

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THAPELO LENKOANE AND DESTINIE RAY-
LENKOANE, INDIVIDUALLY AND AS
PARENTS AND NEXT FRIENDS OF DREAM
LENKOANE, A MINOR,

Petitioners,

Case No. 19-4318N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., D/B/A WINNIE
PALMER HOSPITAL, AND HECTOR RAMIREZ,
M.D.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on April 17, 2020.

STATEMENT OF THE CASE

On August 6, 2019, Petitioners, Thapelo Lenkoane and Destinie Ray-Lenkoane, on behalf of and as parents and natural friends of Dream Lenkoane (Dream), a minor, filed a Petition for Benefits 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 Hector Ramirez, M.D., as the physician who provided obstetric services at the birth of Dream on February 14, 2018, at Winnie Palmer Hospital for Women and Babies (Winnie Palmer Hospital) located in Orange County, Florida.

DOAH served Hector Ramirez, M.D., and Winnie Palmer Hospital with copies of the Petition on August 19, 2019. DOAH served NICA with a copy of the Petition on August 19, 2019. On September 9, 2019, Orlando Health, Inc., d/b/a Winnie Palmer Hospital, and Hector Ramirez, M.D., filed a Petition to Intervene. On September 17, 2019, the undersigned entered an Order Granting Intervenors, Orlando Health, Inc., d/b/a Winnie Palmer Hospital, and Hector Ramirez, M.D.'s, Petition to Intervene.

On February 12, 2020, NICA filed a Response to Petition for Benefits, asserting that Dream did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. On March 11, 2020, NICA filed a Status Update, which stated that it had conferred with counsel for Petitioners and Intervenors, and further stated that the parties were in agreement that a final hearing was not necessary. The Status Update further stated that NICA would file a Motion for Summary Final Order for a determination of Compensability.

On April 17, 2020, NICA filed an Unopposed Motion for Summary Final Order, which noted, *inter alia*, that Petitioners and Intervenors do not oppose the Unopposed Motion for Summary Final Order and do not intend to rebut the opinions of NICA's experts.

FINDINGS OF FACT

1. Dream was born on February 14, 2018, at Winnie Palmer Hospital, located in Orange County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Dream. In a medical report dated October 8, 2019, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, labor was induced at about 33 weeks for preclampsia. FHR tracing during labor did not suggest any significant fetal distress. Delivery was by Cesarean section. Umbilical cord blood gas pH was within normal limits at 7.12. There was no seizure activity noted after delivery. No EEG or head imaging studies were done during the newborn hospital course.

The child suffered brain injury at some time prior to the MRI at 11 months of age, which was consistent with encephalomalacia. However, the brain injury does not appear to be birth related.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the brain or spinal cord during labor, deliver or the immediate post-delivery period.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a Board-certified pediatric neurologist, to examine Dream and to review his medical records. Dr. Duchowny examined Dream on November 26, 2019. In a medical report dated November 27, 2019, Dr. Duchowny summarized his examination of Dream and opined, in pertinent part, as follows:

In summary, Dream's evaluation reveals findings consistent with a substantial mental and motor impairment. The evidences spasticity and hyperreflexia of all extremities, a profound delay in motor milestones and absence of meaningful communication. He also has oromotor dysfunction and a borderline right exotropia.

Review of medical records forwarded on November 12, 2019 reveal that Dream was the 2900 gram product of a 34 week gestation complicated by insulin-dependent gestational diabetes, polyhydramnios, pregnancy-induced hypertension and pre-eclampsia. He was delivered by Caesarian section because of worsening pre-eclampsia and non-reassuring fetal heart tones. Dream was a large-for-gestational-age neonate and had Apgar scores of 6 and 7 at one and five minutes. His neonatal course was prolonged although he remained on CPAP for only one day.

A brain MR imaging performed on January 14, 2019 (age one month) revealed bilateral multifocal cystic periventricular leukomalacia.

Given Dream's relatively stable intrapartum and postnatal care, I would like to review Dream's brain imaging before making a final recommendation regarding acceptance to the NICA program.

4. On February 14, 2020, Dr. Duchowny provided an addendum to his neurological evaluation of Dream, following the review of brain imaging studies. Dr. Duchowny and Dr. Willis conferred regarding Dream's medical records and current neurological status as well. In his February 14, 2020, addendum, Dr. Duchowny opined:

It is our combined opinion that the findings on re-review do not support the presumption that Dream's severe neurological outcome and MR imaging abnormalities were acquired in the course of labor, delivery or the immediate post-natal period as a result of either oxygen deprivation or mechanical injury.

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 to Dream's brain during labor, delivery, and the post-delivery period, which resulted in brain injury. Dr. Willis' opinion is credited. There are no expert opinions filed that

are contrary to Dr. Duchowny's opinion that Dream should not be considered for inclusion in the NICA program. Dr. Duchowny's opinion is credited.

6. Dr. Willis reaffirmed his opinion in an affidavit dated April 17, 2020. Dr. Duchowny reaffirmed his opinion in an affidavit dated April 17, 2020.

CONCLUSIONS OF LAW

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

8. The Legislature established the Plan "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 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.

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. Section 766.302(2) defines the term "birth-related neurological injury" 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.

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, or resuscitation in 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 Dream did not suffer a birth-related neurological injury. Therefore, Dream is not eligible for benefits under the Plan.

CONCLUSION

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

The Petition filed by Thapelo Lenkoane and Destinie Ray-Lenkoane, individually and as parents and next friends of Dream Lenkoane, is dismissed with prejudice.

DONE AND ORDERED this 30th day of April, 2020, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
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Filed with the Clerk of the
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this 30th day of April, 2020.

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).