

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SILVIA CASTILLO and CESAREO)
CASTILLO, as parents and)
natural guardians of KATHY)
EVELYN CASTILLO, a minor,)
)
Petitioners,)
)
vs.) Case No. 01-2476N
)
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 June 25, 2002, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Silvia Castillo, pro se
Post Office Box 246
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For Respondent: Ronald A. Labasky, Esquire
Ronald A. Labasky, P.A.
Post Office Box 669
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Kathy Evelyn Castillo, a minor, suffered an injury for which compensation

should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On June 8, 2001, Silvia Castillo and Cesareo Castillo, as parents and natural guardians of Kathy Evelyn Castillo (Kathy), 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 June 26, 2001. NICA reviewed the claim and on November 8, 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 "an order [be entered] setting a hearing in this cause on the issue of the compensability of this claim." Such a hearing was held on June 25, 2002.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact. Silvia Castillo testified on Petitioners' behalf, and Petitioners' Exhibit 1 (the medical records filed with DOAH on May 16, 2001, and June 4, 2001) and Petitioners' Exhibit 2 (a composite exhibit which included medical records and a variety of other documents) were received into evidence.¹ Respondent's

Exhibit 1 (the deposition of Michael Duchowny, M.D.) and Respondent's Exhibit 2 (the deposition of Donald Willis, M.D.), were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed July 11, 2002, and the parties were accorded 10 days from that date to file proposed final orders. Respondent elected to file such a proposal, and it has been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Silvia Castillo and Cesareo Castillo, are the parents and natural guardians of Kathy Evelyn Castillo, a minor. Kathy was born a live infant on April 4, 1997, at St. Mary's Hospital, a hospital located in West Palm Beach, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Kathy's birth was Sebastian Kent, M.D., who, at all times material hereto, was 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 by the Plan when the claimant demonstrates, more likely than not, that the infant suffered an "injury to the brain . . . 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." Section 766.302(2), Florida Statutes.

4. Here, the proof failed to demonstrate that Kathy was substantially mentally impaired, as required for coverage under the Plan. Consequently, it is unnecessary to address whether she suffered an injury to the brain caused by oxygen deprivation or mechanically injury and, if so, whether such injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Moreover, it is unnecessary to resolve whether Kathy is substantially physically impaired. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial physical and mental impairment).

Kathy's current mental presentation

5. The only proof of record which addressed Kathy's mental presentation were the observations of Dr. Michael Duchowny, a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology, who, at Respondent's request, examined Kathy on October 23, 2001, and

the observations of Enrique Riveria, Ph.D., a clinical psychologist, who, at Petitioners' request, tested Kathy on May 14, 2002. (Respondent's Exhibit 1 and Petitioners' Exhibit 2.)

6. Dr. Duchowny reported the results of his evaluation, as follows:

Kathy's NEUROLOGIC EXAMINATION reveals her to be quiet and cooperative with good social skills and easily answers questions.

Kathy can name colors and body parts without difficulty and answers simple questions quite directly. Her speech sounds are fluent and well articulated. She is helpful in the examination and clearly anticipates complex tasks and performs them without difficulty. The cranial nerve examination reveals full visual fields to confrontation testing, normal ocular fundi and papillary light responses. There is an alternating esotropia more prominent on the left. She has good conjugate gaze fixation and following. There are no facial asymmetries. The tongue and palate move well. There is no drooling. Motor examination reveals generalized static hypotonia, with some slight dynamic hypertonicity more prominent on the left. There is full range of movement without limitation and she is able to stand on her own. Kathy is able to take several steps, but she demonstrates gross truncal ataxia. Her gait is wide-based with prominent foot inversion and some internal rotation at the hips. There are no adventitious movements or atrophy. The deep tendon reflexes are brisk throughout at 3+, with plantar responses in neutrality. Sensory examination is intact to withdrawal of all extremities to pin. She can do finger-to-nose maneuvers without difficulty for age level. The neurovascular examination reveals no cervical, cranial or

ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Kathy's neurologic examination reveals evidence of generalized hypotonia, ataxia with limited gait and bilateral hyperreflexia. She also has an alternating esotropia. In contrast, Kathy's cognitive skills appear well preserved for age.

7. At a deposition held January 17, 2002, and received into evidence as Respondent's Exhibit 1, Dr. Duchowny expanded on the results of his examination and conclusions regarding Kathy's mental presentation, as follows:

Q. And would you explain, please, what your observations were, as it relates to Kathy Castillo?

A. I thought that Kathy was a quiet and cooperative child.

She was four-years-old, and had good social skills and communications skills. Her speech milestones seemed to be appropriate for her age, and she clearly was interactive with me throughout the whole time.

* * *

Q. And based upon your examination . . . you did not note any type of mental impairment?

A. That's . . . correct.

Q. She was normal, based upon your examination, as it relates to a four-year-old?

A. That was my impression.

8. Dr. Rivera summarized the results of his testing, as follows:

Kathy Castillo is a five year old who is currently functioning within the Average intellectual range. When her intellectual potential is compared with the Standard Scores on an Achievement Test, there are no indications of a Learning Disability. In fact, Kathy appears to be learning at a pace that is congruent with her intellectual abilities.

9. Given the record, it must be concluded that the proof failed to demonstrate, more likely than not, that Kathy was substantially mentally impaired. To the contrary, the proof compels the conclusion that Kathy suffers no mental impairment.

CONCLUSIONS OF LAW

10. 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.

11. 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.

12. 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.

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. 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.

14. 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.

15. 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.

16. 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.")

17. Here, the proof failed to support the conclusion that, more likely than not, Kathy was permanently and substantially mentally impaired. Consequently, the record developed in this case failed to demonstrate that Kathy 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, supra.

18. 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 Silvia Castillo and Cesareo Castillo, as parents and natural guardians of Kathy Evelyn Castillo, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 24th day of July, 2002, 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 24th day of July, 2002.

ENDNOTE

1/ Petitioners' Exhibit 2 was received into evidence subject to Respondent's hearsay objection and the limitations imposed on the use of hearsay evidence by Section 120.57(1)(c), Florida Statutes.

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.