

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JORGE MORENO AND GRISELDA
TORRES, on behalf of and as
parents and natural guardians of
ANDY MORENO, a minor,

Petitioners,

and

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Intervenor,

vs.

Case No. 18-0962N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on an Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on March 28, 2019.

STATEMENT OF THE CASE

On February 9, 2018, Jorge Moreno and Griselda Torres, on behalf of and as parents and natural guardians of Andy Moreno ("Andy"), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. ("Petition"), with the

Division of Administrative Hearings ("DOAH") for the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

The Petition identified Alyssa J. Brown, M.D., as the physician who provided obstetric services at the birth of Andy on November 2, 2015, at Tampa General Hospital ("Tampa General") in Tampa, Florida.

DOAH served Dr. Brown with a copy of the Petition on February 28, 2018, and served Tampa General that same date. NICA was also served with a copy of the Petition on February 28, 2018.

University of South Florida Board of Trustees, on behalf of Tampa General, moved to intervene in this matter on April 12, 2018, which was granted.

On May 15, 2018, NICA filed its response to the Petition, taking the position that Petitioner's claim is not compensable under the Plan. NICA requested that DOAH schedule a hearing to determine compensability. After several extensions, the final hearing was set for March 27, 2019, then rescheduled for May 23, 2019.

On March 28, 2019, NICA filed an Unopposed Motion for Summary Final Order, requesting the Administrative Law Judge enter a summary final order finding that the claim is not compensable under the NICA statute because Andy did not suffer a "birth-

related neurological injury” as defined in section 766.302(2), Florida Statutes.

FINDINGS OF FACT

1. Andy was born on November 2, 2015, at Tampa General located in Tampa, Florida.

2. Based on the available evidence, Alyssa J. Brown, M.D., was the delivering physician for Andy’s birth. Dr. Brown was a “participating physician” under the Plan at the time Andy was born. See § 766.302(7), Fla. Stat.

3. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board-certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Laufey Y. Sigurdardottir, M.D., a pediatric neurologist, to review Andy’s medical condition. NICA sought to determine whether Andy suffered a “birth-related neurological injury” as defined in section 766.302(2). Specifically, NICA requested its medical experts opine whether Andy experienced 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 post-delivery period; and, if so, whether this injury rendered Andy permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Andy’s medical records and described Andy’s birth as follows:

[V]acuum assisted vaginal delivery at term resulted in a newborn with normal Apgar scores and a normal umbilical cord blood gas. [Andy] did not require resuscitation.

5. Dr. Willis then opined:

There was no apparent obstetrical event that would have resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period.

6. Dr. Sigurdardottir also reviewed Andy's medical records, as well as conducted an independent medical exam of Andy on May 2, 2018. Dr. Sigurdardottir commented that "Andy is found to have substantial delays in motor and mental abilities. . . .

[T]here is no evidence of impairment consistent with a neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury." Dr. Sigurdardottir further opined:

In light of evidence presented, I believe Andy does fulfill criteria of a substantial mental and physical impairment at this time, but it is likely due to a genetic condition and not to be from birth related injury. I do not feel that Andy should be included in the NICA program.

7. A review of the file reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Sigurdardottir. Their opinions are credible and persuasive.

8. Based on the opinions and conclusions of Dr. Willis and Dr. Sigurdardottir, NICA determined that Petitioner's claim was not compensable. NICA subsequently filed the Unopposed Motion

for Summary Final Order asserting that Andy has not suffered a "birth-related neurological injury" as defined by section 766.302(2). Petitioners do not oppose NICA's motion.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge, has "exclusive jurisdiction to determine whether a claim filed under [NICA] is compensable." §§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stat.

10. The Florida Legislature established the Plan "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

11. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) and 766.305(1), Fla. Stat. NICA, which administers the Plan, then 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.

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.

13. In this matter, however, NICA determined that Petitioner's claim is not compensable under the Plan. Therefore, NICA filed the Unopposed Motion for Summary Final Order, requesting an order be entered finding that the claim is not compensable.

14. In reviewing the compensability of a claim, section 766.309(1) directs the Administrative Law Judge to make the following determinations based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury;

(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; and

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

15. The term "birth-related neurological injury" is defined in section 766.302(2) as:

[I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation . . . 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.

16. "The [NICA] Statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997).

17. In reviewing the injury in this matter, the undisputed evidence establishes that Andy did not sustain a "birth-related neurological injury" as defined in section 766.302(2). Dr. Willis concluded that no apparent obstetrical event resulted in oxygen deprivation or mechanical trauma during labor, delivery, and the immediate post-delivery period which caused brain injury to Andy. Dr. Willis also noted that Andy did not require resuscitation at birth. Dr. Sigurdardottir opined that, while Andy does suffer from "substantial delays in motor and mental abilities . . . there is no evidence of impairment consistent with a neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury."

18. Therefore, based on the available evidence in the record, the undersigned determines that Andy has not suffered a "birth-related neurological injury" and is not eligible for NICA benefits.

DISPOSITION

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

DONE AND ORDERED this 10th day of April, 2019, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 2019.

COPIES FURNISHED:
(via certified mail)

Jorge Moreno
Griselda Torres
207 Sycamore Lane
Tampa, Florida 33610
(Certified No. 7018 2290 0000 1309 8974)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified No. 7018 2290 0000 1309 8981)

Iva M. Valtcheva, Esquire
La Cava & Jacobson, P.A.
101 East Kennedy Boulevard, Suite 2500
Tampa, Florida 33602
(eServed)
(Certified No. 7018 2290 0000 1309 8998)

Brooke M. Gaffney, Esquire
Smith, Stout, Bigman & Brock, P.A.
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118
(eServed)
(Certified No. 7018 2290 0000 1309 9001)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7018 2290 0000 1309 9018)

Mary C. Mayhew, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified No. 7018 2290 0000 1309 9025)

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).