

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YOBANY E. RODRIGUEZ-CAMACHO AND)
MANUEL E. ALCALA, ON BEHALF OF)
AND AS PARENTS AND NATURAL)
GUARDIANS OF VALERIA ALCALA, A)
MINOR,)
)
Petitioners,)
)
vs.) Case No. 07-5675N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
UNIVERSITY OF MIAMI, d/b/a)
MILLER SCHOOL OF MEDICINE and)
PUBLIC HEALTH TRUST OF DADE)
COUNTY,)
)
Intervenors.)
)

FINAL SUMMARY ORDER

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed April 14, 2008.

STATEMENT OF THE CASE

1. On November 5, 2007, Petitioner, Yobany E. Rodriguez-Camacho and Manuel E. Alcala, on behalf of and as parents and natural guardians of Valeria Alcala (Valeria), 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 November 14, 2008, and on March 19, 2008, following a number of extensions of time within which to do so, NICA served its response to the petition and gave notice that it was of the view that Valeria 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.

3. By Notice of Hearing dated March 28, 2008, a hearing was scheduled for August 13, 2008, to resolve the issue of compensability. In the interim, on April 10, 2008, NICA served a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.¹ The predicate for the motion was NICA's contention that, indisputably, Valeria was neither permanently and substantially mentally nor permanently and substantially physically impaired.

4. Attached to NICA's Motion for Summary Final Order was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Valeria on February 27, 2008. Based on that evaluation, and review of the medical records, Dr. Duchowny concluded, within a reasonable degree of medical probability, that Valeria was neither

permanently and substantially mentally nor permanently and substantially physically impaired. Dr. Duchowny's observations and conclusions were documented in his written report of February 27, 2008, as follows:

I evaluated Valeria Alcala on February 27, 2008. Valeria was accompanied by her mother who is fluent only in Spanish. A history was obtained via an interpreter.

HISTORY BY MRS. YOVANIY RODRIGUEZ, VALERIA'S MOTHER: Mrs. Rodriguez began by explaining that Valeria was "born with a brain hemorrhage." She was delivered at 38 weeks gestation at Jackson Memorial Hospital and weighed 7 pounds 9 ounces. She was delivered vaginally and had "problems breathing at birth." Valeria remained in hospital for "over a week." She "was at risk for having seizures" and placed on phenobarbital. The phenobarbital was discontinued on discharge.

PRE- AND PERINATAL HISTORY: Valeria subsequently did well. A review of her early growth and developmental parameters was within the normal range. She rolled over at three months, sat at seven months, stood at nine months, and walked at one year of age. She began speaking single words at age one year. She is not yet toilet trained. Valeria is presently on no medications and is followed by Dr. Lopez at Jackson Memorial Hospital. Her mother has no concerns with regard to Valeria's neurological status. Her speech and hearing are good and she is very sociable. Her behavior is normal.

Valeria is followed by nephrology for a "small left kidney." She has intermittent problems urinating. Apparently, Valeria has nephrocalcinosis and was on a special enriched formula.

Valeria's MRI scan of the brain revealed "a scar." She has had five EEGs.

FAMILY HISTORY: The father is 48 years old and the mother is 41 years old. They are married. There is a half-brother age 23 and two half-sisters ages 20 and 18. There is no family history of epilepsy, mental retardation, or neurodegenerative illnesses.

PHYSICAL EXAMINATION today reveals an alert, cooperative, well-developed and well-nourished 2 1/2-year-old girl. Valeria weighs 31 pounds. The skin is warm and moist. There are no neurocutaneous stigmata or dysmorphic features. The head circumference measures 29.2 centimeters which is at the 75th percentile for age match controls. There is a slight suggestion of frontal bossing but this does not appear clinically significant. There are no facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. There is no spinal dysraphism. The lung fields are clear. The heart sounds are normal. The abdomen is soft and nontender. There is no palpable abdominal organomegaly. Peripheral pulses are 2+ and symmetric.

Valeria's NEUROLOGICAL EXAMINATION likewise discloses no significant findings. She is alert and cooperative with fluent speech. She maintains an age appropriate stream of attention and is easily socially engaged. She is quite playful and cooperates fully with the examination. Cranial nerve examination reveals full visual fiends to direct confrontation testing. The extraocular movements are full and conjugate. Funduscopic examination reveals sharply demarcated disc margins without pallor or retinal findings. The pupils are 3 mm and react briskly to direct and consensually presented light. There are no facial anomalies or asymmetries. The

pharyngeal folds are symmetric and the uvula is midline. The tongue protrudes without difficulty. Motor examination reveals symmetric strength, bulk and tone. There are no adventitious movements, focal weakness or atrophy. Sensory examination is intact to withdrawal of all extremities to stimulation. Valeria is able to hold her outstretched hands in a stable posture. The neurovascular examination reveals no cervical, cranial or ocular bruits and no pulse asymmetries. The gait is stable.

In SUMMARY, Valeria's neurological examination reveals no specific focal or lateralizing findings and there are no findings to suggest structural brain damage. I have had an opportunity to review Valeria's medical records mailed to me on January 23, 2008. The examination today together with the medical records review does not suggest that Valeria is suffering from either a permanent or substantial mental or physical impairment. I therefore do not regard her as compensable under the NICA statute.

Dr. Duchowny's affidavit summarized his conclusions, as follows:

5. In summary, it is my opinion that VALERIA's neurological examination reveals no specific focal or lateralizing findings and there are no findings to suggest structural brain damage. I have had an opportunity to review Valeria's medical records mailed to me on January 23, 2008. The examination today together with the medical record review does not suggest that Valeria is suffering from either a permanent or substantial mental or physical impairment.

6. As such, it is my opinion that Valeria Alcala is not permanently and substantially mentally impaired nor is she permanently and substantially physically impaired due to oxygen deprivation or

mechanical injury occurring during the course of labor, delivery or the immediate post-delivery period in the hospital during the birth of VALERIA ALCALA.

5. Petitioners did not respond to the Motion for Summary Final Order. However, on April 22, 2008, the University of Miami filed a Petition for Leave to Intervene and Motion to Defer Ruling on Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order, and on April 29, 2008, the Public Health Trust filed a Petition for Leave to Intervene. These matters were addressed by Order of May 6, 2008, as follows:

1. The requests for leave to intervene filed on behalf of the University of Miami and the Public Health Trust are granted.
2. The University of Miami's Motion to Defer Ruling on NICA's Motion for Summary Final Order is granted, and ruling is deferred until June 30, 2008.
3. All parties are granted leave to conduct discovery without further request for leave to do so.
4. All parties are accorded until June 30, 2008, to file a response to NICA's Motion for Summary Final Order. Thereafter, NICA's motion will be addressed without further delay.

6. The University of Miami undertook discovery, and on June 16, 2008, filed a Motion to Compel Better Answers to Expert Witness Interrogatories, and on June 19, 2008, Petitioners filed their response to such motion, as well as a Motion for Leave to

Amend Response to Request for Admissions or, in the alternative, Motion to Amend Petition. These matters were addressed by Order of June 25, 2008.

1. Petitioners' Motion for Leave to Amend Responses to Request for Admissions is granted, and Petitioners are accorded to and including July 30, 2008, to amend their responses to Request for Admissions 1-22, propounded to them May 12, 2008.

2. Petitioners' Motion to Amend Petition is granted, and Petitioners are accorded to and including July 30, 2008, to amend their petition.

3. In light of the foregoing, the University of Miami's Motion to Compel Better Answers to Expert Witness Interrogatories is denied, without prejudice.

4. Ruling on Respondent's Motion for Summary Final Order is deferred until July 15, 2008.

5. All parties are accorded until July 15, 2008, to file a response to Respondent's Motion for Summary Final Order. Thereafter, Respondent's Motion will be addressed without further delay.

7. On June 27, 2008, Petitioners filed their Amended Responses to Request for Admissions, and a Petition for Determination of Non-Eligibility, or in the alternative, Amended Petition for Benefits. Thereafter, on July 15, 2008, Intervenor, University of Miami, filed its response to NICA's Motion for Summary Final Order, and stated:

4. On June 16, 2008, Dr. Duchowny's deposition was taken, wherein he reiterated his opinion that VALERIA did not suffer any substantial or permanent mental or physical impairment. Dr. Duchowny testified that, during his physical examination of the child, VALERIA was alert, cooperative, and that her speech and attention span were appropriate for her age. Further, Dr. Duchowny noted that VALERIA had fluent speech, was socially engaged, had full visual fields and had appropriate language development. All of those signs led Dr. Duchowny to conclude that she has developed normally and appropriately for her age of 2 1/2 years. A neurological exam noted that her bilateral extremity function is even and normal. He also noted that VALERIA has no dysmorphic features and, in fact, had no physical anomalies whatsoever. Dr. Duchowny concluded that her physical examination was normal. Dr. Duchowny stated, however, that a neuro-psychological evaluation is likely the best quantitative measure of neurological function, but that one must wait until a child is at a minimum of 6 years of age before the prospective validity of neuro-psychological testing comes to fruition. He cautioned that he can only opine that VALERIA is a normal 2 1/2 year old, but cannot make concrete predictions for the future.

Notably, Intervenor did not file Dr. Duchowny's deposition or other evidence in response to NICA's Motion for Summary Final Order.

8. Given the record, it is indisputable that Valeria is neither permanently and substantially mentally impaired nor permanently and substantially physically impaired. Turner Produce Company, Inc. v. Lake Shore Growers Cooperative

Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969)("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."). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

Therefore, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.

CONCLUSIONS OF LAW

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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Here, indisputably, Valeria is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Valeria 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.).

16. 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 Yobany E. Rodriguez-Camacho and Manual E. Alcala, on behalf of and as parents and natural guardians of Valeria Alcala, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for August 13, 2008, is cancelled.

DONE AND ORDERED this 22nd day of July, 2008, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2008.

ENDNOTE

1/ 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

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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.