

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TASHA ROBERTS on behalf of and)
as parent and natural guardian)
of BILLY RAY SMITH, JR., a)
minor,)
)
)
Petitioner,)
)
vs.) Case No. 11-2960N
)
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
)
Respondent.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order.

STATEMENT OF THE CASE

1. On June 13, 2011, Petitioner Tasha Roberts filed, with the Division of Administrative Hearings (DOAH), a Petition (claim) on behalf of and as parent and natural guardian of Billy Ray Smith, Jr., a minor, for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan) for injuries allegedly associated with Billy Ray's birth on October 3, 2008, at Lakeland Regional Medical Center, a hospital in Lakeland, Florida.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on June 15, 2011, and served Jill Hendry, ARNP, and Lakeland Regional Medical Center (each) on June 16, 2011. There have been no petitions to intervene.

3. On September 30, 2011, after an extension of time in which to do so, NICA filed its Response to the Petition for Benefits and gave notice that NICA was of the view that Billy Ray did not suffer "a birth-related neurological injury" as defined in section 766.302(2), Florida Statutes. The Response further requested a hearing be scheduled to resolve the issue of compensability.

4. By an Order entered October 4, 2011, the parties were required to provide the issues still in dispute, mutually agreeable dates for hearing, and the appropriate venue for hearing.

5. On October 18, 2011, NICA's attorney filed a Joint Response to the September 30, 2011 Order, reciting that the parties had conferred; that NICA intended to file a motion for summary final order, and that the parties requested that a hearing be scheduled only after any order on the motion is entered and not before December 15, 2011.

6. On October 26, 2011, NICA served and filed its Motion for Summary Final Order, the predicate for which is that there

was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby.^{1/}

7. Attached to NICA's Motion for Summary Final Order were the medical reports and affidavits of medical physicians Donald C. Willis, M.D., a board-certified obstetrician, specializing in maternal-fetal medicine, and of Raymond J. Fernandez, M.D., a board-certified pediatric neurologist.^{2/}

8. Dr. Willis' affidavit delivered the following opinion within a reasonable degree of medical probability:

* * *

3. The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in maternal-fetal medicine to review the medical records of both the child, BILLY RAY SMITH, JR., and his mother TASHA ROBERTS f/k/a Tasha Hamblin. The purpose of my review of these medical records was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

4. On July 25, 2011, I issued a Report of my review. A true and accurate copy of my Report is attached hereto. All of the statements and opinions expressed therein are true and correct based upon my review of the medical records.

5. I have reviewed the medical records for the above individual. The mother, Tasha Hamlin was a 24 year old G4 P3003. Pregnancy care was limited to only two prenatal clinic

visits. There were no known complications during pregnancy. She presented to the hospital at term in labor. Cervix was dilated to 3 to 4 cms. Maternal anemia was present on admission. Her hematocrit was 21.6%.

The newborn was not depressed. Apgar scores were 8/9. A vigorous cry was noted at birth with no resuscitation required. The baby was transferred to the normal nursery. The initial Newborn exam was normal.

Retractions and grunting were noted about 5 to 6 hours after birth. About 10 hours after birth, the baby was transferred to the NICU for evaluation of respiratory distress and desaturation with feedings. Evaluation identified swollen nasal turbinates as the cause of the respiratory distress. Arterial blood gas was normal with a pH of 7.36 and a base excess of #-3.6. The respiratory distress was managed by hood oxygen. The baby never required bag and mask ventilation and was not intubated. The nasal swelling improved and the oxygen hood discontinued after two days.

Laboratory testing showed a positive coombs, consistent with ABO Isoimmunization. The baby was not anemic. Phototherapy was required for less than 24 hours. The baby was discharged from the hospital in good condition.

In summary, there was no fetal distress during labor. The baby was not depressed at birth and required no resuscitation during the immediate post delivery period. Although the mother had significant anemia, the level of anemia was not sufficient to result in oxygen deprivation to the fetus.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor,

delivery or the immediate post delivery period.

9. Dr. Fernandez's affidavit, also rendered in terms of a "reasonable degree of medical probability" opined:

* * *

3. The Florida Birth-Related Neurological Injury Compensation Association ("NICA") retained me as its expert in pediatric neurology to conduct an independent medical evaluation of the minor child BILLY RAY SMITH, JR. in this matter. As part of my evaluation I reviewed the medical records of both the child and his mother TASHA ROBERTS, f/k/a Tasha Hamblin. The purpose of my review of the medical records and evaluation of TASHA ROBERTS and BILLY RAY SMITH JR., was to determine whether he suffers from an injury which rendered him permanently and substantially mentally and physically impaired, and whether such injury is consistent with any injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

4. I evaluated BILLY RAY SMITH, Jr., on September 20, 2011. A true and accurate copy of my independent medical evaluation is attached hereto. All of the statements and opinions expressed therein are true and correct based upon my review of the records, the history taken, and my opinions from the evaluation of the child.

5. Billy Ray's mother, Ms. Roberts went into labor on October 2, 2008 at 1400 hours. She had not received prenatal care during the final 3 months of the pregnancy but the pregnancy was otherwise uncomplicated.

Billy Ray was delivered vaginally on October 3rd at 0525 hours. Total duration of

labor was 15 1/2 hours. Resuscitation consisted of tactile stimulation and bulb suction. The Apgar scores were 8 and 9 at one and five minutes (minus 2 for color at one minute and minus 1 for color at five minutes). Birth weight was 7 pounds 6 ounces, length 20.5 inches, head circumference 34 cm. Billy Ray was admitted to the regular nursery. On October 3rd at 0745 hours, his temperature was 98 degrees, pulse rate 116, respiratory rate 50. At 1010 hours he was taken to his mother's room for infant teaching. At 1100 hours there were chest retractions and nasal flaring. At 1330 hours O2 saturation was 92% by pulse oximetry and at 1415 hours it was 84%. At 1515 hours he was transferred to the neonatal intensive care unit because of grunting, nasal flaring and O2 saturations down to the 80 range. On NICU admission he was alert and active. His chest was clear, respiratory rate was 42, blood pressure 76/51, O2 saturation 94%, tone and activity were normal. There were swollen nasal turbinates and mild respiratory distress. The pH was 7.36, pCO2 of 39, pO2 of 87 and base excess minus 3.6. It was stated that the O2 saturation dropped when he was fed and that he fed slowly. On October 5th his suck reflex was described as being poor and he required orogastric tube feedings. In the discharge summary dated October 7, 2008 it was stated that he was doing well clinically and his examination was normal. Discharge diagnoses included: (1) Poor feeding from October 6th through October 7th, resolved and feeding well at discharge; (2) hyperbilirubinemia with a high bilirubin of 13.4, down to 4.3 on October 5th; (3) respiratory distress syndrome, resolved on October 6th; and (4) rule out sepsis but negative cultures.

On October 23, 2008, age 20 days, in a scheduled well baby visit, diagnoses were: (1) well infant and (2) tear duct obstruction.

On September 8, 2010, age 23 months there was a concern regarding his development. He was not yet crawling or walking. He could not feed himself with his fingers. He cried frequently and Ms. Roberts described muscle twitches while asleep. He was not yet talking. Developmental delay was noted in his physical examination. Tone and strength were normal. His developmental age was estimated to be less than 6 months.

On January 25, 2011, age 2 years 3 months, he was delayed and was not using his right upper extremity as well as his left. Body twitches were again described.

There is no evidence in the medical record for oxygen deprivation or mechanical trauma during labor, delivery or the immediate post delivery period that explains Billy Ray Smith's delayed development. While there is evidence for substantial cognitive impairment it is not due to oxygen deprivation or mechanical trauma during labor, delivery or the immediate post delivery period. While he is improving I suspect substantial cognitive impairment will be permanent. Motor function is also improving and the ultimate outcome regarding motor function is indeterminate at this time.

10. Petitioner did not file a timely response in opposition to NICA's Motion for Summary Final Order, as provided-for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on November 14, 2011, an Order to Show Cause was entered, providing:

On October 26, 2011, 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 they [sic] have been accorded the opportunity to do so, it is

ORDERED that by November 28, 2011, 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. (emphasis added).

11. Petitioner filed no response in opposition.

Consequently, Petitioner has offered no evidence, by affidavit or otherwise, to generate a genuine issue of material fact.

12. Given the record, it is undisputed that Billy Ray's problems most likely were not acquired in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, nor are they due to oxygen deprivation or mechanical injury. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.^{3/}

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, 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. §§ 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(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 766.031, 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. (emphasis added).

19. Here, indisputably, Billy Ray's neurologic problems were not ". . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital." Consequently, given the provisions of section 766.302(2), Billy Ray does not qualify for coverage under the Plan. 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); Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

20. 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 is 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 Tasha Roberts, on behalf of and as parent and natural guardian of Billy Ray Smith, Jr., a minor, is dismissed with prejudice.

DONE AND ORDERED this 7th day of December, 2011, in Tallahassee, Leon County, Florida.

Ella Jane P. Davis

ELLA JANE P. DAVIS
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Filed with the Clerk of the
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this 7th day of December, 2011.

ENDNOTES

1/ Section 120.57(1)(h), Florida Statutes (2009), 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. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

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 the 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

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).