

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVELYN MACHADO VALDES AND
ALEJANDRO PINERA, ON BEHALF OF
AND PARENTS AND NATURAL
GUARDIANS OF ALEXANDER PINERA, A
MINOR,

Petitioners,

vs.

Case No. 17-6444N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Partial Summary Final Order, filed September 11, 2018, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA).^{1/} Petitioners did not file a response to the motion.

STATEMENT OF THE CASE

On September 5, 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 Carlos G. Pena, M.D., as the physician who

provided obstetric services at the birth of Alexander Pinera (Alexander) on August 28, 2015, at South Miami Hospital, in Miami, Florida.

On November 28, 2017, DOAH mailed a copy of the Petition to NICA by certified mail. NICA was served with the same on or before December 4, 2017. On November 28, 2017, DOAH mailed copies of the Petition by certified mail to South Miami Hospital and Dr. Pena.

On September 11, 2018, NICA filed its Motion for Partial Summary Final Order requesting that a partial summary final order be entered finding that the claim is not compensable because Alexander did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. As noted above, Petitioners did not respond to the motion.

FINDINGS OF FACT

1. Alexander was born on August 28, 2015, at South Miami Hospital. Alexander was a single gestation, weighing over 2,500 grams at birth.

2. NICA retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review the medical records of Alexander and his mother, Petitioner Evelyn Machado Valdes, 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 post-delivery period due to oxygen deprivation or mechanical injury. In his report, dated February 19, 2018, Dr. Willis set forth the following:

In summary, umbilical cord prolapse occurred during labor. Emergency Cesarean section was done with delivery of a healthy newborn. The baby was not depressed at birth. Apgar scores were 9/9. No resuscitation was required. The baby left the delivery room stable and well. Episodes of cyanosis occurred several hours after birth. Cerebral infarction was diagnosed by MRI.

The baby suffered a stroke at some time around the episodes of cyanosis that occurred several hours after birth. This would be well after the post-delivery resuscitation period. The baby was born active and required no resuscitation at birth, indicating there was no oxygen deprivation during labor, delivery of [sic] the post-delivery period.

* * *

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period. The baby did suffer a stroke during the perinatal period, but this was not related to oxygen deprivation or mechanical trauma during labor, delivery or the immediate post-delivery period.

3. Dr. Willis affirms in his amended affidavit, dated September 24, 2018, the above-quoted opinions from his report and further opines that:

[I]n that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the

immediate post-delivery period in this Hospital, then accordingly, there was no causal event which would have rendered Alexander Pinera permanently and substantially mentally and physically impaired as a result of the same.

4. NICA also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the pertinent medical records, conduct an Independent Medical Examination (IME) of Alexander, and opine as to whether Alexander suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury. Dr. Duchowny reviewed the medical records, obtained historical information from Alexander's mother, Evelyn Machado, and performed an IME on June 13, 2018.

5. In a report authored after the IME, Dr. Duchowny summarized his findings, in pertinent part, as follows:

In SUMMARY, Alex's neurological examination reveals subtle right upper extremity weakness characterized by left hand preference and posturing of his right upper extremity while walking. There is no objective weakness and his fine motor coordination is preserved. His speech is age-appropriate.

* * *

Although Alex had a major cerebral vascular accident that affected his left cerebral hemisphere, he has made a remarkable recovery and now evidences only minimal deficits on his neurological examination. In view of his stable general physical and neurological status at birth, it is most likely that the cerebral vascular accident occurred prior to the onset of labor.

* * *

Based on the medical record review and today's evaluation, I am not recommending Alexander for inclusion in the NICA program.

6. NICA's Motion for Partial Summary Final Order also relies upon the attached affidavit from Dr. Duchowny, dated September 4, 2018. In his affidavit, he affirms his findings and opinions contained in his report to a reasonable degree of medical probability.

7. A review of the file reveals that no contrary evidence was presented to dispute the findings and opinions of Dr. Willis and Dr. Duchowny. Their opinions are credited.

CONCLUSIONS OF LAW

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

9. 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.

10. 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.

11. If NICA determines that the injury alleged is a claim that 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 (ALJ) to whom the claim has been assigned. §766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as here, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

12. In its present posture, the ALJ is required to 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. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury" § 766.31(1), Fla. Stat.

13. 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.


14. The undisputed evidence establishes that there was not an injury to Alexander's brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. The undisputed evidence further establishes that Alexander did not sustain a permanent and substantial mental and physical impairment. Thus, he did not sustain a birth-related neurological injury as defined in section 766.302(2), 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 NICA's Motion for Partial Summary Final

Order on the issue of a birth-related neurological injury is granted, and Petitioners' claim is found and determined to not be compensable. The Petition is dismissed with prejudice.

DONE AND ORDERED this 25th day of September, 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 25th day of September, 2018.

ENDNOTE

^{1/} Although styled as a Motion for Partial Summary Final Order, the undersigned's determination that Petitioners' claim is not compensable is a Final Order subject to appeal under section 766.311, Florida Statutes.

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).