

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SONIA RODRIGUEZ AND ISRAEL)
RODRIGUEZ, on behalf of and as)
parents and natural guardians)
of ELVIN RODRIGUEZ, a minor,)
)
Petitioners,)
)
vs.) Case No. 12-3839N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

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 March 4, 2013.

STATEMENT OF THE CASE

On November 21, 2012, Petitioners, Sonia Rodriguez and Israel Rodriguez, as parents and natural guardians of Elvin Rodriguez (Elvin), a minor, filed a Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition

named John Davis, M.D.; Virginia Su, M.D.; and Kathleen Davis, M.D., as the physicians providing obstetric services at the birth of Elvin at Shands Hospital in Gainesville, Florida.

DOAH served NICA with a copy of the Petition on December 19, 2012. Dr. John Davis was served a copy of the Petition on December 20, 2012. Shands Hospital was served a copy of the Petition on February 12, 2013. Copies of the Petition were sent by certified United States mail to Dr. Kathleen Davis and Dr. Virginia Su at the addresses provided in the Petition, but the copies of the Petition were returned to DOAH as undeliverable.

NICA filed a Motion for Summary Final Order, asserting that Elvin did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the motion that counsel for Petitioners had no objection to the granting of the motion. As of the date of this Summary Final Order, Dr. John Davis, Dr. Kathleen Davis, Dr. Su, and Shands Hospital have not petitioned to intervene in this proceeding.

FINDINGS OF FACT

1. Elvin Rodriguez was born on July 25, 2008, at Shands Hospital in Gainesville, Florida. Elvin weighed 4,685 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elvin. In an affidavit dated February 27, 2013, Dr. Willis opined the following:

Based on my education and experience, it is my professional opinion, within a reasonable degree of medical probability, that there was an apparent obstetrical event that resulted in injury to Elvin Rodriguez's brachial plexus (Erb's palsy) but no oxygen deprivation or mechanical injury to the baby's brain or spinal cord occurred during labor or delivery.

3. Dr. Willis attached a report of his findings to his deposition. He further stated in his report:

In summary, there was no fetal distress during labor. Delivery was complicated by shoulder dystocia related to maternal Diabetes and fetal macrosomia. The initial Apgar score was low due to the difficult delivery, but the baby responded to resuscitation. The umbilical cord blood pH was above 7.0. The baby suffered an Erb's palsy from the shoulder dystocia, but there was no apparent brain injury.

4. A review of the file does not show any contrary opinion, and Petitioners have no objection to the issuance of a summary final order finding that the injury is not compensable under Plan. The opinion of Dr. Willis that Elvin did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor and delivery is credited.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. The evidence, which is not refuted, established that Elvin 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, Elvin 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 Sonia Rodriguez and Israel Rodriguez and as parents and natural guardians of Elvin Rodriguez, is dismissed with prejudice.

DONE AND ORDERED this 8th day of March, 2013, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2013.

COPIES FURNISHED:

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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).