

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER BAKER AND MICHAEL)
BAKER, ON BEHALF OF AND AS)
PARENTS AND NATURAL GUARDIANS)
OF TYLER BAKER, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 07-5364N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
GALENCARE, INC., d/b/a BRANDON)
REGIONAL HOSPITAL,)
)
Intervenor.)
_____)

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 21, 2009, by video teleconference, with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioners: No appearance at hearing.

For Respondent: Robert J. Grace, Jr., Esquire
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Post Office Box 460
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For Intervenor: Richard K. Bowers, Jr., Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On November 21, 2007, Jennifer Baker and Michael Baker, on behalf of, and as parents and natural guardians of Tyler Baker (Tyler), 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 November 26, 2008, and on February 29, 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 Tyler 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. In the interim, Galencare, Inc., d/b/a Brandon Regional Hospital, was granted leave to intervene.

At hearing, neither Petitioners nor anyone on their behalf appeared, and no evidence was offered to support Petitioners'

claim. Respondent's Exhibit 1 (a composite of medical records), Exhibit 2 (the deposition of Michael Duchowny, M.D.), and Exhibit 3 (the deposition of Donald Willis, M.D.) were received into evidence. However, Respondent's Exhibit 1 was hearsay, and received in evidence subject to the limitations of Section 120.57(1)(c), Florida Statutes. No witnesses were called, and no further exhibits were offered.

The parties were accorded 10 days from the date of the hearing to file proposed orders. Respondent elected to file such a proposal and it has been duly-considered.

FINDINGS OF FACT

1. As observed in the Preliminary Statement, neither Petitioners nor anyone on their behalf appeared at hearing, and no proof was offered to support their claim. In contrast, NICA offered the testimony of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, as well as maternal-fetal medicine, and Michael Duchowny, M.D., a physician board-certified in pediatrics; neurology, with special competence in child neurology; and clinical neurophysiology.

2. Dr. Duchowny is a pediatric neurologist associated with Miami Children's Hospital, who evaluated Tyler on January 16, 2008. Based on that evaluation, as well as his review of the medical records associated with Tyler's birth and subsequent development, Dr. Duchowny concluded that, although Tyler was

permanently and substantially mentally and physically impaired, the cause of such impairment was likely a developmentally-based brain abnormality, as opposed to a brain injury caused by oxygen deprivation or mechanical injury during labor, delivery, or the immediate postdelivery period. Dr. Duchowny offered the following basis for his opinion:

A. That opinion is based on several factors. If one looks through the records, it's clear that when Tyler was born, he had reasonably good Apgar Scores, and was actually relatively stable at birth.

By that I mean, he didn't show evidence of any respiratory embarrassment. He did not require intubation and mechanical ventilation, and he did not show evidence of multi-system organ involvement of, for example, the heart, the liver or kidneys, as one would expect in a child who suffered from hypoxic ischemic damage or mechanical injury.

Furthermore, Tyler's normal MRI scans of the brain argue strongly that there was no damage due to mechanical injury or oxygen deprivation at birth.

Q. And why is that, Dr. Duchowny?

A. If Tyler's neurological problems were caused by lack of oxygen at birth, one would expect to see changes on his MRI scan of the brain. Particularly, one would expect to see evidence of brain atrophy, enlargement of the ventricles deep within the brain or possibly abnormalities of white matter.

None of these findings are evident in Tyler's MRI scan, suggesting that lack of

oxygen at birth is simply not a realistic possibility.

(Respondent's Exhibit 2, pp. 14 and 15).

3. Similarly, Dr. Willis, based on his evaluation of the medical records, concluded that Tyler did not suffer a brain injury due to oxygen deprivation or mechanical injury occurring during labor, delivery, or resuscitation. Dr. Willis based his opinion on the fetal monitor strips, which did not reveal any significant abnormalities that would be suggestive of fetal distress; Tyler's Apgar score of 8 at five minutes, which was normal; and Tyler's newborn course, which was uncomplicated.

4. The opinions of Doctors Duchowny and Willis were rationally based, and not contradicted. Consequently, it must be resolved that the cause of Tyler's neurologic impairments was likely a developmental brain disorder, as opposed to a birth-related brain injury. See 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 Tyler suffered a "birth-related neurological injury," as required for coverage under the Plan.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. As the proponent of the issue, the burden rested on the Petitioners to demonstrate that Tyler suffered a "birth-related neurological injury." See § 766.309(1)(a), Fla. Stat.; 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.").

12. Here, the proof failed to demonstrate that Tyler'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." Indeed, the more compelling proof established that the cause of Tyler's neurologic impairment was a developmental brain disorder, and not a birth-related brain injury. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Tyler does not qualify 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).

13. 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 Jennifer Baker and Michael Baker, on behalf of and as parents and natural guardians of Tyler Baker, a minor, is dismissed with prejudice.

DONE AND ORDERED this 3rd day of February, 2009, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
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this 3rd day of February, 2009.

COPIES FURNISHED:

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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.