

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CASSANDRA DREWES, ON BEHALF OF)
AND AS PARENT AND NATURAL)
GUARDIAN OF DANIEL J.)
WILLIAMSON, A MINOR,)
)
Petitioner,)
)
vs.) Case No. 07-0525N
)
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 hearing in the above-styled case on July 19, 2007, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

At issue is whether Daniel J. Williamson, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On January 29, 2007, Cassandra Drewes, on behalf of and as parent and natural guardian of Daniel J. Williamson (Daniel), 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 January 31, 2007, and on May 9, 2007, following an extension of time within which to do so, NICA responded to the claim, and gave notice that it was of the view that Daniel 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 the issue.

Pursuant to notice, such a hearing was convened on July 19, 2007, and the parties offered Joint Exhibit 1, which was received into evidence. That exhibit included the medical chart of Cassandra Drewes from Rose Mary Sobel, M.D., and Crystal River Women's Health Care; the medical chart of Cassandra Drewes from Seven Rivers Community Hospital; Fetal Monitor Strips; the medical chart of Daniel J. Williamson from Seven Rivers

Community Hospital; the medical chart of Daniel J. Williamson from Shands Hospital; a report of Donald Willis, M.D., dated April 30, 2007; and a report of Michael S. Duchowny, M.D., dated April 25, 2007. By agreement of the parties, the reports of Dr. Willis and Dr. Duchowny were received into evidence in lieu of their testimony at hearing.

FINDINGS OF FACT

Stipulated facts

1. Cassandra Drewes is the natural mother of Daniel J. Williamson, a minor. Daniel was born a live infant on July 8, 2005, at Seven Rivers Community Hospital, a licensed hospital located in Crystal River, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Daniel's birth was Rose Mary Sobel, 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.

The etiology of Daniel's impairments

4. Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, based on his review of the medical records, as well as his evaluation of Daniel on April 25, 2007, was of the opinion that Daniel's neurologic impairments were most likely developmentally based, as opposed to birth-related. Dr. Duchowny expressed his findings and conclusions in his report, dated April 25, 2007, as follows:

I evaluated Danny Williamson on April 25, 2007. Danny is a 21-month-old toddler brought to the office by his mother and both grandmothers. They all participated in the evaluation and provided historical information.

MEDICAL HISTORY: Danny is now 21 months old and is developmentally delayed. His mother explained that Danny had difficulties during delivery and that she was "in distress" during labor. She recalled that Danny's "heart rate dropped" and that he "had a small brain hemorrhage." Danny was born at Seven Rivers Hospital but was transferred to Shands Hospital where he remained for nine days. He had respiratory and feeding difficulties that required mechanical ventilation and a gastrostomy. He was discharged at nine days of age. His birth weight was 6 pounds 10 ounces.

Developmental delay was noted in the first year of life. He was late to roll over (eight months) and did not sit until nine months. He stood at 13 months and walked independently at age 15 months. Speech development [h]as also been delayed in that he did not speak single words until one month ago. He continues to have difficulties with speech and presently speaks in single words. He has a tendency to repeat words spoken to him, especially the last word of a command. His speech articulation is also a problem. Danny receives speech therapy at All Children's Hospital once weekly. Occupational therapy has been discontinued.

Danny is also extremely active and has a fascination with drawers, knobs and buttons. He will play with them all day long. In contrast, he does not socialize well with other children and often plays by himself. He is "scared of other children" and tends to play in parallel. He is neither aggressive nor destructive and apparently, "does not defend himself if attacked."

Danny also has problems with motor coordination such as climbing up or down stairs. He behaves "as if his legs are stiff." He postures his right hand when running and at rest.

Danny's health is otherwise good. His vision is normal. He has a slight hearing impairment and tubes were placed in his ears. He sleeps through the night but for a period of time would scream and not fall asleep. His appetite is stable. There has been no regression. There has been no significant toxic or infectious exposure and no postnatal trauma.

Danny is under the care of Dr. Joseph Cassodonte and is followed by a nurse practitioner. An MRI scan at 12-months of age revealed nonspecific abnormalities. Two

EEGs performed to rule out epilepsy were normal.

* * *

PHYSICAL EXAMINATION reveals a well-developed, well-nourished 21-month-old boy. Danny weighs 38 pounds and is 35 inches tall. His hair is light brown and of normal texture. The anterior and posterior fontanelles are closed. The head circumference measures 48.6 centimeters which approximates the 55th percentile for age. There are no cranial or facial anomalies or asymmetries. There are no neurocutaneous stigmata and no dysmorphic features. The spine is straight without dysraphism. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory and abdominal examinations are normal. Peripheral pulses are 2+ and symmetric.

Danny's NEUROLOGICAL EXAMINATION was difficult to complete as he is extremely overactive and oppositional. He virtually fought off all attempts to examine him and required restraint by his multiple caregivers. I measured his head circumference at 48.6 centimeters which is at the 55th percentile for age. His speech output is clearly diminished and he tends to use single words with marked labial disarticulation. He did not drool, although the tongue movements were poorly coordinated. In contrast, he understands simple commands and could identify body parts readily. His attention span is short and he is clearly overactive and impulsive in terms of his overall behavioral interactions. His eye contact is poor and he does not socialize well. His attention span consistently wandered during the examination. Cranial nerve examination is unremarkable. The visual fields are grossly intact to confrontation testing. I was not able to perform a funduscopic examination.

The pupils were 3 mm and react briskly to direct and consensually presented light. There are no significant facial asymmetries. The uvula is midline and the pharyngeal folds are symmetric. Motor examination reveals symmetric strength, bulk and tone. There are no adventitious movements and no evidence of weakness or focal atrophy. Deep tendon reflexes are slightly diminished at 1+ bilaterally and the plantar responses are downgoing. There is withdrawal of all extremities to stimulation. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Danny's neurological examination in detail reveals no specific focal or lateralizing findings. In contrast, he displays findings consistent with developmental delay in multiple domains including attention, behavior, socialization, speech and motor ability[.] Danny's presentation is most consistent with a diagnosis of pervasive developmental disorder and he likely fits within the autism spectrum. Certainly, there are no findings to suggest significant structural brain damage[.] I believe that Danny's neurological presentation is developmentally based and acquired due to prenatally acquired factors. A review of Danny's medical records mailed on March 14, 2007 further confirms that he did not have a significant neurological injury related to oxygen deprivation or mechanical injury at birth. I therefore believe that Danny is not compensable under the NICA statute.

5. Dr. Duchowny's opinions regarding the etiology of Daniel's impairments were not controverted or shown to lack credibility. Consequently, it must be resolved that Daniel's impairments are most likely developmentally based, as opposed to

birth-related. See, e.g., 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."). Therefore, the proof fails to support the conclusion that Daniel suffered a "birth-related neurological injury," as required 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. § 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), 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.

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(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.

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 postdelivery 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 postdelivery 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), 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.

12. As the proponent of the issue, the burden rested on Petitioner to demonstrate that Daniel 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.").

13. Here, the proof failed to support the conclusion that, more likely than not, Daniel's neurologic impairments were the result of 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 the hospital. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Daniel was not shown to 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. 2d 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).

14. 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 the claim for compensation filed by Cassandra Drewes, on behalf of and as parent and natural guardian of Daniel J. Williamson, a minor, is dismissed with prejudice.

DONE AND ORDERED this 30th day of July, 2007, in Tallahassee, Leon County, Florida.

S

WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of July, 2007.

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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.