

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JASON BREINER and WENDY RAMIREZ-
MENDOZA, individually and as
parents and next friends of
JAMES BREINER, a minor,

Petitioners,

vs.

Case No. 17-1315N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HERNANDO HMA, LLC, d/b/a
BAYFRONT HEALTH SPRING HILL,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA) Renewed Motion for Summary Final Order, filed October 25, 2018, and Petitioners' response.

STATEMENT OF THE CASE

On February 23, 2017, Petitioners 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 Natalie Leibensperger, D.O., as the physician providing obstetric services for the birth of James Breiner (James) on February 25, 2012, at Bayfront Health Spring Hill (Bayfront), in Spring Hill, Florida.^{1/}

DOAH served NICA with a copy of the Petition on March 3, 2017. Dr. Leibensperger and Bayfront were served with a copy of the Petition on or before March 8, 2017. On March 9, 2017, Hernando HMA, LLC, d/b/a Bayfront Health Spring Hill filed a Petition for Limited Intervention. Said petition was granted on March 16, 2017.

On June 30, 2017, NICA filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable and requesting a final hearing to address said issue. On July 3, 2017, the undersigned issued an Order directing the parties to confer and advise the undersigned, on or before July 18, 2017, as to the need for a hearing. Thereafter, Petitioners requested an extension of time to respond, and the extension was granted. On August 21, 2017, Petitioners filed a response to the prior Order indicating that a hearing would be needed to determine the issue of compensability.

On October 10, 2017, Petitioners' counsel filed a motion for leave to withdraw as counsel, and an Order granting the same and placing the case in abeyance was issued on October 24, 2017. On

December 15, 2017, at Petitioners' request, the matter was continued in abeyance. The matter remained in abeyance, without opposition to allow Petitioners the opportunity to obtain new counsel.

Following a telephonic status conference on February 23, 2018, the undersigned issued an Order whereby the matter was no longer in abeyance and ordering the parties to provide hearing dates on or before March 2, 2018. Ultimately, the matter was scheduled for final hearing on June 6, 2018.

On May 4, 2018, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim is not compensable because James did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes, and dismissing the Petition. Petitioners did not timely respond to said motion. On May 18, 2018, the undersigned issued an Order to Show Cause. Said Order directed Petitioners to show cause, in writing, on or before May 30, 2018, why NICA's Motion for Summary Final Order should not be granted. Petitioner filed its response on May 30, 2018.

Thereafter, on June 5, 2018, a telephonic status conference was conducted wherein Petitioner made an ore tenus motion to continue the final hearing and expressed, again, the desire to obtain legal counsel and complete a medical evaluation for James. Said motion was granted and based upon Petitioner's desire to

obtain legal counsel, the undersigned reserved ruling on the pending motion. Thereafter, the final hearing was rescheduled for October 19, 2017. Thereafter, the parties engaged in further discovery.

Ultimately, Petitioner was unable to obtain legal counsel, and on October 18, 2018, during a pre-hearing telephonic conference, the parties requested the undersigned rule upon the pending Motion for Summary Final Order and Petitioners' response. The undersigned granted the parties additional time to file renewed motions. On October 25, 2018, Respondent filed its Renewed Motion for Summary Final Order. Petitioner opted to stand on its previously filed response that was filed on October 16, 2018.

FINDINGS OF FACT

1. James was born on February 25, 2012, at Bayfront in Spring Hill, Florida.

2. NICA retained Donald Willis, M.D., who is board-certified in obstetrics, gynecology, and maternal-fetal medicine, to review the medical records of Wendy Ramirez-Mendoza and James, and opine as to whether there was an injury to his brain or spinal cord that occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period due to oxygen deprivation or mechanical injury.

3. In Dr. Willis's final report, dated June 12, 2017, he concluded the following:

In summary, the baby was delivered at term and was not depressed at birth. Apgar scores were 8/8. The baby was transferred to the newborn nursery with the mother. Episodes of cyanosis occurred in the nursery, followed intermittent twitching. Head Ultrasound was normal. CT and MRI did not suggest hypoxic brain injury. EEG was normal.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical injury to the brain or spinal cord.

4. Attached to NICA's Motion for Summary Final Order is the affidavit of Dr. Willis, dated May 2, 2018. In his affidavit Dr. Willis affirms his prior reports and opines within a reasonable degree of medical probability that there was no obstetrical event that resulted in oxygen deprivation or mechanical injury to James's brain or spinal cord.

5. Dr. Willis was deposed on May 30, 2018, and his testimony is attached to NICA's Motion. Dr. Willis testified that James did not suffer a birth-related neurological injury, as set forth in section 766.302(2). In support of his opinion, Dr. Willis first opined that James did not sustain an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor or delivery. In support of this opinion, Dr. Willis testified that: 1) there was no fetal distress on the fetal heart rate monitor during

labor; 2) James was delivered by Cesarean section for failure to progress and was not depressed at birth as evidenced by his Apgar scores of 8 and 8; and 3) with the exception of tactile stimulation (which is relatively common postdelivery), James did not require intubation or mechanical ventilation, chest compressions, or any other form of resuscitation upon delivery.

6. Dr. Willis further testified that James did not sustain an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury during resuscitation in the immediate postdelivery period. Dr. Willis credibly opined that, although James was required to be transferred to the neonatal intensive care unit (NICU) due to respiratory distress, James was breathing well enough on his own that he did not require bag or mask ventilation or mechanical resuscitation. As noted above, Dr. Willis noted that due to respiratory distress James did require oxygen via a nasal cannula postdelivery.

7. While Dr. Willis does not contend that James did not sustain an injury to the brain rendering him permanently and substantially mentally and physically impaired, he does opine that said injury did not occur during the course of labor, delivery, or resuscitation in the immediate postdelivery period. His opinion is credited.

8. NICA also retained Laufey Y. Sigurdardottir, M.D., who is board-certified in pediatrics, psychiatry, and neurology to

review the pertinent medical records, conduct an Independent Medical Examination (IME), and opine as to whether James suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury.

Dr. Sigurdardottir reviewed the available medical records, obtained a historical account from Petitioners, and conducted an IME of James on April 19, 2017.

9. Dr. Siguradottir's affidavit, dated May 1, 2018, attached to NICA's Motion, provides, in part, as follows:

Summary: James is a 5 yr old boy with motor and speech delay from birth. There is no documented fetal depression at birth, and FHR tracings from the onset of induction of labor fails to show heart rate decelerations. Respiratory distress after birth and ensuing hypotonia and feeding difficulties point to patient's difficulties to have apparent from birth but timing of insult is not found to correlate with active labor or delivery. His current status suggests moderate to severe neurological deficits that are likely to be lifelong. It is of note that limited records were available for my review after patient's transfer to ACH. If these are forwarded to NICA I would be able to review them and make appropriate adjustments to this IME.

James is found to have a permanent and substantial physical impairment at this time. He is found to have a permanent and substantial language/cognitive impairment at this time.

In review of available documents, although having respiratory distress shortly after birth, there is no clear acute hypoxic event during labor and/or delivery, and fetal hearth [sic] rate strips were benign. MRI

performed in the neonatal period, EEG performed in the neonatal period did not support an acute encephalopathy (per report). No laboratory evidence of multisystem hypoxic changes were noted in post-natal period.

The prognosis for full motor and mental recovery is poor but his life expectancy is full.

Due to absence of evidence of hypoxic event during active labor, absence of secondary findings supportive of a hypoxic encephalopathy (MRI, laboratory or EEG), I do not feel James should be included in the NICA program.

10. Dr. Sigurdardottir's opinions contained in her affidavit are within a reasonable degree of medical probability. Dr. Sigurdardottir was deposed on May 30, 2018, and her testimony is attached to NICA's motion. Dr. Sigurdardottir testified that in her opinion, to a reasonable degree of medical certainty, James did not suffer a birth-related neurological injury, as set forth in section 766.302.

11. Dr. Siguardottir provided the following testimony concerning the subject labor and delivery:

So, James was born post-term, 42 weeks, to a G2 P0 mother, 29 years old, normal non-complicated pregnancy. The labor was induced, and the fetal heart rate was monitored throughout the labor, and found to be normal, but due to failure to progress, Pitocin was eventually started, and there was meconium staining of the amniotic fluid. When she failed to progress beyond seven to eight centimeters, a cesarean section was completed without complications, and the infant was delivered at 9:07.

12. Dr. Sigurdardottir further testified concerning James's neonatal course as follows:

So, initially, the course was fairly routine. The Apgar scores were given at one and five minutes, and were both eight of ten possible. But then, due to some possible cyanosis, and some respiratory distress, the infant was transferred to the NICU, where a blood gas was performed at about an hour of life, where the pH was 7.25, and the base excess was -5.9, and there was some additional blood work, and a follow-up blood gas performed a few hours later. I'm showing some recovery with a pH of 7.31, and the base excess to be now down to -28. The infant was transferred at four days of life to All Children's Hospital, and had been noted prior to that to have hypotonia, and poor feeding, poor ability to feed by mouth. There was questionable seizures, although that was not established, and the spells that were suspicious for seizures were monitored on EEG at All Children's and found that they were not seizures. He did have an MRI performed, which showed no evidence of brain injury, and an incidental finding of a small cyst, and work-up during the neonatal period did not give any clear etiology of his hypotonia and poor feeding.

13. Dr. Sigurdardottir testified that there was no clear acute hypoxic event during labor, delivery, or in the immediate postdelivery period. In support of that opinion,

Dr. Sigurdardottir testified as follows:

Well, what we can rely on in the information that we have prior to birth, which is mainly the fetal heart rate tracing, which does not show evidence of substantial decelerations, and then, at birth, we have the Apgar scores, which are given to try to establish the neurologic condition of the infant at birth,

and a score of eight and eight is, may I say, normal, completely normal. And then, we have laboratory results, such as the blood gas that was done, which falls within a range that would not be suspect of severe injury. And then, we have both an EEG performed that did not show evidence of a background abnormality consistent with a hypoxic ischemic injury, and we have an MRI that does not show acute injury with diffusion weighted restriction. So, from what I have, apart from him being hypotonic and not feeding well, I have nothing else to support that he was going through an acute injury that occurred during that timeframe.

14. The opinions of Dr. Siguardottir are credited.

15. Petitioners contend that James did sustain a birth-related neurological injury. Petitioners contend that Ms. Ramirez-Mendoza received multiple medications in the course of labor and delivery that individually, or in combination, can and did result in respiratory depression to James. In support of this claim, Petitioners focus on the fact that James's Apgar score for color was initially 0 and that he had episodes of cyanosis in the delivery room and the newborn nursery.

16. It is undisputed that James's Apgar score for "color" was 0 out of 2 at 1 minute and 0 out of 2 at 5 minutes. It is also undisputed, however, that his Apgar scores for heart rate, reflex/irritability, muscle tone, and respiration were all 2 out of 2 at 1 minute and 5 minutes after birth.

17. It is also undisputed that, while in the newborn nursery, on at least two occasions, James had an episode of

cyanosis. This, coupled with “persistently shallow respiratory effort,” resulted in his transfer from the newborn nursery to the NICU nursery approximately 38 minutes after his birth. As discussed above, however, James did not require resuscitative efforts beyond tactile stimulation and the use of a nasal cannula for oxygen. James appeared to respond well to these initial efforts, and on February 27, 2018, was weaned off the nasal cannula to room air with no distress.

18. In summary, Petitioners failed to present sufficient evidence to support their contention that medication administration resulted in respiratory distress causing a brain injury to James in the course of labor and delivery or the immediate postdelivery period. On this specific point, Dr. Sigurdardottir acknowledged that, when children are born with effects of sedating medication or pain medication, they often have suppression of their respiratory drive. She opined, however, that, based upon her review, James appeared to be breathing, moving and having correct color changes of a newborn infant, that would not support that he was heavily affected by the medication.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

20. 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.

21. 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.

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

23. In ruling on the motion, the administrative law judge must make the following threshold 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.

24. 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.

25. The evidence establishes that James sustained an injury that rendered him permanently and substantially mentally and physically impaired. The issue, however, is whether James's brain injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital."

26. Here, NICA established that there is no genuine issue of material fact that James did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period. While

Petitioners generally aver that the medication administration provided to Ms. Ramirez-Mendoza could result in depressed respiration to James, which could lead to his oxygen deprivation resulting in a brain injury, Petitioners failed to present sufficient evidence to establish a genuine issue of material fact on these points.

27. Thus, the undersigned concludes that James did not sustain a birth-related neurological injury as defined in section 766.302(2), Florida Statutes, and, therefore, is not eligible for benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition is dismissed with prejudice.

DONE AND ORDERED this 30th day of November, 2018, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2018.

ENDNOTE

^{1/} According to the Petition, at the time of the birth, Bayfront Health Spring Hill was known as Spring Hill Regional Hospital.

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(via certified mail)

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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).