

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN BUCHANAN and KRYSTAL)
KING, on behalf of and as)
natural parents and guardians)
of NICHOLAS BUCHANAN, a minor,)
)
Petitioners,)
)
vs.) Case No. 06-0847N
)
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, served August 29, 2006.

STATEMENT OF THE CASE

1. On April 3, 2006, Jonathan Buchanan and Krystal King, on behalf of and as natural parents and guardians of Nicholas Buchanan (Nicholas), 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).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on April 4, 2006, and on August 7, 2006, following a number of

extensions of time within which to do so, NICA served its response to the petition, and gave notice that it was of the view that Nicholas 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.

3. Thereafter, on August 29, 2006, NICA served a Motion for Summary Final Order.¹ The predicate for the motion was NICA's contention that, indisputably, any brain injury Nicholas may have suffered was not caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period in the hospital, and that, regardless of the etiology of any injury Nicholas suffered, he was neither substantially mentally nor substantially physically impaired.

4. Attached to NICA's motion was an affidavit of Donald Willis, M.D., an obstetrician, who reviewed the medical records related to Nicholas' birth and concluded, within a reasonable degree of medical probability, that "[t]here was no apparent obstetrical event that resulted in loss of oxygen or mechanical injury to the brain."

5. Also attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Nicholas on July 26,

2006. Based on that evaluation, as well as a review of the medical records, Dr. Duchowny concluded, within a reasonable degree of medical probability, that the brain injury Nicholas suffered was a consequence of his Group B streptococcal meningitis, not intrapartum asphyxia or trauma, and that Nicholas was neither substantially mentally nor substantially physically impaired. The bases for Dr. Duchowny's conclusions were documented in his written report, as follows:

I evaluated Nicholas Buchanan on July 26, 2006. The evaluation was performed at my office in Miami Children's Hospital. Nicholas is 15-months old and was brought by his mother and maternal grandmother. Both supplied historical information.

MEDICAL HISTORY: Nicholas' mother began by explaining that Nicholas has hydrocephalus and seizures. She related both problems to a bout of Group B strep meningitis which was diagnosed at six-days of age. Nicholas was born at the East Pasco Medical Center and discharged on the 5th day of life. He presented the next day with seizures and irritability and was ultimately diagnosed with Group B streptococcal meningitis. Nicholas was transferred to Arnold Palmer Hospital where he remained for two-months. He was treated aggressively with antibiotics and had a PIC line. This ultimately became infected and he was "in and out of hospitals" for another two months. Nicholas' seizures were treated with phenobarbital and he had no further recurrences. In retrospect, Nicholas' mother believes that Nicholas may have had seizures since the first day of life. She recalls Nicholas having "eyelid flutters" and with his tongue being pushed to the roof of his mouth.

Nicholas was maintained on phenobarbital until one-year of age at which time he was switched to Trileptal. He is being followed by Dr. Carl Barr. His present dosage of Trileptal is 120 mg twice per day. An EEG at one-year of age apparently continued to show evidence of seizure activity.

Nicholas also developed hydrocephalus as a consequence of the meningitis. A serial head circumference measurement indicated rapid head growth culminating in placement of a left ventriculoperitoneal shunt at age four-months. The procedure was performed by Dr. Gregg in Orlando. The procedure is uncomplicated and Nicholas' head growth has subsequently returned to normal. He has not had serial imaging studies. No shunt infections or complications have occurred.

In other respects Nicholas has been doing well. He has been growing and developing satisfactorily. Nicholas walked at 14-months of age and now says one or two words. He is not in any interventional therapies. His vision and hearing are both good. His appetite is described as "picky" but he eats table foods along with baby foods. He sleeps through the night but may wake up crying on occasion.

PRE-AND PERINATAL HISTORY: Nicholas was the product of an uncomplicated 41-week gestation with delivery by cesarean section because of postdates. He breathed well at birth and had some transient physiological jaundice. Nicholas' immunizations have been slightly delayed due to his medical problems. He has no known drug allergies.

* * *

PHYSICAL EXAMINATION reveals an alert and cooperative, well-developed will-nourished 15-month-old infant. Nicholas weights 24 pounds. His head circumference of 48.4 centimeters is within normal percentiles for

age. There are no neurocutaneous stigmata and no dysmorphic features. The skin is warm and moist. The anterior and posterior fontanelles are closed. There are no cranial or facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory and abdominal examinations are unremarkable. Peripheral pulses are 2+ and symmetric.

NEUROLOGICAL EXAMINATION reveals a socially interactive infant who is cooperative for the evaluation. He sits quietly in his mother or grandmother's lap but does frequently get up to explore the room. He is quite inquisitive and actively plays with toys. He obeys simple commands, such as "bring the toy to me". He made one sound during the evaluation which was perhaps a word but difficult to decipher. His behavior was appropriate. Cranial nerve examination reveals full visual field to direct confrontation testing. There are full conjugate extraocular movements in the horizontal and vertical planes. The pupils are 3 mm and react briskly to direct and consensually presented light and the ocular fundi are unremarkable including well-demarcated disc margins without optic pallor and normal eye grounds. There are no facial asymmetries. The tongue moves well and the dentition is normal. The pharyngeal folds are symmetric. Motor examination reveals full range of motion and relatively normal muscle tone. Nicholas is able to stand from a sitting position without holding on and he walks on a narrow based gait without evidence of ataxia. He demonstrates bimanual dexterity without hand preference and transfers readily between his hands. He has age appropriate fine motor coordination with individual finger movements and thumb first finger opposition. There are no adventitious movements and no fasciculations or atrophy. The deep tendon reflexes are 2+ at the knees and biceps. Plantar responses

are repeatedly downgoing. Sensory examination is intact with withdrawal of all extremities to stimulation. The neurovascular examination demonstrates no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Nicholas' neurological examination is essentially unremarkable. He is progressing at the expected developmental milestones and has shown a remarkable recovery from his early meningitis. The hydrocephalus has also stabilized and his shunt appears to be intact.

I have had an opportunity to review medical records sent on May 11, 2006. These include records from a Place for Women in Pasco County, East Pasco Medical Center, Arnold Palmer Hospital and Pediatric Neurosurgery, P.A. The information in these records together with the findings on today's evaluation leads me to conclude that Nicholas has neither a substantial mental nor motor impairment. The hydrocephalus and seizures are the consequence of his Group B streptococcal meningitis; therefore unassociated with intrapartum asphyxia or trauma. I therefore do not believe that Nicholas is compensable under the NICA statute.

6. Petitioners did not respond to the Motion for Summary Final Order. Therefore, on September 12, 2006, an Order to Show Cause was entered as follows:

On August 29, 2006, 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.

7. On September 15, 2006, Petitioners filed their Response to Order to Show Cause. Pertinent to NICA's Motion for Summary Final Order, the response stated:

1. Petitioners' expert witnesses agree that the hydrocephalus and seizures suffered by NICHOLAS BUCHANAN, a minor, are the consequence of his Group B streptococcal meningitis and were not associated with any intrapartum asphyxia or trauma. Petitioners' expert witnesses also agree that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical injury to the child's brain.

2. Therefore, Petitioners agree with Respondent that this claim is not compensable because the injury does not meet the definition of a "birth-related neurological injury" as defined by Florida Statute §766.302(2).

3. Therefore, Petitioners cannot show any reason that Respondent should not be entitled to a Summary Final Order determining that this claim is not compensable under the Plan so that this claim should be dismissed with prejudice.

8. Given the record, it is undisputed that Nicholas' brain injury was not caused by intrapartum asphyxia or trauma, and that, regardless of the etiology of his injury, Nicholas is not permanently and substantially mentally and physically impaired. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.² § 120.57(1)(h), Fla. Stat.

CONCLUSIONS OF LAW

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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Here, indisputably, Nicholas did not suffer an injury to the brain, caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, and, whatever the cause of his brain injury, he is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Nicholas does not qualify for coverage under the Plan. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d 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).

16. 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent's Motion for Summary Final Order is granted, and the petition for compensation filed by Jonathan Buchanan and Krystal King, on behalf of and as natural parents and guardians of Nicholas Buchanan, a minor, be and the same is dismissed with prejudice.

DONE AND ORDERED this 28th day of September, 2006, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2006.

ENDNOTES

1/ Pertinent to this case, Section 120.57(1)(h), Florida
Statutes, provides:

(h) Any party to a proceeding in which an
administrative law judge of the Division of
Administrative Hearings has final order
authority may move for a summary final order
when there is no genuine issue as to any
material fact. A summary final order shall
be rendered if the administrative law judge
determines from the pleadings, depositions,
answers to interrogatories, and admissions
on file, together with affidavits, if any,
that no genuine issue as to any material
fact exists and that the moving party is
entitled as a matter of law to the entry of
a final order. . . .

2/ Notably, when, as here, the "moving party presents evidence
to support the claimed non-existence of a material issue, he
. . . [is] entitled to a summary judgment unless the opposing
party comes forward with some evidence which will change the
result; that is, evidence to generate an issue of material fact.

It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

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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.