

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AIMEE FELIX CRUMP, on behalf of
and as parent and natural
guardian of ROBERT CHARLES
CRUMP, a minor,

Petitioner,

vs.

Case No. 14-3732N

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 March 9, 2016.

STATEMENT OF THE CASE

On August 14, 2014, Petitioner, Aimee Felix Crump, on behalf of and as parent and natural guardian of Robert Charles Crump ("Charlie"), 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 Amy D.

Greenwald, M.D., as the physician providing obstetrical services at the birth of Charlie on August 15, 2009, at Baptist South Hospital located in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on August 20, 2014. On August 22, 2014, DOAH received a return receipt from the United States Postal Service showing that Baptist South Hospital and Amy D. Greenwald, M.D., had been served with a copy of the Petition.

As of the date of this Summary Final Order of Dismissal, neither Dr. Greenwald nor Baptist South Hospital has petitioned to intervene in this proceeding.

The parties filed two Joint Motions to Abate the case to allow Petitioner additional time to evaluate the medical condition of Charlie. The Motions were granted and the case was held in abeyance for 18 months.

On March 9, 2016, NICA filed a Motion for Summary Final Order, asserting that Charlie did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served on March 9, 2016. An Order to Show Cause was entered on March 22, 2016, advising Petitioner to show cause in writing on or before April 12, 2016, why Respondent's Motion for Summary Final Order should not be granted. As of the date of this Summary Final

Order of Dismissal, no response was filed to the Motion for Summary Final Order or the Order to Show Cause.

FINDINGS OF FACT

1. Robert Charles Crump was born on August 15, 2009, at Baptist South Hospital located in Jacksonville, Florida. Charlie weighed 2,505 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Charlie, to determine whether an injury occurred 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 medical report dated September 17, 2014, Dr. Willis described his findings in part as follows:

In summary, the mother presented at 34 weeks with premature rupture of the membranes in early labor. Variable HFR [sic] decelerations developed during the last two hours prior to delivery. Cesarean section was done for the non-reassuring FHR pattern. The newborn was depressed. The newborn hospital course was complicated by respiratory depression, hypotension and one episode of apnea. Although the baby was discharged home with a normal exam, MRI at 16 months of age was done for evaluation of a weak left hand and found a prior cerebral stroke.

It is likely the baby suffered some degree of oxygen deprivation during labor, delivery and/or in the immediate post resuscitation period. However, it is less clear that any oxygen deprivation during this time period resulted in brain injury. No head imaging

studies were done during the newborn hospital course. The child did suffer a stroke, which was documented at 16 months of age by MRI. There was an apparent obstetrical event that likely resulted in some degree of oxygen loss to the baby's brain during labor, delivery and continued into the immediate post delivery period. Without imaging studies during the newborn hospital course, I am unable to determine if this oxygen deprivation resulted in the child's brain injury (stroke). Pediatric Neurology evaluation would be helpful in this determination.

3. Dr. Willis reaffirmed his opinion in an affidavit dated March 8, 2016.

4. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Charlie and to review his medical records. Dr. Duchowny examined Charlie on November 5, 2014. In a medical report dated November 5, 2014, Dr. Duchowny opined as follows:

In summary, Charlie's general physical and neurological examinations reveal a mild left hemiparesis, notable mainly for asymmetry of movement. His muscle tone is well-preserved and he has full range of movement bilaterally with the exception of full left supination. Charlie is functioning cognitively at age level. He has done remarkably well in his therapies.

I reviewed the medical records sent on October 14, 2014. They document Charlie's birth at 34 weeks gestation at Baptist Medical Center South in Jacksonville following premature rupture of membranes productive of blood-tinged amniotic fluid. Charlie was born by emergent Caesarian section for arrest of descent and presented

limp, apneic and cyanotic. Apgar scores were 2 and 7 at 1 and 5 minutes. He was resuscitated via bag and mask and breathed spontaneously at just over 2 minutes. His NICU stay was complicated by apnea and bradycardia which resolved fully and transient respiratory depression. Charlie was never intubated or mechanically ventilated and was maintained on room air from August 17th until discharge on August 24th. No neonatal brain imaging was performed. MRI scan of the brain on February 8, 2011 revealed an old ischemic infarct involving the anterior limb of the right internal capsule. The remainder of the brain was normal. A consideration of the findings from today's evaluation and record review lead me to recommend that Charlie not be considered for compensation within the NICA program. He has normal mental functioning and a mild motor deficit. Furthermore, his stroke was likely acquired prenatally, and there is no evidence of either mechanical injury or oxygen deprivation in the course of labor, delivery or the immediate post-delivery period.

5. Dr. Duchowny reaffirmed his opinions in an affidavit dated February 24, 2016.

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 an apparent obstetrical event that likely resulted in some degree of oxygen loss 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 Charlie has normal mental functioning and a mild motor

deficit, and that his stroke was likely acquired prenatally. 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 statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." Fla. Birth-Related Neurological Injury Comp. Ass'n. v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997). As the evidence establishes that Charlie has normal mental functioning, and a mild motor deficit, Charlie is not eligible for benefits under the Plan. §§ 766.302(2) and 766.309(1), Fla. Stat.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Aimee Felix Crump, on behalf of and as parent and natural guardian of Robert Charles Crump, is dismissed with prejudice.

DONE AND ORDERED this 19th day of April, 2016, 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 April, 2016.

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 1200 0002 3330 8963)

Aimee Felix Crump
8813 Canopy Oaks Drive
Jacksonville, Florida 32256
(Certified Mail No. 7014 1200 0002 3330 8970)

M. Mark Bajalia, Esquire
Bajalia Law
11512 Lake Mead Avenue, Suite 301
Jacksonville, Florida 32256
(eServed)
(Certified Mail No. 7014 1200 0002 3330 8987)

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 1200 0002 3330 8994)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 1200 0002 3330 9007)

Baptist South Hospital
Attention: Risk Management
14550 Old St. Augustine Road
Jacksonville, Florida 32258
(Certified Mail No. 7014 1200 0002 3330 9014)

Amy D. Greenwald, M.D.
North Florida OB/GYN
Suite 311
14546 Old St. Augustine Road
Jacksonville, Florida 32258
(Certified Mail No. 7014 1200 0002 3330 9021)

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).