

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRITTANY WEBSTER AND CHARLES
MCCLAIN, as parents and natural
guardians of CHARLESTON MCCLAIN,
a minor,

Petitioners,

vs.

Case No. 19-5475N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

GALENCARE, INC., d/b/a BRANDON
REGIONAL HOSPITAL,

Intervenor.

_____ /

SUMMARY FINAL ORDER

Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), filed a Motion for Summary Final Order (Motion) on December 5, 2019, which is due for consideration. The Motion relies upon the Petition for Determination of Eligibility for Benefits and the Discharge Summary for Brandon Regional Hospital. Neither Petitioners nor Galencare, Inc., d/b/a Brandon Regional Hospital (Brandon Regional) have filed a response to the Motion.

STATEMENT OF THE ISSUE

The issue to be determined is whether the infant, Charleston McClain (Charleston), suffered a birth-related neurological injury as that term is defined by section 766.302, Florida Statutes (2018).

PRELIMINARY STATEMENT

On September 26, 2019, Charleston McClain, by and through his natural parents, Brittany Webster and Charles McClain (collectively, Petitioners) filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition), seeking a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition names Kelly C. Hetchman, D.O., as the attending physician, and Brandon Regional as the hospital where Charleston was born.

NICA, Dr. Hetchman, and Brandon Regional were each served with the Petition by certified mail. Certified return receipts were filed, indicating that all three were served with the Petition. On November 22, 2019, Brandon Regional filed a Motion to Intervene, which was granted on December 4, 2019. On December 5, 2019, NICA filed the Motion, as well as a Motion for Entry of a Protective Order Regarding Confidential Documents Related to Petitioners' Medical Records. The Motion for Entry of a Protective Order is granted by separate order.

Florida Administrative Code Rule 28-106.204 allows seven days for the filing of a response to a motion. Because Petitioners are not represented by counsel, and no timely response was filed to the Motion, an Order Requiring Response was issued on December 17, 2019, directing Petitioners to file a response to the Motion no later than January 3, 2020. The Order provided that failure to timely respond to the Motion would result in the conclusion that Petitioners do not dispute the basis for the Motion, and an Order granting the Motion would be issued. To date, no response has been filed.

All references to Florida Statutes are to the 2018 codification unless otherwise specified. The relevant portions of chapter 766 have not been amended in any way relevant to this proceeding since that time.

FINDINGS OF FACT

1. On March 1, 2019, Charleston was born at Brandon Regional.
2. The birth certificate lists Charleston's birth weight as four pounds, 15 ounces. The discharge summary from Brandon Regional lists his birth weight as 2.260 kilograms, which is equal to 2,260 grams.

CONCLUSIONS OF LAW

3. The Division of Administrative Hearings (DOAH) has jurisdiction over the parties and the subject matter of this

proceeding pursuant to sections 120.569, 120.57(1), and 766.304, Florida Statutes.

4. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

5. An injured infant, his or her 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response to the petition and to submit relevant information regarding whether the injury suffered is a birth-related neurological injury compensable under the Plan.

6. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by an administrative law judge. § 766.305(7), Fla. Stat. If NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120. §§ 766.304, 766.30, and 766.31, Fla. Stat.

7. Whether an infant has sustained a birth-related neurological injury is determined in accordance with the definition in section 766.302(2), which states:

(2) "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.

8. If the administrative law judge determines that the infant meets the statutory weight threshold and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and finds that as a result of the injury the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

9. In this case, the evidence presented does not support such a finding. The undisputed evidence is that Charleston weighed 2,260 grams at birth, which is below the threshold weight required by the definition in section 766.302(2). This issue is

dispositive with respect to compensability. Based on this finding, Charleston did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law, NICA's Motion for Summary Final Order is granted, and Petitioners' claim is found to be not compensable. Accordingly, Petitioners' Petition is dismissed with prejudice.

DONE AND ORDERED this 16th day of January, 2020, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 16th day of January, 2020.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7018 2290 0000 1309 9094)

Brittney Renee Webster
Charles McClain
2936 Skyview Drive
Lakeland, Florida 33801
(eServed)
(Certified Mail No. 7018 3090 0000 2189 4727)

Tana D. Storey, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)
(Certified Mail No. 7018 3090 0000 2189 4734)

Mark R. Messerschmidt, Esquire
La Cava & Jacobson, P.A.
Suite 1250
501 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7018 3090 0000 2189 4741)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7018 3090 0000 2189 4758)

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7018 3090 0000 2189 4765)

Kelly C. Hetchman, D.O.
119 Oakfield Drive
Brandon, Florida 33511
(Certified Mail No. 7018 3090 0000 2189 4772)

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).