

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AIZA P. VELAZQUEZ and ENEMIAS
VELAZQUEZ, individually and on
behalf of BENTLEY X. VELAZQUEZ,
a minor,

Petitioners,

vs.

Case No. 15-0420N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

JOHN J. ORREGO FRANCO, M.D.,

Intervenor.

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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 April 3, 2015.

STATEMENT OF THE CASE

On January 20, 2015, Petitioners, Aiza P. Velazquez and Enemias Velazquez, individually and on behalf of Bentley X. Velazquez (Bentley), 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 John J. Orrego Franco, M.D., as the physician who provided obstetric services for the birth of Bentley on September 19, 2009, at Health Central in Ocoee, Florida.

DOAH served NICA, John J. Orrego Franco, M.D., and Health Central a copy of the Petition on January 26, 2015.

On March 12, 2015, John J. Orrego Franco, M.D., filed a Motion to Intervene, which was granted by Order dated March 20, 2015. As of the date of the Summary Final Order of Dismissal, Health Central has not petitioned to intervene in this proceeding.

On April 3, 2015, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Bentley did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the Motion that Intervenor has no objection or opposition to this motion or the relief sought by the motion. It is noted that the Petition was filed "Under Protest" and that Petitioners are described therein as "not claimants."

FINDINGS OF FACT

1. Bentley X. Velazquez was born on September 19, 2009, at Health Central in Ocoee, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Bentley. In a report dated March 9, 2015, Dr. Willis described his findings in pertinent part as follows:

Fetal heart rate (FHR) monitor tracing during labor was reviewed. The FHR pattern was reactive and did not suggest fetal distress.

Delivery was by spontaneous vaginal birth. Birth weight was 3,327 grams (7 lbs 5 oz's). There was a loose nuchal cord. The newborn was not depressed. Apgar scores were 9/10. No resuscitation was required.

Newborn exam noted "ear shape tilt down." Otherwise, newborn exam was normal. The baby was not in distress. Newborn hospital course was benign. Discharge home was on DOL 2.

Right-sided weakness was noted at 6 months of age. MRI showed an old cerebral infarct. Coagulation evaluation was negative. The child was subsequently diagnosed with spastic hemiplegia and developmental delay. Follow up MRI's showed remote insult of left middle cerebral artery and resulting encephalomalacia.

In summary, labor and delivery were apparently without complications. Delivery was by spontaneous vaginal birth. The baby was not depressed. Apgar scores were 9/10. The newborn hospital course was benign with discharge home on DOL 2.

The child was found to have a cerebral infarct at 6 months of age. The infarct does

not appear to be related to a hypoxic event or trauma during labor, delivery or the immediate post-delivery period.

3. A review of the file reveals that no contrary evidence was presented to dispute Dr. Willis' finding that while Bentley was found to have a cerebral infarct at 6 months of age, Bentley's injuries were not related to a hypoxic event or trauma during labor, delivery or the immediate post-delivery period. Dr. Willis' opinion is credited.

4. The Petition was filed on January 20, 2015, which is more than five years after Bentley's birth.

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. NICA has determined that Petitioners do not have a claim that is compensable under the Plan and has filed a Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

9. In ruling on the motion, 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).

§ 766.309(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 although Bentley was found to have a cerebral infarct at six months of age, the infarct was not related to a hypoxic event or trauma during labor, delivery or the immediate post-delivery period. Thus, Bentley is not eligible for benefits under the Plan.

12. Moreover, the Petition for Benefits was filed more than five years after the birth of Bentley. This is beyond the five-year statute of limitations set forth in section 766.313, and is, therefore, barred.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Aiza P. Velazquez and Enemias Velazquez, individually and on behalf of Bentley X. Velazquez, a minor, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of April, 2015, 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 23rd day of April, 2015.

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 1053 0456)

Maria D. Tejedor, Esquire
Diez-Arguelles & Tejedor
505 North Mills Ave.
Orlando, Florida 32803
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0463)

Jeffrey P. Brock, Esquire
Smith Stout Bigman and Brock PA
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0470)

Michael R. D'Lugo, Esquire
Wicker, Smith, O'Hara, McCoy, Ford, P.A.
Post Office Box 2753
Orlando, Florida 32802
(eServed)
(Certified Mail No. 7014 2120 0003 1053 0487)

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 1053 0494)

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 1053 0500)

Health Central
Attention: Risk Management
10000 West Colonial Drive
Ocoee, Florida 34761
(Certified Mail No. 7014 2120 0003 1053 0517)

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).