

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA AND RUSSELL KERNS, on
behalf of and as parents and
natural guardians of CHRISTIAN
KERNS, a minor,

Petitioners,

vs.

Case No. 14-0882N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

MEASE COUNTRYSIDE HOSPITAL,

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 May 5, 2015.

STATEMENT OF THE CASE

On February 21, 2014, Petitioners, Linda and Russell Kerns, on behalf of and as parents and natural guardians of Christian Kerns (Christian), 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 Wanda Torres, M.D., as the physician providing obstetrical services at the birth of Christian on February 24, 2009, at Mease Countryside Hospital located in Safety Harbor, Florida.

DOAH served NICA with a copy of the Petition on February 26, 2014. DOAH served Mease Countryside Hospital with a copy of the Petition on March 13, 2014. DOAH served Wanda Torres-Oyola, M.D., with a copy of the Petition on February 27, 2014.

On March 27, 2014, Mease Countryside Hospital filed a Petition to Intervene which was granted by Order dated April 9, 2014. As of the date of this Summary Final Order of Dismissal, no petition to intervene has been filed by Dr. Torres-Oyola.

On May 5, 2015, NICA filed a Motion for Summary Final Order, asserting that Christian did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

FINDINGS OF FACT

1. Christian was born on February 24, 2009, at Mease Countryside located in Safety Harbor, Florida. Christian, who was born a twin, weighed in excess of 2,000 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Christian. In a medical report dated August 7, 2014, Dr. Willis opined as follows:

Christine [sic] was delivered by Cesarean section for twins. Christine was designated as fetus A in the hospital records. Birth weight was 2,395 grams. Apgar scores were 9/9. The baby had mild respiratory distress and required nasal oxygen for <24 hours and then weaned to room air. NICU admission exam noted the baby to be alert and active with normal muscle tone.

After weaning off oxygen, the baby remained stable until about one week of age when fever and seizure activity developed. E. coli meningitis was diagnosed. The baby subsequently developed hydrocephalus as a result of the meningitis. The child was subsequently diagnosed with cerebral palsy and developmental delay.

Based on limited medical records, there does not appear [sic] to be any 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. The baby had mild respiratory distress for less than 24 hours. The baby was stable until seizures developed at about one week age. Bacterial meningitis was diagnosed and resulted in hydrocephalus and brain injury.

3. Dr. Willis reaffirmed his opinion in an affidavit dated April 27, 2014.

4. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Christian and to review his medical records. Dr. Duchowny examined Christian on January 14,

2015. In an affidavit dated April 29, 2015, regarding his independent medical examination of Christian, Dr. Duchowny opined as follows:

In summary, Christian's evaluation today reveals findings consistent with a substantial mental and physical impairment. Christian has a right hemiparesis with greater involvement of the upper extremity, absence of meaningful communication skills, repetitive self-stimulatory behavior, cortical visual impairment, microcephaly, and static hydrocephalus with a functioning left ventriculoperitoneal shunt. His developmental level is between 9-12 months of age which is significantly delayed.

A review of Christian's medical records confirms his mother's impression of meningitis. Christian was diagnosed with Citrobacter meningitis in the Newborn Nursery. The records indicate that Christian was born at 33 weeks gestation and weighed 5 pounds 4 ounces at birth and had Apgar scores of 9 & 9 at 1 and 5 minutes. He was delivered by non-emergent repeat elective cesarean section. Citrobacter meningitis was confirmed on cerebrospinal fluid examination on March 3, 2009. Gram negative rods were noted in the fluid which revealed a protein of 248 with 2830 white blood cells. He was treated aggressively with antibiotics but developed obstructive hydrocephalus necessitating his ventriculoperitoneal shunting.

Although Christian has a permanent and substantial mental and motor impairment, the etiology would appear to be postnatal-acquired Citrobacter meningitis and hydrocephalus. The medical records do not substantiate that Christian's neurologic impairment resulted from either oxygen deprivation or mechanical injury in the course of labor or delivery. For this

reason, I am not recommending Christian for inclusion within the NICA program.

5. 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. There are no expert opinions filed that are contrary to Dr. Duchowny's opinion that although Christian's examination reveals findings consistent with a substantial mental and motor impairment, his neurological problems did not result from either oxygen deprivation or mechanical injury acquired in the course of labor or delivery. 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 Christian did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course

of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Therefore, Christian is not eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The Petition filed by Linda and Russell Kerns, on behalf of Christian Kerns, is dismissed with prejudice.

2. The final hearing scheduled for June 16, 2015, is cancelled.

DONE AND ORDERED this 19th day of May, 2015, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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 May, 2015.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0647)

Erin Mary O'Toole, Esquire
Erin M. O'Toole, LLC
540 4th Street, North
St. Petersburg, Florida 33701
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0654)

David S. Nelson, Esquire
La Cava and Jacobson, P.A.
Suite 2500
101 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0661)

Daryl Q. Stringer, Esquire
Law Offices of Daryl Q. Stringer, P.A.
1808 North Morgan Street, Suite A
Tampa, Florida 33602
(Certified Mail No. 7014 2120 0003 1053 0678)

Robert J. Grace, Esquire
The Bleakley Baval Law Firm
15170 North Florida Avenue
Tampa, Florida 33613
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0685)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7014 2120 0003 1053 0692)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7014 2120 0003 1053 0708)

Wanda I. Torres-Oyola, M.D.
Attention: Javier Berolo
Suite 215
2044 Trinity Oaks Boulevard
Trinity, Florida 34655-4406
(Certified Mail No. 7014 2120 0003 1053 0715)

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).