

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LEIGHA MYERS AND CURTIS MYERS, )  
as parents and natural )  
guardians of JADEN MYERS, a )  
minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-5973N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
SOUTHERN BAPTIST HOSPITAL OF )  
FLORIDA, INC., d/b/a BAPTIST )  
MEDICAL CENTER, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

FINAL ORDER ON COMPENSABILITY

Pursuant to the parties' stipulation, this cause was submitted to Ella Jane P. Davis, an Administrative Law Judge of the Division of Administrative Hearings, upon a stipulated record.

APPEARANCES

For Petitioners: Ronald S. Gilbert, Esquire  
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For Respondent: M. Mark Bajalia, Esquire  
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For Intervenor: Earl E. Googe, Jr., Esquire  
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STATEMENT OF THE ISSUE

Whether Jaden Myers qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On October 28, 2009, Leigha Myers and Curtis Myers, as parents and natural guardians of Jaden Myers (Jaden), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) entitled "Petition for Determination of Compensability Pursuant to Florida Statutes Section 766.301 et seq." The petition sought a determination of whether Jaden's injuries are qualifying injuries under the Florida Birth-Related Neurological Injury Compensation Association (NICA) plan.

DOAH served NICA with a copy of the claim on October 29, 2009; served Mitzi Brock, M.D., on November 2, 2009; and served Baptist Medical Center on November 2, 2009.

On February 9, 2010, NICA filed its response to the petition and gave notice that it was of the view that Jaden 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 whether the claim was compensable. By Order entered August 5, 2010, Southern Baptist Hospital, Inc., d/b/a Baptist Medical Center was granted leave to intervene.

Thereafter, the parties pursued discovery, and the case was twice scheduled for hearing and continued upon agreement of the parties.

An Order entered June 1, 2011, granted the parties' Joint Motion to Submit Stipulated Factual Record and Written Argument in Lieu of a Contested Hearing. On August 5, 2011, a Joint Prehearing Stipulation was filed. On August 8, 2011, a Stipulated Record was transmitted to DOAH. On August 17, 2011, an Amended Stipulated Record (a supplement by agreement of the parties) was transmitted to DOAH.<sup>1/</sup> Upon motion, and by Order entered August 18, 2011, the parties were accorded until August 26, 2011, to file their proposed final orders.

Only Respondent NICA filed a proposal, and that proposed final order has been considered.

#### FINDINGS OF FACT

1. Leigha Myers and Curtis Myers are the natural parents and guardians of Jaden Myers, a minor. Jaden was born a live infant on November 13, 2008, at Southern Baptist Hospital of

Florida, Inc., d/b/a Baptist Medical Center hereafter, Baptist Medical Center, a licensed hospital located in Jacksonville, Florida, and his birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services at the time of Jaden's birth was Mitzi Brock, M.D. Dr. Brock was, at all times material, a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan.

3. Notice is not a contested issue in this case.

4. Mrs. Myers' prenatal course was complicated by pregnancy-induced hypertension. She was admitted to Baptist Medical Center on November 13, 2008, at 40 weeks' gestation, for induction of labor.

5. Mrs. Myers was admitted at 7:24 a.m., on November 13, 2008. Oxytocin (Pitocin) IV was started at 7:44 a.m. At 8:47 a.m., Mrs. Myers' membranes were artificially ruptured by Dr. Brock, and clear fluid was noted. A vaginal exam was performed at 8:49 a.m., with findings indicating Mrs. Myers was 3-4 cm dilated; 60% effaced and at a -2 station. Fetal movement was reported and audible.

6. The same day, between 8:57 a.m., and 11:13 a.m., the Pitocin dosage was increased from 6 mu/min to 14 mu/min. At about 11:57 a.m., the infant had an episode of bradycardia.<sup>2/</sup> An epidural bolus was administered at 12:07 p.m. (Noon+).

7. A vaginal exam was performed at 12:17 p.m., with findings indicating that Mrs. Myers was 4 cm dilated; 80% effaced and at a -2 station. At 1:36 p.m., an oxygen face mask was started as a fetal intervention. Mrs. Myers' labor continued to progress, and a vaginal exam at 2:26 p.m., indicated she was 4-5 cm dilated; 90% effaced and at a station -2.

8. A vaginal exam was performed at 3:15 p.m., indicating that Mrs. Myers was 7 cm dilated; 90% effaced and at a -2 station. At this time, Dr. Brock also reviewed the fetal monitor strips. At 4:17 p.m., a Foley catheter was placed in preparation for a cesarean section. Another vaginal exam was performed at 5:24 p.m., indicating the mother was 7-8 cm dilated; 90% effaced and at a -2 station.

9. Dr. Brock was at Mrs. Myers' bedside and performed another vaginal exam at 7:09 p.m. This examination indicated Mrs. Myers was 9-10 cm dilated and 100% effaced. At 7:29 p.m., Dr. Brock indicated that she would try to rotate the infant. Mrs. Myers began to push, starting at 7:30 p.m., and continued pushing with contractions until 8:30 p.m.

10. The fetal monitor strips reveal that the infant experienced an episode of tachycardia<sup>3/</sup> between 7:50 p.m. and 7:53 p.m.

11. While Mrs. Myers was pushing between 7:30 p.m., and 8:30 p.m., the Kiwi vacuum extractor was positioned and there were four pop-offs at 8:01 p.m., 8:04 p.m., 8:10 p.m., and 8:21 p.m.

12. At 8:31 p.m., the baby's head was out. Supra pubic pressure and the McRoberts maneuver were used, resulting in delivery of Jaden Myers at 8:32 p.m. Delivery complications included shoulder dystocia suprapubic pressure, McRoberts maneuver and possible right clavicle fracture with limp right arm. Jaden's Apgar<sup>4/</sup> scores were 1 at 1 minute; 3 at 5 minutes; and 6 at 10 minutes. There was evidence of acidosis.

13. At 8:33 p.m., Jaden was bagged and masked. He was transferred to NICU with oxygen bagging and masking in progress at 8:41 p.m. He was admitted to NICU at 8:42 p.m., for neonatal depression and was noted to be cyanotic, depressed, floppy and flaccid in minimal respiratory distress. A subgaleal hemorrhage was present, as was a denuded scalp lesion and vacuum mark. Jaden had generalized decreased tone and activity. Delivery complications included shoulder dystocia and deep variable decelerations. At two minutes of age, Jaden was very pale, receiving oxygen with bag mask with chest compressions at 45 seconds of age for initial heart rate of 40. Color improved slightly, and his heart rate increased to 100. By five minutes of age, Jaden had been intubated.

14. At 10:40 p.m., Jaden was approximately two hours old. At that time, he was assessed as having a head circumference of 36 cm. His scalp abrasions were covered with tegaderm, and Cool Cap equipment was applied per protocol. At 11:00 p.m., Jaden had bicycling-like movements of his arms and legs, which did not stop with touch. At 11:30 p.m., he was noted to have mild, intermittent grunting. At 11:52 p.m., Phenobarbital was administered for continuous movement of his arms and legs. Jaden continued with bicycling movements of his arms and legs at 12:45 a.m., on November 14, 2008, and at 1:10 a.m., another dose of Phenobarbital was administered. The medical record reflects that there were no further bicycling movements after the second dose of Phenobarbital.

15. Jaden remained on the Cool Cap until November 17, 2008, when it was removed at 6:00 a.m., and he was rewarmed. Scalp abrasions and weeping were noted. A CT scan performed on November 17, 2008, at 12:44 p.m., identified extensive cephalohematoma; trace amounts of hyperdense hemorrhage beneath the left coronal suture; hyperdensity of the tentorium, which could represent a trace amount of subdural hematoma; obliteration of both external auditory canals, secondary to soft tissue swelling/hemorrhage with fluid in both ears.

16. According to the NICU Discharge Summary, Jaden's hospital course from November 13, 2008, through November 26,

2008, was complicated by respiratory distress, metabolic acidosis, hypoperfusion, disseminated intravascular coagulation, thrombocytopenia, seizures, jaundice surveillance, renal dysfunction, hyperglycemia, and hypocalcemia, all of which subsequently resolved themselves prior to discharge. Upon Jaden's discharge, diagnoses included anemia, neonatal depression, subgaleal hemorrhage and fracture of the clavicle.

17. Nonetheless, despite what on its face appears to be a difficult delivery, Jaden's development has continued to improve as he has grown. Jaden has been followed by Dr. Rodolfo Penariet, a pediatrician with Northeast Florida Pediatric Association, P.A., from November 29, 2008, to the present.

18. Jaden has been treated for normal childhood illnesses and has met all of his developmental milestones.

19. On January 4, 2009, David O. Childers, M.D., University of Florida, Department of Pediatrics, Division of Developmental Pediatrics, gave Jaden a newborn neurobiologic risk score of "three," whereby a score of greater than "six" indicated the child was at risk. Jaden scored a "one" or "normal" for sensory and behavioral response, axial tone, extremity tone, deep tendon reflexes and primitive reflexes for an overall combined score of "five." A score of "five to eight" indicates low risk. However, Dr. Childers diagnosed Jaden with



torticollis,<sup>5/</sup> recommended physical therapy and made a referral to the Early Intervention Program for evaluation.

20. A referral was made on January 26, 2009, to "Early Steps" for a developmental evaluation. "Early Steps" is Children's Medical Services' Early Intervention Program provided by the Department of Pediatrics of the University of Florida, and sponsored by the Florida Department of Health. In addition, on March 19, 2009, Jaden's well-child visit at four months of age indicated that he was doing well, being seen by Dr. Childers, Early Steps, and Brooks Rehabilitation and that his only problem was torticollis. According to his chart, subsequent well-child visits with Dr. Pena-Ariet did not identify any concerns for Jaden's growth and development.

21. On February 12, 2009, Mr. and Mrs. Myers had concerns regarding Jaden's motor development, and regarding the diagnosis of torticollis, as well as concerns regarding his overall development as might be observed by clinicians. During the evaluation, Jaden was holding his head turned to the left, or when his head was midline, it was flexed to his right shoulder. His thumbs tended to be flexed into his palms. Jaden was referred to Brooks Rehabilitation to work at being able to turn his head in all directions when on his tummy, when on his back, or when he was held so that he could explore and interact with toys and people in his everyday activities. The goal for

achieving these improvements was set variously at May 2009 and August 2009.

22. Jaden received physical therapy at Brooks Rehabilitation, a provider of physical therapy, from March 12, 2009, until May 21, 2009, for torticollis affecting his right side. Jaden's evaluation on March 12, 2009, found that he kept his head rotated to the left side on "pull to sit" (head lag), but that he was able to keep his head in line with his trunk with no head lag. His head's range of motion in supine position was limited to right rotation when turning his head to track objects. Jaden also kept his head rotated to the left side when holding his head midline with supported sitting. However, physical therapist Shawn T. Hubbard noted in the Discharge Summary dated May 27, 2009, that Jaden and his caregiver (mom) had attended all sessions; that Jaden had shown an improvement with his cervical range of motion, both actively and passively; that he was able to sit supported for short periods of time with good head control; and that he had completed his treatment program. There have been no subsequent physical therapy sessions.

23. In his Follow-Up Neurodevelopment Assessment, dated May 4, 2009, Dr. Childers indicated that at 5.75 months of age, Jaden was saying one word other than "mama" and "dada"; was able to support himself on his forearms in prone position and support

himself on his wrists in prone position; and that Jaden had full range of motion with his extremities. Also, Jaden's muscle bulk, power and tone were age appropriate. His fine motor skills, including grasp and release, finger opposition and finger-to-nose skills were normal. Jaden's gross motor skills, including gait and tandem gait were normal. "Sit-to-stand" was normal. His unipedal stand and single leg hop was normal. Follow-up was recommended in one year.

24. On August 10, 2009, Ellen Hopkins of the Northeastern Early Steps Program indicated on the Individualized Family Support Plan Periodic Review that Jaden had successfully reached his outcome by being able to turn his head in all directions and was now very mobile, crawling and pulling-up without any difficulty. Jaden was subsequently released from physical therapy because he had reached his goals. On February 12, 2010, Jaden's file at Early Steps was placed on inactive status.

25. On November 2, 2010, at age 23 months and 13 days, Jaden was again assessed by Dr. Childers, using the Bayley Scales of Infant and Toddler Development, Third Edition. Upon cognitive testing, Jaden could discriminate between objects; regard an object continuously for five seconds; show visual preference; habituate to an object within 30 seconds; prefer to look longer at a novel object; habituate to picture and prefer a novel picture; take blocks out of a cup; engage in relational

play to self and others; had visual displacement; could attend to a whole story; had pegboard series testing; object assembly; picture matching; representational and imaginative play; understand the concept of one; and engage in multi-scheme combination play.

26. Dr. Childers' testing further indicated that Jaden's receptive language abilities included interaction with others; that he could identify pictures and three items of clothing; identify action pictures and five body parts; follow two-part directions; understand the use of objects; and understand pronouns. Regarding expressive language, Jaden was able to use two words appropriately, use at least one word to make his wants known; combine a word or gesture; name pictures; use eight words appropriately; answer "yes" and "no" in response to questions; imitate a two-word utterance; make a two-word and multiple word utterance; and use pronouns.

27. Jaden's fine motor skills at that time of testing with Dr. Childers included: stacking a series of blocks; imitating strokes with a crayon, horizontally and vertically; placing ten pellets in a bottle within 60 seconds; transitional grasp with crayon or pencil; placing three coins in a slot; taking blocks apart; using his hand to hold paper in place while scribbling; and connecting a series of blocks. His gross motor skills included the ability to: throw a small ball forward; squat

without support; stand up without support; walk up and down stairs; walk backward and forward; run with good coordination; balance on one foot, right and left; walk sideways; jump from bottom step and kick a large ball.

28. Respondent offered, via deposition, the findings and expert opinion of Dr. Michael S. Duchowny, a board-certified pediatric neurologist, who reviewed and analyzed Jaden's medical records and who had personally performed an independent medical examination of Jaden on February 3, 2010, when Jaden was fourteen months old.

29. Dr. Duchowny did not believe that Jaden had any permanent and substantial mental or physical impairments as of the age of fourteen months. He further testified that at the time of his evaluation, Jaden's parents indicated that he had met his age-appropriate developmental milestones. Based on Dr. Duchowny's evaluation and review of the records, the acidosis and any oxygen deprivation that Jaden may have experienced during the birthing process has not had any permanent or substantial impact on him.

30. These expert opinions are demonstrated by the following excerpts from Dr. Duchowny's deposition of August 4, 2011:

A. [Dr. Duchowny] . . .

The neurologic examination revealed him [Jaden] to be an alert, cooperative and socially interactive boy. He was curious, he was easily engaged. In fact, he sat quietly in his father's lap and he did make sounds, but I did not hear him speak words. There was a slight amount of drooling, very small. His cranial nerve examination was essentially normal, as detailed in the report. Similarly, the motor examination revealed full strength. Muscle bulk and tone was also normal. There were no abnormal movements, no weakness. He actually walked fairly steadily for his age, he didn't fall, and he climbed well. He had age-appropriate manual dexterity with both hands. He had good fine motor movements and thumb/finger opposition. He could transfer an object between his hands and did not show a hand preference. That was all normal. His sensory examination was also normal. There were no abnormalities of his neurovascular examination and, essentially, my impression of these findings was that his neurological examination was normal for developmental age.

Q. All right. And would you describe his physical examination as normal as well?

A. Yes, sir. In fact, both the physical and neurological examinations were absolutely fine.

Q. Would you consider your findings consistent with what you read in the deposition transcripts from the parents as to how they described Jaden's growth and

development and how he was performing at the time of those depositions?

A. I would, yes.

Q. In other words, your findings are consistent with their own perspective as to how Jaden was doing and what, if any, issues he may be experiencing?

A. Yes, sir.

Q. Based on your review and examination of Jaden, did you form an opinion as to whether or not he suffered from any permanent and substantial mental impairment?

A. In my opinion, he had neither a substantial mental nor substantial motor impairment.

Q. Based on your examination, did you form an opinion as to whether or not he would qualify for coverage under the NICA program?

A. Based on my understanding of the NICA program requirements--and that is that in order to be eligible a child should suffer from a permanent mental--a permanent and substantial mental and physical impairment. I felt that Jaden did not qualify for eligibility into the NICA program.  
(Exhibit N: Depo. pages 14-16; Bates 1573-1575)

\* \* \*

Q. . . . At the end of your report--and I think it may have been attached as an exhibit now to the deposition--of February 3, 2010, you write his, meaning Jaden, "his neurological examination today is entirely normal." Entirely normal for a fourteen-month old?

A. Yes, sir.

Q. Is that what you meant?

A. Yes, sir.

Q. And so you were asked by Mr. Bajalia what your conclusion was and you said that he had neither a substantial mental or motor impairment. At the time you examined him, did Jaden have any mental impairment that you could identify?

A. No, sir.

Q. Did he have any physical impairment that you could identify?

A. No.

\* \* \*

Q. Okay. Now in your initial discussion of your February 3, 2010 report, you talked about the medical history that was obtained from the parents. You talked about his growth and developmental parameters and the fact, from the parents' perspective, they were all normal.

Do you recall that?

A. Yes. (Exhibit N: Depo. pages 28-29; Bates 1587-1588) (emphasis added).

31. Leigha Myers' deposition testimony further shows that, despite Jaden's initial hospital course, he has shown no physical or mental impairments, but rather, has grown up as any other child. Specifically, Mrs. Myers testified on May 18, 2011, as follows:

Q. . . . Tell me as his parent generally how--how he is doing now.



A. He seems to be doing what every other kid does that I know of.

Q. When you say he seems to be doing what every other kid is doing that you know of, it is your opinion that he appears to be normal from a physical standpoint?

A. Yes.

Q. Does he appear to be normal from a mental perspective?

A. Yes.

Q. Or cognitively?

A. Yeah.

Q. . . . From a physical perspective, what, if any, issues does he have?

A. He doesn't have any that I know of right now.

Q. . . . And from a mental perspective, or cognitive perspective, what, if any, issues does he have?

A. None that I know of--

Q. Okay.

A. --at this time.

Q. As his parents--as his parent, are there any concerns from your perspective from a developmental perspective as far as Jaden is concerned?

A. No, no. (Exhibit M: Depo. pages 8-9; Bates 1533-1535)

32. Jaden's mother also denied that there were any chronic physical developmental issues for which Dr. Pena-Ariet is

currently treating Jaden; that there is any ongoing physical therapy for Jaden; and that Jaden was ever below the standard child development curve for growth and development. She also acknowledged that on formal testing "of everything" (presumably cognitive and physical abilities) Jaden scored "average or better."

Q. Has Jaden had any formal testing done to assess his cognitive level or abilities?

\* \* \*

A. [Mrs. Myers] Yes, I think it was kind of everything. He had, like, a book he had to go through, to do all these little tests and stuff, but he--he scored average on it--

Q. Okay.

A. --like average or better.

Q. Were there any issues or concerns that were relayed to you about his development as a result of that testing?

A. No. (Exhibit M: Depo pages 28-29; Bates 1553-1534)

33. Leigha Myers further testified that Jaden had physical therapy to resolve an issue with torticollis after he was born but that he has not required speech therapy, occupational therapy or any additional therapies. Jaden has also never seen a neurologist. She does not believe Jaden will need physical or occupational therapy in the future.

34. According to Curtis Myers, Jaden's father, who also testified via a May 18, 2011, deposition, Jaden is physically active playing horseshoes and basketball and appears to have met his developmental milestones, as follows:

\* \* \*

Q. . . . And you know, from a physical perspective, when you guys play outside, he doesn't appear to have any issues running?

A. [Curtis Myers] No.

Q. Or jumping?

A. No.

Q. Or picking up objects like a horseshoe?

A. No.

Q. And throwing it?

A. No.

\* \* \*

A. Right. I think as far as physically, he seems to be fine. (Exhibit L: depo pages 10-12; Bates 1513-1515)

\* \* \*

Q. And while you don't remember the exact timing or dates as to when he met those milestones, to your knowledge, did he meet his milestones and develop normally?

A. Yes. He--you know, it's funny, because, I mean, he had someone to compare it to with his little friend Isaac being two years old and they were real close together as far as a lot of stuff. Isaac seems to be a little bit ahead of Jaden somewhat, but they're

pretty close as far as the developmental type stuff.

Q. Nothing that would cause you any concern?

A. No.

Q: Okay.

A. Makes you proud. (Exhibit L: Depo. Pages 17-18; Bates 1520-1521)

35. While no one disputes that Jaden had a difficult delivery, given the record, it is resolved that Jaden does not suffer from permanent or substantial mental or physical impairments.

#### CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

37. 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 after January 1, 1989. § 766.303(1), Fla. Stat.

38. 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), and 766.305(1), 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

39. 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.

40. In discharging this responsibility, the Administrative Law Judge must make the following determination based upon 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 postdelivery 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 postdelivery 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.

41. 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 an 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. (emphasis added).

42. As the proponent of the issue, the burden rested on Petitioners to demonstrate that Jaded suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1997) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

43. More specifically, it has been held in Florida Birth-Related Neurological Injury Compensation Ass'n v. Division of Administrative Hearings, 686 So. 2d 1349, 1356 (Fla. 1997) that, the plan "is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." See also Masterton v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case 08-6032N (Fla. DOAH Jan. 29, 2010) (Corrected Final Order).

44. Here, the proof failed to support the conclusion that, more likely than not, Jaden has any permanent and substantial mental or physical impairments irrespective of the timing or cause of any such impairment. Consequently, given the provisions of section 766.302(2), Jaden does not qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995) ("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it

should be strictly constructed 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).

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

The claim for compensation filed by Leigha Myers and Curtis Myers, as parents and natural guardians of Jaded Myers, a minor, is dismissed with prejudice.

DONE AND ORDERED this 12th day of September, 2011, in Tallahassee, Leon County, Florida.

*Ellajane P. Davis*

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Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of September, 2011.

ENDNOTES

1/ The Stipulated Record includes: Joint Exhibit A: Medical records, including fetal heart monitor strips from Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center,



dated November 15, 2008 through November 17, 2008 (Bates stamped 1-316); Joint Exhibit B: Medical records for Leigha Myers from Mitzi Brock, M.D., dated April 3, 2008 through November 17, 2008 (Bates stamped 317-371); Joint Exhibit C: Medical records from Southern Baptist Hospital of Florida, d/b/a Baptist Medical Center for Jaden Myers dated November 12, 2008 through November 26, 2008 (Bates stamped 372-1071); Joint Exhibit D: Medical records from Northeast Florida Pediatric Associates, P.A., Dr. Rodolfo Pena-Ariat [sic], for Jaden Myers dated November 26, 2008 through January 20, 2010; and updated records from November 26, 2008 through June 28, 2010 and November 28, 2008 through February 25, 2011 (Bates stamped 1072-1204); Joint Exhibit E: Medical records from Brooks Rehabilitation for Jaden Myers dated November 13, 2008 through May 27, 2009 (Bates stamped 1205-1255); Joint Exhibit F: Medical records from UF, Developmental Pediatric Clinic for Jaden Myers dated January 21, 2009 through May 4, 2009 and updated records dated January 21, 2009 through April 4, 2011 (Bates stamped 1256-1364); Joint Exhibit G: Medical records from Early Steps for Jaden Myers dated July 27, 2009 through February 12, 2010; and updated records dated January 22, 2009 through February 12, 2010 (Bates stamped 1365-1486); Joint Exhibit H: Records from Terri Pendleton for Jaden Myers dated June 3, 2009 (Bates stamped 1487-1490); Joint Exhibit I: Michael S. Duchowny, M.D.'s report dated February 3, 2010 (Bates stamped 1491-1493); Joint Exhibit J: Petitioners' Answers to Respondent's First Set of Interrogatories dated April 5, 2010 (Bates stamped 1494-1502); Joint Exhibit K: Donald Willis, M.D.'s report dated December 14, 2009 (Bates stamped 1503); Joint Exhibit L: Transcript of the deposition of Curtis Myers taken on May 18, 2011 (Bates stamped 1504-1525); Joint Exhibit M: Transcript of the deposition of Leigha Myers taken on May 18, 2011 (Bates stamped 1526-1559); Joint Exhibit N: Transcript of the deposition of Michael S. Duchowny, M.D., taken on August 4, 2011, with two exhibits attached, but not noted in the Index to the deposition. (Bates stamped 1560-1633).

2/ Bradycardia is slowness of the heartbeat as evidenced by slowing of the pulse rate to less than 60. See Dorland's Illustrated Medical Dictionary, 223 (28th ed. 1994).

3/ Tachycardia is excessive rapidity in the action of the heart; the term is usually applied to a heart rate above 100 beats a minute in an adult and is often qualified by the locus of origin as well as by whether it is paroxysmal or nonparoxysmal. See Dorland's Illustrated Medical Dictionary, 1655 (28th ed. 1994).

4/ An Apgar score is a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color. Dorland's Illustrated Medical Dictionary, page 1497 (28th ed. 1994).

5/ Torticollis is wry-neck; a contracted state of the cervical muscles, producing twisting of the neck and an unnatural position of the head. See Dorland's Illustrated Medical Dictionary, 1723 (28th ed. 1994).

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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 § 766.311, Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n 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.