STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHITNEY CONARD, on behalf of and as parent and natural guardian of AIDEN TAPLIN, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 10-2077N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the pending Motion for Summary Final Order served September 28, 2010, and Petitioner having offered no reason to postpone consideration of the Motion for Summary Final Order and no opposition thereto, the Motion for Summary Final Order is here considered.

STATEMENT OF THE CASE

1. On April 16, 2010, a Petition for Benefits, styled, "Whitney Conard on behalf of and as parent and natural guardian of Aiden Taplin, a minor v. Florida Birth-Related Neurological Injury Compensation Association," was filed with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan

(Plan) for injuries allegedly associated with Aiden's birth on August 10, 2007.

2. The original Petition named Susan Fair, M.D., and Cape Canaveral Hospital as the physician rendering obstetrical services and the hospital associated with Aiden's birth. DOAH served, by certified mail, the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim/original Petition on April 21, 2010; served Dr. Fair on April 22, 2010; and served Cape Canaveral Hospital on April 26, 2010. On May 4, 2010, Petitioner filed an Amended Petition, substituting Vanessa Dance, M.D., for Susan Fair, M.D., and adding the name of Deanna Mericle, ARNP, as a provider of obstetrical services. DOAH served the Amended Petition upon Dr. Dance, ARNP Mericle, and Cape Canaveral Hospital by certified mail on May 10, 2010.

3. No individual or entity has sought to intervene herein.

4. After ample opportunity for any named individual or entity to intervene or object, an Order was entered on June 1, 2010, recognizing the Amended Petition, pursuant to Florida Administrative Code Rule 28-106.202; substituting the Amended Petition for the Petition; striking the Petition; and causing the case to proceed upon the Amended Petition (that is, without Dr. Fair, who had been inadvertently named in the Petition and with Dr. Dance and ARNP Mericle substituted therefor).

5. Following an extension of time in which to do so, on July 14, 2010, NICA served its Response to the Petition and gave notice that it was of the view that the minor child, Aiden Taplin, did not suffer a "birth-related neurological injury," which renders an infant "permanently and substantially mentally and physically impaired," per sections 766.302(2) and (3), Florida Statutes. NICA requested that a hearing be set to determine compensability.

6. Upon the parties' advices, a hearing on compensability was noticed for October 28, 2010.[1]

7. On September 28, 2010, Respondent NICA served its Motion for Summary Final Order. Petitioner did not timely respond to the motion as permitted by Florida Administrative Code Rules 28-106.103 and 28-106.204. In an abundance of caution, on October 13, 2010, an Order to Show Cause why the Motion for Summary Final Order should not be granted was entered. That Order provided:

> On September 28, 2010, Respondent served a Motion for Summary Final Order. To date, Petitioner has not responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nevertheless, and notwithstanding that she has been accorded the opportunity to do so, it is
>
> ORDERED that by October 25, 2010, Petitioner shall show good cause in writing, if any she can, why the relief requested by Respondent should not be granted, thereby disposing the case against Petitioner.

8. On October 13, 2010, NICA filed a "Response to Order of Prehearing Instructions Dated August 3, 2010," representing, in pertinent part:

> Petitioner and NICA jointly request that the trial date be reset until the Court has had opportunity to rule on NICA's pending Motion for Summary Final Order and request that all other matters held [sic] in abeyance until that time.

9. Accordingly, an Order Granting Continuance was entered on October 18, 2010, which read, in pertinent part:

> 1. The hearing now scheduled for October 28, 2010, is hereby canceled.
>
> 2. In the event Petitioner needs time beyond October 25, 2010, in which to respond to the pending Motion for Summary Final Order, her request/motion must be made in writing, filed with the Division before October 25, 2010.
>
> 3. Another order will be entered to select new final hearing dates, if appropriate.

10. Petitioner filed no response in opposition to the Motion for Summary Final Order and no response in opposition to the October 18, 2010, Order Granting Continuance.

11. Affidavits and reports of Donald C. Willis, M.D., and Michael S. Duchowny, M.D., were attached to NICA's Motion for Summary Final Order.[2]

12. Again, in an abundance of caution, on November 8, 2010, an Order and Notice was entered, providing, in pertinent part, as follows:

> This cause came on for consideration sua sponte. Some of the documents submitted in support of NICA's Motion for Summary Final Order recite that the infant, Aiden Taplin, was seen at "APH" (presumably Arnold Palmer Hospital), while others recite that he was seen at Winnie Palmer Hospital. One physician apparently believes the parents are separated, yet there is a history of the child crawling into bed with the "parents," (plural).

13. A telephonic hearing to resolve the foregoing discrepancies was scheduled, noticed, and held on December 14, 2010. Petitioner did not appear. Oral argument by Respondent was heard, and an Order was entered the same date, providing as follows:

> . . . Petitioner did not appear and Respondent was instructed to file additional written argument with regard to the issue of which medical records were reviewed by the various affiant physicians.
>
> It is ORDERED that either party may, within 20 days, file any additional written argument or documentation as to their position for or against the pending Motion for Summary Final Order.

14. On December 30, 2010, Respondent filed a Supplemental Argument and Exhibit in Support of Respondent's Motion for Summary Order. Petitioner filed nothing. Oral argument on December 14, 2010, had pointed to portions of Dr. Duchowny's report, showing that the biological father is not involved in Aiden's life and that Aiden lives with his mother and stepfather. Although Dr. Willis stated in his report that there

were no records from APH [Arnold Palmer Hospital] available for him to review, Respondent's Supplemental Exhibit, filed December 30, 2010, clarified that Aiden was not transferred to Arnold Palmer Hospital, but was instead transferred to Winnie Palmer Hospital.

15. On January 4, 2011, an Order was entered, providing:

> By January 18, 2011, Petitioner shall show good cause, in writing, filed with the Division of Administrative Hearings, why Respondent's Supplemental Argument and Exhibit should not be considered and/or why a Summary Final Order of Dismissal should not be entered, thereby disposing this case against Petitioner. (emphasis added).

16. Petitioner filed no timely response in opposition to the Motion or the January 4, 2011 Order.

17. There are two theories upon which Respondent NICA's Motion for Summary Final Order are based. First, Respondent contends that there was no apparent obstetrical event which resulted in loss of oxygen or mechanical trauma to Aiden's brain during labor, delivery, or the immediate postdelivery period, i.e., Respondent suggests that there is no record evidence of an injury during labor, delivery or the immediate postdelivery period. Second, Respondent contends that Aiden is not permanently and substantially mentally impaired and permanently and substantially physically impaired.

18. Donald C. Willis, M.D., is an obstetrician specializing in maternal-fetal medicine. He reviewed the medical records of both the child, Aiden Taplin, and his mother, Whitney Conard, for the purpose of determining whether an injury had occurred to Aiden due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in the hospital. He summarized in his affidavit that:

* * *

> 5. In summary, fetal heart rate monitor tracing was not available for review during labor, but the hospital records did not describe any abnormal fetal rate heart [sic] patterns during labor. Spontaneous vaginal birth was accomplished. No forceps or vacuum were required, and birth weight was 3,110 grams (6 lbs. 13 ozs.). The newborn was not depressed and no resuscitation was required. The baby went to the normal newborn nursery.
>
> Seizure activity occurred within 24 hours of birth. The baby was in the mother's room when abnormal movements of the extremities were noted. The EEG was abnormal, but the head ultrasound was normal. Sepsis evaluation was done with negative cultures. MRI on DOL2 was abnormal with "multiple foci with cortical restricted diffusion", consistent with ischemic insult or acute encephalitis. The baby was transferred to Arnold Palmer Hospital for further evaluation of the seizures.
>
> There was no documented or suspected fetal distress during labor. The newborn was not depressed. The baby was in the mother's room when seizure activity occurred.

> There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or immediate post-delivery period.
>
> 6. As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital. Further, in that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital, then accordingly, there was no causal event which could have rendered AIDEN TAPLIN permanently and substantially mentally and physically impaired (which conditions I am not even implying exist) as a result of same.

19. Dr. Michael S. Duchowny is a pediatric neurologist who, after a review of the medical records of both Aiden Taplin and Whitney Conard, and an evaluation of Aiden Taplin on June 30, 2010, opined in his affidavit, within a reasonable degree of medical probability that:

* * *

> 5. In summary, AIDEN TAPLIN's neurological examination discloses no specific focal or lateralizing features. He evidences mild generalized hypotonia, and expressive language delay, speech disfluency, and has a history of neonatal seizures.
>
> 6. I am familiar with the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") and the standards imposed by the Plan for compensability of potential claims. Based upon my review of the medical records as described herein and in my

> report, and further based upon my evaluation of AIDEN TAPLIN, I have formed an opinion as to whether AIDEN TAPLIN qualifies for compensation under the plan.
>
> 7. It is my opinion that AIDEN TAPLIN is not compensable under the NICA statute. I have reviewed medical records that were mailed on May 20, 2010. They do not provide convincing evidence of acquisition of neurological damage during labor and delivery or during resuscitation in the immediate post-delivery period. AIDEN TAPLIN's most recent MRI scan of the brain, performed in December 2009, demonstrated several discreet areas of increased signal in both frontal regions and the left temperal [sic] and right parietal lobes through to present gliosis. Although review of the MRI images will provide a more complete picture of AIDEN's brain involvement, his examination does not demonstrate a substantial mental or motor impairment.

20. Dr. Duchowny's affidavit also adopts the more complete written report of his evaluation dated June 30, 2010, which states, in pertinent part:

> I evaluated Aiden Taplin on June 30, 2010. Aiden is a 2 year, 10-month-old boy who is brought by his mother and stepfather for evaluation. The maternal grandmother was also present and supplied additional historical information.
>
> MEDICAL HISTORY: Aiden's mother explained that Aiden experienced seizures within six hours of life. He was born at Cape Canaveral Hospital and transferred to Winnie Palmer Children's Hospital where he remained for two weeks. Apparently, he had "constant seizures for two days" which were terminated with phenobarbital and other antiepileptic medications. Aiden subsequently experienced

no seizures, although his family regards his initial course as stormy.

Aiden now has developmental delay. He does not speak clearly and all speech sounds are particularly difficult to understand. He can put two words together and rarely three words into phrases but does not make sentences. His hearing has been screened and is normal. Aiden is not in speech therapy and receives no other therapies. There has been no language regression.

Aiden's motor development is behind age level . . . .

Aiden's behavior is felt to be appropriate, although he does not play well with other children . . . .

Aiden's vision and hearing are good. . . .

* * *

PHYSICAL EXAMINATION today reveals an alert, cooperative and well-developed 2 year and 10-month-old toddler. The hair is blond and of normal texture. The skin is warm and moist. The weight is 28 pounds. His head circumference measures 47.6 centimeters. There are no cranial or facial anomalies or asymmetries. The spine is straight without dysmorphism. 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 non-tender. There are no palpable liver, spleen, or masses. Peripheral pulses are 2+ and symmetric.

Aiden's NEUROLOGICAL EXAMINATION reveals him to be alert and cooperative. He is slightly impulsive but easily participates in the examination. He knows body parts and primary colors. His attention span is appropriate for age. He is socially engaged. He answered simple questions and

seemed interested in the evaluation. His speech reveals dysarthric lingual, labial and guttural sounds. It was often difficult to understand what he was saying. His attention span seemed appropriate for age. There is no drooling. The tongue moves well. The cranial nerve examination reveals full visual fields to direct confrontation testing. Examination of the ocular fundi disclosed sharply demarcated optic disc margins without pallor and no evidence of abnormal retinal findings. The facial movements are symmetric. The tongue protrudes in the midline. The pharyngeal folds are symmetric. The uvula is midline. Motor examination reveals mild generalized hypotonea which is symmetrically distributed in all four limbs. There is full range of motion and no adventitious movements, focal weakness, or atrophy. He walked and ran in a stable fashion and could get up from the floor easily without holding onto furniture with no significant motor asymmetries. The deep tendon reflexes age 2+ and symmetric. Plantar responses are downgoing. His coordination appeared age appropriate by observation. Sensory examination is intact to withdrawal of all extremities to stimulation. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Aiden's neurological examination discloses no specific focal or lateralizing features. He evidences mild generalized hypotonia, an expressive language delay, speech disfluency, and has a history of neonatal seizures.

I have also reviewed medical records that were mailed on May 20, 2010. They do not provide convincing evidence of acquisition of neurological damage during labor and delivery. Aiden's most recent MRI scan of the brain, performed in December of 2009, demonstrated several discrete areas of

> increased signal in both frontal regions and the left temporal and right parietal lobes thought to represent gliosis. Although, review of the MRI images would provide a more complete picture of Aiden's brain involvement, his examination does not demonstrate a substantial mental or motor impairment. I therefore do not believe that Aiden is compensable under the NICA statute.

21. In light of St. Vincent's Medical Center, Inc. v. Bennett, 27 So. 3d 65 (Fla. 1st DCA 2009), Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Association, 997 So. 2d 426 (Fla. 5th DCA 2007) and Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155 (Fla. 4th DCA 2002), it may be fairly debated whether Dr. Willis' affidavit and report rule out a possible birth-related neurological injury occurring during "resuscitation in the immediate postdelivery period in a hospital," but Dr. Duchowny's affidavit clearly shows that Aiden suffered no permanent and substantial mental or motor impairment, and given Dr. Duchowny's undisputed and thorough assessment of Aiden's current problems after his personal medical examination/evaluation of Aiden, it is clear that even if Aiden's problems are the result of oxygen deprivation or mechanical injury in the statutory period, a situation not ruled out but also not proven, Aiden's problems do not amount to permanent and substantial mental impairment and permanent and substantial physical impairment, both of which are required by

the statute for compensability. Consequently, for reasons appearing more fully in the following Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.[3]

CONCLUSIONS OF LAW

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

23. 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.

24. The injured "infant, her or his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

25. 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.

26. 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.

27. 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. (Emphasis added).

28. Here, indisputably, Aiden Taplin's problems, although birth-related and neurologic in nature, do not render him both "permanently and substantially mentally impaired" and "permanently and substantially physically impaired." Consequently, given the provisions of section 766.302(2), Florida Statutes, Aiden Taplin does not qualify for coverage under the Plan. See Fla. Birth-Related Neurological Injury

Comp. Ass'n v. Fla. Div. of Admin. 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 physical impairment.). See also Humana of Fla., 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

29. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he shall enter an order [to such effect] and shall 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: Respondent Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order

is granted, and the Petition for Compensation filed herein, be and the same is dismissed with prejudice.

DONE AND ORDERED this 19th day of January, 2011, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of January, 2011.

ENDNOTES

1/ Compensability, to wit: Whether the injury claimed is a birth-related neurological injury and whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

2/ See, e.g., Vero Beach Care Ctr v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. Gen. Parcel Servs., 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Ins. Co. v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

3/ When, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change 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 Co., Inc. v. Lake Shore Growers Coop. Ass'n, 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.