

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRYSTAL SUMPTER and PETER DAVIS,
on behalf of and parents and
natural guardians of LUKE Z.
DAVIS, a minor,

Petitioners,

vs.

Case No. 15-6787N

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 May 31, 2016.

STATEMENT OF THE CASE

On November 24, 2015, Petitioners, Crystal Sumpter and Peter Davis, on behalf of and as parents and natural guardians of Luke Z. Davis (Luke), a minor, filed a Petition for Determination of Compensability of Injuries Pursuant to Florida Statute 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 Patrick Duff, M.D., as the physician providing obstetrical services at the birth of Luke on March 27, 2014, at Shands at the University of Florida (Shands), Gainesville, Florida.

DOAH served NICA with a copy of the Petition on December 11, 2015. DOAH served Patrick Duff, M.D., with a copy of the Petition on January 4, 2016. A copy of the Petition was sent via certified mail to Shands on December 3, 2015, and again on May 19, 2016. On June 22, 2016, DOAH received a return receipt from the United States Post Office showing that Shands had been served with a copy of the Petition.

On April 13, 2016, Respondent filed its Response to Petition for Benefits, suggesting that the subject claim is not compensable, and requesting that a hearing be scheduled to address such issue.

On April 19, 2016, the undersigned entered an Order instructing the parties to confer and advise the undersigned in writing as to the need for a hearing, if any, and if a hearing is needed, stating when they will be prepared to proceed to hearing; the issue(s) still in dispute; their estimate of the time required for hearing; and their choice of venue.

On May 18, 2016, Petitioners filed a Response to Order Entered on April 19, 2016, stating that Petitioners, after consultation with counsel and a review of the records, have

elected not to proceed with a final administrative hearing, and accept the findings of the NICA experts as to the lack of both permanent and substantial mental and physical impairment.

On May 31, 2016, NICA filed a Motion for Summary Final Order, asserting that Luke 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 31, 2016. 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. Luke Z. Davis was born on March 27, 2014, at Shands at the University of Florida, Gainesville, Florida. Luke weighed 4,060 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Luke, to determine whether an injury occurred to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period. In a medical report dated February 25, 2016, Dr. Willis described his findings in part as follows:

There was an apparent obstetrical event, shoulder dystocia that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post delivery period. There was no trauma to the

spinal cord. The oxygen deprivation to the brain resulted in some degree of brain injury, as identified by brain hemorrhage on MRI. The MRI reported no evidence of global brain injury. I am not able to comment about the severity of the brain injury.

3. Dr. Willis reaffirmed his opinion in an affidavit dated May 25, 2016.

4. NICA retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to examine Luke and to review his medical records. Dr. Sigurdardottir examined Luke on March 30, 2016. In her report dated March 30, 2016, Dr. Sigurdardottir opined in pertinent part as follows:

Summary: Here we have a 2-year-old with a difficult birth due to shoulder dystocia leading to an acute hypoxic event lasting 13 minutes. The patient did receive cooling protocol, had evidence of a brain injury on MRI, although not severe, and is left with a significant motor impairment from a flaccid right arm, as well as expressive language delay

[T]he patient is found to have substantial physical impairment, as his right upper extremity has little to no functional use. There is a possible mild mental impairment due to language delay, but his delays do not seem substantial at this time.

[T]here is evidence of a hypoxic ischemic event occurring at birth resulting in neurologic depression at birth, as well as mechanical injury resulting in a severe paresis of right upper extremity. Both his hypoxic events, as well as his mechanical brachial plexopathy is birth related.

5. 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 evidence of global brain injury or injury to the spinal cord. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that Luke does not suffer from a substantial mental impairment. Dr. Sigurdardottir's opinion is credited.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. While Dr. Willis established that there was an apparent obstetrical event which resulted in loss of oxygen to the baby's brain during delivery, and continuing into 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).

13. The evidence, which is not refuted by any contrary expert opinions, established that Luke does not suffer from a substantial mental impairment. Therefore, Luke is not eligible for benefits under the Plan. §§ 766.302(2) and 766.309(1), Fla. Stat.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Crystal Sumpter and Peter Davis, on behalf of and as parents and natural guardians of Luke Z. Davis, is dismissed with prejudice.

DONE AND ORDERED this 28th day of June, 2016, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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Filed with the Clerk of the
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this 28th day of June, 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).