

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CECILIA ROBERTS YOUNG, as)
grandmother and guardian of)
ALONZO HALL, JR., a minor,)
)
Petitioner,)
)
vs.) Case No. 01-3585N
)
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 October 2, 2003, by video teleconference with sites in Tallahassee and Orlando, Florida.

APPEARANCES

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For Respondent: Andrew W. Rosin, Esquire
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STATEMENT OF THE ISSUE

Whether Alonzo Hall, Jr., a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On September 7, 2001, Cecilia Roberts Young, as grandmother and guardian of Alonzo Hall, Jr., a minor (Alonzo), 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 September 12, 2001. NICA reviewed the claim and on January 22, 2002, 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 compensability."

The final hearing was initially convened on January 28, 2003; however, upon review of the record, it became apparent that Andrew Cracker, M.D., the participating physician, was not

named in the petition and had not been served a copy of the claim. Consequently, the hearing was continued to accord Petitioner an opportunity to file an amended petition naming Dr. Cracker, and to serve a copy of the amended petition on Dr. Cracker.

On March 5, 2003, Petitioner filed an amended petition, which named Dr. Cracker as the physician providing obstetric services at Alonzo's birth, and served Dr. Cracker with a copy of the amended petition on March 10, 2003. Thereafter, on October 2, 2003, the hearing was reconvened to resolve whether the claim was compensable.

At hearing, Cecilia Roberts Young testified on her own behalf, and Petitioner's Exhibits 1-9 were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed October 29, 2003, and the parties were accorded 10 days from that date to file proposed orders. Respondent elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioner, Cecilia Roberts Young, is the maternal grandmother and legal guardian of Alonzo Hall, Jr., a minor. Alonzo was born a live infant on January 25, 1997, at HCA Putnam

Community Hospital, a hospital located in Palatka, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Alonzo's birth was Andrew Cracker, 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.¹

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as 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." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Here, indisputably, Alonzo is permanently and substantially mentally and physically impaired. What remains to resolve is whether the proof supports the conclusion that, more likely than not, Alonzo's neurologic impairment resulted from 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," as required for coverage under the Plan.

The cause and timing of Alonzo's neurologic impairment

5. To address the cause and timing of Alonzo's neurologic impairment, Petitioner offered selected medical records relating to Alonzo's birth and subsequent development (Petitioner's Exhibits 1 and 2); the deposition of Michael Duchowny, M.D., a pediatric neurologist (Petitioner's Exhibit 3); the results of Dr. Duchowny's neurologic examination of Alonzo, as well as Dr. Duchowny's conclusions following review of the medical records (Petitioner's Exhibits 5-7); the deposition of Donald Willis, M.D., an obstetrician (Petitioner's Exhibit 4); Dr. Willis' conclusions following review of the medical records (Petitioner's Exhibit 8); and the testimony of Cecilia Young, as well as her deposition (Petitioner's Exhibit 9).

6. As for the cause and timing of Alonzo's impairments, it was Dr. Duchowny's opinion, based on the results of his neurologic examination and review of the medical records, that Alonzo's impairments were prenatal (developmental) in origin, having occurred prior to the onset of labor, and not associated with oxygen deprivation or mechanical injury during labor, delivery, or resuscitation. As for Dr. Willis, he was also of the opinion that the medical records revealed no evidence of

oxygen deprivation or other trauma associated with Alonzo's birth. Notably, the opinions of Doctors Duchowny and Willis are consistent with the medical records, and are credited. Finally, the lay views of Ms. Young likewise do not suggest an association between events surrounding Alonzo's birth and his neurologic impairment. Consequently, it must be concluded that the proof failed to demonstrate, more likely than not, that Alonzo's neurologic impairment was occasioned by 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.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq, Fla. Stat.

8. 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. § 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 the Division of Administrative Hearings. §§ 766.302(3),

766.303(2), 766.305(1), and 766.313, Fla. Stat. 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." § 766.305(3), 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(6), 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 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.

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

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.

13. As the claimant, the burden rested on Petitioner, as the proponent of the issue, to demonstrate that Alonzo suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

14. Here, the proof failed to support the conclusion that, more likely than not, Alonzo's neurologic impairments resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Consequently, the record developed in this case failed to demonstrate that Alonzo suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), and the claim is not compensable. §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat.

15. 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." § 766.309(2), Fla. Stat. Such an order constitutes final agency

action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Cecilia Roberts Young, as grandmother and guardian of Alonzo Hall, Jr., a minor, is dismissed with prejudice.

DONE AND ORDERED this 25th day of November, 2003, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2003.

ENDNOTE

1/ All citations are to Florida Statutes (2003), unless otherwise indicated.

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(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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.