

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD SMITH, JR., AND RACHEL )  
SMITH AS PARENTS OF RORY R. )  
SMITH, A MINOR, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 07-3394N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
LAWNWOOD REGIONAL MEDICAL )  
CENTER, INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, served November 30, 2007.

STATEMENT OF THE CASE

1. On July 23, 2007, Richard Smith, Jr., and Rachel Smith, on behalf of and as parents and natural guardians of Rory R. Smith (Rory), 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 July 23, 2007, and on November 6, 2007, following an extension of time within which to do so, NICA served its response to the petition and gave notice that it was of the view that Rory 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 of compensability. Such a hearing was scheduled for March 27, 2008. However, on November 30, 2007, NICA served the subject Motion for Summary Final Order.<sup>1</sup> The predicate for the motion was NICA's contention that, indisputably, Rory's neurologic problems were most likely developmentally based, as opposed to birth-related, and that, regardless of the etiology of his impairments, Rory was neither substantially mentally nor substantially physically impaired.

3. Attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Rory on October 24, 2007.<sup>2</sup> See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("[L]ay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Service, 646 So. 2d 242, 245 (Fla. 1st DCA

1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); 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 obligated to present expert medical evidence establishing that causal connection."). Based on that evaluation, as well as a review of Rory's medical records and those of his mother, Dr. Duchowny concluded, within a reasonable degree of medical probability, that Rory's neurological problems were likely developmentally based, as opposed to birth-related and that Rory was neither substantially mentally nor substantially physically impaired. Dr. Duchowny's observations and conclusions were documented in his written report, as follows:

I evaluated Rory Smith on October 24, 2007. Rory was brought by both parents for evaluation at my office at Miami Children's Hospital. Both parents supplied historical information.

MEDICAL HISTORY: Mr. and Mrs. Smith began by explaining that Rory has longstanding motor and visual problems. He came to medical attention in the first months of life when he presented with abnormal eye movements and [was] diagnosed with nystagmus. A brain MRI scan at age four months at Palms West Hospital demonstrated ex vacuo dilation of the left lateral ventricle. Follow-up MRI at age nine months at Miami Children's Hospital to evaluate his

brainstem and 2 more MRI scans at Palms West and Arnold Palmer Hospital showed no change in ventricular size. One study was performed to rule out neuroblastoma. A CT scan of the abdomen was reportedly negative. Rory's visual impairment consists of strabismus and severe nearsightedness, and he lacks full depth perception. The parents believe his visual problems may have worsened slightly in the past few months. Rory has been evaluated at the Bascom-Palmer Eye institute and receives therapy through the division of Blind Services.

Rory's motor development has been a further source of concern. The parents indicated that Rory has right-sided weakness and has been diagnosed with "slight cerebral palsy." Rory's right leg intermittently stiffens and "gives out," particularly when he is tired. Rory cannot run, climb stairs, or walk down stairs. He intermittently circumducts his right leg and slightly fists his right hand with fatigue.

Rory received occupational and physical therapy for the past 18 months. He receives each twice weekly at the Advanced Motion Therapy Center in Vero Beach.

Rory recently developed a head tilt to the left when his eyes move to the right. He has periodic side-to-side head movements and occasional up and down movements. Father commented that Rory has frequent tongue thrusts with facial and mouth grimacing.

Rory has not had seizures but he "may go into a daze" for 20-30 seconds. His eyes appear fixated. These behaviors were noted at age seven months. A sedated EEG study was normal. Their frequency has declined in recent months.

Rory's speech is well-developed and his hearing is "heightened." He sleeps through the night with occasional awakenings. His

appetite is stable. He is on no medications.

PRE- AND PERINATAL HISTORY: Rory was the product of a 42 week gestation born by emergency cesarean at Lawnwood Regional Hospital. He had a "double nuchal cord" and was cyanotic. He remained at the Newborn Intensive Care Unit for seven days. He was treated for hypoglycemia. Apparently, the nystagmus was not noted in the nursery and was not picked up until age two months. Rory weighed 7 pounds 4 ounces at birth.

GROWTH AND DEVELOPMENT: Rory rolled over at nine months, sat at 11 months, stood at 14 months, and walked at age 15 months. He began speaking single words at age 18 months. He is not yet toilet trained. Rory is fully immunized and has no known drug allergies. He has undergone urological surgery for an undescended testicle.

FAMILY HISTORY: The father is 45 years old and the mother is 39 years old. Both are healthy, as is a 6-year-old brother. There are no family members with degenerative illnesses, mental retardation, movement disorders, epilepsy or stroke.

Rory has been under the care of two different pediatric neurologists. Dr. Barr and Dr. Haleem. He has not been evaluated by orthopedic surgery. There are no prosthetic devices.

PHYSICAL EXAMINATION reveals an alert, well-developed, pleasant and cooperative 2+2-year-old toddler. Rory weighs 35 pounds. The hair is blond and of normal texture. There are no neurocutaneous stigmata. The spine is straight without dysraphism. There are no cranial or facial anomalies or asymmetries. The dentition is good. The tongue is moist and papillated. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular,

respiratory, and abdominal examinations are unremarkable. Peripheral pulses are 2+ and symmetric. There is a right lower extremity clinodactyly.

NEUROLOGICAL EXAMINATION reveals Rory to be alert, pleasant and cooperative. His head circumference measures 48.7 centimeters. The fontanelles are closed. He maintains an age appropriate stream of thought and attention and has excellent expressive language skills. He answered questions with good verbal content and responded to commands readily. There was a slight labial dysarthria. Rory easily puts three and four words together into short sentences. Cranial nerve examination reveals prominent oculomotor gaze palsy. Rory's eyes move together in a conjugate fashion but he does not fixate well nor can he follow conjugately in response to directed stimulation. He tends to look past targets and his eyes will frequently deviate to the right side. His head makes side-to-side movements but he gives the impression of not adequately maintaining visual fixation. I could not detect horizontal or vertical jerk nystagmus. The pupils are 3 mm and react briskly to direct and consensually presented light. Rory refused to allow me to do a funduscopic examination. There are no facial asymmetries. The uvula is midline. The pharyngeal folds are symmetric. Motor examination reveals generalized hypotonia of all extremities. There is full range of motion at all joints. There are no fasciculations, adventitious movement, or focal atrophy noted. I detected no lateralized weakness. Rory's gait is unstable due to ataxia but he did not fall. In contrast, the outstretched hands are postured in an age appropriate fashion. Sensory examination is intact to withdrawal of all extremities to stimulation. Deep tendon reflexes are 2+ and symmetric. Plantar responses are equivocal. Neurovascular examination reveals no

cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Rory's neurological examination reveals an oculomotor apraxia, hypotonia and ataxia. Rory additionally demonstrates right lower extremity clinodactyly. Rory's neurological examination is most consistent with a diagnosis of ataxic cerebral palsy and congenital oculomotor gaze abnormality. His MRI findings are most likely developmentally based.

I have additionally reviewed medical records that were sent to me on August 21, 2007. The record review, together with the findings on today's evaluation, are incompatible with either a substantial mental or motor impairment. Furthermore, Rory's neurological problems were likely to be acquired prenatally. For these reasons, I do not believe that Rory is compensable under the NICA statute . . . .

4. By letter of December 10, 2007, counsel for Petitioners responded to NICA's Motion for Summary Final Order, as follows:

Dear Judge Kendrick:

We are in receipt of a copy of the Respondent's Motion for Summary Final Order. We respectfully request that the Motion be scheduled for hearing and that we be provided with your deadline for submission of our opposition thereto and supporting affidavits.

In response, by letter of December 17, 2007, counsel was advised that:

In response to your letter of December 10, 2007, please note that responses to all motions are normally due within 7 days of service of a written motion (within 12 days of service if the motion is mailed). Fla. Admin. Code R. 28-106.204. However, I will

certainly honor your request for a hearing on Respondent's motion and will consider any written submissions filed before the hearing. Please coordinate with opposing counsel and schedule a telephone hearing to address Respondent's motion for January 3, 4, 9, 10, or 11, 2008.

Oral argument was subsequently scheduled for, and held on January 10, 2008.

5. Petitioners filed their Response to Motion for Summary Final Order on January 9, 2008, to which they attached a number of documents they assert relate to Rory's medical condition. However, the response was not verified, and the documents attached to the response were not sworn to or certified, were not accompanied by an affidavit of the records custodian or other proper person attesting to their authenticity or correctness, and could not be considered. Bifulco v. State Farm Mutual Automobile Insurance, Co., 693 So. 2d 707 (Fla. 4th DCA 1997). Intervenor did not respond to the Motion for Summary Final Order. Consequently, neither Petitioners nor Intervenor offered evidence, by affidavit or otherwise, to generate a genuine issue of material fact.

6. Given the record, it is undisputed that Rory's neurologic problems are most likely developmentally based, as opposed to birth-related, and that Rory 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.<sup>3</sup>

#### 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, 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.

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), 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.

13. Here, indisputably, Rory's neurologic problems were not "caused by an injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation" and, regardless of the etiology of his problems, Rory is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Rory 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); 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 mental and substantial physical impairment.).

14. 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 Richard Smith, Jr., and Rachel Smith, on behalf of and as

parents and natural guardians of Rory R. Smith, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for March 27, 2008, is cancelled.

DONE AND ORDERED this 14th day of January, 2008, in Tallahassee, Leon County, Florida.

**S**

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WILLIAM J. KENDRICK  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of January, 2008.

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/ Also attached to NICA's motion was an affidavit of Donald Willis, M.D., an obstetrician, specializing in maternal-fetal medicine, who reviewed the medical records related to Rory's birth and concluded, within a reasonable degree of medical certainty, that "[t]here was no apparent obstetrical event that resulted in loss of oxygen during labor, delivery or the immediate post delivery period." Dr. Willis did not otherwise discuss or discount likely causes of Rory's neurologic problems.

3/ 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 a 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.