

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIDGET JACKSON and HORACE)	
JACKSON, as natural guardians)	
of BRENNAY JANELLE JACKSON, a)	
minor,)	
)	
Petitioners,)	
)	
vs.)	Case No. 02-2647N
)	
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 November 25, 2002, by video teleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioners: Alexander Clark, Esquire
Law Offices of Bradley Winston, P.A.
8211 West Broward Boulevard, Suite 420
Plantation, Florida 33324

For Respondent: David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Brenay Janelle Jackson, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On July 1, 2002, Bridget Jackson and Horace Jackson, as parents and natural guardians of Brenay Janelle Jackson, 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 July 3, 2002. NICA reviewed the claim, and on September 10, 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 the administrative law judge "enter an order setting a hearing in this cause on the issue of the compensability of this claim." Such a hearing was duly held on November 25, 2002.

At hearing, the parties stipulated to the matters set forth in paragraphs 1 and 2 of the Findings of Fact, and Petitioners' Exhibit 1 (the medical records filed with DOAH on July 1, 2002) and Respondent's Exhibit 2 (the deposition of Michael Duchowny,

M.D., filed with DOAH on December 2, 2002) were received into evidence.¹ The hearing transcript was filed on December 9, 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

1. Petitioners, Bridget Jackson and Horace Jackson, are the parents and natural guardians of Brenay Janelle Jackson (Brenay), a minor. Brenay was born a live infant on January 11, 2002, at Palmetto General Hospital, a hospital located in Hialeah, Florida, and her birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services during the birth of Brenay was Ignacio Alfredo Ramirez, M.D., who was, at all times material hereto, 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 under the Plan when the claimants demonstrate, more likely than not, that the infant 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 in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired."

Brenay's presentation

4. On August 15, 2002, following the filing of the claim for compensation, Brenay was examined by Michael S. Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology. Dr. Duchowny reported the results of that neurology evaluation, as follows:

HISTORY ACCORDING TO MR. & MRS. JACKSON: The parents began by explaining that Brenay is seven months old and has a "weak left arm." They indicated that Brenay's arm has been in this condition since birth and has "not improved very much." They believe that Brenay's left arm has limited mobility despite physical therapy provided on a routine basis. She additionally receives direct electrical stimulation to the muscles of the upper extremity. They noted that Brenay's "thumb turns in" and that she "cannot get her palm up." However, there is certainly a dexterity in the hand and she is able to use both hands in a cooperative fashion. There are more problems at the shoulder in that she is unable to raise her left arm as high as the right.

Brenay underwent surgical reconstruction of the left brachial plexus three weeks ago. Surgery was performed by Dr. John Grossman and included a transplant of the left sural nerve. The procedure was uncomplicated. Brenay is also followed by Dr. Michael Tidwell in the Orthopedics department at Miami Children's Hospital.

Brenay's right arm has full function and there are no problems with regard to her lower extremities. She rolled over at six months and is now sitting on her own. Her head and neck have a slight tilt to the

right, but this does not compromise Brenay functionally.

Brenay's hearing and vision are said to be adequate and there have been no changes in her appetite. She sleeps through the night. Brenay is on no intercurrent medications. There has been no recent exposure to toxic or infectious agents and no significant postnatal injuries.

FAMILY HISTORY: Brenay's mother and father are both 36 years old. Two brothers, ages eight and seven are healthy. No family members have paralysis, mental retardation, epilepsy or developmental delay.

PRE and PERINATAL HISTORY: Brenay was born at term at Palmetto General Hospital. She weighed 8-pounds, 15-ounces and was delivered vaginally. She remained in the hospital for two days. The parents stated that she breathed well at birth and did not have postnatal jaundice. Brenay's immunizations have been proceeding on schedule and she has no known drug allergies.

Brenay's PHYSICAL EXAMINATION reveals an alert and playful seven month-old, well-developed, well-nourished black female. Brenay weighs 18-pounds. Her skin is warm and moist and there are no neurocutaneous stigmata. There are no digital, skeletal, or palmar abnormalities and no dysmorphic features. The cranial contour appears normal and the head circumference measures 43.4 cm, placing Brenay in the 60th percentile for age-matched controls. The anterior and posterior fontanelles are both patent and flat. There are no significant facial asymmetries. Tongue thrusting is noted intermittently and there is some drooling. The head has a very slight tilt to the right side. The neck is supple without masses, thyromegaly or adenopathy, and the cardiovascular, respiratory and abdominal examinations are normal. There are healed

linear scars over the left calf and left lower lateral cervical region.

Brenay's NEUROLOGIC EXAMINATION reveals an alert infant sitting in her mother's lap. She is extremely engaging and smiles frequently. Brenay makes frequent cooing noises and appears extremely interested in objects and people in her immediate surround. Her cranial nerve examination reveals full visual fields to confrontation testing. The extraocular eye movements are full and conjugate and the pupils are 3 mm and briskly reactive to direct and consensually presented light. There is no ptosis. Fundoscopic examination reveals appropriately demarcated disc margins without pallor and no evidence of retinopathy. The facial movements are symmetric and the tongue moves well. The uvula is midline.

Motor examination reveals a functional asymmetry of the upper extremities. Brenay tends to move her right arm much more actively, and in contrast, the left shoulder mobility is diminished. There are no fixed contractures. The shoulder is held in a position of mild internal rotation and adduction. The elbow is flexed and the wrist is pronated. There is full range of motion at the wrist and finger joints and Brenay demonstrates good individual finger dexterity. There were no asymmetries of motor bulk in the forearm compartments, but the arm showed a slightly greater ridging over the lateral surface on the left. There is no asymmetry of the dorsal musculature and the shape and slope of the shoulders appeared symmetric and normal.

I was unable to accurately assess sensory function in the upper extremities. The deep tendon reflexes are 2+ at the knees and ankles and 1+ to 2+ in the right biceps and brachial radialis. The right triceps is trace. In contrast, the left biceps and

brachial radialis are trace and there is no evidence of a left triceps jerk.

Brenay is able to sit with good head control and has a good grasping bilaterally. There are no pathologic reflexes. She stands with support.

The NEUROVASCULAR EXAMINATION reveals no cervical, cranial or ocular bruits, and no temperature or pulse asymmetries. Brenay is able to grasp objects with either hand, and she demonstrates reasonably well-developed pincer grasp with both the right and left fingers. She does not yet transfer.

IN SUMMARY, Brenay's neurologic examination reveals evidence of a mild left Erb's palsy, affecting the fifth, sixth, and seventh cervical roots. The lower brachial plexus appears preserved, and there are no other neurologic abnormalities. Brenay's Erb's palsy appears to be improving slightly, but it is as yet too early to know how well she will do subsequent to her surgical repair. In contrast, the neurologic examination demonstrates no evidence of mental or motor impairment referable to the central nervous system.

5. An Erb's palsy, such as that evidenced by Brenay, is a weakness of an upper extremity due to damage of the nerve roots of the upper brachial plexus,² and does not involve the brain or spinal cord.³ Moreover, the impairment Brenay suffers is mild, as opposed to substantial, and there is no evidence of mental impairment. Consequently, while Brenay may have suffered a mechanical injury, permanent in nature (to her left brachial plexus) during the course of birth, she does not (for reasons

appearing more fully in the Conclusions of Law) qualify for coverage under the Plan.

CONCLUSIONS OF LAW

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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").

13. Here, the proof demonstrated that Brenay did not suffer an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation that rendered her permanently and substantially mentally and physically impaired. Consequently, the record developed in this case failed to demonstrate that Brenay 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.)

14. 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 Bridget Jackson and Horace Jackson, as parents and natural guardians of Brenay Janelle Jackson, a minor, is hereby denied with prejudice.

DONE AND ORDERED this 23rd day of December, 2002, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2002.

ENDNOTES

- 1/ Respondent did not offer an Exhibit 1.
- 2/ Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition.
- 3/ According to Dr. Duchowny, an Erb's Palsy, a weakness of an upper extremity due to damage of the nerve roots of the upper brachial plexus, does not involve an injury to the central nervous system (the brain or spinal cord). Accord, Dorland's

Illustrated Medical Dictionary, Twenty-sixth Edition, The
"central nervous system" is commonly understood to mean "that
portion of the nervous system consisting of the brain and spinal
cord."

COPIES FURNISHED:
(By certified mail)

Alexander Clark, Esquire
Law Offices of Bradley Winston, P.A.
8211 West Broward Boulevard
Suite 420
Plantation, Florida 33324

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32312

Ignacio Alfredo Ramirez, M.D.
Fem Care, P.A.
Obstetrics & Gynecology
7150 West 20th Avenue, Suite 615
Hialeah, Florida 33106

Palmetto General Hospital
2001 West 68th Street
Hialeah, Florida 33016

Ms. Charlene Willoughby
Agency for Health Care Administration
Consumer Services Unit
Post Office Box 14000
Tallahassee, Florida 32308

Mark Casteel, General Counsel
Department of Insurance
The Capitol, Lower Level 26
Tallahassee, Florida 32399-0300

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.

MS CHARLENE WILLOUGHBY
AGENCY FOR HEALTH CARE ADMINISTRATION
CONSUMER SERVICES UNIT
PO BOX 14000
TALLAHASSEE FL 32308

MARK CASTEEL GEN COUNSEL
DEPARTMENT OF INSURANCE
THE CAPITOL LL 26
TALLAHASSEE FL 32399-0300

IGNACIO ALFREDO RAMIREZ MD
FEM CARE PA
OBSTETRICS & GYNECOLOGY
7150 W 20TH AVE STE 615
HIALEAH FL 33106

PALMETTO GENERAL HOSPITAL
2001 W 68TH ST
HIALEAH FL 33016