

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELISSA D'ANGELO, individually
and as natural parent of ALEX
DeBLASIO, minor,

Petitioner,

vs.

Case No. 14-2802N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION, a/k/a NICA,

Respondent,

and

CITRUS HMA, LLC, d/b/a SEVEN
RIVERS REGIONAL MEDICAL CENTER
AND ROSE MARY SOBEL, M.D.,

Intervenors.

_____ /

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 November 13, 2014.

STATEMENT OF THE CASE

On June 13, 2014, Petitioner, Melissa D'Angelo, individually and as natural parent of Alex DeBlasio (Alex), a minor, filed a Petition under Protest 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 Rose Mary Sobel, M.D., as the physician providing obstetrical services at the birth of Alex on February 7, 2011, at Citrus HMA, LLC, d/b/a Seven Rivers Regional Medical Center located in Crystal River, Florida.

DOAH served NICA with a copy of the Petition on June 19, 2014. DOAH served Dr. Sobel and Seven Rivers Regional Medical Center with copies of the Petition on June 20, 2014.

On July 14, 2014, Rose Mary Sobel, M.D., filed a Petition and Motion to Intervene. On July 17, 2014, Citrus HMA, LLC, d/b/a Seven Rivers Regional Medical Center filed a Petition and Motion to Intervene. The Petitions to Intervene were granted by Order dated July 31, 2014.

On November 13, 2014, NICA filed a Motion for Summary Final Order, asserting that Alex did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On December 2, 2014, Petitioner filed a response to NICA's Motion for Summary Final Order stating that Petitioner takes no position on the Motion and does not have any objection to the Motion. As of today's date, neither Dr. Sobel nor Seven Rivers Regional Medical Center has responded to NICA's Motion for Summary Final Order.

FINDINGS OF FACT

1. Alex DeBlasio was born on February 7, 2011, at Seven Rivers Regional Medical Center located in Crystal River, Florida. Alex weighed 3,640 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Alex. In the report of his review of medical records, Dr. Willis described his findings and stated his opinion as follows:

In summary labor was induced for post-dates. There was no fetal distress during labor and delivery by Cesarean section for failure to progress was uncomplicated. The newborn was not depressed. Apgar scores were 9/9. Newborn hospital course was uneventful. The baby apparently did well after hospital discharge until about two years of age when evaluation for speech and developmental delay was initiated. MRI showed brain injury. Based on the medical records, the brain injury does not appear to be birth related.

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. Dr. Willis reaffirmed the above findings and opinion in an affidavit dated October 7, 2014, which reads in pertinent part:

As such, it is my opinion that there was not 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 postdelivery period in a hospital as required

by Section 766.302(2), Florida Statutes, for a claim to qualify for compensation under Sections 766.301 through 766.316, Florida Statutes.

4. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Alex and to review the medical records for both Alex and his mother, Melissa D'Angelo. Dr. Duchowny examined Alex on October 22, 2014. In a report of his examination of Alex, Dr. Duchowny described his findings and opined as follows:

In summary, Alex's neurological examination is significant for bilateral pyramidal tract involvement primarily in the lower extremities and hyperreflexia consistent with a diagnosis of mild spastic diplegia. In contrast, his mental function is appropriate for age and he has above-average speech development. He does however have significant behavioral and emotional issues and is also overactive by history although I did not observe symptoms today.

A review of Alex's medical records shows that his mother presented to Seven Rivers Medical Center for induction of labor at 41 weeks gestation. Alex was born by cesarean section with a birth weight of 8 pounds. The membranes were ruptured and productive of clear fluid. His mother has reported that Alex was "accidentally poked in his head on 2 occasions when membranes were ruptured." The subsequent postnatal course was uncomplicated and Alex was discharged at 3 days of age. Two MRI scans of the brain were performed on May 1 and November 25, 2013. Both studies revealed extensive abnormal signal in the subcortical white matter of cerebral hemispheres in the T2 and FLAIR sequences. I have not personally reviewed either imaging study.

Based on today's evaluation and review of the medical records, I am not recommending Alex for inclusion within the NICA program. He does not evidence a substantial mental impairment and his motor impairment is judged to be mild. Furthermore, there is no history of either a significant mechanical injury or oxygen deprivation in the course of labor or delivery. I therefore am not recommending Alex to be considered for compensation within the NICA program.

5. Dr. Duchowny reaffirmed his findings and opinion in an affidavit dated November 11, 2014, in which he opined that "Alex is not permanently and substantially mentally and physically impaired due to oxygen deprivation or mechanical injury as required by section 766.302(2), Florida Statutes, for a claim to qualify for compensation under sections 766.301 through 766.16, Florida Statutes."

6. 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 or delivery. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Duchowny's opinion that Alex does not evidence a substantial mental impairment and his motor impairment is judged to be mild; and, that there is no history of either a significant mechanical injury or oxygen deprivation in the course of labor and delivery. Dr. Duchowny's opinion is credited.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. The evidence, which is not refuted, established that Alex 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, Alex 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 Melissa D'Angelo, individually and as natural parent of Alex DeBlasio, is dismissed with prejudice.

DONE AND ORDERED this 5th day of December, 2014, 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 5th day of December, 2014.

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 1048 9983)

Joshua T. Frick, Esquire
Hogan Frick
5626 Curry Ford Road
Orlando, Florida 32822
(eServed)
(Certified Mail No. 7014 2120 0003 1048 9990)

Brandon T. Kuhn, Esquire
Bush Graziano Rice and Platter, P.A.
101 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7014 2120 0003 1049 0002)

Louis LaCava, Esquire
LaCava and Jacobson, P.A.
101 East Kennedy Boulevard, Suite 2500
Tampa, Florida 33602
(Certified Mail No. 7014 2120 0003 1047 9742)

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 1047 9489)

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 1047 9496)

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).