

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSHUA AND LAURA EGGNATZ, on
behalf of and as parents and
natural guardians of ASHER LEE
EGGNATZ, a minor,

Petitioners,

vs.

Case No. 18-3489N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

KOMPAL GADH, M.D.; AND ADVANCED
OB/GYN INSTITUTE, A FLORIDA
CORPORATION,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on a Motion for Partial Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on November 6, 2018.

STATEMENT OF THE CASE

On June 21, 2018, Petitioners, Joshua and Laura Eggnatz, on behalf of and as parents and natural guardians of, Asher Lee Eggnatz ("Asher"), 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 a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan").

The Petition named Kompal Gadh, M.D., as the physician who provided obstetrical services at Asher's birth on April 20, 2017, at Memorial Hospital West ("Memorial Hospital") in Pembroke Pines, Florida.

DOAH served Dr. Gadh with a copy of the Petition on July 11, 2018, and served Memorial Hospital that same date. NICA was also served with a copy of the Petition on July 11, 2018.

On October 24, 2018, NICA filed its response to the Petition, taking the position that Petitioners' claim was not compensable under the Plan. NICA requested that DOAH schedule a hearing to determine compensability. NICA also requested that DOAH bifurcate the administrative proceeding to address the issue of compensability and notice first.

On November 5, 2018, Petitioners filed a Notice Regarding Hearing Requirement wherein they advised DOAH that they did not desire a final hearing and did not oppose a summary disposition based on the written records and reports filed in this matter.

On November 6, 2018, NICA filed a Motion for Partial Summary Final Order, requesting the Administrative Law Judge

enter a summary final order finding that the claim is not compensable because Asher did not suffer a "birth-related neurological injury" as defined in section 766.302(2). As of the date of this Order, Petitioners have not responded to NICA's motion.

FINDINGS OF FACT

1. Asher was born on April 20, 2017, at Memorial Hospital located in Pembroke Pines, Florida.

2. Upon receiving the Petition, NICA retained Michael S. Duchowny, M.D., a pediatric neurologist, to review Asher's case. NICA sought to obtain an opinion whether there was an injury to Asher's brain or spinal cord at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period, and whether that injury rendered Asher permanently and substantially mentally and physically impaired.

3. Dr. Duchowny reviewed Asher's medical records, as well as examined Asher on October 10, 2018. Dr. Duchowny opined, within a reasonable degree of medical probability:

[I]t is my opinion that ASHER's neurological examination reveals neurological findings consistent with a mild motor impairment primarily affecting his right upper extremity. In contrast, Asher has preserved cognitive function and social awareness. He evidences slightly decreased muscle tone in the right distal upper and lower extremities and slightly increased deep tendon reflexes.

As such, it is my opinion that despite ASHER's abnormal MR imaging studies at birth which document prominent hemorrhagic infarction in territories supplied by the left middle and posterior cerebral arteries with a smaller region of right middle cerebral artery infarction, and bilateral parieto-occipital areas of increased signal, he has recovered to a point where he no longer evidences either substantive mental or physical impairment.

Based upon my evaluation and record review, as ASHER is developing normally, I am not recommending him for acceptance into the NICA program.

4. A review of the records filed in this matter reveals no contrary evidence to dispute the findings and opinion of Dr. Duchowny. His opinion is credible and persuasive.

5. Based on the opinion and conclusion of Dr. Duchowny, NICA determined that Petitioners' claim was not compensable. NICA subsequently filed the Motion for Partial Summary Final Order asserting that Asher 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

6. The undersigned, as an Administrative Law Judge, has exclusive jurisdiction over the subject matter of this proceeding. § 766.304, Fla. Stat.

7. The Florida Legislature established the Plan "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.

8. 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, 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.

9. 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.

10. In this matter, however, NICA determined that Petitioners' claim is not compensable under the Plan. Therefore, NICA filed a Motion for Partial Summary Final Order, requesting an order be entered finding that the claim is not compensable.

11. In ruling on NICA's motion, section 766.309(1) provides that 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).

12. 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

13. "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).

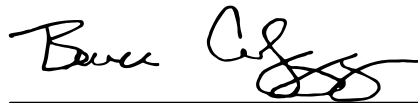
14. The undisputed evidence establishes that Asher did not sustain a "birth-related neurological injury" as defined in

section 766.302(2). Dr. Duchowny concluded that, at this time, Asher has recovered from the incident that occurred at his birth to a point "where he no longer evidences either substantial mental or physical impairment" and is developing normally. Therefore, based on the evidence in the record, Asher 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 8th 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).