

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RESIE CADEAU AND SMITH FRANCOIS,
on behalf of and as parents and
natural guardians of RESHNAYA E.
FRANCOIS, a minor,

Petitioners,

vs.

Case No. 16-3826N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

BROWARD HEALTH CORAL SPRINGS,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order^{1/} filed on August 24, 2017, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA). Petitioners did not file a response to the motion, and accordingly, on September 18, 2017, the undersigned entered an Order to Show Cause, directing Petitioners to show cause within 10 days as to why the motion should not be granted. No response to the Order to Show Cause has been filed as of the date of this Order.

STATEMENT OF THE CASE

On July 7, 2016, Petitioners, Resie Cadeau and Smith Francois, on behalf of and as parents and natural guardians of Reshnaya E. Francois (Reshnaya), a minor, filed a Petition 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 (the Plan). The Petition named Arif Wajid, M.D. (Dr. Wajid), as the physician who provided obstetric services at the birth of Reshnaya on January 31, 2016, at Broward Health Coral Springs Hospital (Broward Health) in Coral Springs, Florida.

DOAH served NICA, Broward Health, and Dr. Wajid with a copy of the Petition on July 7, 2016.

On July 25, 2016, a Motion to Intervene was filed by Broward Health. On August 9, 2016, an Order was entered granting Broward Health's Motion to Intervene.

On August 24, 2017, NICA filed a Motion for Partial^{2/} Summary Final Order on the issue of a birth-related neurological injury. Through its motion, NICA requested the entry of a summary final order determining that the claim is not compensable under the Plan as a matter of law, and denying the Petition for Benefits, with prejudice.

STATEMENT OF THE ISSUE

The issue in this case is whether Reshnaya E. Francois suffered a birth-related injury as defined by section 766.302(2), Florida Statutes, for which compensation should be awarded under the Plan.

FINDINGS OF FACT

1. Reshnaya E. Francois was born on January 31, 2016, at Broward Health, in Coral Springs, Florida. Reshnaya weighed in excess of 2,500 grams at birth. The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records of Broward Health submitted with the Petition.

2. At all times material, both Broward Health and Dr. Wajid were active members under NICA pursuant to sections 766.302(6) and (7).

3. Reshnaya was delivered by Dr. Wajid, who was a NICA-participating physician, on January 31, 2016.

4. Petitioners contend that Reshnaya suffered a birth-related neurological injury and seek compensation under the Plan. Respondent contends that Reshnaya has not suffered a birth-related neurological injury as defined by section 766.302(2).

5. In order for a claim to be compensable under the Plan, certain statutory requisites must be met. Section 766.309 provides:

(1) The Administrative Law Judge shall 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 § 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.

(c) How much compensation, if any, is awardable pursuant to § 766.31.

(2) If the Administrative Law Judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at birth, she or he shall enter an order

(3) The term "birth-related neurological injury" is defined in Section 766.302(2), Florida Statutes, as:

. . . 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).

6. In the instant case, NICA has retained Donald Willis, M.D. (Dr. Willis), as its medical expert specializing in maternal-fetal medicine and pediatric neurology. Upon examination of the pertinent medical records, Dr. Willis opined:

The newborn was not depressed. Apgar scores were 8/8. Decreased movement of the right arm was noted. The baby was taken to the Mother Baby Unit and admission exam described the baby as alert and active. The baby had an Erb's palsy or Brachial Plexus injury of the right arm. Clinical appearance of the baby suggested Down syndrome.

Chromosome analysis was done for clinical features suggestive of Down syndrome and this genetic abnormality was confirmed. Chromosome analysis was consistent with 47, XX+21 (Down syndrome).

Dr. Willis's medical Report is attached to his Affidavit. His Affidavit reflects his ultimate opinion that:

In summary: Delivery was complicated by a mild shoulder dystocia and resulting Erb's palsy. There was no evidence of injury to the spinal cord. The newborn was not depressed. Apgar scores were 8/9. Chromosome analysis was consistent with Down syndrome.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period. The baby has a genetic or chromosome abnormality, Down syndrome.

7. 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. The opinion of Dr. Willis that Reshnaya did not suffer an obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery, or the immediate post-delivery period is credited.

8. In the instant case, NICA has retained Michael S. Duchowny, M.D. (Dr. Duchowny), as its medical expert in pediatric neurology. Upon examination of the child and the pertinent medical records, Dr. Duchowny opined:

In summary, Reshnaya's examination today reveals findings consistent with Down syndrome including multiple dysmorphic features, hypotonia, and hyporeflexia. She has minimal weakness at the right shoulder girdle and her delayed motor milestones are likely related to her underlying genetic disorder. There are no focal or lateralizing features suggesting a structural brain injury.

Dr. Duchowny's medical report is attached to his Affidavit. His Affidavit reflects his ultimate opinion that:

Neither the findings on today's evaluation nor the medical record review indicate that Reshnaya has either a substantial mental or

motor impairment acquired in the course of labor or delivery. I believe that her present neurological disability is more likely related to Downs syndrome. For this reason, I am not recommending that Reshnaya be considered for compensation within the NICA program.

9. 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. Duchowny. The opinion of Dr. Duchowny that Reshnaya did not suffer a substantial mental or motor impairment acquired in the course of labor or delivery is credited.

CONCLUSIONS OF LAW

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

11. 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.

12. 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.

13. If NICA determines that the injury alleged in a claim is a compensable brain-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. 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.

14. 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.

15. In the instant case, Petitioners filed a claim alleging that Reshnaya did sustain a birth-related neurological injury that is compensable under the 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 HRS, 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.").

16. Dr. Willis' opinion that "[t]here was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery

or the immediate post delivery period" and Dr. Duchowny's opinion that "[n]either the findings on today's evaluation nor the medical record review indicate that Reshnaya has either a substantial mental or motor impairment acquired in the course of labor or delivery" are credited.

17. In order for a birth-related injury to be compensable under the 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. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

18. The evidence in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Drs. Willis and Duchowny that Reshnaya does not have a permanent substantial mental or motor impairment acquired in the course of labor or delivery. Thus, Reshnaya has not suffered a birth-related neurological injury as defined by section 766.302(2), and is therefore 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 Petitioners, Resie Cadeau and Smith Francois, on behalf of and as parents and natural guardians of Reshnaya E. Francois, is dismissed with prejudice.

DONE AND ORDERED this 9th day of January, 2018, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 2018.

ENDNOTES

^{1/} Although styled as a Motion for Partial Summary Final Order, the motion seeks the entry of a Summary Final Order denying the Petition for Benefits, as clarified in Paragraph 7 of the motion.

^{2/} See Endnote 1.

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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).