

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICOLE LAFONTAINE MALAVE, as
parent and natural guardian and
on behalf of JOSUE A. SOLIS, a
minor,

Petitioner,

vs.

Case No. 16-4104N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

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 February 28, 2017.

STATEMENT OF THE CASE

On July 11, 2016, Petitioner, Nicole Lafontaine Malave, as parent and natural guardian of Josue A. Solis (Josue), 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 Josue suffered neurological damage as the result of a difficult birth.

The Petition named Mark Tomback, M.D., as the physician providing obstetric services at the birth of Josue at Plantation General Hospital in Plantation, Florida, on December 12, 2013.

DOAH served NICA with a copy of the Petition on July 22, 2016. DOAH served Mark Tomback, M.D., with a copy of the Petition on July 25, 2016. The website of the U.S. Postal Service indicates that Plantation General Hospital was served with a copy of the Petition on July 25, 2016.

As of this date, neither Plantation General Hospital nor Dr. Tomback has petitioned to intervene in this proceeding.

On February 14, 2017, 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 February 28, 2017, NICA filed a Motion for Summary Final Order, asserting that Josue 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 February 28, 2017. No response to the motion was filed by Petitioner.

On March 14, 2017, an Order to Show Cause was entered which allowed Petitioner until March 27, 2017, 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. Josue A. Solis was born on December 12, 2013, at Plantation General Hospital in Plantation, Florida. Josue weighed in excess of 2,500 grams at birth.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Josue's medical records. In a medical report dated August 17, 2016, Dr. Willis made the following findings and expressed the following opinion:

In summary, labor was induced at 39 weeks. There was no fetal distress during labor. The baby was delivered by spontaneous vaginal birth without complications. The baby was not depressed and had normal Apgar scores of 9/9.

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 reaffirmed his ultimate opinion in an affidavit dated February 24, 2017.

4. 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.

5. Respondent retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to evaluate Josue. Dr. Duchowny reviewed Josue's medical records and performed an Independent Medical Evaluation on him on February 1, 2017. In a medical report dated February 7, 2017, Dr. Duchowny made the following findings and summarized his evaluation as follows:

IN SUMMARY Josue's physical examination reveals evidence of hypotonia and ataxia with delayed language development. I believe his presentation is most consistent with ataxic hypotonic cerebral palsy. I believe his motor skills will improve in the future and it is unlikely that he will ultimately have a substantial motor impairment. In all likelihood, Josue will continue to have a delayed language development.

Ataxic cerebral palsy is a prenatally acquired syndrome and there is no evidence from the records that Josue's neurological difficulties were acquired in the course of labor or delivery. Furthermore, there is no support for either mechanical injury or oxygen deprivation as contributing factors. I am therefore not recommending Josue for inclusion in the NICA program.

6. Dr. Duchowny reaffirmed his ultimate opinion in an affidavit dated February 27, 2017, in which he opined, "it is my opinion that IME and record review do not provide a basis to find that Josue's neurological difficulties were acquired in the course of labor, delivery or resuscitation in the immediate postdelivery period. I therefore do not recommend consideration for inclusion within the NICA program."

7. Dr. Duchowny's opinion that ataxic cerebral palsy is a prenatally acquired syndrome and that there was no basis found in the records or in his Independent Medical Evaluation that Josue's neurological difficulties were acquired in the course of labor, delivery or resuscitation in the immediate post-delivery period 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 ataxic cerebral palsy is a prenatally acquired syndrome and that there is no indication that Josue's neurological difficulties were acquired in the course of labor, delivery or resuscitation in the immediate post-delivery period.

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.

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, Petitioner filed a claim alleging that Josue suffered neurological damage as the result of a difficult birth, and sought NICA benefits. 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.").

15. The evidence, which is not refuted, established that Josue 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 him permanently and substantially mentally and physically impaired. Thus, Josue 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 Nicole Lafontaine Malave, as parent and natural guardian of Josue A. Solis, a minor, is dismissed with prejudice.

DONE AND ORDERED this 31st day of March, 2017, 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 31st day of March, 2017.

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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).