

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIBAN MACHADO AND LEIDY MENDEZ,)
ON BEHALF OF AND AS PARENTS AND)
NATURAL GUARDIANS OF LISYANIEL)
MACHADO, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 08-2090N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
PALMETTO GENERAL HOSPITAL, FEM-)
CARE, P.A., and IGNACIO A.)
RAMIREZ, M.D.,)
)
Intervenors.)
_____)

SUMMARY FINAL ORDER

This cause came on to be heard on Respondent's Motion for Summary Final Order, served September 19, 2008.

STATEMENT OF THE CASE

1. On April 25, 2008, Liban Machado and Leidy Mendez, on behalf of, and as parents and natural guardians of Lisyaniel Machado (Lisyaniel), 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 petition on April 28, 2008, and on August 15, 2008, following an extension of time within which to do so, NICA served its response to the petition and gave notice that it was of the view that Lisyaniel 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, Palmetto General Hospital, Fem-Care, P.A., and Ignacio A. Ramirez, M.D., were granted leave to intervene.

3. By Notice of Hearing dated September 5, 2008, a hearing was scheduled for December 9, 2008, to resolve the issue of compensability. However, on September 19, 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, Lisyaniel's impairments were most likely developmentally based, as opposed to birth-related, and regardless of the etiology of his problems, Lisyaniel was not substantially physically impaired.

4. Attached to NICA's motion was an affidavit of Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, who reviewed the medical records related to

Lisyaniel's birth and concluded, within a reasonable degree of medical probability, that Lisyaniel "did not have oxygen deprivation or mechanical trauma during labor, delivery or the immediate post delivery period that would result in brain damage."

5. Also attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Lisyaniel on July 30, 2008. Based on his evaluation, as well as his review of Lisyaniel's medical records and those of his mother, Dr. Duchowny concluded, within a reasonable degree of medical probability, that Lisyaniel's impairments were likely developmentally based, as opposed to birth-related, and that Lisyaniel was not substantially physically impaired. Dr. Duchowny's observations and conclusions were documented in his written report, as follows:

PHYSICAL EXAMINATION reveals an alert, remarkably cooperative, well-developed and well-nourished 3-year-old boy. The hair is dark brown and of normal texture. There is a single pigmented nevus under the hair in the left parietal scalp. There are no neurocutaneous stigmata or dysmorphic features. The head circumference measures 48.5 centimeters which is at the 40th percentile for age match controls. There are no cranial or facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. The heart sounds are strong and the lung fields are clear. The abdomen is soft and

nontender with no palpable abdominal organomegaly. Peripheral pulses are 2+ and symmetric.

Lisyaniel's NEUROLOGICAL EXAMINATION reveals him to be alert and fully cooperative with the examination. He did not speak spontaneously but did answer several questions and could articulate a fair number of words in Spanish. He appropriately identified pictures of several animals. His speech sounds are poorly articulated for lingual and labial consonants. His attention span appeared appropriate for age and he maintained a coherent stream of interaction. Cranial nerve examination reveals full visual fields to direct confrontation testing. The pupils are 3 mm and react briskly to direct and consensually presented light. Funduscopic examination revealed sharply demarcated disc margins without evidence of optic pallor or retinopathy. There are no significant facial asymmetries. The tongue and palate move well. The uvula is midline. The motor examination revealed symmetric strength, bulk and tone. There is no evidence of atrophy or weakness in the proximal shoulder girdle of either side and there is a full range of motion. The scapulae appear normal without evidence of winging. The deltoid, pectoralis, latissimus and rhomboid musculature appears normal. There is full range of motion at all joints and well-developed individual finger dexterity of both hands. Lisyaniel is able to build a tower of 8 cubes without difficulty. He has a well-developed pincher grasp and uses both hands cooperatively. The sensory examination was limited by diminished cooperation but appeared to be normal with regard to withdrawal of extremities to stimulation. Deep tendon reflexes are 2+ throughout and both plantar responses are downgoing. Tests of cerebellar coordination including finger touching tasks were normal. Lisyaniel's station and gait were

appropriate for age and there is a symmetric arm swing. There is no evidence of ataxia. The spine is straight without dysraphic features. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Lisyaniel's neurological examination reveals evidence of developmental language disorder. There are no specific focal or lateralizing features to suggest structural brain damage - findings consistent with his normal neuroimaging and EEG evaluations. I believe that Lisyaniel's major problems center around mental illness given the occurrence of visual hallucinations.

I have reviewed medical records sent to me on May 28, 2008. These records together with the findings on today's evaluation do not suggest that Lisyaniel's impairments result from a neurological injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury at birth. Rather, Lisyaniel's problems are more likely to represent significant mental illness and the early onset of visual hallucinations is particularly worrisome. Furthermore, Lisyaniel does not have a substantial physical impairment. For these reasons, I do not believe that Lisyaniel is compensable under the NICA statute

6. Neither Petitioners nor Intervenors responded to the Motion for Summary Final Order. Therefore, on October 2, 2008, an Order to Show Cause was entered, as follows:

On September 19, 2008, Respondent served a Motion for Summary Final Order. To date, neither Petitioners nor Intervenors have responded to the motion. Fla. Admin. Code R. 28-106.204(4). Accordingly, it is

ORDERED that by October 16, 2008, Petitioners and Intervenors show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

7. Petitioners filed a Response to Order to Show Cause on October 9, 2008, and requested an extension until November 14, 2008, to respond to the Motion for Summary Final Order. That response was addressed by Order of October 13, 2008, as follows:

This cause came on to be heard on Petitioners' Response to Order to Show Cause, filed October 9, 2008. By this response, Petitioners request until November 14, 2008, to reply to the Order to Show Cause.

Given that Respondent's Motion for Summary Final Order was served September 19, 2008; Petitioners did not respond to that motion; and this case is scheduled for hearing on December 9, 2008, and has been since September 5, 2008, on the issue of compensability, it is

ORDERED that Petitioners are accorded until October 31, 2008, to file their response to the Motion for Summary Final Order and the Order to Show Cause. Thereafter, Respondent's Motion for Summary Final Order will be addressed without further delay.

It is further ORDERED that Intervenors are accorded until October 31, 2008, to file their response to the Motion for Summary Final Order and the Order to Show Cause. Thereafter, Respondent's Motion for Summary Final Order will be addressed without further delay.

8. By requests filed October 16, 2008, and October 17, 2008, respectively, Intervenor Palmetto General Hospital and

Intervenors Fem-Care, P.A. and Ignacio A. Ramirez, M.D., also requested and extension until November 14, 2008, to respond to the Motion for Summary Final Order. That request was denied by Order of October 21, 2008, as follows:

This cause came on to be heard on the Response to Order to Show Cause filed by Intervenors, Fem-Care, P.A. and Ignacio A. Ramirez, M.D., on October 17, 2008, whereby they request an extension of time to respond to Respondent's Motion for Summary Final Order, and the Motion for Extension of Time to File Response to Respondent's Motion for Summary Final Order, filed by Intervenor Palmetto General Hospital on October 16, 2008. Notably, by Order of October 13, 2008, Petitioners and Intervenors were accorded an extension of time until October 31, 2008, to file their responses to the Motion for Summary Final Order. Under the circumstances, and for reasons stated in that order, it is

ORDERED that Intervenors request for an extension until November 14, 2008, to respond to the Motion for Summary Final Order is denied.

9. Thereafter, on October 28, 2008, and October 30, 2008, respectively, Intervenor Palmetto General Hospital and Intervenors Fem-Care, P.A. and Ignacio A. Ramirez, M.D., filed a Notice of No Opposition to Respondent's Motion for Summary Final Order. In contrast, on October 30, 2008, Petitioners filed a Motion for Extension of Time to Respond to Order to Show Cause, and stated:

The Petitioners, LIBAN MACHADO and LEIDY MENDEZ, on behalf of and as parents and

natural guardians of LISYANIEL MACHADO, by and through undersigned counsel, move this Court for an Order granting an additional 60 days in which to respond to the Order to Show Cause, and as grounds therefore states as follows:

1. On October 13, 2008 this Court entered an order giving the Petitioners until October 31, 2008 to file an affidavit in opposition to the Defendant's Motion for Summary Judgment.

2. Undersigned counsel has advised the Petitioners that he would be unable to proceed with this matter any further. In response, the Petitioners requested additional time to seek out new counsel. Assuming the Petitioners are able to retain new counsel, a substitution of counsel, would be filed. In the event the Petitioners are unable to retain new counsel, they would authorize undersigned counsel to take a voluntary dismissal.

3. Based upon the above, the Petitioners are requesting an additional 60 days in order to allow the Petitioners to find new counsel.

WHEREFORE, the Petitioners move this Court for an additional 60 days in which to respond to the Order to Show Cause.

10. By Order of November 18, 2008, Petitioners request for an extension of time was approved, as follows:

1. Petitioners' motion is granted, and they are accorded until December 31, 2008, to secure new counsel, and file their response to the Order to Show Cause, or voluntarily dismiss their claim. Thereafter, Respondent's Motion for Summary Final Order will be addressed without further delay.

2. The hearing scheduled for December 9, 2008, is cancelled, and will be rescheduled at a later date, if necessary.

To date, Petitioners have not complied with the Order of November 18, 2008. Consequently, Respondent's Motion for Summary Final Order is addressed without further delay.

11. Given the record, it is undisputed that Lisyaniel's impairments are developmentally based, as opposed to birth-related, and regardless of the etiology of his impairments Lisyaniel is not substantially physically impaired. Consequently, NICA's Motion for Summary Final Order is well-founded.²

CONCLUSIONS OF LAW

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

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. Here, indisputably, Lisyaniel'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 his problems, Lisyaniel is not permanently and substantially physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Lisyaniel 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.).

19. 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
Liban Machado and Leidy Mendez, on behalf of, and as parents and
natural guardians of Lisyaniel Machado, a minor, be and the same
is dismissed with prejudice.

DONE AND ORDERED this 8th day of January, 2009, 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 8th day of January, 2009.

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/ 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 that 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).

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. 7005 1820 0002 9840 7731)

Octavio L. Martinez, Esquire
Octavio L. Martinez, P.A.
9595 North Kendall Drive, Suite 200
Miami, Florida 33176
(Certified Mail No. 7005 1820 0002 9840 7748)

William F. Fink, Esquire
Wicker, Smith, O'Hara, McCoy,
Graham & Ford, P.A.
Grove Plaza, Fifth Floor
2900 Southwest 28th Terrace
Miami, Florida 33133
(Certified Mail No. 7005 1820 0002 9840 7755)

Maria Vidakis, Esquire
Stephens, Lynn, Klein, Lacava, Hoffman, and Puya, P.A.
Two Datran Center- Penthouse 2
9130 South Dadeland Boulevard
Miami, Florida 33156
(Certified Mail No. 7005 1820 0002 9840 8424)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324
(Certified Mail No. 7007 2980 0000 9309 0946)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7005 1820 0002 9840 5690)

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.