

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2003

ADVENTIST HEALTH SYSTEM / SUNBELT, INC.,
etc.,

Appellant,

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY, etc., et al.,

Appellees.

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND
IF FILED, DISPOSED OF BY

03 MAR 2003
FILED
DIVISION OF
ADMINISTRATIVE
HEARINGS
PH 2:24

CASE NO. 5D02-892

01-1657N

WJK-CLOS

Opinion Filed March 28, 2003

Administrative Appeal from the Division
of Administrative Hearings.

Robert A. Hannah, Christopher C. Curry and Robin
D. Black, of Hannah, Estes & Ingram, P.A., Orlando,
for Appellant.

Thomas E. Dukes, III, of McEwan, Martinez &
Dukes, P.A., Orlando, for Intervenors, Michael
Geiling, D.O., Juan Ravelo, M.D., and Mid-Florida
OB/GYN Specialists, Inc.

John Elliott Leighton and Patricia M. Kennedy of
Leesfield, Leighton, Rubio, Mahfood and Boyers,
P.A., Miami, for Appellees, Sandra Shoaf and
James Shoaf.

Kelly B. Plante, of Brewton, Plante & Plante, P.A.,
Tallahassee, for Appellee, Florida Birth-Related
Neurological Injury Compensation Association.

PLEUS, J.

This is an appeal of a final order issued by an administrative law judge ("ALJ")
finding that Raven Shoaf ("Raven") was not subject to compensation under the Florida
Birth-Related Neurological Injury Compensation Plan ("the plan"), because she is not

"mentally impaired' within the meaning of the plan. We conclude that the order conflicts with the applicable law and accordingly reverse.

Raven was born at appellant's hospital on November 28, 1997. She was deprived of oxygen during birth and sustained significant and substantial injuries.

Raven's parents (the Shoafs), filed an administrative claim to determine whether their daughter qualified for coverage under the plan. The plan is designed to alleviate obstetricians' medical malpractice insurance premiums by providing an exclusive remedy for "birth related neurological injuries." § 766.301, Fla. Stat. (1995). As applied to this case, a "birth-related neurological injury" is defined as an injury "to the brain . . . of a live infant" which is "caused by oxygen deprivation occurring in the course of labor [or] delivery," "which renders the infant permanently and substantially mentally and physically impaired." § 766.302(2), Fla. Stat. (1995).¹ The Shoafs alleged that Raven did not meet the criteria for coverage under the plan insofar as she had not sustained a permanent and substantial mental impairment.

At the administrative hearing, the evidence clearly showed that Raven had sustained significant physical injuries due to oxygen deprivation at birth. It was essentially undisputed

¹ Section 766.302(2), Florida Statutes (1995), in its entirety provides:

"Birth-related neurological injury" means 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 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.

that she has cerebral palsy, which refers to a group of motor disorders caused by an injury to the developing brain. She is unable to walk or talk. She has problems holding her head up and directing her gaze. She cannot crawl or even sit up without assistance. She cannot reach out and hold objects, and will not be able to use a touch screen because of her motor difficulties. She is unable to eat by mouth and must wear a diaper. The most she is able to do on her own is roll over. In short, her physical disabilities are significant and severe.

The dispute in this case concerns whether Raven has a "mental impairment" in addition to her physical impairments. Both sides acknowledged that Raven's CAT scans and MRIs clearly show that she has sustained various severe and permanent injuries to her brain. Her imaging studies show that she has damage to the "deeper structure of the brain," which includes both sides of the basal ganglia and thalamus. There was also damage to the white matter surrounding the basal ganglia (which acts as insulation), the hippocampi, both frontal lobes, both parietal lobes, the corpus callosum, and the cerebral cortex. The witnesses agreed that these injuries have the potential for far-reaching damage.²

Raven's parents presented evidence that despite her physical impairments and brain damage shown on the CAT scans, Raven is of normal or above-average intelligence. Other witnesses testified that Raven has an I.Q. as low as 20 or 30 due to her injuries and that she has no understanding of the world around her. One expert felt that her parents'

² The basal ganglia is a "motor control center." The hippocampi controls memory. The thalamus is a relay station which also controls motor functions. The frontal lobes can affect behavior, attention, social development, and personality, among other things. The parietal lobes affect sensation and the ability to integrate functions.

belief that Raven was responsive was nothing more than wishful thinking. Nevertheless, the ALJ concluded that, despite her extensive physical limitations, Raven was not mentally impaired within the meaning of the plan and that her claim was therefore not compensable under the plan.

On appeal, appellants argue that the ALJ erred in concluding that Raven was not mentally impaired within the meaning of the NICA statutes. The question of whether Raven is "mentally impaired" within the meaning of the plan is a mixed question of law and fact. As stated in *Nagy v. Florida Birth-Related Neurological Injury Compensation Association*, 813 So. 2d 155 (Fla. 4th DCA 2002):

"A determination of the administrative law judge as to the qualification of the claim for purposes of compensability under s. 766.309 . . . shall be conclusive and binding as to all questions of fact." § 766.311(1), Fla. Stat. (1997). An ALJ's findings of fact are reversible on appeal when they are not supported by competent substantial evidence in the record or where the agency's interpretation of the law is clearly erroneous. See § 120.68(7), (10), Fla. Stat. (1997); *Carreras v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 665 So.2d 1082, 1084 (Fla. 3d DCA 1995). An ALJ's interpretation of the Plan is reviewed de novo. See *Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 788 So.2d 1010 (Fla. 2d DCA 2001).

Id. at 159.

The finding that Raven is not substantially mentally impaired is inconsistent with the Florida Supreme Court's holding in *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Division of Administrative Hearings*, 686 So. 2d 1349 (Fla. 1997) (hereinafter referred to as the *Birnie* decision). The physical and mental impairments of Raven Shoaf are strikingly similar to those of the child in that case, Eric Birnie.

A comparison of the effects of the injuries between the two infants is most revealing.

In both, there was damage to the basal ganglia including the surrounding white matter. In both, the child exhibited poor head control, inability to sit or stand independently, severely limited control of body movements, difficulty talking or communicating, difficulty expressing knowledge except through eye movements, facial and emotional gestures, and significantly large cognitive delays which will increase with age. In both cases, special accommodation within the class room will be required resulting in impaired intellectual development. The only positive with both Eric Birnie and Raven Shoaf is that they may have normal to above normal intellect.

Eric Birnie was deemed mentally impaired within the meaning of the NICA plan despite normal intelligence test scores because the evidence established there, as here, that as a result of his injuries, the child would: (1) not be able to translate his cognitive capabilities into adequate learning in a normal manner, and (2) suffer from drastic impairment in social and vocational development. *Birnie* rejects a narrow interpretation of the legislation which equates mental impairment with cognitive functioning as measured by intelligence tests irrespective of the need for special accommodations or the serious social and vocational limitations inflicted on the child as a result of the injury.

The final order in this case failed to include any justification for deviating from the legal standard approved in the *Birnie* decision and is entirely inconsistent with the legislative intent to provide compensation to infants who suffer birth-related neurological injuries on a no-fault basis. The test for substantial mental impairment is not whether cognitive reduction exists, but rather whether substantial accommodations are required for the exercise of cognitive functions. Mental impairment, in its plain and simple meaning, exists where, as here, the child will experience abnormal difficulties in developing and using

her cognitive abilities.

It is conceivable that one can have substantial physical impairment without any mental impairment such as a person paralyzed from the waist down. In our view, the substantial accommodations must relate to the development of one's cognitive functions and not simply accommodations for physical impairments. To conclude that Raven is not mentally impaired because she has some degree of cognitive ability is absurd. Mental impairment should not be limited to impairment of cognitive functioning as measured by intelligence tests.

Examination of the undisputed facts as to the condition of Raven Shoaf leads to only one conclusion. This child is both physically and mentally impaired, and her mental impairment is substantial.

REVERSED.

COBB, W., Senior Judge, concurs.
GRIFFIN, J., dissents.