

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEBBLES BRUGMAN, individually
and as Parent and Natural
Guardian of RAILEY BRUGMAN, a
minor child,

Petitioner,

vs.

Case No. 14-0503N

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 May 23, 2014.

STATEMENT OF THE CASE

On January 29, 2014, Petitioner, Pebbles Brugman, individually and as parent and natural guardian of Railey Brugman (Railey), a minor, filed a Petition Under Protest Pursuant to § 766.301, et seq., Fla. Stat. (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Ignacio Armas,

M.D., as the physician providing obstetrical services at the birth of Railey on May 25, 2010, at Brandon Regional Hospital located in Brandon, Florida.

DOAH served NICA with a copy of the Petition on January 31, 2014. On February 6, 2014, DOAH received a receipt from the United States Postal Service showing that Brandon Regional Hospital had received a copy of the Petition. On March 14, 2014, DOAH received a receipt from the United States Postal Service showing that Dr. Armas had received a copy of the Petition. Neither Dr. Armas nor Brandon Regional Hospital has petitioned to intervene in this proceeding.

On May 23, 2014, NICA filed a Motion for Summary Final Order, asserting that Railey did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. As of the date of this Summary Final Order of Dismissal, Petitioner has not filed a response to the Motion for Summary Final Order.

FINDINGS OF FACT

1. Railey Brugman was born on May 25, 2010, at Brandon Regional Hospital in Brandon, Florida. Railey weighed in excess of 2,500 grams at birth.

2. Michael S. Duchowny, M.D. (Dr. Duchowny), was retained by NICA to review the medical records of Railey and her mother and to examine Railey, to determine whether Railey suffers from

an injury which rendered her permanently and substantially mentally and physically impaired, and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in a hospital.

Dr. Duchowny evaluated Railey on May 14, 2014. In an affidavit dated May 22, 2014, Dr. Duchowny opined as follows:

It is my opinion that Railey's neurological examination reveals evidence of bilateral upper extremity ataxia, right greater than left, and has multiple dysmorphic features. The dysmorphic features are consistent with the clinical impression of KBG syndrome. However, the findings from the evaluation do not reveal either a substantial mental or physical impairment, and in all likelihood, Railey will continue to progress in the future.

I reviewed the medical records sent to me on April 15, 2014[,] which document a history of overstimulation by Pitocin during labor accompanied by fetal distress and brachycardia. Railey was subsequently delivered vaginally with vacuum assistance and weighed 2,680 grams at birth. Her Apgar scores were 6 and 9. Seizures began within the first day of life and an MRI scan done shortly after birth revealed bilateral posterior cerebral hemispheric infarctions. Although the cerebral lesions were likely intrapartum complications, Railey has done remarkably well and has well preserved neurological function.

As such, based on the foregoing, it is my opinion that Railey should not be considered for compensation within the NICA program.

3. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to Dr. Duchowny's opinion that there is no evidence for a substantial and permanent motor or mental impairment. Dr. Duchowny's opinion 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 Railey has not sustained permanent and substantial mental and physical impairments. Thus, Railey is not eligible for compensation under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Pebbles Brugman, individually and as parent and natural guardian of Railey Brugman, is dismissed with prejudice.

DONE AND ORDERED this 12th day of June, 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 12th day of June, 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).