

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELISSA CALDERON AND DENNIS)
RODRIGUEZ, on behalf of and as)
parents and natural guardians)
of MIA RODRIGUEZ, a minor,)
)
Petitioners,)
)
vs.) Case No. 12-1994N
)
FLORIDA BIRTH- RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
LUIS CALDERA-NIEVES, M.D.,)
)
Intervenor.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on August 30, 2012.

STATEMENT OF THE CASE

On June 4, 2012, Petitioners, Melissa Calderon and Dennis Rodriguez, on behalf of and as parents and natural guardians of Mia Rodriguez (Mia), a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute

Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Luis Caldera-Nieves, M.D., and Jackson South Community Hospital.

DOAH served NICA with a copy of the Petition on June 7, 2012. DOAH served a copy of the Petition on Jackson South Community Hospital on June 6, 2012. Dr. Caldera-Nieves received a copy of the Petition on June 14, 2012. As of the date of this Summary Final Order of Dismissal, Jackson South Community Hospital has not petitioned to intervene in this proceeding. On August 9, 2012, Dr. Caldera-Nieves filed a Petition for Leave to Intervene. By Order dated September 25, 2012, Dr. Caldera-Nieves was granted leave to intervene.

On August 30, 2012, NICA filed a Motion for Summary Final Order, asserting that Mia did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

On September 11, 2012, Dr. Caldera-Nieves filed Intervenor, Luis Caldera-Nieves, M.D.'s Motion to Defer Ruling on Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order, requesting additional time in which to respond to the Motion for Summary Final Order. An Order Granting Motion to Defer Ruling was entered on

September 25, 2012. After an additional extension of time in which to respond to the motion, Dr. Caldera-Nieves filed a response on November 13, 2012, stating that he had no objection to the entry of a Summary Final Order as requested by Respondent.

Petitioners did not file a response to Respondent's Motion for Summary Final Order. On November 14, 2012, an Order to Show Cause was entered requiring Petitioners to show cause in writing on or before November 30, 2012, why the Motion for Summary Final Order should not be granted. As of the date of this Summary Final Order of Dismissal, Petitioners have not filed a response to the Order to Show Cause.

FINDINGS OF FACT

1. Mia Rodriguez was born on September 29, 2008, at Jackson South Community Hospital in Miami, Florida. Mia weighed 3,230 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), an obstetrician specializing in maternal-fetal medicine, was requested by NICA to review the medical records for Mia. In an affidavit dated August 24, 2012, Dr. Willis described his findings as follows:

[L]abor was complicated by infection, chorioamnionitis. Fetal heart rate monitoring during labor did not suggest any significant fetal distress. The baby was not depressed at birth. Apgar scores were 9/9. Newborn hospital course was uneventful. Within one year of age the

child demonstrated neurologic abnormalities and was diagnosed with cerebral palsy. MRI showed a porencephalic cyst.

This child has clinical and MRI evidence of brain injury. However, review of the medical records does not suggest the brain injury was the result of oxygen deprivation or mechanical trauma during labor, delivery of [sic] the immediate post-delivery period. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during delivery or the immediate post delivery period.

3. In his affidavit, Dr. Willis summarized his opinion as follows:

[I]t 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 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 immediately post-delivery period in the Hospital, then accordingly, there was no causal event which would have rendered MIA RODRIGUEZ permanently and substantially mentally and physically impaired as a result of same.

4. NICA retained Michael S. Duchowny, a pediatric neurologist, to examine Mia and to review the medical records of Mia and her mother, Ms. Calderon, to determine whether Mia suffers from an injury which rendered her permanently and substantially mentally and physically impaired and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor,

delivery, or the immediate post-delivery period in the hospital.

In an affidavit dated August 27, 2012, Dr. Duchowny stated:

I evaluated MIA RODRIGUEZ on July 25, 2012. . . . In SUMMARY, Mia's neurological examination is significant for a mild to moderate left spastic hemiparesis affecting the arm greater than the leg. There is no evidence of a visual field deficit and her higher cognitive function is assessed at age level.

The medical records sent on June 19, 2012 reveal that the mother was febrile in labor and diagnosed with chorioamnionitis. She was placed on triple intravenous antibiotics at Jackson South Hospital. Apgar scores were 9 and 9 at 1 and 5 minutes and there was no evidence of postnatal complication. Placental pathology reveals findings consistent with a 3rd trimester placenta but findings consistent with chorioamnionitis were not reported.

I do not believe that Mia should be considered for compensation within the NICA statute. She has normal mental functions for age and there are no findings from her history to suggest that hemiparesis was a consequence of either mechanical injury or oxygen deprivation in the course of labor or delivery. More likely, Mia's hemiparesis is due to a right porencephalic cyst which was likely acquired due to cerebrovascular accident in utero prior to the onset of labor.

As such, it is my opinion that MIA RODRIGUEZ'S left hemiparesis is not due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate post-delivery period in the hospital during the birth of MIA RODRIGUEZ.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis and Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Mia did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or immediate post-delivery period are credited.

CONCLUSIONS OF LAW

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

7. The 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.

8. 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 DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, 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.

9. 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.

10. 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 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.

11. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means 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.

12. The evidence, which is not refuted, established that Mia did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. Therefore, Mia is not eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Melissa Calderon and Dennis Rodriguez, on behalf of and as parents and natural guardians of Mia Rodriguez, is dismissed with prejudice.

DONE AND ORDERED this 7th day of December, 2012, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2012.

COPIES FURNISHED:
(Via Certified Mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7011 1570 0001 1540 6809)

Melissa Calderon
Dennis Rodriguez
No. 29
13816 Southwest 142nd Avenue
Miami, Florida 33186
(Certified Mail No. 7011 1570 0001 1540 6793)

David W. Black, Esquire
Frank, Weinberg and Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(Certified Mail No. 7012 1640 0000 7865 0872)

Marc J. Schleier, Esquire
Fowler, White, Burnett, P.A.
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
(Certified Mail No. 7012 1640 0000 7865 0889)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7012 1640 0000 7865 0896)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7012 1640 0000 7865 0902)

Jackson South Community Hospital
9333 Southwest 152nd Street
Palmetto Bay, Florida 33157
(Certified No. 7012 1640 0000 7865 0919)

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).