

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AILEN BENITEZ MORALES, on behalf
of and as parent and natural
guardian of DARIEL ANTONIO
MOLINA BENITEZ, a minor,

Petitioner,

vs.

Case No. 16-4105N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

BAPTIST HOSPITAL OF MIAMI, INC.,

Intervenor.

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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 Association (NICA), on October 19, 2016.

STATEMENT OF THE CASE

On July 18, 2016, Petitioner, Ailen Benitez Morales, on behalf of and as parent and natural guardian of Dariel Antonio Molina Benitez (Dariel), 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 Dariel suffered brain damage as a result of a difficult birth.

The Petition named Carlos G. Pena, M.D., as the physician providing obstetric services at the birth of Dariel at Baptist Hospital in Miami, Florida.

DOAH served NICA with a copy of the Petition on July 22, 2016. DOAH served Carlos G. Pena, M.D., with a copy of the Petition on July 25, 2016. On August 10, 2016, DOAH received a return receipt from the United States Postal Service showing that Baptist Hospital had been served with a copy of the Petition.

Baptist Hospital filed a Petition to Intervene, which was granted by Order dated September 28, 2016. As of this date, Dr. Carlos G. Pena has not petitioned to intervene in this proceeding.

On October 6, 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, which specifically requires that the injury render the infant permanently and substantially impaired." NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On October 19, 2016, NICA filed a Motion for Summary Final Order, asserting that Dariel 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 October 19, 2016. No response to the Motion was filed by Petitioner. Intervenor, Baptist Hospital, requested an extension of time in which to notify the undersigned as to whether a hearing was necessary. Intervenor's request was granted and was ordered to respond by November 21, 2016. As of today's date, Intervenor has not responded. To date, no response has been filed to the Motion for Summary Final Order by either Petitioner or Intervenor.

FINDINGS OF FACT

1. Dariel Antonio Molina Benitez was born on September 29, 2011, at Baptist Hospital in Miami, Florida. Dariel weighed in excess of 2,500 grams at birth.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Dariel's medical records. In an affidavit dated October 17, 2016, Dr. Willis made the following findings and expressed the following opinion:

5. In summary, Cesarean section was done for variable FHR decelerations during labor. The baby was not depressed at birth. Apgar scores were 9/9 and the baby stated to be vigorous after birth. The medical records do not suggest a birth related hypoxic 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 trauma 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 Dariel. Dr. Duchowny reviewed Dariel's medical records and performed an independent medical examination on him on September 21, 2016. Dr. Duchowny made the following findings and summarized his evaluation as follows:

IN SUMMARY Dariel's general, physical and neurological examinations today are entirely within normal limits. There are no focal or lateralizing findings to suggest a structural brain injury.

I have reviewed medical records for Dariel sent by your office on September 16, 2016. The records are primarily directed at long-term follow up and confirm that Dariel's overall development has proceeded normally with a slight expressive language delay. An MRI scan of the brain on September 10, 2015, apparently revealed mild generalized cortical atrophy but was otherwise within normal limits. Dariel underwent a genetic workup including a chromosomal microarray that was normal. All other laboratory parameters were similarly within normal limits. An EEG obtained on April 1, 2014 was unremarkable.

Given Dariel's normal mental and physical status, I am not recommending him for compensation within the NICA program.

5. Dr. Duchowny stated his ultimate opinion in an affidavit dated October 18, 2016, in which he opined, "Based on review of the medical records and the neurological evaluation and given Dariel's normal and physical status, Dariel does not have a substantial and permanent mental or motor impairment, and I am not recommending him for compensation within the NICA program."

6. Dr. Duchowny's opinion that Dariel does not have a substantial and permanent mental or motor impairment is credited.

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 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 Dariel does not have a substantial and permanent mental or motor impairment.

CONCLUSIONS OF LAW

8. 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).

9. 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).

10. 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.

11. 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.

12. 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.

13. In the instant case, Petitioner filed a claim alleging that Dariel 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.").

14. The evidence, which is not refuted, established that Dariel 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, Dariel 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 Ailen Benitez Morales, on behalf of and as parent and natural guardian of Dariel Antonio Molina Benitez, is dismissed with prejudice.

DONE AND ORDERED this 30th day of November, 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 30th day of November, 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).