

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROSINA DIXON, ON BEHALF OF AND)
AS PARENT AND NATURAL GUARDIAN)
OF JHALEIL DIXON, A MINOR,)
)
Petitioner,)
)
vs.) Case No. 07-3421N
)
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 April 22, 2008, and October 6, 2008, by video teleconference, with sites in Tallahassee and Jacksonville, Florida.

APPEARANCES

For Petitioner: Rosina Dixon, pro se¹
1830 East 22nd Street
Jacksonville, Florida 32206

For Respondent: Tana D. Storey, Esquire
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On July 24, 2007, Rosina Dixon, on behalf of and as parent and natural guardian of Jhaleil Dixon (Jhaleil), 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 petition on July 25, 2007, and on January 18, 2008, following a number of extensions of time within which to do so, NICA responded to the petition and gave notice that it was of the view that Jhaleil 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. Such a hearing was held on April 22, 2008, and October 6, 2008.

At the hearing held April 22, 2008, Rosina Dixon testified on her own behalf, offered the testimony of Page Lutchman, and the parties stipulated to the facts set forth in paragraph 1 of the Findings of Fact, infra. No further witnesses were called, and no exhibits were offered. However, the hearing was adjourned to accord Petitioner an opportunity to employ counsel

and to accord the parties an opportunity to review and agree on the admission of the medical records. The parties were to provide the administrative law judge with a written status report by June 30, 2008.

Petitioners did not provide the administrative law judge with a status report. However, on July 30, 2008, NICA filed its status report and stated:

1. The hearing held in the case on April 22, 2008, was continued for several reasons, including the Petitioner's desire to seek legal representation, and that the Petitioner and the undersigned could not agree as to the name of the delivery physician.
2. Despite repeated attempts to contact to the Petitioner, through correspondence and telephone calls to the address and telephone number of the Petitioner on record in this matter, the undersigned has been unable to reach the Petitioner. The undersigned is unaware of another means of contacting the Petitioner.
3. As requested at the April 22, 2008, hearing, NICA forwarded a copy of all the medical records in its possession relative to this case, to the Petitioner.
4. Also, as discussed at the April 22, 2008, hearing, NICA requested that Donald C. Willis, M.D., NICA's expert in obstetrics and maternal-fetal medicine, review the additional medical records available and issue a supplemental report. Dr. Willis issued his supplemental report in which his opinion remains that "there was no mechanical trauma that resulted in injury to the spinal cord or brain," and that "the baby did not suffer oxygen deprivation

sufficient to cause brain injury." NICA filed the supplemental report with DOAH and forwarded a copy to the Petitioner on June 17, 2008.

Given the status of the case, a hearing was duly-noticed for October 6, 2008, to conclude the hearing on compensability.

At the hearing, scheduled for October 6, 2008, neither Petitioner nor anyone on her behalf appeared. However, Respondent did appear, through counsel, and called Donald C. Willis, M.D., as a witness, and Respondent's Exhibit 1 (medical records from Shands Jacksonville), Exhibit 2 (the CV of Dr. Willis), Exhibit 3 (Dr. Willis' report of January 18, 2008), and Exhibit 4 (Dr. Willis' report of May 22, 2008) were received into evidence.

On October 6, 2008, following the conclusion of the hearing, an Order was entered, which provided:

Pursuant to Notice of Hearing by Video Teleconference, dated July 3, 2008, a hearing was held on October 6, 2008, to complete the compensability hearing. At the time, neither Petitioner nor anyone on her behalf appeared. Respondent was represented by counsel, and offered the testimony of Donald Willis, M.D. and Respondent's Exhibit 1 (the medical records from Shands Jacksonville), Exhibit 2 (the CV of Dr. Willis), Exhibit 3 (Dr. Willis' report of January 18, 2008), and Exhibit 4 (Dr. Willis' report of May 22, 2008) were received into evidence. Accordingly, it is

ORDERED that Petitioner is accorded until October 17, 2008, to show good cause in writing, if any she can, why the record

should not be closed, and the issue of compensability resolved on the record established at the hearing held on April 22, 2008, and October 6, 2008.

It is further ORDERED that the parties are accorded 10 days from the date the transcript is filed to file proposed orders.

Petitioner did not respond to the Order of October 6, 2008.

The transcript of the hearing held April 22, 2008, was filed June 17, 2008, and the transcript of the hearing held October 6, 2008, was filed October 21, 2008. Respondent elected to file a proposed order, and it has been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Rosina Dixon is the natural mother and guardian of Jhaleil Dixon, a minor. Jhaleil was born a live infant on February 17, 2004, at Shands Medical Center, a hospital located in Jacksonville, Florida, and his birth weight exceeded 2,500 grams.

Coverage under the Plan

2. 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 Jhaleil's impairments

3. To address the likely etiology of Jhaleil's impairments, Ms. Dixon testified on her own behalf, and offered the testimony of Page Lutchman. In contrast, NICA offered the testimony of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine, together with Dr. Willis' reports and the medical records related to Jhaleil's birth.

4. Based on Dr. Willis' review of the medical records, it was his opinion that, within a reasonable degree of medical probability, Jhaleil did not suffer an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation. In so concluding, Dr. Willis noted that Apgar scores were 3 and 7, at one and five minutes, respectively; that while depressed at birth, Jhaleil responded quickly to minimal resuscitation; umbilical cord blood gas was normal, with pH of 7.19 and base excess of -3.1; neurologic consultation was consistent with bilateral brachial plexus injury, not an injury to the brain or spinal cord; MRI of the spine on day 3 of life was negative; and, there being no evidence of multisystem system involvement

(i.e., seizures, renal failure), Jhaleil's newborn stay was not otherwise consistent with injury to the brain or spinal cord.

5. The opinions of Dr. Willis are rationally based, supported by the record, and credible. Consequently, it must be resolved that, more likely than not, Jhaleil's impairments were not 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. See 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."); 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 Jhaleil 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 within five years of the infant's birth. §§ 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(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 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. As the proponent of the issue, the burden rested on the Petitioner to demonstrate that Jhaleil suffered a "birth-related neurological injury." See § 766.309(1)(a); see also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[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 demonstrate that Jhaleil's impairments were, more likely than 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 in the immediate postdelivery period in a hospital." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Jhaleil 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).

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 Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Rosina Dixon, on behalf of and as parent and natural guardian of Jhaleil Dixon, a minor, is dismissed with prejudice.

DONE AND ORDERED this 3rd day of November, 2008, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2008.

ENDNOTE

1/ Ms. Dixon appeared at the hearing held April 22, 2008, but
did not appear for the hearing held October 6, 2008.

COPIES FURNISHED:
(Via Certified Mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7007 2680 0000 9309 0533)

Rosina Dixon
1830 East 22nd Street
Jacksonville, Florida 32206
(Certified Mail No. 7007 2680 0000 9309 0540)

Tana D. Storey, Esquire
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(Certified Mail No. 7007 2680 0000 9309 0557)

Robert Garrison, D.O.
655 West 8th Street
Jacksonville, Florida 32209
(Certified Mail No. 7007 2680 0000 9309 0564)

Shands Medical Center
655 West 8th Street
Jacksonville, Florida 32209
(Certified Mail No. 7007 2680 0000 9309 0571)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7007 2680 0000 9309 0588))

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.