

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA FISHER-DOUGLAS and
ROLANDO DOUGLAS, individually
and as parents and next friends
of KODA FISHER-DOUGLAS, a minor,

Petitioners,

vs.

Case No. 18-1071N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HALIFAX HOSPITAL MEDICAL CENTER
AND JOHN WILLIAM MEYERS, M.D.,

Intervenors.

FINAL ORDER

This cause came before the undersigned upon a Joint Motion to Submit Stipulated Factual Record in Lieu of a Contested Hearing, which was granted on August 10, 2018; a Stipulated Record; and a proposed final order submitted by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA).

STATEMENT OF THE ISSUES

The issue in this case is whether Koda Fisher-Douglas (Koda) 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 (Plan).

PRELIMINARY STATEMENT

On February 20, 2018, Petitioners filed a Petition for Determination of NICA Coverage (Petition) with the Division of Administrative Hearings (DOAH) alleging that they were uncertain as to whether Koda sustained a birth-related neurological injury as defined by section 766.302, Florida Statutes, and sought a determination of the same.

The Petition named John William C. Meyers, M.D. (Dr. Meyers), as the physician who provided obstetric services for the birth of Koda on November 17, 2016, at Halifax Medical Center in Daytona Beach, Florida.

On March 5, 2018, DOAH mailed a copy of the Petition to NICA by certified mail. The certified receipt indicates the same was served on March 9, 2018. On March 5, 2018, DOAH mailed copies of the Petition by certified mail to Dr. Meyers and Halifax Medical Center. On March 19, 2018, Halifax Medical Center's Motion to Intervene was granted. On March 27, 2018, Dr. Meyer's Motion to Intervene was granted.

On June 13, 2018, NICA filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable because Koda had not suffered a birth-related neurological injury

and requesting a final hearing to address said issue.

Ultimately, the parties filed a Joint Motion to Submit Stipulated Factual Record in Lieu of Contested Hearing. Said motion was granted on August 10, 2018, and the parties were directed to submit their stipulated record on or before August 17, 2018, and any written arguments or proposed final orders on or before August 24, 2018. Upon NICA's Unopposed Motion to Extend Deadline to Submit a Proposed Final Order, an Order was entered, giving the parties until August 27, 2018, to file their written arguments and/or proposed final orders.

On August 14, 2018, Petitioners, NICA, and Dr. Meyers filed a "Joint Stipulation Concerning Intervenor's Participation in NICA." In this filing, the above-noted parties agreed and stipulated that, on or about November 17, 2016, Dr. Meyers was a participating provider in the Plan.

The parties' Stipulated Record was timely filed on August 16, 2018, and the following were thereby admitted into evidence without objection of any party: Joint Exhibits A through O; and NICA's Exhibits A through D. NICA timely filed a proposed final order on August 27, 2018, which has been considered in preparation of this Final Order. Neither Petitioners nor Intervenors filed a written argument or proposed final order.

FINDINGS OF FACT

1. Koda was born a live infant on November 17, 2016, at a hospital, Halifax Medical Center. Koda was a single gestation, weighing over 2,500 grams at birth.

2. With respect to Koda's birth, obstetrical services were delivered by Dr. Meyers, a NICA participating physician, in the course of labor, delivery or resuscitation in the immediate post-delivery period.

3. NICA retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review Koda's medical records 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 March 13, 2018, report, Dr. Willis set forth his findings and opinions which have been admitted in this matter, without objection. Said findings and opinions are set forth below in pertinent part:

In summary, pregnancy was complicated by poorly controlled Maternal Diabetes. Fetal distress was noted on BPP at 37 weeks, requiring delivery. Delivery was further complicated by hydramnios and maternal obesity. Vacuum extraction and an extended "T" incision in the uterus was required. The baby was depressed at birth with Apgar Scores of 1/2/5. Cord blood gas was consistent with acidosis with a pH of 6.9. The newborn hospital course was complicated by multi-system organ failures. Seizure activity was noted on EEG and MRI was consistent with HIE.

Although the mother was not in labor prior to delivery, there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post-delivery period. The oxygen deprivation resulted in a brain injury.

4. NICA also retained Laufey Y. Sigurdardottir, M.D., a pediatric neurologist, to review Koda's medical records, conduct an Independent Medical Examination (IME), and opine as to whether he 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 full historical account from Petitioners, and conducted an IME of Koda on May 31, 2018.

5. In her IME report, Dr. Sigurdardottir set forth her findings and opinions which have been admitted in this matter, without objection. Said findings are set forth below in pertinent part:

Pregnancy and Birth Summary: Koda was born at 13:37 on 11/17/2016 at Halifax hospital at 37 weeks gestation to a 33 yr old G5P1 female with insulin dependent diabetes after a high-risk pregnancy via emergent cesarean section for non-reassuring fetal heart rate tracing. There was meconium stained amniotic fluid. There was difficulty delivering fetal head and multiple attempts with vacuum was needed along with needing to extend incision in T. Infant was floppy and non-reactive at birth. The infant was born with Apgar scores of 1 after one minute, 2 after 5 minutes and 5 at 10 minutes. Patient had respiratory distress and required intubation and positive pressure ventilation and cardiac compressions was

admitted in critical condition to NICU. Birth weight 3960 gm (LGA), HC 35.5 cm (>75th percentile). Cord gas pH 6.9 and BE -9, lactic acid 9.7. He had a complex NICU course requiring cooling for HIE. He had seizures on rewarming, a congenital heart defect (bicuspid aortic valve and VSD). MRI on 11/28/2016 was abnormal: "findings consistent with hypoxic ischemic encephalopathy, with acute lesions within the posterior parietal and posterior parietooccipital watershed areas." There was also increased signal attenuation within the bilateral lentiform nuclei. Prominent extraaxial spaces were also noted over the bifrontal and bitemporal areas. The magnetic resonance spectroscopy showed "mild reversal of the NAA choline and NAA creatine as well as elevation of lactate peaks." He had respiratory issues and was intubated for approximately one month. He had G tube placed for aspirations. He was discharged from hospital around age 2 months.

* * *

Developmental history: Initially he had significant stiffness around the hip and shoulder girdles and mom describes fisting of both hands requiring hand and thumb splints. Koda has no major delays in motor milestones, was walking at 13 months. He knows 15 words and does not use any 2-word phrases. He is socially engaged and is always on the go. He is in no therapy. Mom feels he is right-sided dominant, both with arm and with leg.

He was seen by rehabilitation at UF. He was receiving PT at Speech Works in Daytona for an evaluation, which noted some tightness of shoulders and hips, and that was flatfooted. PT feels he is up to date with gross motor milestones, but problems with hand-eye coordination. He has not been evaluated for OT/SLP.

Past medical history: He has a known cardiac defect with VSD and a bicuspid aortic valve.

This is stable at this time. There was concern for shuddering spells at age one year but EEG was normal.

6. Dr. Sigurdardottir, after conducting her evaluation, provided the following opinions: 1) there is evidence of impairment consistent with a neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury; 2) Koda is not found to have substantial delays in motor or mental abilities; and 3) that his prognosis for full motor and mental recovery is good and his life expectancy is full. In summary, Dr. Sigurdardottir opined that, "[i]n light of evidence presented I believe Koda does not fulfill criteria of a substantial mental and physical impairment at this time. I do not feel that Koda should be included in the NICA program due to his near age appropriate motor and language development."

7. No contrary evidence has been submitted to refute the findings and opinion of Drs. Willis and Sigurdardottir. Their unrefuted findings and 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 claims, 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 discharging this responsibility, the ALJ is required to make the following threshold determinations 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.

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 evidence establishes that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post-

delivery period, resulting in an injury to Koda's brain. The evidence further establishes that obstetrical services were delivered by a participating physician, Dr. Meyers, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Halifax Medical Center. The unrefuted evidence, however, establishes that Koda 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

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

DONE AND ORDERED this 11th day of September, 2018, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 11th day of September, 2018.

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).