

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAULA DALLY, Individually and on
behalf of MICHAEL PAUL DALLY, a
minor,

Petitioner,

vs.

Case No. 14-4041N

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

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 April 2, 2015.

STATEMENT OF THE CASE

On August 21, 2014, Petitioner, Paula Dally, individually and on behalf of Michael Paul Dally (Michael), 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 Meredith Johnson Farrow, M.D., as the physician providing obstetrical services at the birth of Michael

on January 2, 2012, at Baptist Medical Center Beaches located in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on August 28, 2014. DOAH served Meredith Johnson Farrow, M.D., on September 2, 2014. On September 2, 2014, DOAH received a return receipt from the United States Postal Service showing that Baptist Medical Center Beaches had been served with a copy of the Petition.

Neither Meredith Johnson Farrow, M.D., nor Baptist Medical Center Beaches has petitioned to intervene in this proceeding.

On April 2, 2015, NICA filed a Motion for Summary Final Order, asserting that Michael did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. It is noted that the Petition was filed "Under Protest" and that Petitioner is described therein as "not a claimant." Moreover, in a Joint Response to Order filed by the parties on February 26, 2015, NICA represented that Petitioner agreed that a hearing is not necessary in this matter.

FINDINGS OF FACT

1. Michael Paul Dally was born on January 2, 2012, at Baptist Medical Center Beaches located in Jacksonville, Florida. Michael weighed in excess of 2,500 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Michael. In a medical report

dated November 10, 2014, Dr. Willis described his findings as follows:

Delivery was by spontaneous vaginal delivery. Birth weight was 3,657 grams. The baby was not depressed. Apgar scores were 9/9. The delivery was felt to be uncomplicated.

The newborn hospital course was uncomplicated. The baby was discharged from the hospital on DOL 2.

In summary, the mother presented in active labor and had an uncomplicated spontaneous vaginal delivery. The baby was not depressed at birth and had an uncomplicated newborn hospital course.

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. NICA retained Raymond J. Fernandez, M.D.

(Dr. Fernandez), a pediatric neurologist, to examine Michael and to review his medical records. Dr. Fernandez examined Michael on January 21, 2015. In a medical report dated January 25, 2015, Dr. Fernandez opined as follows:

IMPRESSION:

There is no evidence in the medical record, nor is there evidence based on history for oxygen deprivation during labor, delivery, and the immediate post delivery period. There was no resuscitation necessary in the delivery room. Michael's neurological development has been normal. His general physical examination and his neurodevelopmental examination are normal. There is no evidence whatsoever for any

degree of brain injury, mental or motor disability, or oxygen deprivation during labor, delivery, or the post delivery period.

4. A review of the file in this case reveals that there have been no 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, and Petitioner has no objection to the issuance of a summary final order finding that the injury is not compensable under the plan. Dr. Willis' opinion is credited. There are no contrary opinions filed that are contrary to Dr. Fernandez's opinion that there is no evidence of any degree of brain injury, mental or motor disability, or oxygen deprivation in the course of labor, delivery, or the post-delivery period. Dr. Fernandez's opinion 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 Michael did not sustain an injury to the brain caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or in the immediate post-delivery period. Therefore, Michael 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 Paula Dally, individually and on behalf of Michael Paul Dally, is dismissed with prejudice.

DONE AND ORDERED this 15th day of April, 2015, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of April, 2015.

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).