

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICOLE FUSSELL, on behalf of and
as parent and natural guardian
of CHRISTIAN FUSSELL, a minor,

Petitioner,

vs.

Case No. 16-2573N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

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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 January 9, 2017.

STATEMENT OF THE CASE

On May 4, 2016, Petitioner, Nicole Fussell, on behalf of and as parent and natural guardian of Christian Fussell (Christian), a minor, filed a Petition for Determination of Compensability of Injuries 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 George Buchanan, M.D., as the

physician providing obstetrical services at the birth of Christian on January 25, 2014, at Shands at the University of Florida (Shands), Gainesville, Florida.

DOAH served NICA and George Buchanan, M.D., with a copy of the Petition on May 10, 2016. A copy of the Petition was sent via certified mail to Shands on May 10, 2016.

On October 17, 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 October 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 November 2, 2016, Respondent filed a Response to Order entered on October 19, 2016, stating that both parties agreed that a hearing would not be necessary and that this claim may be resolved by a motion for summary final order. On January 9, 2017, NICA filed a Motion for Summary Final Order, asserting that Christian 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

Petitioner on January 9, 2017. As of the close of the applicable response period, Petitioner did not file a response to the motion. Accordingly, on February 16, 2017, the undersigned entered an Order to Show Cause, giving Petitioner 10 days in which to show cause as to why the motion should not be granted. Petitioner did not file a response to the Order to Show Cause, and 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. Christian Fussell was born on January 25, 2014, at Shands, Gainesville, Florida. Christian weighed 3,901 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Christian, 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 September 12, 2016, Dr. Willis described his findings in part as follows:

Delivery note indicated one pull with the vacuum extractor resulted in vaginal birth. Birth weight was 3,901 grams or 8 lbs 9 oz's. The newborn was not depressed. Apgar scores were 8/9. Cord blood gas was normal with a pH of 7.27. Resuscitation was not required. Delivery note stated

"delivery of vigorous male infant" and went on to state "mother and baby doing well".

The newborn hospital course was uneventful. Muscle tone was noted to be normal after birth. The baby was discharged home with mother on DOL 2.

Pediatric evaluation at 6 months of age stated the baby was healthy with normal growth and development. Subsequently, the baby evaluated poor muscle tone and developmental delay. Neurology evaluation at one year of age included the diagnoses of spastic cerebral palsy and central hypotonia. Genetic evaluation showed normal chromosomes and microarray. MRI at 19 months of age showed periventricular leukomalacia vs. delayed myelination. The baby or child was never diagnosed with a CMV or Parvovirus infection.

In summary, a healthy baby was delivered at term with a normal cord blood pH (7.27) and Apgar scores of 8/9. The baby was described as vigorous at birth and did not require resuscitation. The newborn hospital course was uncomplicated. The subsequently diagnosed or suspected brain injury was not birth-related.

3. Dr. Willis reaffirmed his opinion in an affidavit dated December 9, 2016.

4. NICA retained Laufey Sigurdardottir, M.D. (Dr. Sigurdardottir), a pediatric neurologist, to examine Christian and to review his medical records. Dr. Sigurdardottir examined Christian on September 28, 2016. In her report dated September 28, 2016, Dr. Sigurdardottir opined in pertinent part as follows:

Summary: Christian is a 2-year-8-month-old male with gross motor delays, fine motor delays and language delays. He has a diagnosis of possible right hemiplegic cerebral palsy, but has had [sic] made good progress as of recently. He was born via vacuum assisted vaginal delivery but with no complications noted in the perinatal period. Neuroimaging was inconclusive with possible mild periventricular leukomalacia.

Result of question 1: The patient is found to have mild physical and mental impairment at this time. His impairments are not substantial at this time.

Result of question 2: There is no evidence of a substantial hypoxic event during labor or delivery and the infant had no signs of ischemic encephalopathy in the immediate postnatal period. MRI brain was inconclusive. His motor and language delay cannot be determined to be birth related.

5. Dr. Sigurdardottir's affidavit, dated December 9, 2016, reflects her ultimate opinion that "the IME and record review do not support a finding that Christian suffered a "birth-related neurological injury." Dr. Sigurdardottir does not recommend consideration for inclusion within the NICA program.

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. Willis that the newborn hospital course was uncomplicated, and that the subsequently diagnosed or suspected brain injury was not birth-related. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that Christian does not suffer

from a substantial mental impairment. Dr. Sigurdardottir's opinion is credited.

CONCLUSIONS OF LAW

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

8. 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.

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 to 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 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.

12. 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.

13. The evidence, which is not refuted by any contrary expert opinions, established that Christian does not suffer from a substantial mental impairment. Therefore, Christian 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 Nicole Fussell, on behalf of and as parent and natural guardian of Christian Fussell, is dismissed with prejudice.

DONE AND ORDERED this 4th day of May, 2017, in Tallahassee,
Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of May, 2017.

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).