

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVELYN GREEN and AKEEM E. BROWN,
individually and on behalf of
AKEEM BROWN, a minor,

Petitioners,

vs.

Case No. 15-0983N

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

Respondent.

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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 October 17, 2016.

STATEMENT OF THE CASE

On February 18, 2015, Petitioners, Evelyn Green and Akeem E. Brown, individually and on behalf of Akeem Brown (Akeem), 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, and the Amended Petition Under Protest was filed on June 18, 2015.

The Petition named Marwan Munib Shaykh, M.D., as the physician providing obstetric services at the birth of Akeem at Memorial Hospital in Jacksonville, Florida, on May 15, 2012.

DOAH served NICA with a copy of the Petition on February 25, 2015. DOAH served Marwan Munib Shaykh, M.D., with a copy of the Petition on February 26, 2015. DOAH served Memorial Hospital Jacksonville with a copy of the Petition on February 27, 2015.

On June 29, 2015, Memorial Healthcare Group, Inc., d/b/a Memorial Hospital Jacksonville, filed a Petition to Intervene, which was granted.

On November 17, 2015, NICA filed a response to the 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.

A hearing was scheduled for June 28, 2016. A Motion for Continuance was granted and the hearing was rescheduled for October 6, 2016. On September 23, 2016, Intervenor Memorial Hospital Jacksonville filed a Notice of Withdrawal, stating that it would take no part in advancing or opposing any argument regarding the issue of compensability. Petitioners and Respondent filed a Joint Notice Regarding Need for Final Hearing, stating

that with the withdrawal of Intervenor Memorial Hospital Jacksonville, there was no longer any need for a final hearing. The hearing scheduled for October 6, 2016, was canceled.

On October 17, 2016, NICA filed a Motion for Summary Final Order, asserting that Akeem did not sustain a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes. While no response to the motion was filed by Petitioners, it is noted that the Petition was filed under protest and asserted that the Petitioners are not claimants.

FINDINGS OF FACT

1. Akeem Brown was born on May 15, 2012, at Memorial Hospital Jacksonville in Jacksonville, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Akeem's medical records. In a medical report dated May 14, 2015, Dr. Willis made the following findings and expressed the following opinion:

Spontaneous vaginal delivery was apparently uncomplicated. Birth weight was 3,626 grams or 8 lbs. The baby was not depressed. Apgar scores were 8/9.

Newborn hospital course appears to be uncomplicated. Progress note on the day after birth recommended routine newborn care.

Neurology evaluation at 20 months of age stated the baby had global developmental delay, hypotonia, and hyperreflexia. MRI at about 2 years of age showed bilateral motor cortex hyperintense FLAIR, suggestive of gliosis. A subsequent neurology note stated

this finding was likely related perinatal ischemia.

In summary, there was no apparent fetal distress during labor. Delivery was uncomplicated. The newborn was not depressed. Newborn hospital course was uncomplicated. The baby was subsequently found to have global developmental delay and an abnormal MRI as described above. There is nothing in the medical records to suggest this brain injury was related to hypoxia or trauma during the birth process.

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. Dr. Willis reaffirmed his opinion in an affidavit dated October 31, 2016.

4. Dr. Willis' opinion that there was no obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or in the immediate post-delivery period is credited.

5. Respondent retained Laufey Y. Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Akeem. Dr. Sigurdardottir reviewed Akeem's medical records, and performed an independent medical examination on him on October 21, 2015. Dr. Sigurdardottir made the following findings and summarized her evaluation as follows:

Summary: Akeem is a 3-year 5-month-old black male who has a possible bilateral hemiplegic cerebral palsy following a fairly

uncomplicated pregnancy and delivery. His MRI shows evidence of old hypoxia. After review of fairly extensive maternal records and labor and delivery records, it seems clear that timing his injury is difficult as he did not show any evidence of recent neurologic injury at the time of birth. Although sparse medical records of Akeem are made available to us, such as physical therapy or occupational therapy records, cognitive testing or language assessments and no additional neurologic evaluations are at hand it seems clear that Akeem has relatively spared cognitive abilities.

Final result:

Results of question 1: The patient is found to have a permanent substantial physical impairment, but to have relatively mild mental impairment mainly in the areas of language.

Results of question 2: There is evidence on neuroimaging that Akeem's difficulties could relate to hypoxic neurologic injury, but no clear evidence to suggest the timing of such an injury and, therefore, it cannot be established that it occurred in the immediate perinatal period.

Results of question 3: We would expect full life expectancy, although a guarded prognosis for motor recovery and likely ongoing disability from his significant bilateral hemiplegia. We expect favorable recovery in areas of cognition and language. In light of the above-mentioned details, difficulty with clear timing of Akeem's injury, we do not recommend Akeem 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 November 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 while Akeem has a substantial physical impairment, he has a relatively mild mental impairment, mainly in the area of language, 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 Akeem does not have a substantial mental 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 seeking a determination of whether Akeem sustained 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 & Rehabilitative 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. Dr. Willis established that there was no apparent obstetrical event which resulted in oxygen deprivation or mechanical trauma to the baby's brain during labor, delivery and the immediate post-delivery period. 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 Akeem does not have a permanent and substantial mental impairment. Thus, Akeem 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 Evelyn Green and Akeem E. Brown, individually and on behalf of Akeem Brown, is dismissed with prejudice.

DONE AND ORDERED this 2nd day of December, 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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this 2nd day of December, 2016.

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).