

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHITNEY F. LIRIANO and KEVIN
RAMOS, individually and on
behalf of NOAH E. RAMOS, a
minor,

Petitioners,

vs.

Case No. 15-0421N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL FOR WOMEN
& BABIES; PHYSICIAN ASSOCIATES,
LLC; AND PAMELA CATES-SMITH,
M.D.,

Intervenors.

_____ /

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 Association (NICA), on May 3, 2016.

STATEMENT OF THE CASE

On January 20, 2015, Petitioners, Whitney F. Liriano and Kevin Ramos, individually and on behalf of Noah E. Ramos (Noah), a minor, filed a Petition Under Protest Pursuant to Florida Statute

Section 766.301 et seq. (Petition), with the Division of Administrative Hearings (DOAH). The Petition was subsequently amended twice, and the Second Amended Petition Under Protest was filed on December 18, 2015.

The Petition named Pamela Cherie Cates-Smith, M.D., as the physician providing obstetric services at the birth of Noah at Winnie Palmer Hospital in Orlando, Florida. The Second Amended Petition alleged that a non-physician and non-NICA provider midwife (unnamed) delivered Noah on October 9, 2014.

DOAH served NICA on January 26, 2015. On January 29, 2015, DOAH received a return receipt from the United States Postal Service showing that Winnie Palmer Hospital had been served with a copy of the Petition. DOAH served Pamela Cherie Cates-Smith with a copy of the Petition on February 3, 2015.

On February 2, 2015, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women and Babies; Physician Associates, LLC; and Pamela Cates-Smith, M.D., filed a Petition for Leave to Intervene, which was granted. On February 17, 2016, counsel for Petitioners filed a Motion to Withdraw as Counsel of Record, which was granted on March 1, 2016.

On March 1, 2016, NICA filed a response to the Second Amended Petition, giving notice that the injury does not "meet the definition of a 'birth-related neurological injury' as defined in section 766.302(2), Florida Statutes, which specifically requires

that the injury render 'the infant permanently and substantially mentally and physically impaired.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On March 28, 2016, NICA and Intervenors filed a Response to Order indicating that neither NICA nor the Intervenors thought a hearing was necessary. On May 3, 2016, NICA filed a Motion for Summary Final Order, asserting that Noah did not sustain a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes. The motion was served by United States mail to Petitioners on May 3, 2016. No response to the motion was filed by Petitioners.

On June 3, 2016, an Order to Show Cause was entered which allowed Petitioners until June 17, 2016, to inform the undersigned as to why Respondent's Motion for Summary Final Order should not be granted. To date, no response has been filed to the Motion for Summary Final Order or to the Order to Show Cause.

FINDINGS OF FACT

1. Noah E. Ramos was born on October 9, 2014, at Winnie Palmer Hospital in Orlando, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Noah's medical records. In a medical report dated February 3, 2016, Dr. Willis made the following findings and expressed the following opinion:

In summary, spontaneous vaginal delivery resulted in a depressed newborn. Cord blood gas was within normal limits, suggesting there was no significant oxygen deprivation during labor. There was no detectable heart beat at birth. The baby responded to resuscitation after birth, but respiratory distress worsened about 2 hours after birth. The baby became acidotic (pH 6.92) and required intubation. MRI showed a subarachnoid hemorrhage and ischemia. The baby was diagnosed with HIE.

There was an apparent obstetrical event that resulted in oxygen deprivation and some degree of brain injury at birth and in the post delivery period. I am not able to comment about the severity of the brain injury.

3. Dr. Willis reaffirmed his opinion in an affidavit dated May 2, 2016.

4. Dr. Willis' opinion that there was an obstetrical event that resulted in oxygen deprivation and some degree of brain injury at birth is credited.

5. Respondent retained Laufey Y. Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Noah. Dr. Sigurdardottir reviewed Noah's medical records, performed an independent medical examination on him on November 11, 2015, and subsequently reviewed additional medical records, on February 22, 2016. Dr. Sigurdardottir made the following findings and summarized her evaluation as follows:

Summary: Here we have a youngster with evidence of neonatal asphyxia mainly by his Apgar score of 0 at 1 minute, although rapid improvement is noted with 6 at 5 minutes, 8 at 10 minutes. His mother does report a 1

month long NICU stay but records indicate discharge on 10/22. Regardless of his early medical history, he is now age appropriate in both cognition, visual maturity and motor skills.

Result of question 1: The patient is found to have no permanent substantial physical or motor impairment.

Result of question 2: There is evidence of complications during Noah's birth that could have resulted in hypoxic neurologic injury. There is, however, no clear evidence in the history to suggest that his low Apgar scores are secondary to any prenatal abnormality and is, therefore, felt to be [the] result of perinatal oxygen deprivation.

Result of question 3: We would expect full life expectancy.

In light of the above-mentioned details and the fact that Noah has no current signs of neurologic sequelae, I do not recommend Noah to be included into the Neurologic Injury Compensation Association (NICA) program and would be happy to answer additional questions.

6. Dr. Sigurdardottir reaffirmed her opinions in an affidavit dated April 29, 2016.

7. In order for a birth-related injury to be compensable under the Plan, the injury must meet the definition of a birth-related neurological injury and the injury must have caused both permanent and substantial mental and physical impairment.

8. Dr. Sigurdardottir's opinion that Noah does not have a substantial physical or motor impairment is credited.

9. 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. Sigurdardottir that Noah does not have a substantial physical or motor impairment.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2014).

11. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The Plan applies only to a birth-related neurological injury, which 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

12. 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. The Florida Birth-Related Neurological Injury Compensation Association, 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

13. 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.

14. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all 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. 766.302(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.

15. In the instant case, Petitioners filed a claim alleging that Noah did sustain a birth-related neurological injury that is compensable under the NICA plan. As the proponent of the issue of compensability, the burden of proof is upon Petitioners.

§ 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

16. While Dr. Willis established that there was an apparent obstetrical event which resulted in oxygen deprivation and some degree of brain injury, the remaining issue to be determined is

whether the injury resulted in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

17. The evidence, which is not refuted, established that Noah does not have a permanent and substantial physical impairment. Thus, Noah is not entitled to benefits under the Plan.

CONCLUSION

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

That the Petition filed by Whitney F. Liriano and Kevin Ramos, individually and on behalf of Noah E. Ramos, is dismissed with prejudice.

DONE AND ORDERED this 22nd day of June, 2016, 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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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).