

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JULIE E. SMITH AND MARK L.
MCMILLAN, individually and on
behalf of COLEMAN MCMILLAN,
minor,

Petitioners,

vs.

Case No. 13-3884N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

SOUTHERN BAPTIST HOSPITAL OF
FLORIDA, INC., d/b/a BAPTIST
MEDICAL CENTER SOUTH,

Intervenor.

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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 July 3, 2014.

STATEMENT OF THE CASE

On October 9, 2013, Petitioners, Julie E. Smith and Mark L. McMillan, individually and on behalf of Coleman McMillan (Coleman), 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 Amy D. Greenwald, M.D., as the physician providing obstetrical services at the birth of Coleman on December 12, 2012, at Baptist Health System located in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on October 11, 2013. On October 17, 2013, DOAH received a return receipt from the United States Postal Service showing that Dr. Greenwald had been served with a copy of the Petition. On October 23, 2013, DOAH received a return receipt showing that Baptist Health System had been served with a copy of the Petition.

On December 18, 2013, Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center South filed a Petition for Leave to Intervene, which was granted by Order dated January 6, 2014. As of the date of this Summary Final Order of Dismissal, Dr. Greenwald has not petitioned to intervene in this proceeding.

On July 3, 2014, NICA filed a Motion for Summary Final Order, asserting that Coleman 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 electronic mail on July 3, 2014. Respondent represented in its motion that Intervenor had no objection to the granting of the

motion, and that Petitioners had an objection because they wanted to take the depositions of Respondent's experts. As of the date of the Summary Final Order of Dismissal, Petitioners have filed no response to the Motion for Summary Final Order nor have they requested additional time to respond to the motion.

FINDINGS OF FACT

1. Coleman McMillan was born on December 12, 2012, at Baptist Medical Center South located in Jacksonville, Florida. Coleman weighed 3,690 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Coleman, 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 summary: The mother had well-controlled hypertension during pregnancy. She was followed twice weekly for fetal testing. There was no documentation of fetal distress prior to labor. The baby was depressed at birth, requiring resuscitation. A cord blood gas was apparently not done. The initial blood gas in the NICU was consistent with acidosis. Abnormal fetal tone was noted shortly after delivery. MRI on DOL 2 was consistent with anoxic brain injury.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post delivery period. Oxygen deprivation was likely present during labor, but without reviewing the FHR tracing I am reluctant to make a statement concerning this issue.

After a review of the fetal heart rate monitor tracing, Dr. Willis concluded that there was no significant oxygen deprivation during labor.

3. NICA retained Raymond J. Fernandez, M.D., a pediatric neurologist, to examine Coleman and to review his medical records. Dr. Fernandez examined Coleman on May 29, 2014, and made the following findings:

Coleman was active and energetic during much of the examination. He usually turned when his name was called, and maintained good eye contact. Towards the end of the examination Coleman sat calmly on his father's lap and again maintained good eye contact. He displayed appropriate stranger anxiety. He pointed and made grunting sounds. No words were spoken. He carried out age-appropriate verbal requests. He opened the door on request without visual cues, looked up at the light when I asked him where is the light, lifted his shirt when I asked him to show me his shirt and pointed to his father's nose when I asked him to touch his nose. He scribbled with pen and paper and pushed the button on the pen before he handed it back to me. He stacked four, one-inch cubes using either hand in well-coordinated fashion. He walked and ran well. He was able to squat, pick up objects and shift to stand without difficulty. He was able to throw a ball overhand. Muscle tone was normal. He reached accurately with either hand. There

was no tremor, ataxia or involuntary movement. Deep tendon reflexes were 2+ throughout. There were no pathologic reflexes. Limited funduscopic examination was normal. Eye movement was normal and he was visually attentive. Face was symmetric. He swallowed well. Palate elevated at midline. Tongue was midline.

4. Based on his review of the medical records and his examination of Coleman, Dr. Fernandez opined as follows:

There is no evidence for substantial motor impairment. Coleman's motor examination is normal, both with regard to fine and gross motor control and muscle tone is normal.

There is no evidence for substantial mental impairment at this time. Expressive speech is delayed, but he displays normal or age-appropriate preverbal skills and he appears to have age-appropriate comprehension of language. Expressive speech will probably improve within a reasonable period of time.

Coleman sustained an hypoxic brain injury, probably during labor and delivery, but there is no evidence for substantial mental and motor impairment that will be permanent.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis and Dr. Fernandez that there was an obstetrical event that resulted in loss of oxygen to the brain. Their opinions are credited. There are no contrary expert opinions filed that are contrary to Dr. Fernandez's opinion that there is no evidence for a substantial motor or mental impairment that will be permanent. Dr. Fernandez'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 most likely Coleman did sustain an injury to the brain caused by oxygen deprivation occurring in the course of delivery. The evidence does not establish that the brain injury resulted in permanent and substantial mental and physical impairments. Therefore, Coleman 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 Julie E. Smith and Mark L. McMillan, individually and on behalf of Coleman McMillan, is dismissed with prejudice.

DONE AND ORDERED this 16th day of July, 2014, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of July, 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).