

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHANNON BREEN AND ALEXANDRA
ZAYAS, on behalf of and as
parents and natural guardians of
ELEANOR BREEN ZAYAS, a minor,

Petitioners,

vs.

Case No. 16-1391N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Intervenor.

_____ /

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 November 4, 2016.

STATEMENT OF THE CASE

On March 4, 2016, Petitioners, Shannon Breen and Alexandra Zayas, on behalf of and as parents and natural guardians of Eleanor Breen Zayas, (Eleanor), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq.

(Petition), with the Division of Administrative Hearings (DOAH). The Petition alleged that Eleanor suffered brain damage as the result of a birth-related neurological injury.

The Petition named Scott Riddell, M.D., as the physician providing obstetric services at the birth of Eleanor at University of South Florida Health, South Tampa Center, in Tampa, Florida, on May 8, 2015.

DOAH served NICA with a copy of the Petition on March 16, 2016. DOAH served Scott Riddell, M.D., and James Palmer, M.D., with a copy of the Petition on March 17, 2016. On March 21, 2016, DOAH received a return receipt from the United States Postal Service showing that Tampa General Hospital had been served with a copy of the Petition.

A Motion to Intervene was filed by the University of South Florida Board of Trustees, which was granted by Order dated April 19, 2016. As of the date of this Summary Final Order of Dismissal, neither Dr. Riddell nor Dr. Palmer has petitioned to intervene in this proceeding.

On August 24, 2016, NICA filed a Response to Petition, 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 September 7, 2016, NICA filed a letter 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 will be forthcoming.

On November 4, 2016, NICA filed a Motion for Summary Final Order, asserting that Eleanor 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 on November 4, 2016. An Order to Show Cause was entered on November 17, 2016, advising Petitioners to show cause in writing why Respondent’s Motion for Summary Final Order should not be granted. As of today’s date, no response has been filed to the Motion for Summary Final Order or to the Order to Show Cause.

FINDINGS OF FACT

1. Eleanor Breen Zayas was born on May 8, 2015, at University of South Florida Health, South Tampa Center, in Tampa, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Eleanor. In an affidavit dated October 28, 2016, Dr. Willis described his findings in pertinent part as follows:

In summary, delivery was complicated by a prolonged FHR deceleration about 8 hours prior to delivery, maternal chorioamnionitis and fetal tachycardia. Cesarean section was done with thick Meconium present. The baby was not depressed at birth. Cord blood gas pH was normal (pH 7.36). However, oxygen desaturation occurred at 5 hours after birth with seizure activity following shortly after. MRI within 24-hours of birth showed acute cerebral infarction.

The baby suffered a cerebral infarction. The exact timing of the infarction is difficult to determine. However, it is possible the infarction occurred during the severe and prolonged FHR deceleration 8 hours prior to birth. It appears the baby recovered from this hypoxic event during the remaining 8 hours of labor. Therefore, the cord blood gas was not abnormal at birth and the baby was not depressed at birth. Infection (Chorioamnionitis) could be a contributing factor. The other opinion would be the infarct occurred after delivery, primarily related to infection.

There was an apparent obstetrical event that may have resulted in loss of oxygen to the baby's brain during labor. Oxygen deprivation resulted in brain injury. I am unable to comment about the severity of the injury.

3. Dr. Willis' opinion that there was an apparent obstetrical event that may have resulted in loss of oxygen to the baby's brain during labor is credited.

4. Respondent retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to evaluate Eleanor. Dr. Sigurdardottir reviewed Eleanor's medical records, and performed an independent medical examination on her on

August 10, 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:

Summary: Here we have a 14-month-old girl with a sinus vein thrombosis at birth, focal seizures and possible subsequent infarction. This is likely a birth related injury. Her recovery has been remarkable and neurologic exam today is suggestive of mild expressive language delay, but no focal motor abnormalities are found.

Results as to Question 1: The patient is found to have no substantial physical or mental impairment at this time.

Results as to Question 2: Eleanor's injury is a neurologic injury to the brain occurred [sic] due to oxygen deprivation and is felt to be birth related.

Results as to Question 3: Eleanor's prognosis for full recovery is extremely good and mild expressive delays are not likely to have any lasting ill effect.

In light of the above-mentioned details, although clear evidence is that Eleanor's infarct and thrombosis was due to a difficult prolonged birth with chorioamnionitis and recurrent decelerations, she has made such good recovery that at this time I do not recommend Eleanor being included into the Neurologic Injury Compensation Association (NICA) Program 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 Eleanor does not have a substantial 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 Eleanor does not have a substantial 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, Petitioners filed a claim alleging that Eleanor did suffer 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.").

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 Eleanor does not have a substantial mental or physical impairment. Thus, Eleanor 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 Shannon Breen and Alexandra Zayas, on behalf of and parents and natural guardians of Eleanor Breen Zayas, is dismissed with prejudice.

DONE AND ORDERED this 9th 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 9th 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).