

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEATHER JAMES AND BRIAN COOPER,
on behalf of and as parents and
natural guardians of WYATT
COOPER, a minor,

Petitioners,

vs.

Case No. 16-6532N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HIGHLANDS REGIONAL MEDICAL
CENTER,

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 April 12, 2017.

STATEMENT OF THE CASE

On October 25, 2016, Petitioners, Heather James and Brian Cooper, on behalf of and as parents and natural guardians of Wyatt Cooper (Wyatt), a minor, filed a Petition for Benefits Filed Under Protest (Petition), with the Division of Administrative Hearings

(DOAH). The Petition alleged that Wyatt suffered brain damage and other delays as a result of a difficult birth.

The Petition named David Guerra, M.D., as the physician providing obstetric services at the birth of Wyatt at Highlands Regional Medical Center in Sebring, Florida. Petitioners further state that they are not seeking NICA benefits, but are seeking to establish their right to sue in the appropriate court.

DOAH served NICA with a copy of the Petition on November 14, 2016. On November 16, 2016, DOAH received a return receipt from David Guerra, M.D., showing that he had been served with a copy of the Petition. DOAH served Highlands Regional Medical Center with a copy of the Petition on November 17, 2016.

On December 2, 2016, Highlands Regional Medical Center filed a Motion to Intervene, which was granted. As of this date, Dr. Guerra has not petitioned to intervene in this proceeding.

On March 22, 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, which specifically requires that the injury render "the infant permanently and substantially mentally and physically impaired."

On April 12, 2017, NICA filed an Unopposed Motion for Summary Final Order. The Motion stated that neither Petitioners nor Intervenor take a position on the Motion.

FINDINGS OF FACT

1. Wyatt Cooper was born on July 21, 2015, at Highlands Regional Medical Center in Sebring, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Wyatt's medical records. In a medical report dated December 15, 2016, Dr. Willis made the following findings and expressed the following opinion:

In summary, labor at 37 weeks was complicated by a non-reassuring FHR pattern during labor, followed by a shoulder dystocia at delivery. The newborn was depressed with Apgar scores 1/3/6/6/7. Blood cultures were positive for E. coli. Respiratory distress at birth progressively worsened and required ECMO. The newborn hospital course was complicated by multisystem organ failures. MRI was consistent with encephalomalacia.

The cord blood pH of 7.25 seems somewhat inconsistent with the FHR pattern prior to delivery, a shoulder dystocia at birth and low Apgar scores of 1/3. The baby had E. coli sepsis, presumably prior to birth. Sepsis could account for the fetal tachycardia and decreased FHR variability during labor. Clinically, it would be reasonable that oxygen deprivation occurred during labor and delivery and continued into the post delivery period. If the cord pH is correct, it would suggest the oxygen deprivation occurred more likely during the immediate post delivery period. In either case, oxygen deprivation occurred during the post delivery period and the oxygen deprivation resulted in brain injury.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain, primarily during the immediate post delivery period. The oxygen deprivation resulted in brain injury. I am not able to

comment about the severity of the brain injury. E. coli sepsis would likely be a contributing factor for the oxygen deprivation and brain injury.

3. Dr. Willis' opinion that there was an obstetrical event that resulted in loss of oxygen to the baby's brain primarily during the immediate post-delivery period which resulted in brain injury is credited.

4. Respondent retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to evaluate Wyatt. Dr. Duchowny reviewed Wyatt's medical records and performed an independent medical examination on him on March 8, 2017. Dr. Duchowny made the following findings and summarized his evaluation as follows:

IN SUMMARY Wyatt's neurological examination reveals evidence of generalized hypotonia, borderline expressive language delay and evidence of high activity level and short attention span. There are no focal or lateralizing findings.

I have not yet had the opportunity to review medical records and will issue a final report once the review process is complete.

5. Following his review of medical records, Dr. Duchowny wrote an Addendum dated March 14, 2017, which amended the above-referenced independent medical evaluation report. The addendum reads in pertinent part:

Wyatt remained in the newborn nursery for a total of 65 days. His course was obviously extremely complicated with many risk factors

for overall development. However, Wyatt does not have a substantial motor impairment, and his neurological deficits were likely acquired after birth. I am therefore not recommending consideration for inclusion in the NICA program.

6. Dr. Duchowny's opinion that Wyatt does not have a substantial motor impairment is credited.

7. In order for a birth-related injury to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (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.

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. Duchowny that Wyatt does not have a substantial motor impairment. While Wyatt has neurological deficits, these deficits do not render him permanently and substantially physically impaired.

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. (emphasis added).

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. 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 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. While Dr. Willis established that there was an apparent obstetrical event which resulted in loss of oxygen to Wyatt's brain during the immediate post-delivery period that resulted in brain injury, the remaining issue to be determined is whether the injury resulted in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

15. The evidence, which is not refuted, established that Wyatt does not have a permanent and substantial physical impairment. Thus, Wyatt 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 under protest by Heather James and Brian Cooper, on behalf of and as parents and natural guardians of Wyatt Cooper, is dismissed with prejudice.

DONE AND ORDERED this 20th day of April, 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 20th day of April, 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).