

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAYUMI PEREZ, individually and
on behalf of CHRISTOPHER PEREZ,
a minor,

Petitioner,

vs.

Case No. 13-4175N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

TAMPA OBSTETRICS, P.A., URMILA
J. PATEL, M.D., ADAM S. LEVINE,
M.D., AND ST. JOSEPH'S WOMEN'S
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 May 8, 2014.

STATEMENT OF THE CASE

On October 22, 2013, Petitioner, Mayumi Perez, individually and on behalf of Christopher Perez (Christopher), 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 Adam Scott Levine, M.D., and Urmila Patel, M.D. as the physicians providing obstetric services at the birth of Christopher on May 16, 2007, at St. Joseph's Medical Center located in Tampa, Florida.

DOAH served NICA with a copy of the Petition on October 28, 2013. DOAH served copies of the Petition on Dr. Patel, Dr. Levine, and St. Joseph's Medical Center by certified mail and received receipts from the United States Postal on October 30, 2013, showing that the Petition had been received by Dr. Patel and St. Joseph's Medical Center. On November 4, 2013, DOAH received a receipt from the United States Postal Service showing that Dr. Levine had been served with a copy of the Petition.

On November 13, 2013, Dr. Levine filed a Petition to Intervene, which was granted by Order dated On December 2, 2013. On November 14, 2013, Tampa Obstetrics, P.A., and Dr. Patel filed a Petition and Motion to Intervene, which was granted by Order dated December 3, 2013. On December 2, 2013, St. Joseph's Women's Hospital filed a Petition and Motion to Intervene, which was granted by Order dated December 17, 2013.

On May 8, 2014, NICA filed a Motion for Summary Final Order, asserting that Christopher did not sustain a "birth-related

neurological injury" as that term is defined in section 766.302(2), Florida Statutes, and that any claim for compensation under the Plan is barred by the statute of limitations.

As of the date of this Summary Final Order of Dismissal, no response has been filed by the Petitioners or by Intervenors.

FINDINGS OF FACT

1. Christopher Perez was born on May 16, 2007, at St. Joseph's Medical Center in Tampa, Florida. Christopher weighed 3,470 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Christopher 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. In a report dated December 6, 2013, Dr. Willis described his findings as follows:

In summary, there was no fetal distress during labor. Cesarean section delivery was uncomplicated. The baby was not distressed at birth and was taken from the delivery room in his mother's arms. The baby was transferred to the NICU at about seven hours of life due to temperature instability and an elevated white blood count. Blood cultures were negative. Newborn hospital course was otherwise uncomplicated.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical

trauma to the baby's brain during labor, delivery, or in the immediate post delivery period.

3. NICA retained Raymond J. Fernandez, M.D., a pediatric neurologist, to examine Christopher and to review the medical records of Christopher. On January 30, 2014, Dr. Fernandez examined Christopher. Dr. Fernandez made the following findings:

There was no evidence on examination for substantial physical (motor) impairment. There is evidence for substantial mental (cognitive) impairment, characterized mainly by learning difficulty and difficulty with processing of speech and language. I suspect that Christopher will prove to continue to experience significant learning difficulty, especially as learning becomes more complex. There is no evidence in the record that would indicate Christopher's substantial mental impairment to be due to neurological injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury during labor, delivery, or the immediate post delivery period.

4. 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. The opinions of Dr. Willis and Dr. Fernandez that Christopher did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or the immediate post-delivery period are credited. Dr. Fernandez's opinion that Christopher does not have a substantial motor impairment is 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 Christopher 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 in a hospital and that Christopher does not have a permanent and substantial physical impairment. Therefore, Christopher is not eligible for benefits under the Plan.

12. Section 766.313 provides: "Any claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred." Christopher was born on May 16, 2007, and the Petition was filed on October 22, 2013, more than five years after Christopher's birth. Thus, any claim for compensability under the Plan is barred by the statute of limitations.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Mayumi Perez, individually and on behalf of Christopher Perez, is dismissed with prejudice.

The final hearing scheduled for June 9, 2014, is cancelled.

DONE AND ORDERED this 23rd day of May, 2014, 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 May, 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).