

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERICA WRIGHT AND KARL)
WASHINGTON, ON BEHALF OF AND AS)
PARENTS AND NATURAL GUARDIANS)
OF TAYLOR ALLEN, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 08-1066N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL SUMMARY ORDER

This cause came on to be heard on Respondent's Motion for Summary Final Order, served June 6, 2008.

STATEMENT OF THE CASE

1. On February 28, 2008, Erica Wright and Karl Washington, on behalf of and as parents and natural guardians of Taylor Allen (Taylor), 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 February 29, 2008, and on May 13, 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 Taylor 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 May 28, 2008, a hearing was scheduled for September 8, 2008, to resolve the issue of compensability. However, on July 6, 2008, NICA served the subject Motion for Summary Final Order.¹ The predicate for the motion was NICA's contention that, indisputably, Taylor's neurologic impairment, a right Erb's palsy, was caused by an injury to the right brachial plexis, not the brain or spinal cord, and that while such injury may have resulted in some physical limitations in the right upper extremity, Taylor's neurologic functioning, mental and physical, was otherwise fully preserved.

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 Taylor on April 23, 2008. Based on that evaluation, as well as the medical records, Dr. Duchowny concluded, within a reasonable degree of medical probability, that Taylor did not suffer an injury to the central nervous system, commonly known to refer to that part of the nervous system consisting of the brain and

spinal cord,² and that whatever the etiology of Taylor's impairment, she 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 April 23, 2008, as follows:

I evaluated Taylor Allen on April 23, 2008. The evaluation was performed in my office at Miami Children's Hospital. Taylor, age 19 months, was brought by her mother, Ms. Erica Wright who supplied historical information to supplement medical records.

MEDICAL HISTORY: Taylor is now age 19 months and "does not have full strength of her right arm." Her mother believes that "everything ends up in her left hand" and that Taylor "doesn't break her fall with her right arm." Taylor's right arm weakness was discovered at birth but she has made steady improvement. She attends physical and occupational therapy provided at Tallahassee Memorial Rehab. Taylor attends therapy twice per month and is winding down from a more active therapy program. Taylor is followed by Dr. Ayala in Tallahassee. At approximately age one year nerve conduction velocity studies and an EMG were performed. The results are not available but based on the results Taylor was referred to Dr. Pinkus at Shands Hospital for further treatment of her weakness. She was diagnosed with Erb's palsy and a shoulder MRI at Shands apparently demonstrated "nerve damage." Surgery was contemplated but not performed.

Taylor's left arm and her legs are completely normal. Her right arm moves well for most activities but her mother is concerned that it is not as strong as the left. Taylor's vision and hearing are good and she sleeps through the night. There are

no problems with appetite. She is on no medications and has never had seizures. Her past medical history is significant for gastroesophageal reflux disease in the first year of life treated with Zantac.

PRE- AND PERINATAL HISTORY: Taylor was the product of a term pregnancy born at Tallahassee Memorial Hospital. She was delivered vaginally. The procedure was complicated by a shoulder dystocia and a right Erb's palsy was diagnosed in the neonatal period. Taylor weighed 7 pounds 9 ounces at birth and was given blow-by oxygen. She remained in the nursery for six days for treatment of infection.

FAMILY HISTORY: Taylor's mother and father are both 34 years old. Taylor has a 13-year-old sister who is a 7th grade Honor Student. The parents are not married and live apart. The mother was adopted and there is no information regarding her biological background. On Taylor's father's side, there is no history of mental retardation, cerebral palsy, epilepsy or paralysis.

GROWTH AND DEVELOPMENT: All of Taylor's milestones have been on time. She walked at 8-9 months and spoke words at age one year. She is not toilet trained.

Taylor is fully immunized and has no known drug allergies. She has never been hospitalized or undergone surgery.

PHYSICAL EXAMINATION reveals an alert, extremely sociable and active 19-month-old infant. Taylor weighs 24 pounds. The skin is warm and moist. There are no neurocutaneous stigmata or dysmorphic features. The spine is straight without dysraphism. There are no cranial or facial anomalies or asymmetries. The head circumference measures 46.2 centimeters, which is within standard percentiles for

age. The fontanelles are closed. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory, and abdominal examination are unremarkable.

Taylor's NEUROLOGICAL EXAMINATION reveals her to be alert and socially integrated. She responds well to the evaluation and is quite playful. She is interactive and will pass objects back and forth. She frequently smiles and shows a well-developed level of curiosity. She speaks in single words. There is an age appropriate stream of attention. Her activity level is appropriate. Cranial nerve examination reveals full visual fields by confrontation testing. The pupils are 3 mm and react briskly to direct and consensually presented light. The extraocular movements are full and conjugate. Funduscopic examination demonstrates well-demarcated disc margins with normal color. There are no abnormal retinal findings. There are no significant facial asymmetries. The uvula is midline. The pharyngeal folds are symmetric. The tongue movements are normal. Motor examination demonstrates an asymmetry of the upper extremities. There is an asymmetric downward slope to the right shoulder compared to the left and the scapula shows a very slight winging. The right biceps muscle appeared somewhat more muscular than the left. There is full range of motion at all joints. Taylor is able to elevate both arms well above neutrality and can raise the right arm over her head. She is able to put the right arm out laterally but has difficulty bringing it behind her back. Distal muscle strength is good and Taylor demonstrates well-developed bimanual dexterity. She demonstrates a left hand preference. She will grab a cube with the right thumb and finger and transfer it to her left hand to build a tower. She can pronate and supinate without difficulty. There are no abnormalities of the left arm

or lower extremities. Deep tendon reflexes are 2+ in the lower extremities but demonstrate an asymmetry at the biceps being 1+ on the left and trace on the right. Triceps reflexes are trace bilaterally and the brachioradialis reflex is 1+ bilaterally. There are no pathological reflexes. Sensory examination reveals a suspected hypoesthesia to pinprick over the right arm in a C5 and C6 cutaneous distribution. The stance is appropriately narrow and the gait is stable. There is symmetric arm swing. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Taylor's neurological examination reveals evidence of mild right Erb's palsy. She has done quite well and has shown good recovery which I believe will continue in the future. Her neurological impairment now is minimal and despite her mother's concern, I believe that she is functioning at a high level.

I have had an opportunity to review medical records sent on March 24, 2008. The record review together with today's evaluation indicate that Taylor's neurological problems are limited to the right brachial plexis and do not include injury to the central nervous system. I therefore do not believe that she is compensable under the NICA statute.

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

5. It is my opinion that TAYLOR ALLEN suffers from neither a substantial mental nor motor impairment originating within the central nervous system. Rather, her neurologic impairment originates in the right brachial plexis and constitutes a peripheral nerve injury. She has a right Erb's Palsy. She has done quite well and has shown good recovery which I believe will continue in the future. Her neurological

impairment now is minimal and despite her mother's concern, I believe she is functioning at a high level. TAYLOR's neurological problems are limited to the right brachial plexis and do not include injury to the central nervous system. I therefore do not believe that she is compensable under the NICA statute.

5. Also attached to NICA's motion was an affidavit of Donald Willis, M.D., an obstetrician, specializing in maternal-fetal medicine. Based on Dr. Willis' evaluation of the medical records, he concluded, within a reasonable degree of medical probability, that Taylor did not suffer an injury to the brain or spinal cord due to oxygen deprivation or mechanical injury during labor and delivery. Dr. Willis' observations and conclusions were documented in his written report of March 31, 2008, as follows:

I have reviewed the medical records for the above individual. The mother, Erica Wright, was a 32 year old G3 P1011 admitted to the hospital at 39 weeks in labor. Prenatal record is not available for review. Fetal heart rate monitoring strip during labor is also not available for review.

Delivery was complicated by a mild shoulder dystocia and a nuchal cord. Birth weight was 3,435 grams or 7 lbs 9 ozs. Apgar scores were 5/9. Umbilical artery pH was 7.189. Blow by O2 was given for three minutes after birth. The NICU nursery was called at twelve minutes after birth. When they arrived, the baby was pink and crying. No resuscitation was required. The baby left the delivery room with the mother and Labor and Delivery staff. A weakness in the right ar[m] was noted, consistent with an

Erb's palsy. The newborn hospital course was otherwise uncomplicated.

Although delivery was complicated by a mild shoulder dystocia, there are no findings to suggest brain or spinal cord damage due to oxygen deprivation or mechanical trauma during labor or delivery

Dr. Willis' affidavit summarized his conclusions, as follows:

5. It is my opinion that although delivery was complicated by a mild shoulder dystocia, there are no findings to suggest brain or spinal cord damage due to oxygen deprivation or mechanical trauma during labor or delivery.

6. Petitioners did not respond to the Motion for Summary Final Order. Therefore, on June 20, 2008, an Order to Show Cause was entered, as follows:

On June 6, 2008, Respondent served a Motion for Summary Final Order. To date, Petitioners have not responded to the motion. Fla. Admin. Code R. 28-106.204(4). Accordingly, it is

ORDERED that by June 30, 2008, Petitioners show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

Petitioners did not respond to the Order to Show Cause.

7. Given the record, it is indisputable that while Taylor suffered a mechanical injury to her right brachial plexis during the course of birth, with a resulting right Erb's Palsy, such injury is unrelated to the brain or spinal cord, and that regardless of the origin of her injury, Taylor is not

permanently and substantially mentally and physically impaired. Consequently, NICA's Motion for Summary Final Order is well-founded.³

CONCLUSIONS OF LAW

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

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Here, indisputably, Taylor'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 her problems, Taylor is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes,

Taylor 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.).

15. 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 Erica Wright and Karl Washington, on behalf of and as parents and natural guardians of Taylor Allen, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for September 8, 2008, is cancelled.

DONE AND ORDERED this 7th day of July, 2008, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2008.

ENDNOTES

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

2/ See "System," "central nervous," Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. See also "systems," "nervous," ("It comprises the central and peripheral nervous systems: the former is composed of the brain and spinal cord, and the latter includes all other neural elements."

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.