

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELE SANCHEZ AND FIDEL
SANCHEZ, on behalf of and as
parents and natural guardians of
AILANI SANCHEZ, a minor,

Petitioners,

vs.

Case No. 17-3662N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

CARL D. ZOLLICOFFER, M.D.,

Intervenor.

_____ /

FINAL ORDER OF DISMISSAL

This came before the undersigned upon a Joint Motion to Submit Stipulated Factual Record in Lieu of a Contested Hearing, which was granted by the undersigned on September 21, 2018; a Stipulated Record; and written arguments/proposed final orders submitted by the parties.

STATEMENT OF THE ISSUES

The issue in this case is whether Ailani Sanchez suffered a birth-related injury as defined by section 766.302(2), Florida Statutes, for which compensation should be awarded under the

Florida Birth-Related Neurological Injury Compensation Plan (the Plan).

PRELIMINARY STATEMENT

On June 14, 2017, Michele Sanchez and Fidel Sanchez (Petitioners), on behalf of and as natural guardians of Ailani Sanchez (Ailani), filed a Petition for Benefits (claim) with the Division of Administrative Hearings (DOAH) alleging that Ailani suffered brain damage as a result of a birth-related neurological injury and requesting relief available under the Plan.

The Petition named Carl Zollicoffer, M.D. (Dr. Zollicoffer), as the physician who provided obstetrical services for the birth of Ailani on October 29, 2015, at Lakeland Regional Medical Center (Lakeland Regional) in Lakeland, Florida.

On June 27, 2017, DOAH mailed a copy of the Petition to the Florida Birth-Related Neurological Injury Compensation Association (NICA), with copies to Dr. Zollicoffer and Lakeland Regional, by certified mail. The certified receipts indicate that the same was received by NICA on June 30, 2017; by Dr. Zollicoffer on June 29, 2017; and by Lakeland Regional on July 12, 2017. On July 24, 2017, the undersigned granted Lakeland Regional's Petition to Intervene. On October 11, 2017, the undersigned granted Dr. Zollicoffer's Petition to Intervene. On

September 17, 2018, the undersigned granted Lakeland Regional's Motion to Withdraw its Petition to Intervene.

On November 13, 2017, NICA responded to the Petition for Benefits, suggesting that the subject claim was not compensable because Ailani had not suffered a birth-related neurological injury and requesting a final hearing to address said issue.

NICA filed a Motion for Summary Final Order on December 29, 2017, which was denied by Order dated June 25, 2018, because Petitioners asserted both in their Petition and in their Response to the undersigned's Order to Show Cause (as to why the Motion for Summary Final Order should not be granted) that Ailani suffered a birth-related neurological injury.

By Order dated September 21, 2018, this tribunal granted the parties' Joint Motion to Submit Stipulated Factual Record in Lieu of a Contested Hearing. Dr. Zollicoffer takes no position on the issue of compensability. The undersigned's Order of September 21, 2018, directed the parties to submit their stipulated record no later than September 28, 2018, and any written arguments and/or proposed final orders no later than October 5, 2018.

NICA and Dr. Zollicoffer filed a Joint Stipulation on September 17, 2018, establishing their agreement that at the time of the birth of Ailani, Dr. Zollicoffer was a NICA participating physician. The parties' Joint Stipulation

regarding Stipulated Record was filed on September 27, 2018. The parties' Stipulated Record, consisting of Joint Exhibits A through H, and NICA's Exhibits A through D, were timely filed on September 28, 2018. The stipulated evidence includes, inter alia, Ailani's medical records and the written reports of two NICA consulting physicians, Dr. Donald G. Willis and Dr. Laufey Sigurdardottir.

Each party timely filed written argument and/or a proposed final order, which have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Ailani Sanchez was born a live infant at 5:46 a.m., on October 29, 2015, at Lakeland Regional Medical Center.

2. Ailani was a single gestation, weighing 2,950 grams at birth.

3. Ailani was delivered via cesarean section for suspected abruption/velamentous insertion of cord by Dr. Zollicoffer who was a NICA participating physician on October 29, 2015.

4. Ailani's Apgar scores were 2/4/4. Upon delivery, she was floppy and pale and had no respiratory effort. Pulse oximetry was within target saturations for age and her heart rate remained 100 or greater. She was intubated at seven minutes of age and transferred to the Neonatal Intensive Care Unit (NICU). No seizures were noted. Ailani had increasing

spontaneous respiratory effort and whole body cooling was started prior to her transfer to St. Joseph's Hospital NICU on October 29, 2015.

5. Upon admission to St. Joseph's Hospital on October 29, 2015, Ailani was lethargic with decreased reactions to stimuli, but appeared pink and well perfused. Neurologically, she was noted to be improving; she was breathing spontaneously and moving all extremities to stimuli.

6. After a complicated newborn hospital course, Ailani was ultimately discharged from St. Joseph's Hospital on January 6, 2016. At the time of her discharge, she was noted to be feeding by mouth and was overall gaining weight. Prior to her discharge, an EEG on October 30, 2015, showed seizures predominantly on the right side of her brain and generalized brain dysfunction. A brain MRI obtained on November 5, 2015, revealed restricted diffusion related to acute infarction in the right temporal occipital region with laminar necrosis. Additional laminar necrosis in the frontal lobes and insular cortex bilaterally was noted. An EEG on November 16, 2015, was consistent with nonspecific cerebral dysfunction with occasional sharp waves in the temporal parietal regions bilaterally with no evidence of seizures and irregular slow waves with slightly more predominance to the right.

7. Ailani was seen for a newborn visit by her pediatrician, Dr. Bou Salvador, on January 7, 2016. Nutritionally, she was noted to be breast feeding adequately, with supplements with formula. Developmentally, she was noted to have equal movements of all extremities and follow midline. She responded to a bell and was able to lift her head while lying on her stomach. Examination of her spine, extremities, and peripheral pulses were all normal. Neurologically, she was reportedly normal, with normal strength, tone, and reflexes reported.

8. On January 19, 2016, Ailani was evaluated at All Children's Outpatient Care upon referral by St. Joseph's Hospital secondary to hypoxic ischemia. The occupational therapist's impression included decreased bilateral coordination, decreased developmental milestones, decreased gross motor skills, decreased play skills, decreased strength, and fine motor deficits. Skilled therapy was identified to have the potential to improve her functional level in the areas of manipulation. It was recommended that Ailani undergo 30 minutes of occupational therapy once a week for six months. Her prognosis for achieving goals established by her therapist was noted to be excellent. On February 4, 2016, Ailani was evaluated for participation in, and deemed eligible for, the Early Steps Program.

9. On February 18, 2016, Ailani was evaluated by Dr. Qureshi at Kids Neurology. Developmentally, she was noted to smile and coo and focus. It was noted that Ailani had three seizures at the age of one day old, but none since. At this time, she was taking Keppra and Phenobarbital, from which she was being weaned. A sleep deprived EEG, obtained since the last visit, was normal. She was noted to be doing very well neurologically. Her physical examination revealed she was lifting her chest and head with her arms extended. Early head control with bobbing motion was noted. She was noted to say "aah," smile, and follow pass midline. The plan noted at this time was to continue to wean and discontinue Keppra and Phenobarbital.

10. Ailani was again seen by Dr. Bou Salvador on March 4, 2016, for her four-month well visit. Nutritionally, she was noted to be feeding with formula adequately. She had been started on solids for one to two feeds. Developmentally, she was noted to squeal and laugh. She was able to follow 180 degrees. She turned to void and was able to hold her head up 90 degrees while lying on her stomach. She was able to sit with support with her head up. She was able to pull to sit with no head lag. She could bring her hands together and had no persistent fist clenching. Her physical examination was normal.

Her neurological examination was also normal, with normal strength, tone, and reflexes reported.

11. Ailani was again seen by Dr. Bou Salvador on May 4, 2016, for her six-month well visit. Nutritionally, she was noted to be breast feeding adequately. Developmentally, she was noted to be social and smiling responsively. Adaptive equal movements of all extremities and the ability to follow midline were noted. She could respond to a bell and was able to lift her head while lying on her stomach. A physical examination was normal. A neurological examination was also normal, with normal strength, tone, and reflexes reported.

12. On May 24, 2016, Ailani returned to Dr. Qureshi at Kids Neurology. It was noted that Ailani had been weaned from her seizure medication and had had no seizures for the last three months. She was noted to be doing very well neurologically. Physically and developmentally, she was noted to have no head lag, to be rolling over, to have her chest up in a prone position, to be trying to crawl, to be lifting her head, and to be sitting briefly unsupported. She was also noted to be leaning forward on her hands, engaging in bounce activity, supporting most of her weight, reaching out and grasping large objects, transferring from hand to hand, babbling, enjoying mirror, and using polysyllable sounds. She was noted to be feeding herself. Dr. Qureshi reported that Ailani was in

occupation therapy but that it was on hold since her evaluation was "pretty unremarkable." Ailani was noted to be progressing well for her age and was receiving Early Steps intervention once a week at home. She was given a prescription of Phenobarbital for use only if a seizure occurred.

13. On June 18, 2016, Ailani was seen by Dr. Frances Arrillaga at Pediatric Cardiology Associates for a cardiology consultation secondary to a history of pulmonary hypertension, and an echocardiogram that showed a patent foramen ovale (PFO). Ailani's mother reported that since her discharge from St. Joseph's, she was doing well. Cyanosis, difficulty breathing and unexplained diaphoresis and feeding problems, were denied. An echocardiogram on this date showed a PFO, with otherwise normal anatomy. There were normal right ventricular (RV) pressures, normal left ventricular (LV) size and function. No cardiovascular restrictions were given and she was told to return in one year for further follow up.

14. Ailani was again seen by Dr. Bou Salvador on August 4, 2016, for her nine-month well visit. Nutritionally, she was reported to be feeding adequately. She was feeding 2 to 3 varieties of solid foods with no problems and was starting with a cup for water and juice. Developmentally, she was reported to be playing pat-a-cake and looking for fallen objects. She could bang two cubes in her hand with thumb-finger grasp. She could

say "dada" and "mama" and walk while holding on. She was also noted to be crawling and standing momentarily. Her physical and neurological examinations were noted to be normal, with normal strength, tone, and reflexes noted.

15. An August 22, 2016, a progress note from Early Intervention reflects that Ailani was babbling two syllables together, was happy, pulling to a stand and cruising along furniture, and was responding to her name. Attendance at Early Intervention was noted to be consistent and once a week.

16. Ailani was again seen by Dr. Bou Salvador on November 3, 2016, for her 12-month well visit. Nutritionally, she was noted to be eating two to three varieties of solid foods with no problems and was feeding herself finger foods. Developmentally, she was reported to be playing pat-a-cake and drinking from a cup. She was able to bang two cubes held in her hands with thumb-finger grasp. She was saying "mama" and "dada," imitated speech sounds, could say three words other than "mama" and "dada," and understood "no." She was able to walk while holding on, and was reported to stand alone and walk well. A physical examination revealed normal extremities. A neurologic examination was also normal, with normal strength, tone, and reflexes reported.

17. On November 21, 2016, Ailani returned to Dr. Qureshi at Kids Neurology. It was noted that Ailani had been weaned off

medications six months earlier and had no seizure activity since. She was noted to be doing very well. It was noted that no therapy was being provided at this time, although she was evaluated for occupational therapy but did not qualify for it. Developmentally, she was noted to be walking with one hand held, rising independently, taking several steps, getting to sitting, pulling to stand, standing for two seconds, saying a few words besides "mama" and "dada," playing ball game, making postural adjustment to dressing, waiving "bye bye," and indicating what she wants. She was noted to have pincer grasp, releasing objects to others when grabbed, and banging two things. Dr. Qureshi noted "she is doing amazing right now."

18. A December 24, 2016, emergency room record (for a cough/choking episode after eating a piece of Dorito) from Florida Hospital Tampa reflects that Ailani had not had seizures since birth, and had been off Keppra and Phenobarbital for almost a year. A physical examination revealed an active, well-developed, and well-nourished child. Neurologically, she was noted to be awake, alert, and interacting with family and staff. She was also noted to be active and playful.

19. An Early Intervention progress note from February 15, 2017, reflects Ailani had age-level play skills, could communicate using vocalizations and some single words, could follow routine directions, and was independent with walking and

floor transfers. Good progress was noted to be made, many goals were reported met, and the parents decided to reduce services to one time per month.

20. On January 30, 2017, Ailani was reevaluated for participation in Early Steps. It was noted that Ailani's mother had no concerns at this time. The report notes that Ailani liked the slide, liked to kick the ball, liked to play with her siblings and cousins, and that she is very curious. No hearing or vision concerns were noted. It was reported that many of her goals had been met, and that Ailani was using a variety of vowels and consonants, identifying at least three family members when named, that she was saying a variety of words, and was using a sign for "more food." Ailani was noted to still be eligible for Early Steps secondary to her diagnosis of hypoxic ischemic encephalopathy.

21. Ailani was seen by Dr. Bou Salvador on March 28, 2017, for her 16-month well visit. She was noted to have good eating habits and a good appetite. No mealtime problems were reported, and she was noted to be eating solid foods with no problems. She was noted to have socially appropriate behavior for her age. She was talking well and was able to balance on one foot for five seconds, could throw a ball overhead, and pedal a tricycle. Her orthopedic and neurologic examinations were normal, with normal strength, tone, and reflexes reported.

22. At the request of NICA, Donald C. Willis, M.D., who specializes in obstetrics and gynecology and maternal-fetal medicine, reviewed the medical records included in the Stipulated Record as Joint Exhibits A through G. In his report dated August 2, 2017, which was admitted into evidence without objection, Dr. Willis noted in pertinent part that Ailani's mother was cramping when she presented to the hospital, and was three centimeters dilated with suspected amniotic membranes ruptured. Contractions were noted to be occurring occasionally. Medical records indicated the presence of late decelerations on admission, which progressed to bradycardia, for which an immediate Cesarean section was recommended. Dr. Willis observed that Ailani was depressed at birth with Apgar scores of 2/4/4, and that cord blood gas was abnormal with a pH of only 6.97. He further noted that Ailani was floppy, pale, and had poor perfusion; that bag and mask ventilation was initiated, followed by intubation for continued respiratory distress; that hypotension was present and required IV fluids; that the initial blood count was low; and that Ailani remained acidotic after birth with a pH of 6.7 and a base excess of -27 at 90 minutes after birth. Dr. Willis further noted Ailani's hospital course consistent with her medical records and ultimately opined that "there was an obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into

the immediate post delivery period. The oxygen deprivation resulted in brain injury." Dr. Willis was unable to comment about the severity of the injury, however.

23. At the request of NICA, Laufey Y. Sigurdardottir, M.D., who is board certified in neurology and specializing in pediatric neurology, reviewed the medical records included in the Stipulated Record as Joint Exhibits A through G, and performed a thorough examination of Ailani on October 18, 2017. Dr. Sigurdardottir's summary of Ailani's medical history, along with her findings upon a full physical and neurological examination, is documented within her written report, which was admitted into evidence without objection. Dr. Sigurdardottir noted that Ailani was a non-dysmorphic, interactive toddler with normal facial features and apparently intact vision. No abnormalities in Ailani's extremities were noted other than occasional toe walking. Neurologically, Ailani was noted to be interactive, curious, and exhibiting normal joint attention. Ailani exhibited pretend play with a stethoscope, said the word "mom" a few times, pointed to her mouth when asked to do so, enjoyed playing with a tablet computer, shook her head for "no," exhibited understandable words, and exhibited no autistic features. Cranial nerves were intact, facial grimacing was symmetric and normal, and hearing seemed intact. No drooling was noted. Muscle tone was noted to be normal, strength was

full and symmetric and deep tendon reflexes were symmetric and within normal limits. Gross and fine motor skills were noted to be within normal limits for age.

24. Overall, Dr. Sigurdardottir determined that despite her initial abnormal neurological examination, and delays in early development, Ailani's current neurologic and developmental functioning is age-appropriate. She went on to opine in relevant part that,

Ailani is not found to have substantial delays in motor and mental abilities at this time In review of available documents, there is evidence of impairment consistent with a neurologic injury to the brain or spinal cord acquired due to oxygen deprivation The prognosis for full motor and mental recovery is excellent and the life expectancy is full In light of evidence presented I believe Ailani does not fulfill criteria of a substantial mental and physical impairment at this time. I do not feel that Ailani should be included in the NICA program.

25. Neither Petitioner nor Intervenor submitted or introduced into evidence any expert reports rebutting the opinions of Dr. Willis and/or Dr. Sigurdardottir.

CONCLUSIONS OF LAW

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

27. 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.

28. 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.

29. 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.

30. In discharging this responsibility, 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).

(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.

31. 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.

32. To be compensable under the NICA Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby's brain during labor, delivery, or resuscitation in the immediate post-delivery period resulting 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).

33. Dr. Willis's unrebutted opinion that "there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post-delivery period" is credited.

34. Likewise, Dr. Sigurdardottir's unrebutted opinions that "Ailani is not found to have substantial delays in motor and mental abilities at this time" and that "the prognosis for full motor and mental recovery is excellent and the life expectancy is full" are also credited.

35. In his Order to Show Cause of February 5, 2018, the undersigned included the following endnote:

2/ The undersigned notes that he is not qualified to determine whether Ailani Sanchez suffered a "birth related neurological injury" based solely upon a review of the medical records submitted to NICA.

36. Thereafter, on February 14, 2018, Petitioners filed a response to the Order to Show Cause. In their response, Petitioners reiterated their position that Ailani did suffer a compensable neurological injury, and stating further "Petitioners continue to rely upon the medical records submitted to NICA with Petitioners' claim to support their position in this case." Petitioners further stated that Florida Statutes do not require that Petitioners retain a medical expert in order to obtain NICA benefits.

37. While Petitioners are correct that nothing in the statutes governing NICA requires them to retain a medical expert to substantiate their claim, they do bear the burden of proving, by competent substantial evidence, that Ailani suffered a birth-related neurological injury as defined by section 766.302(2).

38. As noted in the cited endnote above, the undersigned is not qualified to determine whether Ailani Sanchez suffered a "birth related neurological injury" based solely upon a review of the medical records submitted to NICA. See Worzalla v.

Barnhart, 311 F. Supp. 2d 782 (E.D. Wis. 2004) (“ALJs must not succumb to the temptation to play doctor and make their own independent medical findings.”). As the party bearing the burden of proof, it was incumbent upon Petitioners to present expert medical opinion to rebut the expert medical opinions expressed by NICA’s retained experts. This, Petitioners failed to do.

39. The competent substantial evidence in this case reveals that Ailani does not have a permanent and substantial mental or physical impairment. Thus, Ailani has not suffered a birth-related neurological injury as defined by section 766.302(2) and is not entitled to benefits under the Plan.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Michele Sanchez and Fidel Sanchez, on behalf of and as parents and natural guardians of Ailani Sanchez, is dismissed with prejudice.

DONE AND ORDERED this 15th day of January, 2019, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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).