

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YUSLEIDY ATORRESGASTI AND DANDEL
ORTEGA, on behalf of and as
parents and natural guardians of
DANNEL ORTEGA, a minor,

Petitioners,

vs.

Case No. 13-2000N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ADVENTIST HEALTH SYSTEM/SUNBELT,
INC., d/b/a FLORIDA HOSPITAL
CELEBRATION HEALTH; FLORIDA
HOSPITAL MEDICAL GROUP, INC.;;
AND JENNIFER SWOBODA, M.D.,

Intervenors.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's
Motion for Summary Final Order filed by Respondent, Florida
Birth-Related Neurological Injury Compensation Association
(NICA), on October 30, 2013.

STATEMENT OF THE CASE

On May 24, 2013, Petitioners, Yusleidy Atorresgasti and
Dannel Ortega, on behalf of and as parents and natural guardians

of Dannel Ortega (Dannel), 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 Jennifer Swoboda, M.D., and David Marcantel, M.D., as the physicians providing obstetric services at the birth of Dannel at Florida Hospital Celebration in Celebration, Florida.

DOAH served NICA with a copy of the Petition on May 31, 2013. DOAH served a copy of the Petition on Florida Hospital Celebration Health on July 31, 2013. DOAH served copies of the Petition on Dr. Swoboda and Dr. Marcantel on June 3, 2013. On June 26, 2013, Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital Celebration Health, Florida Hospital Medical Group, Inc. (Florida Hospital), and Dr. Swoboda filed a Motion to Intervene, which was granted by Order dated July 9, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Marcantel has not petitioned to intervene in this proceeding.

On October 30, 2013, NICA filed a Motion for Summary Final Order, asserting that Dannel did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

On November 4, 2013, Petitioners filed Petitioners' Response to Respondent's Motion for Summary Final Order and Motion to

Abate, requesting that Respondent's Motion for Summary Final Order be abated until completion of discovery. On November 6, 2013, Intervenors filed Intervenors' Motion to Defer Ruling or Hearing on NICA's Motion for Summary Final Order, and Motion for Extension of Time to Respond to NICA's Motion in Order to Allow Intervenors Time to Complete Discovery. Petitioners' and Intervenors' motions were heard by telephonic conference call on November 13, 2013, and an Order was entered on November 15, 2013, extending the time to respond to Respondent's Motion for Summary Final Order to February 17, 2014.

On February 17, 2014, Intervenors filed Intervenors' Response to NICA's Motion for Summary Final Order, stating that they "take no position regarding NICA's pending Motion for Final Summary Order." Petitioners filed no further response to the Motion for Final Summary Order.

FINDINGS OF FACT

1. Dannel Ortega was born on August 9, 2009, at Florida Hospital in Celebration, Florida. Dannel weighed eight pounds and 11 ounces at birth.

2. Raymond J. Fernandez, M.D. (Dr. Fernandez), was requested by NICA to do an independent medical examination of Dannel. Dr. Fernandez examined Dannel on September 10, 2013. Based on his examination, Dr. Fernandez opined the following:

There is evidence for substantial mental impairment characterized mainly by delay in acquisition of expressive speech and receptive language skills that will probably be permanent, although I anticipate some improvement. This is more likely than not due to oxygen deprivation during labor, delivery, and the immediate postdelivery period of resuscitation. There is MRI evidence of focal atrophy and gliosis within a portion of the left parietal lobe, probably due to ischemia resulting in oxygen deprivation. Ischemia is probably explained on the basis of hypotension that required pharmacologic support. However, there is no evidence for motor impairment at this time and there is no reason to suspect motor impairment will become a problem for Dannel in the future.

3. A review of the file does not show any contrary opinion.

The opinion of Dr. Fernandez that Dannel does not have a permanent and substantial motor impairment is credited.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. The evidence, which is not refuted, established that Dannel does not have a permanent and substantial motor impairment; thus, Dannel has not sustained a birth-related neurological injury because he is not permanently and

substantially physically impaired. Therefore, Dannel 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 Yusleidy Atorresgasti and Dannel Ortega on behalf of and as parents and natural guardians of Dannel Ortega, is dismissed with prejudice.

DONE AND ORDERED this 19th day of February, 2014, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

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 19th day of February, 2014.

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. 7013 2630 0000 4176 5700)

Maria D. Tejedor, Esquire
Diez-Arguelles and Tejedor, P.A.
505 North Mills Avenue
Orlando, Florida 32803
(Certified Mail No. 7013 2630 0000 4176 5717)

Eric P. Gibbs, Esquire
Estes, Ingram, Foels and Gibbs, P.A.
Post Office Box 4974
Orlando, Florida 32802-4974
(Certified Mail No. 7013 2630 0000 4176 5724)

Jeffrey P. Brock, Esquire
Smith, Hood, Loucks, Stout,
Bigman, and Brock P.A.
444 Seabreeze Boulevard, Suite 900
Post Office Box 15200
Daytona Beach, Florida 32118
(Certified Mail No. 7013 2630 0000 4176 5731)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7013 2630 0000 4176 5748)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7013 2630 0000 4176 5755)

David Ashley Marcantel, M.D.
Suite 208
410 Celebration Place
Celebration, Florida 34747
(Certified Mail No. 7013 2630 0000 4176 5762)

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).