulevard
Lakeland, Florida 33805
(Certified Mail No. 7014 2120 0003 1053 2115)

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).