

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAWN TABOR AND BRITT TABOR, on)
behalf of and as parents and)
natural guardians of NOAH)
TABOR, a minor,)
)
)
Petitioners,)
)
vs.) Case No. 02-1086N
)
)
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 January 21, 2003, by
telephone conference.

APPEARANCES

For Petitioners: Scott M. Whitley, Esquire
Morgan, Colling & Gilbert, P.A.
101 East Kennedy Boulevard, Suite 1790
Tampa, Florida 33602

For Respondent: Stanley L. Martin, Esquire
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100 South Ashley Drive, Suite 1900
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STATEMENT OF THE ISSUE

At issue is whether Noah Taber (Noah), a minor, suffered a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes.¹

PRELIMINARY STATEMENT

On March 15, 2002, Petitioners, Dawn Tabor and Britt Tabor, on behalf of and as parents and natural guardians of Noah Tabor, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 18, 2002, and on April 25, 2002, Petitioners filed an amended petition. On September 3, 2002, NICA gave notice that it had resolved that Noah did not suffer a "birth-related neurological injury within the meaning of Section 766.302(2), Florida Statutes," and requested that a hearing be scheduled to address, inter alia, the issue of compensability.

On January 21, 2003, a hearing was held to address, inter alia, the issue of compensability. At hearing, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact, and Petitioners' Exhibit 1A and 1B (two volumes of medical records, filed with DOAH on March 15, 2002) and Respondent's Exhibit 1 (a report of Neurological Evaluation

and a report of Neurological Review by Michael S. Duchowny, M.D.) were received into evidence. No witnesses were called and no further exhibits were offered.

The transcript of hearing was filed January 27, 2003, and the parties were accorded 10 days from that date to file proposed orders. Neither party elected to file such a proposal.

FINDINGS OF FACT

Preliminary findings

1. Dawn Tabor and Britt Tabor, are the parents and natural guardians of Noah Tabor, a minor. Noah was born a live infant on June 19, 1999, at Largo Medical Center, a hospital located in Largo, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Noah's birth was Ivelisse Ruiz-Robles, 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.

Noah's presentation

3. On April 23, 2002, following the filing of the claim for compensation, Noah 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 his neurological evaluation, as follows:

Noah's PHYSICAL EXAMINATION reveals Noah to be an alert, extremely active youngster. He weighs 25-pounds. The hair is blond and of normal texture. The head circumference measures 43.3 cm, which is several standard deviations below age level and median for age 5-month males. He has frequent tongue thrusting movements and drooling. There are no dysmorphic features and no cutaneous stigmata. The spine is straight. There is a small nevus flambeaus. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory and abdominal examinations are normal.

Noah's NEUROLOGIC EXAMINATION reveals a small child with a short attention span and high activity level. Noah is difficult to control and has poor social skills. He did not articulate words during the evaluation. Noah tends to engage in simple games and there is no evidence of overtly aggressive behavior. He will perform very simple commands. Noah would not identify body parts for me.

Noah's MOTOR EXAMINATION reveals generalized hypotonia in all extremities, with a slight dynamic increase of tone on the right. He has exaggerated range of motion on the left side, with normal range of motion on the right. There is no evidence of spasticity. Noah demonstrates a clear left hand preference and will grasp with both hands on the right. He can clearly use the right hand to manipulate objects and transfer to the left. There is also diminished arm swing on the right side, compared to the left. His overall movement is clearly more fluid on the left side of his body. He has bilateral pes planus and there is no clear asymmetry of gait with regard to the lower extremities. Muscle bulk is symmetric throughout. The deep tendon reflexes are bilaterally brisk at 3+ and both plantar responses are in extension. He walks in a straightforward manner and turns crisply. He would not cooperate for formal finger-to-nose or heel-

to-shin testing. A sensory examination is grossly intact to withdrawal all extremities to touch. The cardiovascular examination reveals no cervical, cranial, or ocular bruits and no temperature or pulse asymmetries. An AFO is appreciated over the right ankle.

In SUMMARY, Noah's neurologic examination is significant for microcephaly and a prominent cognitive impairment. In contrast, his motor deficit is much less severe and it appears to be improving steadily. I am not sure that he needs an AFO, as he has good range of motion. Noah also suffers from epilepsy.

4. Following his examination, Dr. Duchowny had the opportunity to review Noah's medical records and concluded that:

Although Noah has a substantial mental impairment, his motor abilities are only mildly behind age level and I suspect that he will continue to improve over the next several years. For this reason, I do not believe that Noah is eligible for compensation under the Florida NICA statute.

Coverage under the Plan

5. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as a "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. See also Section 766.309(1)(a), Florida Statutes.

6. Here, the medical records and the results of Dr. Duchowny's neurological evaluation demonstrate Noah suffered an injury to the brain caused by oxygen deprivation in the course of labor, delivery, or resuscitation in the immediate post-delivery period that rendered him permanently and substantially mentally impaired; however, physically, he was not similarly affected or, stated otherwise, he was not rendered permanently and substantially physically impaired.

CONCLUSIONS OF LAW

7. 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.

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. Section 766.303(1), Florida Statutes.

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. 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.

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. 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.

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.

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.

12. 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.

13. 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.")

14. Here, while the proof demonstrated that Noah did suffer an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation that rendered him permanently and substantially mentally impaired, it also demonstrated that such injury did not result in permanent and substantial physical impairment. Consequently, the record developed in this case failed to demonstrate that Noah 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)(The Plan is written in the conjunctive and can only be interpreted to require both substantial physical and mental impairment.); and 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).

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." 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 Dawn Tabor and Britt Tabor, on behalf of and as parents and natural guardians of Noah Tabor, a minor, is hereby denied with prejudice.

DONE AND ORDERED this 11th day of February, 2003, 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 11th day of February, 2003.

ENDNOTE

1/ Also at issue were whether the participating physician and the hospital complied with the notice provisions of the Florida Birth-Related Neurological Injury Compensation Plan (Plan), as prescribed by Section 766.316, Florida Statutes, and whether Petitioners' recovery, through settlement with the hospital (Largo Medical Center), bars them from recovery under the Plan; however, since it was resolved that Noah did not suffer a "birth-related neurological injury," it was unnecessary to address those issues.

COPIES FURNISHED:
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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.