

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARAH RENEE KOBRYN, on behalf of
and as parent and natural
guardian of WESTIN DAVID KOBRYN,
a minor,

Petitioner,

vs.

Case No. 15-5659N

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 April 18, 2016.

STATEMENT OF THE CASE

On October 9, 2015, Petitioner, Sarah Renee Kobryn, on behalf of and as parent and natural guardian of Westin David Kobryn (Westin), a minor, filed a Petition for Benefits 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 Sharon M.

Desmarais, M.D., as the physician who provided obstetrical services at the birth of Westin on November 27, 2013, at Baptist Medical Center South located in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on October 14, 2015. On October 19, 2015, DOAH received a return receipt from the United States Postal Service showing Sharon M. Desmarais, M.D., had been served with a copy of the Petition. On December 11, 2015, DOAH received a return receipt from the United States Postal Office showing that Baptist Medical Center South had been served with the Petition.

As of the date of this Summary Final Order of Dismissal, neither Dr. Desmarais nor Baptist Medical Center South has petitioned to intervene in this proceeding.

On April 1, 2016, NICA filed a Response to Order Dated February 15, 2016, stating in part that Petitioner informed counsel for NICA that Petitioner no longer intends to obtain legal counsel in this matter and does not intend to contest NICA's determination that the claim is not compensable.

On April 18, 2016, NICA filed a Motion for Summary Final Order, asserting that Westin did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. As of the date of this Summary Final Order of Dismissal, no response has been filed to the Motion for Summary Final Order.

FINDINGS OF FACT

1. Westin David Kobryn was born on November 27, 2013, at Baptist Medical Center South located in Jacksonville, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Westin. In an affidavit dated April 1, 2016, Dr. Willis opined as follows:

In summary, labor was induced for post-dates. Cesarean section was done for arrest of decent. The baby was depressed at birth with Apgar scores of 1/4/8, required intubation, but respiratory distress resolved quickly. Cord blood gas was within normal limits (pH of 7.11). The baby did not have any significant problems during the newborn hospital stay. Head imaging studies were not done.

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 or spinal cord occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period.

3. NICA retained Laufey Y. Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to examine Westin and to review his medical records. Dr. Sigurdardottir examined Westin on January 6, 2016. In an affidavit dated April 15, 2016, regarding her independent medical examination of Westin, Dr. Sigurdardottir opined as follows:

The summary of the examination is as follows:

Here we have a 2-year 1-month-old with documented low Apgar scores of 1 at 1 minute, 4 at 5 minutes and 8 at 10 minutes. He

required endotracheal intubation at birth, but was discharged successfully after a rule out sepsis admission at 3 days of life. He has since then had a very mild delay in motor development and a more pronounced delay in language development with possible autistic features, although he does not carry that diagnosis at this time. Language testing has revealed normal language comprehension, but a mild expressive language delay.

. . . The patient is found to have no substantial physical impairment and to have a mild mental impairment, mainly in areas of expressive language and possible autistic features.

. . . There is evidence of a perinatal depression (low Apgars) and a mixed metabolic and respiratory acidosis that quickly resolved and no evidence of neurologic impairment or multisystem dysfunction in the immediate postnatal period is documented. MRI findings from December 2015 show non specific white matter abnormalities and a congenital abnormality (cavum Septum Pellucidum).

. . . We would expect full life expectancy as he has no noticeable motor impairment and mild delays in language development. His possibly autistic features will need further testing. Overall prognosis in areas of cognition are fair.

As such, it is my opinion that the IME and record review do not support a finding that Westin suffered a birth-related neurological injury. I therefore do not recommend consideration for inclusion within the NICA program.

4. 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. Willis that there was no apparent obstetrical

event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or resuscitation in the immediate post-delivery period. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that Westin has no substantial physical impairment and to have a mild mental impairment, mainly in areas of expressive language. Dr. Sigurdardottir'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 Westin did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital which rendered him permanently and substantially mentally and physically impaired. Therefore, Westin is not eligible for benefits under the Plan.

DONE AND ORDERED this 10th day of May, 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 10th day of May, 2016.

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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).