

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAPHNE WALLER, as parent and)
natural guardian of WESLEY)
DUNAWAY, III, a minor,)
)
Petitioner,)
)
vs.) Case No. 04-2951N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

With the parties' agreement, this case was heard on an agreed record.

STATEMENT OF THE ISSUE

At issue is whether Wesley Dunaway, III, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On August 18, 2004, Daphne Waller, as parent and natural guardian of Wesley Dunaway, III (Wesley), 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

August 19, 2004, and on November 16, 2004, following an extension of time within which to do so, NICA filed its Response to Petition for Benefits, wherein it gave notice that it was of the view that Wesley did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve whether the claim was compensable.

By Notice of Hearing dated December 7, 2004, a hearing was scheduled for May 16, 2005, to resolve whether the claim was compensable; however, on May 12, 2005, the parties filed an Amended Joint Motion to Submit Stipulated Factual Record and Written Argument in Lieu of a Contested Hearing, wherein they agreed "to submit a stipulated record of the evidence that would be presented at the hearing," and requested that the hearing scheduled for May 16, 2005, be cancelled. By Order of May 12, 2005, it was resolved that:

1. The parties' Amended Joint Motion to Submit Stipulated Factual Record is granted, and the parties' Pre-Hearing Stipulation and Stipulated Record [Exhibits 1-13¹], filed May 12, 2005, is accepted.
2. The parties' request to submit written argument is granted, and they are accorded until May 25, 2005, to file written argument or proposed final orders.
3. The hearing in this cause scheduled for May 16, 2005, is cancelled, and the claim will be resolved on the parties' Pre-Hearing Stipulation and Stipulated Record.

Respondent elected to submit a proposed final order, and it has been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Daphne Waller is the natural mother of Wesley Dunaway, III, a minor. Wesley was born a live infant on February 11, 2003,² at North Florida Regional Medical Center, a licensed hospital located in Gainesville, Alachua County, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Wesley's birth was Anthony Agrios, 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 . . . 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. Here, indisputably, Wesley is permanently and substantially mentally and physically impaired.³ What remains to resolve is whether the record supports the conclusion that, more likely than not, Wesley's neurologic impairment resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period," as required for coverage under the Plan.

The cause and timing of Wesley's neurologic impairment

5. To address the cause and timing of Wesley's neurologic impairment, the parties offered medical records related to, inter alia, Ms. Waller's antepartum course; those associated with Wesley's birth and subsequent development; and the opinions of Dr. Michael Duchowny, a pediatric neurologist, and Dr. Donald Willis, an obstetrician, regarding the likely etiology of Wesley's impairment. (Exhibits 1-13).

6. As for the etiology of Wesley's neurologic impairment, it was Dr. Duchowny's opinion, based on the results of his neurologic evaluation of Wesley on October 25, 2004, and review of the medical records, that, while of unknown etiology, Wesley's neurologic impairment was most likely prenatal (developmental) in origin, having occurred prior to the onset of labor, and not associated with oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or

resuscitation. As for Dr. Willis, he, like Dr. Duchowny, was of the opinion that the medical records failed to support a conclusion that Wesley's brain damage was associated with the birth process. Finally, the medical records, including the observations of the physicians who have treated Wesley, while unrevealing as to etiology, also speak to the likelihood of a developmental disorder, as opposed to birth trauma, as the cause of Wesley's neurologic impairment.⁴

7. Given the record, it must be resolved that Wesley's impairments were, more likely than not, occasioned by a developmental abnormality, that preceded the onset of labor, and not by an injury to the brain occurring in the course of labor, delivery, or resuscitation. See, e.g., Wausau Insurance Company v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obliged to present expert medical evidence establishing that causal connection."); Ackley v. General Parcel Service, 646 So. 2d 242 (Fla. 1st DCA 1995)(determining cause of psychiatric illness is essentially a medical question, requiring expert medical evidence); 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.")

CONCLUSIONS OF LAW

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

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. § 766.303(1), Fla. Stat.

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. §§ 766.302(3), 766.303(2), and 766.305(1), 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(4), Fla. Stat.

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. § 766.305(7), 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.

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.

§ 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.

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 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.

14. As the proponent of the issue, the burden rested on Petitioner to demonstrate that Wesley suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

15. Here, the proof failed to support the conclusion that, more likely than not, Wesley's neurologic impairment was the result of a brain or spinal cord injury caused by oxygen

deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Wesley does not qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; 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 constructed 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. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or 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 claim for compensation filed by Daphne Waller, as parent and natural guardian of Wesley Dunaway, III, a minor, is dismissed with prejudice.

DONE AND ORDERED this 2nd day of June, 2005, in Tallahassee, Leon County, Florida.

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WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2005.

ENDNOTES

1/ Exhibit 6 (Medical Records from Shand's Hospital at UF for Wesley) covers a number of treatment dates and has been marked Exhibits 6A-6I).

2/ The petition, as well as the parties' Pre-Hearing Stipulation, reflect a date of birth of August 11, 2003; however, Wesley's Certification of Birth, as well as the Stipulated Record, reveal that Wesley was born February 11, 2003.

3/ Wesley was evaluated by Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, on October 25, 2004. In his report of October 27, 2004, Dr. Duchowny described Wesley's neurologic impairment, as follows:

NEUROLOGIC EXAMINATION reveals severe impairment of cognitive and motor functioning. Wesley makes no meaningful contact with the environment and does not visually fixate or follow. He does not communicate by vocalizing and does not respond to verbal commands. He lies supine in his father's arms. There is no blink to threat from either direction, but he does appear to alert to a loud noise. He does not reach for offered objects. There is left positional plagiocephaly. There is no evidence of central gaze fixation or conjugate following. I saw no rotational nystagmus or opsoclonic movements. The pupils are 3 mm and react briskly to direct and consensually presented light and the ocular fundi are unremarkable. The facial movements are diminished. Tongue movements are poorly coordinated. The uvula is midline. The pharyngeal folds are symmetric. Motor examination reveals a marked generalized static hypotonia. The muscles have a doughy quality. There are no adventitious movements and no focal weakness. A widespread disuse atrophy is noted. There are no fixed contractures. The deep tendon reflexes are difficult to elicit being 1+. Both plantar responses are bilaterally upgoing. There is no evidence of palmar grasping or traction response, and head control is poor. There is little in the way of axial support. In supine positioning, Wesley's head droops forward. He does not demonstrate obligate tonic neck responses. There is withdrawal of all extremities to stimulation. The neurovascular examination reveals no cervical, cranial or ocular bruits, and no temperature or pulse asymmetries. (Exhibit 12).

4/ Wesley presents with a complex medical history remarkable for a complete lack of myelination of the white matter, with global developmental delay, hypotonic cerebral palsy, failure to thrive, gastroesophageal reflex, and a history of seizures/abnormal motor movements. To date, the probable cause of Wesley's neurologic impairments has not been identified; however, birth history has been considered noncontributory.

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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.