

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LIZBETH AND EDGARDO CARABALLO, )  
on behalf of and as parents and )  
natural guardians of LUIS )  
CARABALLO, a minor, )  
)  
Petitioners, )  
)  
vs. ) Case No. 12-3999N  
)  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
)  
Respondent, )  
)  
and )  
)  
PETER PERRY, M.D., AND )  
PHYSICIAN ASSOCIATES, LLC, AND )  
ORLANDO HEALTH, INC., d/b/a )  
ARNOLD PALMER HOSPITAL AND )  
WINNIE PALMER HOSPITAL, )  
)  
Intervenors. )  

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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 February 5, 2013.

STATEMENT OF THE CASE

On December 13, 2012, Petitioners, Lizbeth Caraballo and Edgardo Caraballo, on behalf of and as parents and natural

guardians of Luis Caraballo (Luis), a minor, filed a Petition Under Protest Pursuant to Florida Statutes 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 the following physicians who provided obstetric services for the birth of Luis: Peter Perry, M.D.; Javier Pena, M.D.; Virgil Davila, M.D.; Hector Ramirez, M.D.; and Stephen Carlan, M.D. The Petition stated that Luis was born at Arnold Palmer Hospital, in Orlando, Florida.

DOAH served NICA and Dr. Ramirez with copies of the Petition on December 21, 2012. DOAH served a copy of the Petition on Dr. Davila on December 20, 2012. On December 28, 2012, DOAH received a receipt from the United States Postal Service (USPS) showing that the Petition had been served on Arnold Palmer Hospital. Dr. Carlan received a copy of the Petition on December 24, 2012. On December 18, 2012, DOAH sent a copy of the Petition to Dr. Pena by United States certified mail. DOAH did not receive a receipt from the USPS showing that a copy of the Petition had been received by Dr. Pena. On February 7, 2012, another copy of the Petition was sent to Dr. Pena by United States certified mail. On February 19, 2013, DOAH received a receipt from the USPS that a copy of the Petition had been received by Dr. Pena.

On December 27, 2012, Dr. Perry and Physician Associates, LLC, filed a Petition for Leave to Intervene. By Order dated January 9, 2013, Dr. Caldera-Nieves and Physician Associates, LLC, were granted leave to intervene.

On December 31, 2012, Orlando Health, Inc. d/b/a Arnold Palmer Hospital and Winnie Palmer Hospital filed a Motion to Intervene. By Order dated January 17, 2013, the motion was granted.

On February 5, 2013, NICA filed a Motion for Summary Final Order, requesting that a Summary Final Order be entered finding that the claim was not compensable because Luis did not meet the requisite minimum statutory birth weight as required by section 766.302(2), Florida Statutes.

As of the date of this Summary Final Order of Dismissal, neither Petitioners nor Intervenors have filed a response to the Motion for Summary Final Order.

#### FINDINGS OF FACT

1. Luis Caraballo was born on July 2, 2005, at Arnold Palmer Hospital in Orlando, Florida. He was a single gestation.

2. Based on his birth certificate, Luis weighed five pounds at birth. Five pounds equates to 2,267.96 grams. There is no dispute that Luis did not weigh at least 2,500 grams.

CONCLUSIONS OF LAW

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

4. 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.

5. 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. In the instant case, Petitioners have filed a Petition under protest, stating that they are not seeking any benefits under the Plan.

6. NICA has determined that Luis does not have a claim that is compensable under the Plan and has filed a Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

7. In ruling on the motion, 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).

§ 766.309(1), Fla. Stat.

8. 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.

9. The evidence, which is not refuted, established that Luis was a single gestation and did not weigh at least 2,500 grams at birth. Thus, Luis has not sustained a birth-related neurological injury because he did not meet the minimum

statutory weight as set forth in the definition of "birth-related neurological injury," in section 766.302(2).

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Lizbeth Caraballo and Edgardo Caraballo, on behalf of and as parents and natural guardians of Luis Caraballo, is dismissed with prejudice.

DONE AND ORDERED this 21st day of February, 2013, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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Filed with the Clerk of the  
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this 21st day of February, 2013.

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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).