

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA JOSE MORALES CANNON, the
mother, and DAVID CANNON, the
father, on behalf of and as
parents and natural guardians of
MICHAEL CANNON, a minor,

Petitioners,

vs.

Case No. 18-4147N

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 November 30,
2018.^{1/} Petitioners did not file a response to the motion.

STATEMENT OF THE CASE

On July 23, 2018, 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 Makbib Diro, M.D., as the physician who provided obstetric
services at the birth of Michael Cannon (Michael) on June 27,
2017, at Jackson Memorial Hospital in Miami, Florida.

On August 10, 2018, DOAH mailed a copy of the Petition to Respondent, Dr. Diro, and Jackson Memorial Hospital by certified mail. Respondent was served with the Petition on August 14, 2018.

On November 21, 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. On November 26, 2018, the undersigned issued an Order Requiring Response, wherein the parties were ordered to confer and advise the undersigned as to the need for a final hearing.

On November 30, 2018, Respondent filed the instant Motion for Partial Summary Final Order. On December 5, 2018, Respondent filed its Response to Order of November 26, 2018, advising that it had conferred with Petitioners, and that Petitioners request a hearing. Petitioners, who are represented by counsel, did not file a response to Respondent's Motion for Partial Summary Final Order.

FINDINGS OF FACT

1. Michael was born on June 27, 2014, at Jackson Memorial Hospital. Michael was a twin, a multiple gestation, weighing over 2,000 grams at birth.

2. Respondent retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review the medical records of Michael and his mother, Petitioner Maria

Jose Morales Cannon, 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 postdelivery period due to oxygen deprivation or mechanical injury. In his report, dated September 10, 2018, Dr. Willis set forth the following, in pertinent part:

The mother was admitted to the hospital at about 32 weeks gestational age for steroids to enhance fetal lung maturity and intravenous MgSO₄ as neuroprotection to help reduce the risk for intracranial bleed. Her cervix was dilated one centimeter, 20% effaced and posterior, consistent with an unlabored cervix. Primary Cesarean section was done at 32 weeks as pre management plan for TTTS.^[2/1] Biophysical profiles (BPP) were 8/8 for both fetuses prior to delivery, indicating neither fetus was in distress. Fetal heart rate tracing was stated to be reactive, again suggesting no distress prior to delivery.

Michael Cannon was the larger of the twins, designated as twin A. Cesarean delivery was apparently uncomplicated. Birth weight was 2,090 grams. The baby was not depressed at birth. Apgar scores were 9/9/9. Essentially no resuscitation was required with only tactile stimulation and oral suctioning done after birth.

* * *

In summary, this child was born as twin A at 32 weeks gestational age. Delivery was by elective Cesarean selection. Birth weight was 2,090 grams. The mother was not in labor. Delivery was uncomplicated. The baby was not depressed at birth. Apgar scores were 9/9. No resuscitation was required. The initial platelet count was

decreased at 96,000. However, Intracranial hemorrhage would be unlikely with this platelet count. Head ultrasound and MRI were consistent with periventricular leukomalacia. Brain injury was most likely related to prematurity and not oxygen deprivation or trauma at birth.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma during labor, delivery or the immediate post-delivery period. Brain injury identified by head Ultrasound and MRI was more likely related to prematurity and not oxygen deprivation at birth.

3. In his affidavit, dated November 30, 2018, Dr. Willis affirms, to a reasonable degree of medical probability, the above-quoted findings and opinions from his report.

4. Respondent also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the pertinent medical records, conduct an Independent Medical Examination (IME) of Michael, and opine as to whether Michael 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 Michael's mother and aunt, and performed an IME on November 14, 2018.

5. Respondent's Motion for Partial Summary Final Order also relies upon the attached affidavit from Dr. Duchowny, dated November 28, 2018. In his affidavit, Dr. Duchowny testifies, in pertinent part, as follows:

In summary, MICHAEL's examination reveals neurological findings consistent with spastic diparetic cerebral palsy. He evidences dysarthric speech and refractory strabismus. Impairment primarily affecting his right upper extremity. In contrast, Michael has preserved cognitive function and social awareness.

Review of MICHAEL's medical records reveals that his mother's twin pregnancy was complicated by intrauterine growth retardation and polyhydramnios. Concern over absent diastolic blood flow in MICHAEL's twin brother prompted decision to deliver both twins at 32 weeks gestation. MICHAEL's APGAR scores were 9, 9, and 9 at 1, 5 and 10 minutes. MICHAEL remained in the Jackson Memorial Hospital NICU for 28 days and was treated for apnea of prematurity and retinopathy of prematurity. Hyperechoic periventricular regions were noted on head ultrasound studies in the NICU, and a follow-up MR imaging study on January 7, 2015, revealed findings compatible with periventricular leukomalacia.

Although MICHAEL has a substantial motor impairment, he is not currently evidencing a substantial cognitive impairment. I further believe that his neurological deficits are a consequence of prematurity and not acquired in the course of labor and delivery. I am therefore not recommending MICHAEL for consideration by the NICA program.

6. In his affidavit, Dr. Duchowny testifies that his opinions are to a reasonable degree of medical probability. A review of the file reveals that no contrary evidence was presented to dispute the findings and opinions of Drs. Willis and Duchowny. Their opinions are credited.

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.

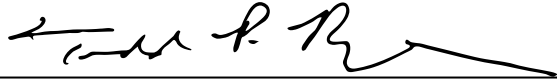
13. The undisputed evidence establishes that there was not an injury to Michael's brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. To the contrary, the unrefuted evidence establishes that his injury and deficits were a consequence of prematurity.

14. The undisputed evidence further establishes that Michael did not sustain a permanent and substantial mental impairment. Thus, he 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 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 10th day of January, 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 10th day of January, 2019.

ENDNOTES

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

^{2/} Twin-twin transfusion syndrome.

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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).