

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFERY AND MEREDITH FARNUM, on
behalf of and as parents and
natural guardians of ZACKARY K.
FARNUM, a minor,

Petitioners,

vs.

Case No. 13-2796N

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 August 18, 2014.

STATEMENT OF THE CASE

On July 10, 2013, Petitioners, Jeffery and Meredith Farnum, on behalf of and as parents and natural guardians of Zackary K. Farnum, 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 Dr. Amy

Million as the physician providing obstetrical services at the birth of Zackary on August 11, 2008, at North Florida Regional Medical Center located in Gainesville, Florida.

DOAH served NICA with a copy of the Petition on July 26, 2013. On September 26, 2013, DOAH received a return receipt from the United States Postal Service showing that North Florida Regional Medical Center had been served with a copy of the Petition. DOAH served a copy of the Petition on Dr. Million on July 29, 2013.

On August 18, 2014, NICA filed a Motion for Summary Final Order, asserting that Zackary did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The Motion was served by United States Mail on August 18, 2014.

An Order to Show Cause was entered on September 3, 2014, advising the Petitioners to show cause in writing why Respondent's Motion for Summary Final Order should not be granted. To date, no response has been filed.

FINDINGS OF FACT

1. Zackary K. Farnum was born on August 11, 2008, at North Florida Regional Medical Center in Gainesville, Florida. Zackary weighed 3,620 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Zackary to determine whether an

injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Dr. Willis described his findings as follows in his medical report:

In summary, labor was induced at term due to rupture of the membranes. A prolonged FHR deceleration, lasting about 4 minutes occurred at about five hours prior to birth. However, the baby was not depressed after birth with a normal Apgar score of 8 by five minutes and a normal cord blood pH of 7.29. The newborn hospital course was not complicated by multisystem organ failure, which is commonly seen with birth asphyxia. The baby had some initial difficult feeding and one episode of arching of the back was noted. Clinical findings were no [sic] substantial enough to require further evaluation, such as EEG or MRI. Overall, review of the medical records does not clearly identify a hypoxic event during labor or delivery that would have resulted in substantial brain injury.

There was no apparent 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.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Zackary and to review his medical records. Dr. Duchowny examined Zackary on May 21, 2014, and opined as follows in his medical report:

In summary, Zackary's neurological examination reveals evidence of left-sided motor findings including left hemihypotrophy, left mild spastic weakness, and left hyperreflexia with a left Babinski sign. Despite these findings, he is able to accomplish most tasks reasonably well and is well-adjusted to his motor deficits. His cognitive functioning is appropriate for age, although he is behaviorally overactive and impulsive. His speech dysarthria is likely developmentally based. Medical records confirm the parental history of a difficult delivery. Zack's Apgar scores were 2 and 8 at 1 and 5 minutes and there was evidence of thick meconium. A tight nuchal cord was removed at birth. The neonatal course was subsequently benign.

I am familiar with the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") and the standards imposed by the Plan for compensability of potential claims. Based upon my review of the medical records as described herein and in my report, and further based upon my evaluation of ZACKARY FARNUM, I have formed an opinion as to whether ZACKARY FARNUM qualifies for compensation under the plan.

I regard Zack's motor difficulties as mild to moderate and his evaluation today does not provide evidence for a substantial mental impairment. I suspect that his right hemisphere stroke was acquired in utero but I have not had an opportunity to personally review the MR images. However, Zackary does not have a substantial mental impairment. I therefore believe that he should not be considered for inclusion within the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that there was no apparent 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. Dr. Willis' opinion is credited.

5. There are no contrary expert opinions filed that are contrary to Dr. Duchowny's opinion that Zackary does not have a substantial mental or physical impairment. Dr. Duchowny's opinion is 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 Zackary 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 post-delivery period and that Zackary does not have a permanent and substantial mental or physical impairment. Therefore, Zackary 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 Jeffery and Meredith Farnum, on behalf of and as parents and natural guardians of Zackary K. Farnum, a minor, is dismissed with prejudice.

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



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 19th day of September, 2014.

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).