

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HILDA RIOS AND JAIME RIOS, ON)
BEHALF OF AND AS PARENTS AND)
NATURAL GUARDIANS OF MARITZA)
RIOS, A MINOR,)
)
)
Petitioners,)
)
vs.) Case No. 08-4198N
)
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
WINTER HAVEN HOSPITAL, INC.,)
d/b/a REGENCY MEDICAL CENTER;)
VINCENT W. GATTO, M.D.;)
STEFANIE L. YOUNG, ARNP; and)
BOND & STEELE CLINIC, PA,)
)
Intervenors.)
)
_____)

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 May 18, 2009, by video teleconference, with sites in Tallahassee and Lakeland, Florida.

APPEARANCES

For Petitioners: Armando T. Lauritano, Esquire
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For Respondent: David W. Black, Esquire
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For Intervenors Vincent W. Gatto, M.D., Stefanie L. Young,
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On August 25, 2008, Hilda Rios and Jaime Rios, on behalf of
and as parents and natural guardians of Maritza Rios (Maritza),

a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for benefits under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on August 26, 2008, and on December 5, 2008, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view that Maritza did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, because she was not substantially mentally impaired, and requested that a hearing be scheduled to resolve the issue of compensability. In the interim, Winter Haven Hospital Inc., d/b/a Regency Medical Center, was accorded leave to intervene, and on December 19, 2008, Vincent W. Gatto, M.D., Stefanie L. Young, ARNP, and Bond & Steele Clinic, P.A., were accorded leave to intervene.

At hearing, Joint Exhibits 1-11 were received into evidence.¹ No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed June 9, 2009, and the parties were accorded 10 days from that date to file proposed orders. Respondent and Intervenors elected to file such proposals and they have been duly-considered.

FINDINGS OF FACT

Stipulated facts²

1. Petitioners, Hilda Rios and Jaime Rios, are the parents and natural guardians of Maritza Rios, a minor. Maritza was born a live infant on October 10, 2005, at Winter Haven Hospital, Inc., d/b/a Regency Medical Center, a licensed Florida hospital located in Winter Haven, Florida, and her birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Maritza's birth by Vincent W. Gatto, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

3. "Notice pursuant to § 766.316, Fla. Stat., was properly given or excused, and is not an issue in this case."

4. Maritza suffered an injury to the brain, caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered her permanently and substantially physically impaired. The only remaining issue is whether such injury also rendered Maritza permanently and substantially mentally impaired.

Findings related to Maritza's injury and her impairment

5. At NICA's request, Donald Willis, M.D., an obstetrician/gynecologist, reviewed the medical records related to Maritza's birth and newborn course, and concluded that Maritza suffered an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, and the immediately postdelivery period. Dr. Willis summarized the basis for his conclusion, as follows:

I have reviewed the medical records for the above individual. The mother, Hilda Rios, was a 29 year old G4 P2103 with her first baby born by Cesarean section and then two vaginal births. Prenatal care was uncomplicated. She presented at 38 weeks with spontaneous rupture of the membranes. Vaginal birth after Cesarean section was planned.

The fetal heart rate pattern had a normal baseline heart rate and was reactive on admission [to Winter Haven Hospital]. Some occasional variable decelerations were present since early in labor. About 45 minutes before delivery the patient had moderate vaginal bleeding and severe variable decelerations that continued until delivery. Cesarean section was done for the abnormal FHR pattern. A uterine rupture was documented at surgery. The fetal head was in the maternal abdomen and the placenta was completely separated from the uterus. No cord blood could be obtained due to the abruption. Birth weight was 3,329 grams or 7 lbs 5 ozs.

The newborn was floppy, depressed and had no respiratory effort. [Apgar scores were noted as 1, 5, and 7, at one, five, and ten minutes respectively.] Bag and mask

ventilation was done until the heart rate was >100 bpm. There was still no respiratory effort and intubation was required. The baby was taken to the NICU intubated and with depressed muscle tone. Initially, the baby did well, but shortly after birth, an attempt to take the baby off the ventilator failed. The baby became acidotic and hypoxic. Seizure activity was suspected based on facial grimacing. EEG was normal. Re-intubation was required. The baby remained on the ventilator for six days.

Ultrasound of the head on the day after birth was normal. MRI . . . [showed abnormal signal within the thalami and basal ganglia] suspicious of hypoxic insult. A follow up MRI at 10 months of age was normal. Genetic evaluation was done and was normal.

* * *

In Summary, labor was complicated by a uterine rupture due to a prior Cesarean section. The baby was expelled into the maternal abdominal cavity and the placenta separated from the uterus. This event resulted in oxygen deprivation to the baby during labor, delivery and into the immediate post delivery period with resulting brain injury. I am not able to comment as to the extent of the brain injury.

(Joint Exhibit 7).

6. To address the nature and significance of Maritza's injury, the parties also offered the report and deposition testimony of Raymond Fernandez, M.D., a pediatric neurologist who, at NICA's request, evaluated Maritza on November 12, 2008, when she was a 3-year 1-month old infant. (Joint Exhibits 6 and

10). Based on his evaluation, review of the medical records, and the history he obtained from Maritza's parents, Dr. Fernandez, like Dr. Willis, was of the opinion that Maritza suffered a brain injury (within the thalami and basal ganglia) due to oxygen deprivation during labor and delivery, secondary to uterine rupture. As for the significance of her injury, Dr. Fernandez was of the opinion that Maritza's brain injury rendered her permanently and substantially physically impaired, but not permanently and substantially mentally impaired.

7. Pertinent to Maritza's impairments, Dr. Fernandez documented the results of his evaluation, and Maritza's medical history following her discharge from Winter Haven Hospital on October 23, 2005, in his report, as follows:

An independent medical examination was performed on 3-year 1-month-old Maritza Rios on November 12, 2008, at the request of Ms. Kathe Alexander, Florida Birth-Related Neurological Injury Compensation Association. Maritza was accompanied by her parents, Mr. and Mrs. Rios.

* * *

Maritza was referred to a pediatric neurologist on August 1, 2006, age 10 months, because of motor delay. She was not sitting or crawling. She had strabismus and was referred for physical therapy and occupational therapy. Brain MRI on August 21, 2006, reportedly was normal. Also normal were amino acids, organic acids, chromosomes, acylcarnitine profile, and testing for Angelman syndrome was negative. The next visit to pediatric neurology was on

September 26, 2006, age 11 months. She was unable to sit, had mild tightness of heel cords, stood with support on her tiptoes, rolled over and said mama and papa. Plantar responses were extensor. On December 19, 2006, age 14 months, personal-social development was on target, fine motor development was at the 10 to 11 month age, language 14 months, and gross motor development 7 months. It was stated that lactate and ammonia were elevated. Muscle biopsy showed congenital fiber type disproportion but no details were given and nonspecific Z-band streaming on electron microscopy.

[On March 15, 2007, at] 17 months of age, [a Speech-Language and Oral Motor Evaluation noted] auditory comprehension was at the 14-month level, and expressive communication was at the 9-month level. [The evaluation characterized Maritza's receptive language skills as within normal limits [WNL] and her expressive language skills as mildly to moderately delayed. Speech therapy, at 30 minutes twice weekly for 6 months was recommended.³] At 1 year and 11 months of age, gross and fine motor development was said to be at the 12-month level.

Mr. and Mrs. Rios stated that Maritza was generally healthy. They have not observed seizures. They feel that she understands what is said to her at an age-appropriate level and that she interacts well with her sisters. Speech, while initially delayed, has improved significantly over the past 2 to 3 months. She now speaks numerous single words, phrases and sentences, mainly in Spanish. She sits independently but with a rounded back and with her head often deviated to 1 side or the other and sometimes flexed onto her chest. Head control is improving. She ambulates by bouncing on her knees. She pulls to stand, takes 2 or 3 independent steps and then falls if not supported. She began doing

this about 2 months ago. Maritza has been enrolled in a physical therapy program and will begin an early learning program in public school in January of 2009.

PHYSICAL EXAMINATION: Weight approximately 32 pounds. Pulse rate 92. Respiratory rate 20. Head circumference 48.5 cm (just below the 50th percentile). Maritza was alert and attentive. She was socially engaging. She smiled responsively and extended her hand to me when I greeted her. She told me her first name and age when asked. She told me her sisters' names. She also said in Spanish that "I don't want to walk because I cannot." Speech at times was indistinct [dysarthric⁴] but I was usually able to understand her. She identified 2 colors correctly, counted to 3 correctly, then skipped 4 and then counted from 5 to 8. She sang the alphabet song, although not completely. She pointed to most body parts correctly. She counted my fingers up to 3 correctly, then again skipped 4 and resumed counting at 5. Maritza was visually attentive and maintained good eye contact. Pupils were equal and reactive to light. Eyes were straight and moved fully. There was no ptosis. Face was symmetric. Hearing was grossly normal. Palate elevated symmetrically. Tongue midline. She swallowed well. There was no drooling. Muscle tone was reduced axially and in her limbs. She sat independently but with a rounded back, and her head was either flexed forward or deviated to either side. She pulled to stand with difficulty and took 2 unsteady steps, and then would have fallen if not supported. There was truncal instability. There was no obvious weakness of extremities in that she easily elevated her arms above her head and elevated her legs when on her mother's lap. Also, she supported her weight when standing but was unsteady, and I believe this is what would have caused her to fall rather than weakness of her legs. She reached with either hand

with tremor and with some writhing movements of her arms distally. Deep tendon reflexes were 1+ in the arms, knees and ankles. Plantar responses were probably flexor. ENT exam was normal as were heart, lungs, and abdomen. There were no dysmorphic features or significant skin abnormalities. Maritza stacked three 1-inch cubes, although with difficulty because of her motor incoordination. She attempted to draw circles but had difficulty because of tremor. She handed objects to either parent correctly when asked to do so, and she also placed objects on the examining table next to her on request so that she understood these verbal requests. She correctly named pictures of animals and correctly described a picture of ducks and stated in Spanish that they were walking.

IMPRESSION: Motor impairment that is substantial and consistent with deep brain injury (with basal ganglia) due to oxygen deprivation during labor and delivery, secondary to uterine rupture. However, I do not find evidence for substantial cognitive impairment at this time. Please note that Maritza might eventually prove to have learning difficulty, but this cannot be predicted based on current findings. She is improving, and this trend should continue. (Emphasis added).

(Joint Exhibit 6).

8. In his deposition testimony, Dr. Fernandez contrasted the history he obtained and the results of his examination of Maritza, with what he would expect to find if she were substantially mentally impaired, as follows:

Well, a child with substantial cognitive mental impairment is a child who is not interactive, who is not attentive, who doesn't comprehend or understand spoken

language, receptive language. A child that cannot carry out verbal requests because they don't understand what they are being asked to do. A child who might not speak at all. A child who doesn't understand, for example, prepositional commands to give something to that person, to give something to the mother, to the father, put something on the table. A child that cannot understand that. A child who has not learned and remembered colors at the age of three years. That's a three-year-old function. A child who cannot remember the shapes of symbols like circles. That's a three-year-old function, to know what a circle looks like and to draw it, or try to draw it in Maritza's case. She had trouble because of the motor problem that she has, but she made a definite attempt to make that circle.

There are the things that a child with substantial mental cognitive impairment are not going to be able to do

(Joint Exhibit 10, p. 116). In contrast, Dr. Fernandez was of the opinion that, by history and on evaluation, Maritza interacted at an age appropriate level, by conversing, understanding and following verbal requests; demonstrated expressive and receptive language skills at an age appropriate level; and had the ability to learn and be educated.

9. In response to the observations and opinions of Dr. Fernandez, Intervenors offered the deposition testimony of Mr. and Mrs. Rios, as well as the deposition testimony of Elias Chalhub, M.D., a pediatric neurologist, to support a conclusion that Maritza was permanently and substantially

mentally impaired. (Joint Exhibits 8, 9, and 11). However, such testimony was not compelling.

10. From the testimony of Mr. and Mrs. Rios one learns that Maritza does not know her numbers, or can count only to 2; Maritza does not know the alphabet; Maritza knows only 3-5 words, but says more than 10; that six months earlier Maritza spoke only 1 word; Maritza does not speak in sentences; Maritza cannot converse; Maritza does not understand her parents; Maritza does not understand the television shows she watches (but, she watches in English, and speaks only Spanish); and Maritza does not understand stories her parents may read to her (but, they rarely read to her). However, Mr. and Mrs. Rios' testimony conflicts dramatically with the history they provided Dr. Fernandez, as well as Dr. Fernandez's personal and professional observations, and no credible explanation was offered to explain such discrepancy.

11. From Dr. Chalhub we learn that in his opinion Maritza is permanently and substantially mentally impaired. However, Dr. Chalhub did not examine Maritza, and in reaching his opinion, Dr. Chalhub accepted, as true, the testimony of Mr. and Mrs. Rios regarding Maritza's presentation, and rejected or ignored the observations of Dr. Fernandez, without a persuasive explanation.

12. Notably, the observations and opinions of Dr. Fernandez were logical, consistent with the record, and not shown to lack credibility. In contrast, the testimony of Mr. and Mrs. Rios, as well as Dr. Chalhub, was not compelling. Accordingly, it is resolved that, more likely than not, Maritza is not permanently and substantially mentally impaired.

CONCLUSIONS OF LAW

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

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. As the proponents of the issue, the burden rested on Petitioners or Intervenors to demonstrate that Maritza 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.").

20. Here, the proof failed to demonstrate that Maritza was "permanently and substantially mentally . . . impaired." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Maritza 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, 1356 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and substantial physical impairment.).

21. 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 Hilda Rios and Jaime Rios, on behalf of and as parents and natural guardians of Maritza Rios, a minor, is dismissed with prejudice.

DONE AND ORDERED this 10th day of July, 2009, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2009.

ENDNOTES

1/ The Joint Exhibits are described, as follows: Exhibit 1 (Medical records of Winter Haven Hospital, October 10-22, 2005, for Maritza Rios), Exhibit 2 (Medical records of Winter Haven Hospital, October 9-13, 2005, for Hilda Rios), Exhibit 3 (Medical records of N. Nur Qureshi, M.D.), Exhibit 4 (Medical

records of Ricardo Arguello, M.D.), Exhibit 5 (Medical records of Our Children's Rehab), Exhibit 6 (Medical report of Raymond J. Fernandez, M.D., for an evaluation on November 12, 2008), Exhibit 7 (Medical report of Donald Willis, M.D., dated October 16, 2008), Exhibit 8 (Original deposition transcript of Jaime Rios, taken March 25, 2009), Exhibit 9 (Original deposition transcript of Hilda Rios, taken March 25, 2009), Exhibit 10 (Original deposition transcript of Raymond J. Fernandez, M.D., taken March 27, 2009), and Exhibit 11 (Original deposition transcript of Elias Chalhub, M.D., taken May 13, 2009).

2/ Joint Pre-Hearing Stipulation; Transcript, pp. 4-7.

3/ Joint Exhibit 5.

4/ In Dr. Fernandez's deposition testimony he described her speech as "dysarthric," and likely a motor issue as opposed to a cognitive issue. (Joint Exhibit 10, p. 42). See also "dysarthria," "imperfect articulation of speech due to disturbance of muscular control which result from damage due to the central or peripheral nervous system." Dorland's Illustrated Medical Dictionary, 28th Edition, 1994.

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.