

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE DELGADO AND HUGO
DELGADO, Individually and on
behalf of ELISSA DELGADO, a
minor,

Petitioners,

vs.

Case No. 14-5405N

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 January 8, 2015.

STATEMENT OF THE CASE

On November 13, 2014, Petitioners, Jacqueline Delgado and Hugo Delgado, individually and on behalf of Elissa Delgado (Elissa), 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 Manal Saad

Antoun, M.D., as the physician providing obstetrical services at the birth of Elissa on September 27, 2010, at Baptist Hospital located in Miami, Florida.

DOAH served NICA with a copy of the Petition on November 19, 2014. DOAH served a copy of the Petition on Baptist Hospital on November 20, 2014. On December 1, 2014, DOAH received a return receipt from the United States Postal Service showing that Dr. Antoun had been served with a copy of the Petition.

As of the date of this Summary Final Order of Dismissal, neither Manal Saad Antoun, M.D., nor Baptist Hospital has petitioned to intervene in this proceeding.

On January 8, 2015, NICA filed a Motion for Summary Final Order, asserting that Elissa 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 asserts that the parents are not claimants. Referencing the Petition and the affidavit attached to the Motion for Summary Final Order, NICA asserts that there are no genuine issues of material fact regarding the compensability of this claim.

No objection has been filed to the Motion. On January 20, 2015, NICA filed a Response to Order of January 8, 2015, advising that Petitioners and Respondent agree that no hearing is necessary.

FINDINGS OF FACT

1. Elissa Delgado was born on September 27, 2010, at Baptist Hospital located in Miami, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elissa. In a report dated December 12, 2014, Dr. Willis described his findings as follows:

The mother was admitted to the hospital at 38 weeks with spontaneous rupture of the membranes. Delivery was by spontaneous vaginal birth. The birth weight of 2,550 grams (5 pounds 9 oz's) was consistent with the prenatal ultrasound finding of fetal growth delay. This weight is below the 10% for gestational age.

The newborn was not depressed. Apgar scores were 9/9. The baby was described as crying and alert after birth.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor and delivery, based on the mother's hospital records.

3. In an affidavit dated January 7, 2015, Dr. Willis confirmed his opinion as stated in his medical report and opined as follows:

5. It is my opinion that the newborn was not depressed. Apgar scores were 9/9. The baby was described as crying and alert after birth.

6. As such, it is my opinion 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, based on the mother's hospital records.

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 or delivery, and Petitioners have filed their Petition under Protest, stating that they are not claimants. Dr. Willis' 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 Elissa did not sustain an injury to the brain caused by oxygen deprivation or mechanical injury in the course of labor or delivery. Therefore, Elissa 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 Jacqueline Delgado and Hugh Delgado, individually and on behalf of Elissa Delgado, a minor, is dismissed with prejudice.

DONE AND ORDERED this 10th day of February, 2015, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
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this 10th day of February, 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).