

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATTHEW SALLING AND MANDY
SCHUMACHER, on behalf of and as
parents and natural guardians of
JACKSON J. SALLING, a minor,

Petitioners,

vs.

Case No. 13-0760N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on July 25, 2013.

STATEMENT OF THE CASE

On February 27, 2013, Petitioners, Matthew Salling and Mandy Schumacher, on behalf of and as parents and natural guardians of Jackson J. Salling (Jackson), a minor, filed a Petition for Benefits 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 Luisa Vanegas, M.D., as the physician providing obstetric services at the birth of Jackson at Brandon Regional Hospital located in Brandon, Florida.

DOAH served NICA with a copy of the Petition on March 4, 2013. DOAH served a copy of the Petition on Dr. Vanegas on March 4, 2013. DOAH received a return receipt from the United States Postal Service on May 1, 2013, showing that Brandon Regional Hospital had been served with a copy of the Petition. As of the date of this Summary Final Order of Dismissal, neither Dr. Vanegas nor Brandon Regional Hospital has petitioned to intervene in this proceeding.

On July 25, 2013, NICA filed a Motion for Summary Final Order, asserting that Jackson did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. A response to the motion was due to be filed on August 1, 2013. No response was filed. On August 6, 2013, an Order was entered requiring Petitioners to show cause on or before August 20, 2013, why the motion should not be granted. As of the date of this Summary Final Order of Dismissal, Petitioners have filed no response to the motion for summary final order.

FINDINGS OF FACT

1. Jackson J. Salling was born on February 28, 2008, at Brandon Regional Hospital in Brandon, Florida. Jackson weighed 4,070 grams at birth.

2. NICA retained Michael S. Duchowny, M.D., as its medical expert in pediatric neurology. Dr. Duchowny examined Jackson and reviewed his medical records. In an affidavit dated July 22, 2013, Dr. Duchowny opined as follows:

Based upon the history provided to me and my physical and neurological examination of the child, and as further described in my evaluation report, I concluded that the child has a substantial mental impairment but does not evidence a substantial motor impairment. Further the medical records do not provide support for neurological injury of the brain or spinal cord acquired due to oxygen deprivation or mechanical injury. Rather, Jackson's present neurological problems are prenatal in origin and unrelated to intrapartum or immediate post-delivery events.

* * *

It is my medical opinion that Jackson Salling has not suffered a birth-related neurological injury as defined by the provisions of Chapter 766, Florida Statutes, and the he therefore is not eligible for compensation under the Florida Birth-Related Neurological Injury Compensation Plan.

3. NICA retained Donald Willis, M.D., as an expert in maternal-fetal medicine to review the medical records of Jackson and his mother. In an affidavit dated July 19, 2013, Dr. Willis opined:

Jackson Salling was born by vaginal delivery after elective induction of labor at 39 weeks gestation. Delivery was complicated by a shoulder dystocia lasting three minutes which resulted in a fractured humerus bone. Umbilical cord gas was within normal limits, and did not suggest hypoxia at birth. The newborn was cyanotic, floppy, and without spontaneous respirations at birth. His one-minute Apgar score was 3. Bag and mask ventilation was given and the child quickly improved, with an Apgar score of 9 at five minutes and 9 at 10 minutes. Significant oxygen deprivation during labor and birth would be unlikely with normal Apgar scores of five and ten minutes. The fractured humerus required orthopedic management. No MRI or CT scan of the head was done.

Based on my review of medical records, it is my opinion that there was no 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.

4. A review of the file does not show any opinions contrary to the opinions of Dr. Duchowny and Dr. Willis that Jackson did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate post-delivery period and that Jackson does not have substantial and permanent mental and physical impairments due to lack of oxygen or mechanical trauma are 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 Jackson 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 during resuscitation in the immediate post-delivery period, which resulted in substantial and permanent mental and physical impairments. Therefore, Jackson 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 Matthew Salling and Mandy Schumacher, on behalf of and as parents and natural guardians of Jackson J. Salling, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of August, 2013, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2013.

COPIES FURNISHED:
(Via certified mail)

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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).