

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADA FERNANDEZ AND ANTHONY
PORTUONDO, on behalf of and as
parents and natural guardians of
AYDRIAN PORTUONDO, a minor,

Petitioners,

vs.

Case No. 16-5654N

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

STATEMENT OF THE CASE

On September 21, 2016, Petitioners, Ada Fernandez and Anthony Portuondo, on behalf of and as parents and natural guardians of Aydrian Portuondo (Aydrian), 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 Julio E. Arronte, M.D., as the physician who provided obstetric services for the birth of Aydrian on October 16, 2014, at South Miami Hospital in Coral Gables, Florida.

DOAH served NICA with a copy of the Petition on September 30, 2016. DOAH served South Miami Hospital and Julio E. Arronte, M.D., with a copy of the Petition on October 3, 2016. As of the date of this Summary Final Order of Dismissal, neither Dr. Arronte nor South Miami Hospital has 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 Aydrian did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. Petitioners did not file a response to the Motion.

On December 29, 2016, an Order to Show Cause was entered which allowed Petitioners until January 13, 2017, to inform the undersigned in writing as to why the motion should not be granted and a summary final order be entered finding Petitioners' claim is not compensable. To date, no response has been filed by Petitioners to the Motion or to the Order to Show Cause.

FINDINGS OF FACT

1. Aydrian Portuondo was born on October 16, 2014, at South Miami Hospital in Coral Gables, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Aydrian. In a report dated November 7, 2016, Dr. Willis described his findings in pertinent part as follows:

Delivery was by spontaneous vaginal birth. Birth weight was 3,000 grams. Apgar scores were 4/8. The newborn was pale and Jaundice. After intubation for suctioning meconium, bag and mask ventilation was required for poor respiratory effort. Initial oxygen saturation was low at 70% and the baby was re-intubated and taken to the NICU.

Generalized petechiae were noted on NICU evaluation. The liver and spleen were felt to be enlarged. Platelet count was only 14,000. TORCH infection was suspected. Urine culture for CMV was positive and CMV IgM antibody was also positive.

Liver function studies were elevated. The newborn hearing test was failed.

MRI on DOL 3 had findings consistent with congenital CMV infection with dilated lateral ventricles and multiple periventricular calcifications. Follow-up MRI's continued to show similar findings with diffuse volume loss and findings consistent with congenital CMV.

The baby was followed on an out-patient basis by Infectious Disease for congenital CMV infection.

In summary, the pregnancy was complicated by fetal congenital CMV infection. Physical

exam of the baby, laboratory testing and head imaging studies were consistent with this diagnosis.

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. The child's brain injury would be consistent with congenital CMV infection and not a birth related hypoxic event.

3. Dr. Willis reaffirmed his opinion in an affidavit dated November 17, 2016.

4. A review of the file reveals that no contrary evidence was presented to dispute Dr. Willis' finding 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. 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 Aydrian's brain during labor, delivery or the immediate post-delivery period. Thus, Aydrian 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 Ada Fernandez and Anthony Portuondo, on behalf of and as parents and natural guardians of Aydrian Portuondo, 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.

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).