

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAURA ANN ONTIVEROS, on behalf
of and as parent and natural
guardian of ELEANOR ELIZABETH
ONTIVEROS, a minor,

Petitioner,

vs.

Case No. 18-4021N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed January 22, 2019; and Petitioner's Response, filed April 5, 2019.

STATEMENT OF THE CASE

On July 27, 2018, Petitioner 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 Gregory Delong, M.D., as the physician who provided obstetric services at the birth of Eleanor Elizabeth Ontiveros

(Eleanor) on August 28, 2017, at Lower Keys Medical Center in Key West, Florida.

On August 8, 2018, DOAH mailed a copy of the Petition to Respondent, Dr. Delong, and Lower Keys Medical Center.

Respondent was served with the Petition on August 9, 2018.

On December 13, 2018, Respondent filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable, and requesting a hearing to address such issue. Thereafter, the final hearing was scheduled for March 7, 2019.

On January 22, 2019, Respondent filed its Motion for Summary Final Order. Three days later, Respondent filed an Agreed Motion to Continue Final Hearing, wherein it was represented that Petitioner had requested of Respondent additional time to prepare a response to the Motion for Summary Final Order and the scheduled hearing. Said filing requested an order cancelling the final hearing and requiring the parties to provide the undersigned a status report. On January 29, 2019, the undersigned issued an Order continuing the final hearing and required the parties to submit a written status report on or before March 29, 2019.

The parties timely filed status reports. Petitioner averred that she was prepared to reschedule the final hearing. Respondent requested that the undersigned rule upon Respondent's Motion. On March 29, 2019, the undersigned issued an Order

providing that Petitioner had the opportunity to file a response to Respondent's Motion within seven days. Petitioner filed a timely response.

FINDINGS OF FACT

1. Eleanor was born on August 28, 2017, at Lower Keys Medical Center in Key West, Florida. Eleanor was a single gestation weighing over 2,500 grams at birth.

2. Respondent retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review the medical records of Eleanor and her mother, Laura Ann Ontiveros, and opine as to whether there was an injury to her brain or spinal cord that occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period due to oxygen deprivation or mechanical injury. In his report, dated September 9, 2018, Dr. Willis set forth the following:

The mother was admitted to the hospital at 37 weeks gestational age in labor. A fetal heart rate (FHR) monitor tracing during labor was reviewed and showed no fetal distress. Delivery was by Cesarean section for arrest of dilation. Birth weight was 2,857 grams. Amniotic fluid was clear.

The baby was not depressed at birth. Apgar scores were 8/9. No resuscitation was required. Newborn physical exam states "Healthy Term Newborn." The baby failed the newborn hearing test in one ear. Newborn hospital course was otherwise uncomplicated and the baby was discharged home on DOL 2.

Hearing evaluation after hospital discharge identified hearing loss in one ear. Records also indicate the child had Torticollis and limited mobility. MRI at 7 months of age identified a small Arachnoid cyst, slightly increased extra axial fluid and a simple pineal cyst. There were mention of findings suggestive of hypoxic ischemic encephalopathy (HIE).

In summary, pregnancy was essentially uncomplicated. Cesarean section was done during labor for Arrest of Dilation. The baby was not depressed at birth with Apgar scores of 8/9. No resuscitation was required. The baby was discharged home on DOL 2. MRI at 7 months of age did not describe findings consistent with HIE.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma during labor, delivery or in the immediate post-delivery period.

3. Respondent's Motion also relies upon Dr. Willis's January 14, 2019, affidavit, wherein he affirms, to a reasonable degree of medical probability, the above-quoted findings and opinions from the report.

4. Respondent also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the medical records of Eleanor and her mother, conduct an Independent Medical Examination (IME) of Eleanor, and opine as to whether Eleanor suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury, as that term is defined in Section 766.302(2), Florida Statutes. Dr. Duchowny reviewed the medical records, obtained historical information

from Eleanor's mother, and performed an IME on November 28, 2018.

5. Respondent's Motion also relies upon the attached affidavit from Dr. Duchowny, dated January 14, 2019. In his affidavit, Dr. Duchowny testifies, as follows:

It is my opinion that:

In summary, Eleanor's examination reveals neurological findings consistent with a diagnosis of ataxic hypotonic cerebral palsy associated with sensorineural and conductive hearing losses. Eleanor has preserved social awareness. It is premature to adequately assess cognitive functioning although her speech output is obviously delayed. She evidences dysmorphism characterized by epicanthal folds and a saddle nasal bridge.

A review of the medical records does not disclose any significant risk factors during labor or delivery. Eleanor's Apgar scores were 8 and 9 at 1 and 5 minutes, and her post-natal course in the newborn nursery was unremarkable. MR imaging performed on April 26, 2018 revealed benign cysts of the right anterior temporal and pineal regions.

Based on today's evaluation and record review, I believe that Eleanor's neurological disabilities were acquired prior to birth and did not result from either oxygen deprivation or mechanical injury in the course of labor or delivery.

6. In his affidavit, Dr. Duchowny testifies that his opinions are to a reasonable degree of medical probability. A review of the file, including Petitioner's Response, reveals that no contrary evidence was presented to dispute the findings

and opinions of Drs. Willis and Duchowny. Their opinions are credited.^{1/}

CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. If Respondent 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, Respondent 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.

11. 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.

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

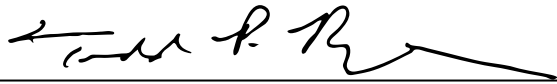
postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

13. The undisputed evidence establishes that there was not an injury to Eleanor's brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. Accordingly, Eleanor did not sustain a birth-related neurological injury as defined in section 766.302(2), Florida Statutes, 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 Respondent's Motion for Summary Final Order is granted, and Petitioner's claim is found and determined to not be compensable. The Petition is dismissed with prejudice.

DONE AND ORDERED this 9th day of April, 2019, 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 9th day of April, 2019.

ENDNOTE

^{1/} Indeed, Petitioner's Response is not supported by any evidence or affidavits. Petitioner's Response merely provides as follows: "Please consider this document a statement opposing the Respondent's Motion for Summary Final Order and additional request for trial date."

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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).