

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAVIN KELLY, A MINOR, BY AND)
THROUGH HIS PARENTS AND NATURAL)
GUARDIANS, GILLIAN KELLY AND)
KENNETH KELLY, AND GILLIAN)
KELLY AND KENNETH KELLY,)
INDIVIDUALLY,)
)
Petitioners,)
)
vs.) Case No. 08-4568N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
PLANTATION GENERAL HOSPITAL)
LIMITED PARTNERSHIP, d/b/a)
PLANTATION GENERAL HOSPITAL,)
)
Intervenor.)
_____)

SUMMARY FINAL ORDER

This cause came on to be heard on Respondent's Motion for Summary Final Order, served January 20, 2009.

STATEMENT OF THE CASE

1. On September 17, 2008, Gillian Kelly and Kenneth Kelly, individually, and as parents and natural guardians of Gavin Kelly (Gavin), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH), to resolve whether

the claim was compensable under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and whether the health care providers complied with the notice provisions of the Plan.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on September 18, 2008, and on December 22, 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 Gavin 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, Plantation General Hospital was granted leave to intervene.

3. By Notice of Hearing dated January 13, 2009, a hearing was scheduled for April 14, 2009, to resolve the issues of compensability and notice. However, on January 20, 2009, 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 Gavin's impairments were most likely related to a brain injury that post-dated labor, delivery, and the immediate postdelivery period, and, regardless of the etiology of his impairments, Gavin was not permanently and substantially mentally and 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 Gavin's birth and concluded, within a reasonable degree of medical probability, that Gavin's brain injury was not birth-related. In reaching his conclusion, Dr. Willis observed that the medical records revealed:

Fetal heart rate had a normal baseline and was reactive during early labor. Some variable decelerations occurred about ninety minutes before delivery. Fetal tachycardia of 170 to 180 bpm was present when the fetal heart rate monitor was removed for delivery.

Cesarean section was done for fetal tachycardia and arrest of descent. Birth weight was 3,835 grams. Apgar scores were 9/9. The baby was not depressed at birth. No resuscitation was required. The baby was described as active, alert and cried spontaneously at birth. Physical exam on admission to the normal newborn nursery was normal.

Two cyanotic episodes were observed at two days of age. The baby was transferred to the NICU for evaluation. Neurologic exam was normal. Arterial blood gas was normal. Condition on admission to the NICU was described as vigorous, active and responsive. Antibiotics were given. Cultures were negative. Several episodes of apnea and bradycardia were observed after feedings. The baby did not have any seizures. No etiology was identified for the episodes and the baby was discharged home on the 8th day of life.

MRI at six months of age showed extensive cystic and degenerative changes throughout

the left hemisphere of the brain. The child had clinical weakness on the right side. Thrombophilia laboratory evaluation was negative.

Consequently, Dr. Willis concluded:

. . . [T]his baby was not depressed at birth and had an apparently normal newborn course until the second day of life when two cyanotic episodes were observed. MRI at six months of age is consistent with a cerebral vascular accident. However, there was no obstetrical event that would suggest oxygen deprivation or mechanical trauma to the brain occurred during labor, delivery or the immediate post delivery period.

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 Gavin on December 3, 2008. Based on his evaluation, as well as his review of Gavin's medical records and those of his mother, Dr. Duchowny also concluded, within a reasonable degree of medical probability, that Gavin's brain injury was not birth-related, and further resolved that Gavin did not have a significant mental impairment. Dr. Duchowny documented his findings and the basis for his opinion, as follows:

PHYSICAL AND NEUROLOGICAL EXAMINATIONS today reveal Gavin to be an alert and cooperative, well-behaved, appropriately proportioned 22-month-old infant. He sits quietly and attentively in his father's lap. He maintains an age appropriate stream of attention and will answer questions with appropriate responses. The skin is warm and moist. There are no neurocutaneous

stigmata. There is one café au lait spot over the left ankle. The head circumference is asymmetric with left posterior plagiocephaly. The fontanelles are closed. The head circumference measures 47.1 centimeters which is within standard percentiles. The spine is straight without dysraphism. The neck is supple without masses, thyromegaly or adenopathy. There are no significant facial asymmetries. If anything, the left palpebral fissure is slightly wider than the right. The tongue movements are well coordinated. The uvula is midline and the pharyngeal folds are symmetric. There is no drooling. Motor examination reveals a right upper extremity monoparesis more prominent distally. Gavin tends to grasp almost exclusively with his left hand. I was able to get him to place objects in his right hand but he would readily transfer it to the left. He could build a tower of five cubes with his left hand and had a well-developed left pincher grasp. He could not fully supinate the right hand. There is no obvious muscle bulk asymmetry of the arm or forearm. There is full range of motion at all joints when resistance is overcome. There are no fasciculations, adventitious movements or focal atrophy. The cranial nerve examination reveals full visual fields to direct confrontation testing. There are full extraocular movements. The pupils are 3mm and react briskly to direct and consensually presented light. The funduscopic examination is unremarkable.

Gavin's speech showed significant dysarthria but he could name animals, body parts, and could count to five. His attention span was appropriate for age. Sensory examination is intact to withdrawal of all extremities to stimulation. The deep tendon reflexes are 2+ at the biceps and knee jerks. Plantar responses are downgoing. His gait is stable with diminished right arm swing. He could elevate his left arm fully and could do so

with the right but the movement clearly lagged the left side. Both arms were held sideways without difficulty. Gavin could get up from a sitting position on the floor with reasonably good balance for age. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Gavin's neurological examination reveals a right upper extremity monoparesis. I could detect no involvement in the face or lower extremities. His station and gait are appropriate for age. His cognitive development also appears to be proceeding satisfactory. Gavin therefore does not have a significant mental impairment at his neurocognitive status is at age level.

I have reviewed medical records sent to me on October 23, 2008. The records indicate that Gavin suffered a stroke in the distribution of the left middle cerebral artery. His MRI scan of July 24, 2007 demonstrates cystic encephalomalacia in the left cerebral hemisphere in this vascular territory. Of note, placental pathology demonstrated fibrinoid deposition and microcalcifications suggesting placental insufficiency in utero. Furthermore, a laboratory workup disclosed a mutation in the gene controlling methylene tetrahydrofolate reductase. The biochemical abnormality is a predisposing factor for stroke and indicates that Gavin most likely has a hereditary disorder.

I therefore do not believe that Gavin is compensable under the NICA statute

6. Petitioners responded to the Motion for Summary Final Order on January 30, 2009, and stated, "they have no opposition to the entry of a Summary Final Order in accordance with the Motion for Summary Final Order filed by [NICA]." However,

Intervenor did not respond to the motion. Accordingly, on February 3, 2009, an Order to Show Cause was entered, which provided:

ORDERED that Intervenor is accorded until February 13, 2009, to file a response to Respondent's Motion for Summary Final Order, and show good cause in writing, if any it can, why the relief requested by Respondent should not be granted. Thereafter, Respondent's Motion for Summary Final Order will be addressed without further delay.

7. Intervenor filed a response to the Order to Show Cause on February 6, 2009, and stated "Intervenor . . . takes no position regarding the Respondent's pending Motion for Summary Final Order."

8. Given the record, it is undisputed that Gavin's impairments are not birth-related and, regardless of the etiology of his impairments, Gavin is not substantially mentally impaired. Consequently, NICA's Motion for Summary Final Order is well-founded.²

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 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.

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(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.

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, Gavin's neurologic impairments were not "caused by an injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation" and, regardless of the etiology of his problems, Gavin is not permanently and substantially mentally impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Gavin 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 Gillian Kelly and Kenneth Kelly, individually, and as parents and natural guardians of Gavin Kelly, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for April 14, 2009, is cancelled.

DONE AND ORDERED this 17th 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
Division of Administrative Hearings
this 17th day of February, 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).

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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.