

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS CASCO and MARIA CASCO,)
as parents and natural guardians)
JACKELINE CASCO, a minor,)
)
Petitioners,)
)
vs.) Case No. 01-0555N
)
FLORIDA BIRTH-RELATED NEUROLOGICAL)
INJURY COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on September 14, 2001, by video teleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Alexander Clark, Esquire
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For Respondent: B. Forest Hamilton, Esquire
Florida Birth-Related Neurological
Injury Compensation Association
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Jackeline Casco, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On February 5, 2001, Luis Casco and Maria Casco, as parents and natural guardians of Jackeline Casco, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on February 7, 2001. NICA reviewed the claim, and on April 18, 2001, gave notice that it had "determined that such claim is not a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that the administrative law judge "enter an order setting a hearing in this cause on the issue of the compensability of this claim." Such a hearing was duly held on September 14, 2001.

At hearing, the parties stipulated to the matters set forth in paragraphs 1 and 2 of the Findings of Fact, and Petitioners' Exhibit 1 (the medical records filed with DOAH on February 5, 2001) and Respondent's Exhibit 2 (the deposition of Michael

Duchowny, M.D., filed with DOAH on July 10, 2001) were received into evidence. The hearing transcript was filed on September 27, 2001, and the parties waived the opportunity to submit proposed final orders.

FINDINGS OF FACT

1. Petitioners, Luis Casco and Maria Casco, are the parents and natural guardians of Jackeline Casco (Jackeline), a minor. Jackeline was born a live infant on June 3, 2000, at Holy Cross Hospital, a hospital located in Fort Lauderdale, Broward County, Florida, and her birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services during the birth of Jackeline was William Joyner, M.D., who was, at all times material hereto, a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded under the Plan when the claimants demonstrate, more likely than not, that the infant suffered an "injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired."

Jackeline's presentation

4. On March 29, 2001, following the filing of the claim for compensation, Jackeline was examined by Michael S. Duchowny, M.D., a board-certified pediatric neurologist associated with Miami Children's Hospital, Miami, Florida. Dr. Duchowny reported the results of that neurologic evaluation, as follows:

HISTORY ACCORDING TO THE FAMILY: Jackeline was accompanied by her mother who began by explaining that Jackeline's major problem is with regards to her left arm. She noted that Jackeline had problems with her left arm "since birth" and that she had acquired a left clavicular fracture at delivery. The birth took place at Holy Cross Hospital after 38 weeks gestation. Jackeline weighed 9 pounds, 7 ounces and was a difficult delivery. She was moved from the regular nursery to the special care nursery because of a heart murmur, but this turned out to be inconsequential.

Jackeline subsequently was referred for reconstructive surgery and had this performed three weeks ago. Dr. John Grossman did transplantations of the sural nerves. The cast came off one week ago. Mrs. Casco had not yet seen return of neurologic functioning in Jackeline.

Jackeline otherwise enjoys good health and has been developing nicely. She rolled over at four months and sat at five months. She is described as being quite socially interactive and attentive. There are no problems with regards to her hearing or vision and her feeding, swallowing and sleep patterns are normal.

Jackeline's immunizations have been administered on time. Apart from the brachial plexus reconstruction, she has had

no other surgeries. She has an allergy to amoxicillin and sulfa drugs. She also has a vesicle ureteral reflux which was diagnosed after she presented with recurrent urinary tract infections. She now takes Primisol daily.

The FAMILY HISTORY reveals the father to be 32 and the mother to be 29 years old. Jackeline has a 2-year-old sister who is healthy. There are two half brothers, ages 4 and 2 and two half sisters, ages 8 and 6. No family members have degenerative illnesses, mental retardation or cerebral palsy.

PHYSICAL EXAMINATION reveals an alert, socially responsive 9-month-old infant. The weight is 19 pounds. Head circumference measures 44.1 cm, which approximates at the 50th percentile for age. The fontanelles are both opened and flat and there are no cranial or facial anomalies or asymmetries. Jackeline has no dysmorphic features or evidence of spinal dysraphism. The neck is supple without masses, thyromegaly or adenopathy and the cardiovascular, respiratory and abdominal examinations are unremarkable. Jackeline does have a grade 2/6 innocent ejection systolic murmur. There are healed scars over both posterior calves and left lateral neck.

Jackeline's NEUROLOGICAL EXAMINATION reveals her to be quite socially attentive. She displays a great deal of preverbal babbling and has a pleasant disposition. She is appropriately fearful. There is good central gaze fixation and conjugate following movements. The pupils are 3 mm and briskly reactive. The iris pigment is symmetric and normal. The funduscopic examination discloses no significant findings. There are no facial asymmetries and the tongue moves well. The uvula is midline. There is no drooling. Motor examination reveals an asymmetry of movement of the upper extremities, where there is active movement

on the right, but this is much less developed on the left where Jackeline rarely grasps an object unless it is placed in close proximity to her hands. She does have individual finger movements and has movement of the hands, but her proximal limb movement, especially the shoulder girdle, shows a relative absence of movement. There is an asymmetric slope to the shoulder indicating deltoid atrophy. There are no frank fasciculations. Jackeline's proximal muscle strength is judge at 1+ where her distal strength is 4+. The deep tendon reflexes are asymmetric as well being 2+ at the right biceps and brachial radialis and 1+ at the right triceps. These same reflexes on the left are not elicited. The knee jerks are 2+.

Jackeline is able to sit with good balance and has well developed head control. There are no pathologic reflexes. The Moro response is asymmetric with diminished left arm movement. Jackeline grasps objects by coming across the midline with her right hand. The sensory examination is differed, although Jackeline's withdrawal to stimulation seemed less pronounced with the left upper extremity. In contrast, Jackeline's lower extremities muscle strength, bulk and tone are normal and the reflexes are likewise unremarkable. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Jackeline's examination discloses no significant neurologic abnormalities apart from her left upper extremity. Her examination is consistent with a left Erb's palsy and status post brachial plexus reconstruction, but does not have a significant return of functioning at this point. In contrast, Jackeline's mental status would appear to be normal and her motor development has been proceeding satisfactorily.

5. An Erb's palsy, such as that evidenced by Jackeline, is a weakness of an upper extremity due to damage of the nerve roots of the upper brachial plexus,¹ and does not involve the brain or spinal cord.² Moreover, Jackeline's mental or cognitive status has been described as essentially normal. Consequently, while Jackeline may have suffered a mechanical injury, permanent in nature (to her right brachial plexus) during the course of birth, she does not (for reasons appearing more fully in the Conclusions of Law) qualify for coverage under the Plan.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

7. The Florida Birth-Related Neurological Injury Compensation 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. Section 766.303(1), Florida Statutes.

8. The injured "infant, 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. Sections 766.302(3),

766.303(2), 766.305(1), and 766.313, Florida Statutes. 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 to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

9. 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. Section 766.305(6), Florida Statutes. 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. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

10. 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 post-delivery 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 post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. 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." Section 766.31(1), Florida Statutes.

11. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery 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. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal").

13. Here, the proof demonstrated that Jackeline did not suffer an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation that rendered her permanently and substantially mentally and physically impaired. Consequently, the record developed in this case failed to demonstrate that Jackeline suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes, and the subject claim is not compensable under the Plan. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes. See also Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997).

14. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent

immediately to the parties by registered or certified mail."
Section 766.309(2), Florida Statutes. Such an order constitutes
final agency action subject to appellate court review. Section
766.311(1), Florida Statutes.

CONCLUSION

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

ORDERED that the petition for compensation filed by
Luis Casco and Maria Casco, as parents and natural guardians of
Jackeline Casco, a minor, be and the same is hereby denied with
prejudice.

DONE AND ORDERED this 9th day of October, 2001, in
Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of October, 2001.

ENDNOTES

1/ Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition.

2/ According to Dr. Duchowny, an Erb's Palsy, a weakness of an upper extremity due to damage of the nerve roots of the upper brachial plexus, does not involve an injury to the central nervous system. The "central nervous system" is commonly understood to mean "that portion of the nervous system consisting of the brain and spinal cord." Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition.

COPIES FURNISHED:
(By certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.