

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA HERNANDEZ AND JESUS)
HERNANDEZ, ON BEHALF OF AND AS)
PARENTS AND NATURAL GUARDIANS)
OF AARON HERNANDEZ, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 07-4579N
)
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 January 30, 2008, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Jesus Hernandez, pro se
Maria Hernandez, pro se
18516 Southwest 114 Court
Miami, Florida 33157

For Respondent: Tana D. Storey, Esquire
Brewton Plante, P.A.
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On October 4, 2007, Maria Hernandez and Jesus Hernandez, on behalf of and as parents and natural guardians of Aaron Hernandez, 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 October 5, 2007, and on November 19, 2007, NICA responded to the petition and gave notice that it was of the view that Aaron did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, because Aaron's birth weight of 2,190 grams, as disclosed by the medical records provided NICA by Petitioners, was less than the minimum weight of 2,500 grams for a single gestation required for coverage under the Plan. §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat. NICA requested that a hearing be scheduled to resolve the issue, and such a hearing was duly-scheduled for January 30, 2008.

The transcript of the hearing was filed February 5, 2008, and the parties were accorded 10 days from that date to file proposed orders. Respondent elected to file such a proposal and it has been duly-considered.

FINDINGS OF FACT

1. At hearing, Maria Hernandez and Jesus Hernandez, the parents of Aaron Hernandez, acknowledged that Aaron was born May 26, 2004, at approximately 31 weeks' gestation; that he was the product of a single gestation; and that his birth weight was 2,190 grams.

CONCLUSIONS OF LAW

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

3. 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.

4. 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(4), Fla. Stat.

5. 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.

6. 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.

7. 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.

8. Here, indisputably, Aaron was the product of a single gestation, and his birth weight was 2,190 grams. Consequently,

given the provisions of Section 766.302(2), Florida Statutes, Aaron 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).

9. 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 Maria Hernandez and Jesus Hernandez, on behalf of and as parents and natural guardians of Aaron Hernandez, a minor, is dismissed with prejudice.

DONE AND ORDERED this 19th day of February, 2008, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2008.

COPIES FURNISHED:
(Via Certified Mail)

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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.