

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BELYNDA FERNANDEZ AND ENRIQUE
DIAZ, on behalf of and as
parents and natural guardians of
BELLA B. DIAZ, a minor,

Petitioners,

vs.

Case No. 16-5499N

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 Injury Compensation Association (NICA), on December 13, 2016.

STATEMENT OF THE CASE

On September 14, 2016, Petitioners, Belynda Fernandez and Enrique Diaz, on behalf of and as parents and natural guardians of Bella B. Diaz (Bella), 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 named Guillermo Antonio Lievano, M.D., as the physician who provided obstetric services for the birth of Bella on July 31, 2013, at Baptist Hospital in Miami, Florida.

DOAH served NICA and Guillermo Antonio Lievano, M.D., with a copy of the Petition on September 23, 2016. The docket reflects that DOAH received an undated return receipt from the United States Postal Service on October 11, 2016, showing that Baptist Hospital had been served with a copy of the Petition.

On September 30, 2016, Baptist Hospital filed a Petition to Intervene which was granted. As of the date of this Summary Final Order of Dismissal, Dr. Lievano has not petitioned to intervene into this proceeding.

On December 13, 2016, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Bella did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On the same day as the Motion for Summary Final Order was filed, Intervenor Baptist Hospital filed a Motion for Extension of Time to inform as to its position regarding whether a hearing would be necessary. Intervenor's motion was granted and the parties were instructed

to inform the undersigned no later than January 13, 2017, as to whether a hearing was necessary. Intervenor filed a notice that that Intervenor does not believe that a hearing is necessary and does not object to NICA's Motion for Summary Final Order. Petitioners did not file a response to NICA's Motion, nor file a response to the Order directing the parties to indicate whether they were seeking a hearing.

FINDINGS OF FACT

1. Bella B. Diaz was born on July 31, 2013, at Baptist Hospital located in Miami, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Bella. In a report dated November 2, 2016, Dr. Willis described his findings in pertinent part as follows:

Cesarean section was done for post-dates with unfavorable cervix and decreased FHR variability. Birth weight was 3,385 grams. Amniotic fluid was clear. The newborn was not depressed. Apgar scores were 9/9. Pediatric evaluation at delivery stated the "baby came out vigorously crying." No resuscitation was required. The baby was taken to the normal nursery.

The initial meconium drug screen was positive for cannabinoids, but repeat testing the following day was negative. Chest X-ray suggested an enlarged heart, but ECHO was essentially normal.

The baby was transferred to the NICU about 3 hours after birth due to clinically evident Jaundice. Neurologic exam was normal. The

baby did not have any respiratory distress. ABO blood type incompatibility was diagnosed as the cause of Jaundice and managed with phototherapy.

The baby was noted to have poor feeding and neurologic evaluation initiated. EEG was done on the day after birth and was abnormal, consistent with diffuse encephalopathy. The abnormal EEG findings were felt to be only due to immaturity and expected to improve. Follow-up EEG at 1 month of age was normal, but EEG at 16 months of age was again abnormal with findings suggestive of global cortical dysfunction.

MRI at one month of age was normal. Follow up MRI at 6 months of age was essentially normal with "delayed myelination for the age of the patient." No structural defects were seen.

An extensive Genetic evaluation was negative. Chromosome analysis showed a pericentric inversion of chromosome #9, which is considered a normal variation. Microarray was negative.

Evaluation at 19 months of age described a child that was unable to walk or stand unassisted and with global developmental delay. No obvious cause was identified.

In summary, labor was induced for post-dates. There was no change in the cervix after overnight cervidil induction. Primary Cesarean section delivery was done the following morning. The newborn was not depressed. Apgar scores were 9/9. The baby was "active and responsive" at birth. No resuscitation was required. The baby was taken to the normal newborn nursery. Shortly after delivery the baby was transferred to the NICU for clinically apparent Jaundice. Poor feeding lead to further evaluation, including MRI, which was normal. Genetic evaluation was negative.

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 opinion in an affidavit dated December 12, 2016.

4. A review of the file reveals that no contrary evidence was presented to dispute Dr. Willis' finding that there was no apparent obstetric event that resulted in oxygen deprivation or mechanical trauma during labor, delivery, or the immediate post-delivery period. Dr. Willis' opinion is credited.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. NICA has determined that Petitioners do not have a claim that is compensable under the Plan and has filed a Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

9. In ruling on the motion, 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).

§ 766.309(1), Fla. Stat.

10. 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.

11. The evidence, which is not refuted, established that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to Bella's brain during labor, delivery or the immediate post-delivery period. Thus, Bella is not eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Belynda Fernandez and Enrique Diaz, on behalf of and as parents and natural guardians of Bella D. Diaz, a minor, is dismissed with prejudice.

DONE AND ORDERED this 25th day of January, 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 25th day of January, 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).