

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GARY AND RACQUEL DONALDSON, on  
behalf of and as parents and  
natural guardians of HARMONY  
DONALDSON, a minor,

Petitioners,

vs.

Case No. 16-2436N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

BETHESDA HOSPITAL, INC.,

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 Association (NICA), on September 7, 2016.

STATEMENT OF THE CASE

On April 29, 2016, Petitioners, Gary and Racquel Donaldson, on behalf of and as parents and natural guardians of Harmony Donaldson (Harmony), 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 alleged that Harmony suffered brain damage as a result of a birth-related neurological injury.

The Petition named Jennifer Daif-Parker, M.D., as the physician providing obstetric services at the birth of Harmony at Bethesda Memorial Hospital in Boynton Beach, Florida.

DOAH served Bethesda Memorial Hospital on May 6, 2016. On May 9, 2016, DOAH received a return receipt from the United States Postal Service showing that Jennifer Daif-Parker, M.D., had been served with a copy of the Petition. DOAH served NICA with a copy of the Petition on June 5, 2016.

Bethesda Hospital, Inc., filed a Petition to Intervene, which was granted by Order dated July 25, 2016. As of this date, Dr. Daif-Parker has not petitioned to intervene in this proceeding.

On August 24, 2016, NICA filed a response to the 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." NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On September 7, 2016, NICA filed a Motion for Summary Final Order, asserting that Harmony 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 U.S. mail on September 7, 2016. No response to the Motion was filed by Petitioners.

On September 20, 2016, an Order to Show Cause was entered which allowed Petitioners until October 5, 2016, to inform the undersigned as to why a Summary Final Order of Dismissal should not be entered and the case closed. To date, no response has been filed to the Motion for Summary Final Order or to the Order to Show Cause.

#### FINDINGS OF FACT

1. Harmony Donaldson was born on February 22, 2016, at Bethesda Memorial Hospital in Boynton Beach, Florida. Harmony weighed in excess of 2,500 grams at birth.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Harmony's medical records. In an affidavit dated September 16, 2016, Dr. Willis made the following findings and expressed the following opinion:

5. In summary, this child was delivered by what appears to be an uncomplicated vaginal birth. The baby was not depressed at birth. Apgar scores were 9/9. Mother and baby were stated to be stable in the delivery room and the baby was taken to the well nursery. However, the baby did suffer an intracranial hemorrhage, which became clinically apparent about 8 hours after birth. The brain does not appear to be a birth related hypoxic or traumatic event.

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

4. Respondent retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to evaluate Harmony. Dr. Duchowny reviewed Harmony's medical records and performed an independent medical examination on her on August 17, 2016. Dr. Duchowny made the following findings and summarized his evaluation as follows:

IN SUMMARY Harmony's neurological examination today reveals no specific focal or lateralizing findings. She appeared cognitively intact and her motor development is proceeding at age level. There is no evidence of oromotor dysfunction and her clavicular fracture has obviously healed well.

I have not yet had an opportunity to review medical records and I will issue a final report once the review process is complete.

5. After reviewing Harmony's medical records, Dr. Duchowny wrote an addendum to his earlier report in which he stated:

ADDENDUM: Review of medical records reveals that Harmony was born at term and had 1 and 5 minute Apgar scores of 9 and 9. Desaturations thought to be seizures

(accompanied by right arm and leg jerking) occurred at 8 hours of age. Her PTT was slightly prolonged but INR and fibrinogen was normal, and there was no evidence clinically of DIC. Factors 7, 10 and 13 levels were normal. A head ultrasound on March 5, 2016 revealed haziness of the thalami which was not observed on an MRI scan after the transfer to NCH. This later study did however reveal bilateral parietal intraparenchymal hemorrhage, hemorrhage in the frontal gray-white interface and punctate hemorrhage in the sylvian aqueduct. The basal ganglia were normal; MRA and MRV were likewise WNL.

Based on review of the medical records and the neurological evaluation, I do not believe that Harmony has a substantial mental or motor impairment, and did not suffer from substantial intrapartum oxygen deprivation or mechanical injury. I am therefore not recommending Harmony for inclusion in the NICA program.

6. Dr. Duchowny stated his ultimate opinion in an affidavit dated September 7, 2016, in which he opined, "I do not believe that HARMONY has a substantial mental or motor impairment and did not suffer from substantial intrapartum oxygen deprivation or mechanical injury."

7. Dr. Duchowny's opinion that Harmony does not have a substantial mental or motor impairment and did not suffer from substantial intrapartum oxygen deprivation or mechanical injury is credited.

8. 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 during labor, delivery or the immediate post-delivery period. There are no expert opinions filed that are contrary to Dr. Duchowny's opinion that Harmony does not have a substantial mental or motor impairment.

#### CONCLUSIONS OF LAW

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.

14. In the instant case, Petitioners filed a claim alleging that Harmony did sustain 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 & Rehab. 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.").



15. The evidence, which is not refuted, established that Harmony 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 which rendered her permanently and substantially mentally and physically impaired. Thus, Harmony 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 Gary and Racquel Donaldson, on behalf of and as parents and natural guardians of Harmony Donaldson, is dismissed with prejudice.

DONE AND ORDERED this 11th day of October, 2016, in Tallahassee, Leon County, Florida.



---

BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of October, 2016.

COPIES FURNISHED:  
(via certified mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7012 3050 0001 0080 3631)

Gary Donaldson  
Racquel Donaldson  
5117 Little Beth Drive North  
Boynton Beach, Florida 33472  
(Certified Mail No. 7012 3050 0001 0080 3556)

Susanne Elizabeth Riedhammer, Esquire  
Sonneborn Rutter Cooney Viergever  
Burt & Lury, P.A.  
1400 Centrepark Boulevard, Suite 400  
West Palm Beach, Florida 33401  
(eServed)  
(Certified Mail No. 7012 3050 0001 0080 3563)

David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(eServed)  
(Certified Mail No. 7012 3050 0001 0080 3570)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7012 3050 0001 0080 3587)

Justin Senior, Interim Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7012 3050 0001 0080 3617)

Jennifer Daif-Parker, M.D.  
5150 Linton Boulevard, Suite 210  
Delray Beach, Florida 33484  
(Certified Mail No. 7012 3050 0001 0080 3600)

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).