

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANE BLUNT, as parent and)
natural guardian of ANTHONY)
WAYNE BLUNT, a minor,)
)
Petitioner,)
)
vs.) Case No. 01-4501N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
RAUL MONTENEGRO, M.D.; ST.)
PETERSBURG MATERNAL FETAL)
MEDICINE ASSOCIATES, P.A.;)
TENET HEALTHCARE CORPORATION,)
d/b/a NORTH BAY MEDICAL CENTER;)
and LYNDIA MCKENRY, CNM,)
)
Intervenors.)
_____)

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 December 3, 2002, in Tampa,
Florida.

APPEARANCES

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STATEMENT OF THE ISSUE¹

1. Whether Anthony Wayne Blunt, a minor, suffered a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes.

2. If so, whether Petitioner's recovery, through settlement, with the participating physician bars her from recovery under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On November 19, 2001, Jane Blunt, on behalf of and as parent and natural guardian of Anthony Wayne Blunt (Anthony), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 21, 2001, and on April 1, 2002, NICA 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." In the interim, Raul Montenegro, M.D.; St. Petersburg Maternal Fetal Medicine Association, P.A.; Tenet Healthcare Corporation, d/b/a North Bay Medical Center; and Lynda McKenry, CNM, were accorded leave to intervene.

On November 26, 2002, the parties filed a joint pre-hearing stipulation, and on December 3, 2002, the final hearing was held. At hearing, Petitioner's Exhibits 1A, B, and C (the three volumes of medical records, filed with DOAH on November 19, 2001); Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D.), Exhibit 2 (a report of neurological examination prepared by Dr. Duchowny), and Exhibit 3 (an Order on Petition for Approval of Settlement entered in an underlying civil action);

Intervenors', Raul Montenegro, M.D.'s, and St. Petersburg Maternal Fetal Medicine Associates, P.A.'s (Montenegro's), Exhibit 1 (Request for Admissions to Petitioner and Petitioner's Response to Request for Admissions), Exhibit 2 (Petitioner's Amended Response to Request for Admissions), and Exhibit 3 (Petitioner's Second Amended Response to Request for Admissions); and North Bay Medical Center's Exhibit 1 (the deposition of Jane Blunt, filed with DOAH on December 18, 2002), and Exhibit 2 (Petitioner's answers to expert interrogatories), were received into evidence. No witnesses were called, and no further exhibits were offered.

The transcript of hearing was filed January 6, 2002, and the parties were accorded 10 days from that date to file proposed final orders. Respondent and Intervenors elected to file such a proposal, and they have been duly considered.

FINDINGS OF FACT

Preliminary findings

1. Petitioner, Jane Blunt, is the mother and natural guardian of Anthony Wayne Blunt, a minor. Anthony was born a live infant on September 24, 1997, at Tenet Healthcare Corporation, d/b/a North Bay Medical Center, a hospital located in New Port Richey, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Anthony's birth was Melchiades J. Loman, 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 for infants who suffer a "birth-related neurological injury," defined as 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." Section 766.302(2), Florida Statutes. See also Section 766.309(1)(a), Florida Statutes.

Anthony's presentation

4. On March 20, 2002, following the filing of the claim for compensation, Anthony was examined by Michael S. Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, Miami, Florida. Dr. Duchowny reported the results of that neurological evaluation, as follows:

PHYSICAL EXAMINATION reveals Anthony to be alert and impulsive. He weights 46 pounds and is 43 inches tall. The hair is blonde and of normal texture. The skin is warm and moist without cutaneous stigmata. There are

no dysmorphic features. The head circumference measures 50.8 cm which falls within standard percentile. There are no cranial or facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory and abdominal examinations are normal. Peripheral pulses are 2+ and symmetric.

Anthony's NEUROLOGIC EXAMINATION reveals an impulsive behavioral style and short attention span. He is oppositional and the examination is completed with his mother providing restraint. He talked in completed sentences and clearly identified objects, colors and body parts. There is a slight lingual disarticulation. Cranial nerve examination reveals full visual fields to direct confrontation testing and normal ocular fundi. The pupils are 3 mm and briskly reactive to direct and consensually presented light. There are no funduscopic abnormalities. Facial movements are symmetric. The tongue and palate move well. The uvula is midline. Motor examination reveals an asymmetry of the upper extremities whereby there is a more downward slant to the right shoulder and a fixed contracture of the right upper extremity whereby Anthony is unable to fully extend the elbow. In contrast, he has good finger dexterity and well developed pincer grasp. He transfers readily between hands. Muscle bulk and tone appear symmetric. Anthony is however unable to fully extend the right arm above the shoulder and in fact cannot place the right arm in a complete horizontal position parallel to the left. The lower extremity's strength, bulk and tone are within normal limits. Deep tendon reflexes are 2+ in the lower extremities and 1+ in the upper extremities. Plantar responses are down-going. Station and gait are stable although there is diminished arm swing on the right side. Sensory examination is grossly intact to withdrawal of all extremities to touch.

The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Anthony's neurologic examination reveals findings referable to a mild right Erb's palsy and mild developmental delay. He additionally has short attention span and high activity level. I believe that the findings on examination suggest neither a substantial nor permanent impairment of mental or motor functioning.

5. Following his examination, Dr. Duchowny had the opportunity to review Anthony's medical records, and on August 1, 2002, concluded that:

[t]he medical records, together with the neurological evaluation do not suggest that Anthony has a permanent or substantial mental or physical impairment of the central nervous system acquired in the course of labor, delivery or resuscitation. Rather, Anthony has a mild right Erb's palsy and evidence of mild learning problems which are developmentally based.

Further, in his deposition testimony (Respondent's Exhibit 1), Dr. Duchowny offered the following additional observations:

Q. . . . Is it your opinion based upon . . . your evaluation of Anthony Blunt and by your review of the medical records that the only injury suffered by Anthony Blunt in the course of labor and delivery was the Erb's palsy injury?

A. Yes.

Q. And the reason that injury does not fit within the NICA Statute in your opinion is because it's located outside the central nervous system?[²]

A. Yes.

Q. Therefore, it wouldn't be considered an injury to the spinal cord?

A. That's correct.

Q. And there was no brain injury based on your review of the records and your evaluation of the child that was suffered in the course of labor and delivery?

A. That's correct.

* * *

Q. Could you explain just briefly if it's not related to a birth injury what ADHD [Attention Deficit Hyperactivity Disorder] is related to or how it develop[ed]?

A. It is related to slow maturation of the brain, it's a developmental disorder.

Q. Does that slow maturation of the brain have anything to do in this instance with any type of injury to the brain during labor and delivery based upon your experience and review in this case?

A. No.

6. An Erb's palsy, such as that evidenced by Anthony, is a weakness of the upper extremity due to damage to the nerve roots of the upper brachial plexus, and does not involve the brain or spinal cord. Moreover, the impairment Anthony suffers is mild, as opposed to substantial, and there is no evidence of mental impairment. Consequently, while Anthony may have suffered a mechanical injury, permanent in nature (to his right brachial

plexus) during the course of birth, he does not qualify for coverage under the Plan.³

Petitioner's settlement with the participating physician

7. By the terms of their Pre-Hearing Stipulation, filed November 26, 2002, the parties agreed, as follows:

3. The underlying medical negligence lawsuit captioned Jane Lynn Blunt and Wayne A. Blunt, Individually and as parents and next of friends of Anthony W. Blunt, a minor, v. Melchiades J. Loman, M.D.; Loman & Loman, M.D., P.A., d/b/a Woman's Care Center Center; Lynda McKenry, CNM; Raul Montenegro, M.D.; St. Petersburg Maternal Fetal Medicine Associates, P.A.; Humana Medical Plan, Inc.; and Morton Plant Hospital Associates, Inc., d/b/a North Bay Hospital, Pinellas County Case No. 99-4566-CI-20, is premised upon injuries allegedly sustained by the Petitioner and Child during the birth of the Child.

* * *

9. The Petitioner and Child recovered \$270,000 (before attorney's fees) . . . [through settlement of] the lawsuit against Dr. Loman and Humana Medical Plan, Inc.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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. 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.

11. 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.

12. 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.

13. 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.

14. 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.")

15. Here, since the proof failed to demonstrate, more likely than not, that Anthony 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 . . . which rendered him permanently and substantially mentally and physically impaired," it must be resolved that Anthony was not shown to have suffered a "birth-

related injury," within the meaning of Section 766.302(2), Florida Statutes, and the claim is not compensable. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995) ("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

16. Having resolved that the claim is not compensable, it is unnecessary to address the implication of Petitioner's recovery, through settlement with the participating physician, on her ability to pursue an award under the Plan.

17. 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 Jane Blunt, as parent and natural guardian of Anthony Wayne Blunt, a minor, is hereby denied with prejudice.

DONE AND ORDERED this 23rd day of January, 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 23rd day of January, 2003.

ENDNOTES

1/ Initially, notice was also at issue; however, at hearing, the parties stipulated that the participating physician (Melchiades J. Loman, M.D.) and the hospital (North Bay Medical Center) satisfied the notice provisions of the Plan, as prescribed by Section 766.316, Florida Statutes. Consequently, that issue need not be addressed.

2/ 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.

3/ Here, the only medical testimony offered by the parties that addressed whether Anthony suffered a "birth-related neurological injury" was the testimony of Dr. Duchowny. Consequently, given that Dr. Duchowny is, by training and experience, well qualified to address the issue, it must be resolved that Anthony did not suffer a "birth-related neurological injury." See, e.g., Thomas v. Salvation Army, 562 So. 2d 746, 749 (Fla. 1st DCA 1990) ("In evaluating medical evidence, a judge of compensation claims may not reject uncontroverted medical testimony without a reasonable explanation.")

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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.