

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAYLA LAVENDER AND TIMOTHY
LAVENDER, as parents and natural
guardians of TIMOTHY RYAN EDWARD
LAVENDER, a minor,

Petitioners,

vs.

Case No. 17-4991N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

KAREN L. BRUDER, M.D.,

Intervenor.

_____ /

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 3, 2018.

STATEMENT OF THE ISSUES

On August 28, 2017, Petitioners, Gayla Lavender and Timothy Lavender, as parents and natural guardians of Timothy Ryan Edward Lavender (Timothy), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 776.301 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 Karen Bruder, M.D., as the physician who provided obstetric services for the birth of Timothy at Tampa General Hospital, in Tampa, Florida, on October 25, 2009.

DOAH served a copy of the Petition to NICA on September 18, 2017. Karen L. Bruder, M.D., was served with a copy of the Petition, and filed a Petition to Intervene on October 16, 2017. DOAH sent Tampa General Hospital a copy of the Petition via certified mail on September 15, 2017.

On April 3, 2018, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Timothy did not meet the requisite minimum statutory birth weight as required by section 766.302, Florida Statutes. Neither Petitioner nor Intervenor Karen L. Bruder, M.D., filed a response to the Motion for Summary Final Order.

FINDINGS OF FACT

1. Timothy was born at Tampa General Hospital, in Tampa, Florida, on October 25, 2009. He was a single gestation.

2. NICA attached to its motion the affidavit of the Custodian of Records for Tampa General Hospital, and nine pages of medical records for Timothy. The medical records show that

Timothy's birth weight was less than 2,500 grams. Specifically, the records show that his birth weight was 1,980 grams.

3. A review of the file reveals that no contrary evidence was presented to dispute the medical records from Tampa General Hospital showing that Timothy's birth weight was less than 2,500 grams.

CONCLUSIONS OF LAW

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

5. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

6. 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.

7. NICA has determined that Petitioner does 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.

8. 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. 766.302(2).

§ 766.309(1), Fla. Stat.

9. 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.

10. The evidence, which is not refuted, established that Timothy was a single gestation and did not weigh at least 2,500 grams at birth. Thus, Timothy did not sustain a birth-related neurological injury because he did not meet the minimum statutory weight as set forth in the definition of "birth-related neurological injury," in section 766.302(2).

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition is dismissed with prejudice.^{1/}

DONE AND ORDERED this 19th day of April, 2018, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2018.

ENDNOTE

^{1/} Although not raised in Respondent's Motion for Summary Final Order, from the undersigned's review of the record, Petitioner's claim is also due to be dismissed as the Petition was filed more than five years after Timothy's birth. See § 766.313, Fla. Stat.

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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).