

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN JOSEPH DUSS, III, and)
KRYSTAL T. DUSS, on behalf of)
and as parents and natural)
guardians of DANIEL J. DUSS, a)
minor,)
)
Petitioners,)
)
vs.) Case No. 03-3340N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed December 12, 2003, and the Order to Show Cause, entered December 26, 2003.

STATEMENT OF THE CASE

1. On September 15, 2003, John Joseph Duss, III, and Krystal T. Duss, on behalf of and as parents and natural guardians of Daniel J. Duss (Daniel), a minor, filed a petition (claim), and on October 6, 2003, an amended petition, with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition and amended petition on September 19, 2003, and October 9, 2003, respectfully,¹ and on December 12, 2003, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.² The predicate for NICA'S motion was, inter alia, its assertion that, indisputably, Daniel is not permanently and substantially mentally and physically impaired and, consequently, does not qualify for coverage under the Plan.³ See §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat.

3. Attached to NICA's Motion for Summary Final Order was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Daniel (born on December 3, 2002) on November 19, 2003. Dr. Duchowny reported the results on this neurologic evaluation, as follows:

Daniel's NEUROLOGIC EXAMINATION reveals him to be alert and quite socially interactive. He has good central gaze fixation and conjugate following movements. He babbles actively and tends to observe objects and faces in the environment quite keenly. He was not overly fussy or colicky. Cranial nerve examination reveals normal ocular fundi. The pupils are 3 mm and react briskly to direct and consensually presented light. The sclerae are clear. There are no significant facial asymmetries. The tongue moves well and the uvula is midline. There is a positive gagging response. Daniel does not drool actively.

MOTOR EXAMINATION reveals an obvious asymmetry of the upper extremities, whereby Daniel tends to exclusively favor the left hand. He crosses the midline and has well developed pincher grasp and thumb/first finger opposition. In contrast there is less voluntary movement on the right and Daniel does not grasp an offered object. He tends to maintain a palmar grasp and does not have individual finger dexterity. The resting muscle tone is slightly increased on the right as compared to the left. There is a much less noticeable lower extremity asymmetry. Daniel tends to have a mild plantar grade on the right, but has full range of motor at all lower extremity joints. The upper extremity range of motion is also within normal limits and there are no fixed contractures of any of his limbs. Daniel's biceps and knee jerks are at 3+ compared to 2+ on the left and he has a right Babinski sign. The left toe is downgoing. Gross sensory testing reveals no asymmetry of withdrawal response. Daniel has a well developed stepping and placing response and he has excellent sitting balance. There is no head lag on pull-to-sit and he has good axial stability. There is no obvious fasciculation or atrophy. The peripheral pulses are 2+ and symmetric and there are no cranial, cervical, or ocular bruits, temperature or pulse asymmetries. He withdraws all extremities in response to stimulation. The spine is straight without dysraphism.

IN SUMMARY, Daniel's neurologic examination reveals evidence of a motor asymmetry of the upper extremities, relatively good preservation of the lower extremity strength bulk, and muscle tone. Daniel also manifests a mild asymmetry of his deep tendon reflexes and a right-sided Babinski response. In contrast his communication, social, and behavioral skills appear quite well preserved for age.

Dr. Duchowny concluded, based on his neurologic evaluation of Daniel and review of his medical records, that Daniel did not reveal evidence of a substantial mental or motor impairment.

4. Petitioners did not respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on December 26, 2003, which provided, as follows:

On December 12, 2003, Respondent served a Motion for Summary Final Order. To date, Petitioners have not responded to the motion. Fla. Admin. Code R. 28-106.204(4). Accordingly, it is

ORDERED that within 10 days of the date of this Order, Petitioners show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

Petitioners did not respond to the Order to Show Cause.

5. Given the record, it is indisputable that Daniel is not permanently and substantially mentally and physically impaired. Consequently, NICA's Motion for Summary Final Order is well-founded. §§ 120.57(1)(h), 766.309, and 766.31(1), Fla. Stat.

CONCLUSIONS OF LAW

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

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. § 766.303(1), Fla. Stat.

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. §§ 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.

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. § 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.

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.

§ 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.

11. 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.

12. Here, indisputably, Daniel's neurologic presentation does not disclose permanent and substantial mental and physical impairment. Consequently, given the provisions of Section 766.302(2), Florida Statutes, he does not qualify for coverage under the Plan. 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.)

13. 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 amended petition for compensation filed by John Joseph Duss, III, and Krystal T. Duss, on behalf of and as parents and natural guardians of Daniel J. Duss, a minor, be and the same is dismissed with prejudice.

DONE AND ORDERED this 16th day of January, 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 16th day of January, 2004.

ENDNOTES

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (Martin A. Garcia, M.D.) named in the petition as having provided obstetrical services at the infant's birth, as well as the hospital (Baptist Medical Center) named in the petition as the facility at which the infant's birth occurred, with a copy of the petition on September 19, 2003. Thereafter, on October 9, 2003, DOAH served the physician and hospital with a copy of the amended petition. To date, neither

the physician nor hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

2/ All citations are to Florida Statutes (2002) unless otherwise indicated.

3/ NICA also averred that the infant's injury did not occur during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, as required for coverage under the Plan, and attached an affidavit of an obstetrician (Dr. Donald C. Willis) who, based on his review of the medical records opined that:

I have reviewed the medical records for the above individual. The mother, Krystal Duss, was a 28 year old with a twin pregnancy. She was admitted to the hospital at 35 weeks with severe preeclampsia. Labor was induced for this indication. The fetal heart rate tracing during labor did not suggest distress. Daniel was the presenting twin. Vaginal delivery was accomplished with vacuum assistance. Birth weight was 5 lbs 8 ozs. The baby was not depressed at birth. Apgar scores were 7/8 and the umbilical blood pH was normal at 7.21. The baby was described as having a "lusty" cry at birth. Hypotension developed shortly after birth and blood transfusions were required. MRI three days after birth suggested a thrombotic infarct in the middle cerebral artery.

This newborn was not depressed at birth. There was no apparent obstetrical event that would explain the child's injury. I am not aware of the extent of the child's injury.

Pertinent to a consideration of NICA's contention, as well as the conclusiveness of Dr. Willis' opinion, are the following well pled allegations of the amended petition:

Description of disability:

4. It is alleged that Daniel Duss suffered a left middle cerebral artery infarct and is

disabled as a result thereof. Specifically, Daniel has right sided neurological weakness.

Time and place of injury:

5. The injured infant suffered an injury to his scalp during delivery at Baptist Medical Center, 820 Prudential Drive, Jacksonville, Florida 32207 on December 3, 2002, between approximately 07:34 - 07:59 am. He sustained the above-described brain injury thereafter.

Brief Statement of facts and circumstances giving rise to claim:

6. A brief statement of the relevant facts is as follows:

A. On December 2, 2002, after having elevated blood pressure, massive weight gain and edema with 3+ proteinuria, Krystal T. Duss was sent to Baptist Medical Center for labor and delivery of twins.

B. She was admitted to Baptist Medical Center Jacksonville at 14:50.

* * *

G. After becoming fully dilated at 07:03, Krystal Duss was moved to the delivery room for instrumental assistance during delivery with the Caesarean team on standby.

H. The fetal monitoring strips document 6 vacuum delivery attempts between 07:34 and 07:59.

I. Daniel J. Duss was delivered at 08:00 - at a gestational age of 35 weeks, having been conceived by in vitro fertilization on April 16, 2002.

J. The Physician Progress Record - Neonatology Resuscitation Note documented that at delivery, the patient was pale and hypotonic. He had a cephalhematoma and a boggy scalp with possible subgaleal bleeding that did cross suture lines.

K. The Progress Note for 12/3/02 noted bleeding over his scalp which dissected down around his right ear with his head circumference increasing by 1 cm during the previous 2 hours.

L. Daniel was admitted to the Neonatal Intensive Care Unit for prematurity, apnea, respiratory insufficiency, and possible sepsis. The admission notes record metabolic acidosis which resolved the following day.

M. Daniel received a blood transfusion after admission to the NICU for anemia.

N. On 12/6/02, a cranial ultrasound was performed to evaluate for intraventricular hemorrhage. The study found no intraventricular hemorrhage but did demonstrate a cerebral infarct in the middle cerebral artery distribution: "abnormal parenchymal echogenecity in left basil ganglia and left parietal perivent white and grey matter. No IVH. Findings suspicious of left MCA infarct."

O. An MRI, which was also done on 12/6/02, found evidence of an infarction in the middle cerebral artery distribution.

Notably, neither Dr. Duchowny nor Dr. Willis addressed the likely cause and timing of the infant's brain injury. Consequently, the record does not conclusively demonstrate that the infant's injury was not caused by the vacuum delivery or that it did not occur during delivery or resuscitation. Under such circumstances, NICA is not entitled to the entry of a summary final order based on its contention that the infant's injury did not occur during labor, delivery, or resuscitation in the immediate postdelivery period. Holl v. Talcott, 191 So. 2d

40, 43 (Fla. 1996)("[T]he burden of providing the absence of a genuine issue of material fact is upon the moving party.")
Accord, Lenhal Realty, Inc. v. Transamerica Commercial Finance Corporation, 615 So. 2d 207 (Fla. 4th DCA 1993); Campbell v. Sands, 404 So. 2d 402 (Fla. 5th DCA 1981).

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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.