

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NINSI GALINDO AND WILFREDO
MORALES, Individually and on
behalf of ELIAN O. MORALES
GALINDO, a minor,

Petitioners,

vs.

Case No. 14-4180N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL FOR WOMEN
& BABIES; AMANPREET S. BHULLAR,
M.D.; YOCOIMA PLAZA, M.D.; AND
DIANA NARVAEZ, M.D.,

Intervenors.

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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 January 15, 2015, and a Supplemental Motion for Summary Final Order filed February 23, 2015.

STATEMENT OF THE CASE

On September 4, 2014, Petitioners, Ninsi Galindo and Wilfredo Morales, individually and on behalf of Elian O. Morales Galindo (Elian), 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 Amanpreet Bhullar, M.D., Yocoima Plaza, M.D., and Diana Narvaez, M.D., as the physicians providing obstetrical services at the birth of Elian on October 27, 2012, at Winnie Palmer Hospital for Women and Babies located in Orlando, Florida.

DOAH served NICA with a copy of the Petition on September 12, 2014. On October 14, 2014, DOAH received a return receipt from the United States Postal Service showing that Dr. Bhullar had been served with a copy of the Petition. On October 24, 2014, DOAH received a return receipt from the United States Postal Service showing that Winnie Palmer Hospital had been served with the Petition. A copy of the Petition was mailed to Diana Narvaez, M.D., and Yocima Plaza, M.D., on September 11, 2014.

On October 9, 2014, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women and Babies, Amanpreet S. Bhullar, M.D., Yocoima Plaza, M.D., and Diana Narvaez, M.D., filed a Petition

for Leave to Intervene which was granted by Order dated October 22, 2014.

On October 30, 2014, Respondent filed a Motion to Dismiss, which was granted with leave to amend, by Order dated November 7, 2014. Petitioners filed an Amended Petition Under Protest on November 24, 2014.

On January 15, 2015, NICA filed a Motion for Summary Final Order, asserting that Elian did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On January 26, 2015, Intervenors filed a Motion for Extension of Time in which to file a response to NICA's Motion for Summary Final Order, which was granted by Order dated January 27, 2015.

On February 23, 2015, Respondent filed a Supplemental Motion for Summary Final Order. On March 12, 2015, Intervenors filed a Response to Supplemental Motion for Summary Final Order, in which Intervenors advised that they do not oppose the entry of a summary final order finding that this claim is not compensable under the Plan.

FINDINGS OF FACT

1. Elian O. Morales Galindo was born on October 27, 2012, at Winnie Palmer Hospital for Women and Babies located in Orlando, Florida. Elian weighed 3,849 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elian to determine whether an injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury. Dr. Willis described his findings as follows in an affidavit dated January 14, 2015:

5. It is my opinion, in summary, spontaneous vaginal delivery was complicated by nuchal cord x2 and avulsion of the cord during reduction for delivery. Despite a normal cord blood pH, the baby was depressed at birth and required bag and mask ventilation for six minutes. The baby recovered quickly and was on room air within 24-hours after delivery. The initial blood gas after birth had a base excess of -12, which is consistent with some degree of acidosis. Head ultrasound was normal. EEG, CT scan and MRI were not done during newborn hospital course.

Avulsion of the umbilical cord can occur when a tight nuchal cord is being reduced to allow delivery. The only risk related to cord rupture is neonatal blood loss and resulting hypotension. The baby's blood counts were normal with a Hematocrit of 47% which would suggest the baby did not have a significant blood loss at time [sic] or cord rupture. This does not appear to be a factor in the outcome.

There was an apparent obstetrical event that resulted in some degree of oxygen loss during delivery and continuing into the immediate post-delivery period. This is based primarily on the low Apgar scores and an initial blood gas with a based excess of -12. I am unable to comment about oxygen deprivation during labor without review [sic]

the FHR monitor tracing. No imaging studies were done during the newborn hospital course to determine if this oxygen deprivation caused any brain injury.

6. Thereafter, I reviewed the additional medical records, which include the mother's hospital course during labor and delivery, the fetal heart rate (FHR) tracing during labor and an emergency room visit for the mother at 7 weeks gestational age for nausea.

The FHR tracing during labor was reviewed. The baseline FHR on admission was normal at 130 bpm with normal heart rate variability. The FHR monitor tracing does not suggest fetal distress during labor.

7. Accordingly, it is my opinion that there was no obstetrical event that resulted in oxygen deprivation or brain injury to the baby during labor.

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

(Dr. Fernandez), a pediatric neurologist, to examine Elian and to review his medical records. Dr. Fernandez examined Elian on February 11, 2015. In the medical report attached to Respondent's Supplemental Motion for Summary Final Order, Dr. Fernandez opined as follows:

CONCLUSION: There is no evidence for substantial motor or physical impairment. Elian walked on time and gross and fine motor skills are improving at a steady pace based on history and this trend should continue. Expressive speech and receptive language development is delayed, but improving and this trend should continue. While speech and language delay is a predictor of later learning difficulty, he is improving and we do not have convincing evidence, at this

time, for substantial mental impairment that will be permanent.

There was transient physical depression immediately after birth and there was transient respiratory distress, but he improved within a reasonable period of time. There was no clear evidence for neonatal encephalopathy or multi-organ involvement. Therefore, there is no clear evidence in the record for brain or spinal cord injury during labor, delivery, or the immediate post delivery period of resuscitation.

4. While Dr. Willis and Dr. Fernandez are of the same opinion that an obstetrical event causing oxygen deprivation did not occur during labor, Dr. Willis' opinion is somewhat at odds with Dr. Fernandez's opinion regarding whether an obstetrical event occurred that resulted in some degree of oxygen loss during delivery and continuing into the immediate post-delivery period. However, there are no opinions filed contrary to Dr. Fernandez's opinion that there is no evidence of substantial motor or physical impairment or convincing evidence at this time of substantial mental impairment that will be permanent.

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 Elian does not have a substantial motor or physical impairment and does not have a substantial mental impairment that will be permanent. It is noted that Petitioners stated in their Petition Under Protest that they are not claimants. And, Intervenors do not oppose the entry of a summary final order finding that the injury is not compensable under the Plan. Therefore, Elian is not eligible for benefits under the Plan.


CONCLUSION

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

1. The Petition filed by Ninsi Galindo and Wilfredo Morales, individually and on behalf of Elian O. Morales Galindo, is dismissed with prejudice.

2. The final hearing scheduled for June 17, 2015, is canceled.

DONE AND ORDERED this 17th day of March, 2015, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March, 2015.

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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).