

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA MARY MARTINEZ and HALLE)
MARTINEZ, JR., on behalf of and)
as parents and natural)
guardians of HALLE COHEN)
MARTINEZ, III, a minor,)
)
Petitioners,)
)
vs.) Case No. 03-3126N
)
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 March 25, 2004, in Ocala, Florida.

APPEARANCES

For Petitioners: Halle Martinez, Jr., pro se
Barbara Mary Martinez, pro se
16865 Southeast 101st Avenue Road
Summerfield, Florida 34491

For Respondent: Andrew W. Rosin, Esquire
Phelps Dunbar, LLP
100 South Ashley Drive, Suite 1900
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STATEMENT OF THE ISSUES

At issue in this proceeding is whether Halle Cohen Martinez, III, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On August 28, 2003, Barbara Mary Martinez and Halle Martinez, Jr., on behalf of and as parents and natural guardians of Halle Cohen Martinez, III (Halle), a minor, filed a petition (claim) with the Division of Administrative Hearings 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 August 29, 2003, and on January 16, 2004, NICA gave notice that it was of the view that Halle did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes (2001)¹, and requested that a hearing be scheduled to address whether the claim was compensable. Such a hearing was duly noticed for March 25, 2004.

At hearing, Halle Martinez, Jr., and Barbara Mary Martinez testified on their own behalf, and Petitioners' Exhibit 1 (the medical records filed with the Division of Administrative Hearings on August 28, 2003) and Respondent's Exhibit 1 (an affidavit and report by Donald C. Willis, M.D.) and Exhibit 2 (an

affidavit and report by Paul R. Carney, M.D.) were received into evidence.² No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed April 5, 2004, 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

Preliminary findings

1. Petitioners, Barbara Mary Martinez and Halle Martinez, Jr., are the natural parents and guardians of Halle Cohen Martinez, III, a minor. Halle was born a live infant on November 12, 2001, at Leesburg Regional Medical Center, a hospital located in Leesburg, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Halle's birth was Wendell Courtney, 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 postdelivery 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. To address the cause, timing, and significance of Halle's impairment, Petitioners offered selected medical records relating to Halle's birth and subsequent development, as well as the testimony of Mr. and Mrs. Martinez. In turn, Respondent offered the affidavits and the reports of Doctors Donald C. Willis and Paul R. Carney.

The cause and significance of Halle's neurologic impairment

5. At birth, Halle suffered a left brachial plexus injury, with resultant left arm brachial plexus palsy, and a left posterior dislocated shoulder, secondary to the birth brachial plexus palsy. Thereafter, at age 5 months, Halle underwent corrective surgery of the brachial plexus using sural nerve grafts, and at 8 months he underwent corrective surgery to improve the function of his left shoulder. The operations resulted in functional improvements; however, as of the date of hearing, Halle continued to suffer impairments of his left arm

and hand, which are likely to be permanent, with notable atrophy within the left upper extremity.

6. Apart from the physical impairment Halle exhibits in his left upper extremity, he is otherwise neurologically sound, without evidence of impairment in his right upper extremity or lower extremities; without evidence of cognitive delay; and without evidence of vision or hearing impairment. Accordingly, although Halle evidences a significant birth-related left brachial plexus injury, he is not, on balance, substantially physically impaired, and evidences no mental impairment. Therefore, for reasons appearing fully in the Conclusions of Law, the claim is not compensable, and it is unnecessary to address whether Halle's brachial plexus injury is, anatomically, an injury to the spinal cord.

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, however, 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, 766.307, 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), 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 claimant, the burden rested on Petitioners to demonstrate entitlement to compensation. § 766.309(1)(a), Fla. Stat. 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, given that the proof demonstrated, more likely than not, that Halle was not permanently and substantially mentally and physically impaired, it must be resolved that the record developed in this case failed to demonstrate that Halle suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes. §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat. 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.); Humana of Florida, Inc. v. McKaughan, 658 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." § 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 petition for compensation filed by Barbara Mary Martinez and Halle Martinez, Jr., on behalf of and as parents and natural guardians of Halle Cohen Martinez, III, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 21st day of April, 2004, 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 21st day of April, 2004.

ENDNOTES

1/ All citations are to Florida Statutes (2001) unless otherwise indicated.

2/ Respondent's Exhibits 1 and 2 are hearsay, and not otherwise admissible over objection in a civil action. Consequently, they were received into evidence subject to the limitations imposed by Section 120.57(1)(c), Florida Statutes (2003) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.")

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 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.