

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEANNA BRAYBOY, individually and  
as parent of MYA BRAYBOY, a  
minor,

Petitioner,

vs.

Case No. 16-0940N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

DOROTHY J. ODOM, M.D.; PHYSICIAN  
ASSOCIATES, LLC; AND ORLANDO  
HEALTH, INC., d/b/a WINNIE  
PALMER HOSPITAL,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon an Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on February 13, 2017.

STATEMENT OF THE CASE

On February 12, 2016, Petitioner, Deanna Brayboy, individually and as parent of Mya Brayboy (Mya), a minor, filed a Petition for Determination of Compensability 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 alleged that Mya suffered permanent and substantial physical and mental impairment as the result of oxygen deprivation during labor and delivery.

The Petition named Pamela Cates-Smith, M.D., as the physician providing obstetric services at the birth of Mya at Winnie Palmer Hospital, located in Orlando, Florida, on March 6, 2014.

DOAH served NICA with a copy of the Petition on February 23, 2016. DOAH served Pamela Cates-Smith, M.D., and Winnie Palmer Hospital with a copy of the Petition on February 22, 2016.

A Petition to Intervene was filed by Dorothy J. Odom, M.D.; Physician Associates, LLC; and Orlando Health, Inc., d/b/a Winnie Palmer Hospital, which was granted by Order dated April 7, 2016.

On May 10, 2016, NICA filed a Response to Petition for Benefits, giving notice that the injury does not "meet the definition of a 'birth-related neurological injury'" as that term is defined in section 766.302(2), Florida Statutes, which specifically requires that the injury render "the infant permanently and substantially medically and physically impaired." NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On February 10, 2017, NICA filed a Status Report indicating that the parties were in agreement that a hearing to determine compensability will not be necessary and that a motion for summary final order would be forthcoming.

On February 13, 2017, NICA filed an Unopposed Motion for Summary Final Order, asserting that Mya did not sustain a birth-related neurological injury as that term is defined in section 766.302(2). The Motion states that Petitioner and Intervenors have no objection to the Motion.

#### FINDINGS OF FACT

1. Mya Brayboy was born on March 6, 2014, at Winnie Palmer Hospital, located in Orlando, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Mya. In a medical report dated March 21, 2016, Dr. Willis described his findings in pertinent part as follows:

In summary, this was a twin pregnancy with vaginal delivery of the first baby followed by Cesarean section for the second baby due to footling breech presentation and fetal bradycardia (fetal distress). Fetus B (Mya Brayboy) was depressed at birth and had a blood gas pH of 6.86, consistent with acidosis. The newborn hospital course was complicated by multi-system organ failure. EEG was abnormal and consistent with a history of HIE. However, the MRI on DOL 8 was reported as unremarkable.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's

brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in some degree of brain injury based on the abnormal EEG. I am unable to determine the severity of any possible injury.

3. Dr. Willis' opinion that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post-delivery period is credited.

4. Respondent retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Mya. Dr. Sigurdardottir reviewed Mya's medical records, and performed an independent medical examination on her on April 27, 2016. In a neurology evaluation based upon this examination and a medical records review, Dr. Sigurdardottir made the following findings and summarized her evaluation as follows:

In summary: This is a 2-year-old, ex-36-week twin with significant intrapartum bradycardia resulting in an emergent C-section. Patient had a neonatal neurologic syndrome including hypotonia, little respiratory drive with multisystem abnormalities including a metabolic acidosis, hypotension, elevated creatinine, elevated coagulation studies, elevated LFTs, and poor urine input. The patient's Apgar scores were 2 after 1 minute, 2 after 5 minutes and 3 after 10 minutes and the patient required a 9-day NICU stay. Fortunately, her EEG was reassuring and her MRI did not show definite signs of acute ischemic injury. Her neurologic exam during this examination is normal, indicating good motor function for her age. A full language evaluation could not be performed, but as per

report from mother, she is on target for normal language development. No autistic features were noted.

Therefore, my results within reasonable degree of medical certainty are the following:

Results as to Question 1: The patient is found to have no permanent mental or physical impairment.

Results as to Question 2: There is evidence of complications during Mya's birth that resulted in hypoxic ischemic encephalopathy, although her recovery has been favorable. Based on record review the timing of her hypoxic event is intrapartum.

Results as to Question 3: We would expect full life expectancy and an excellent prognosis for both motor and mental skills.

In light of the above-mentioned details, I do not recommend Mya to be included into the Neurologic Injury Compensation Association (NICA) and would be happy to answer additional questions.

5. In order for a birth-related injury to be compensable under the NICA 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. Dr. Sigurdardottir's opinion that Mya does not have a permanent physical or mental impairment is credited.

6. 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 Mya does not have a permanent physical or mental impairment.

CONCLUSIONS OF LAW

7. 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).

8. 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).

9. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

10. 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.

11. 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.

12. In the instant case, Petitioner filed a claim alleging that Mya did suffer permanent and substantial physical and mental impairment as a result of oxygen deprivation during labor and delivery. As the proponent of the issue of compensability, the burden of proof is upon Petitioner. § 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.").

13. To be compensable under the NICA Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate post-delivery period, resulting 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).

14. The evidence, which is not refuted, established that Mya does not have a permanent mental or physical impairment. Thus, Mya 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 Deanna Brayboy, individually and as parent of Mya Brayboy, is dismissed with prejudice.

DONE AND ORDERED this 21st day of February, 2017, in Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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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).