

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MS. CLAUDIA ANDRADE as parent
and natural guardian of NICOLE
ANGUIANO, a minor,

Petitioner,

vs.

Case No. 18-5041N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HOMESTEAD HOSPITAL, INC.,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned on Respondent's Motion for Partial Summary Final Order, filed May 1, 2019. In its Motion, the Florida Birth-Related Neurological Injury Compensation Association (NICA) asserts that in order for a claim to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), the statutory prerequisites of section 766.309, Florida Statutes, must be met, including:

- (1) The administrative law judge shall make the following determinations based upon all 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.

* * *

(2) If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, she or he shall enter an order . . . (emphasis supplied).

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

(2) "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. (emphasis added).

Petitioner did not file a response to NICA's motion within the allowable response period. However, due to the dispositive nature of the motion, on May 22, 2019, the undersigned entered an Order to Show Cause, affording Petitioner an additional opportunity to file a written response, should she so choose. Petitioner did not file a response to the Order to Show Cause.

FINDINGS OF FACT

1. On July 5, 2018, the Petitioner filed a Petition for Benefits pursuant to Florida Statute Section 766.301 et seq. for benefits pursuant to sections 766.301-766.316, Florida Statutes, otherwise known as the Plan.

2. The baby was born on October 13, 2014, at Homestead Hospital. The circumstances of the labor, delivery and birth of the minor child are reflected in the medical records of Homestead Hospital submitted with the Petition.

3. In the instant case, NICA has retained Donald Willis, M.D. as its medical expert specializing in maternal-fetal medicine pediatric neurology. Upon examination of the pertinent medical records, Dr. Willis opined:

Nursery notes indicate "patient with routine transition." Neurologic exam was normal. The baby was described as active, alert throughout the newborn hospital stay. Exam showed normal range of movement for all extremities. No EEG's or imaging studies were done prior to hospital discharge.

Subsequently the child was diagnosed with cerebral palsy with spastic hemiplegia and partial seizures. MRI at about 20-months of age showed Gilosis and encephalomalasia, likely related to old vascular injury.

4. Dr. Willis's medical reports dated October 23, 2018, and February 20, 2019 (which reviews additional medical records), are attached to his Affidavit, with the Affidavit being attached to the motion as Exhibit "1". His Affidavit reflects his ultimate opinion that:

In summary, the baby did not appear to be depressed at birth. Apgar scores were 9/9. Transition was stated to be routine. This does not appear to be a birth related brain injury. The additional medical records are in agreement with my opinion that the baby did not suffer a birth related injury.

5. In the instant case, NICA has retained Michael S. Duchowny, M.D. as it's medical expert in pediatric neurology. Upon examination of the child and the pertinent medical records, Dr. Duchowny opined:

NICOLE ANGUIANO's neurological evaluation reveals findings consistent with a mild-to-moderate right hemiparesis, in-toeing and circumducted gait, but stable and independent ambulation. She evidences delay in her expressive language development and a speech articulation deficit. There is a history of right-sided motor convulsions that are presently well-controlled.

Dr. Duchowny's medical Report is attached to his Affidavit, with the Affidavit being attached to the motion as Exhibit "2". His Affidavit reflects his ultimate opinion that:

I am not recommending NICOLE ANGUIANO for inclusion within the NICA program. I believe that her neurological injuries resulted from a prenatal stroke that predated labor and delivery. Furthermore, Nicole does not evidence substantial mental or motor impairments and thus does not have either a permanent substantial mental impairment nor a permanent substantial motor impairment.

6. The affidavits of Dr. Willis and Dr. Duchowny are the only evidence of record relating to the issue of whether the subject claim is compensable as defined by statute. As noted, Petitioner did not file a response to the motion, nor submit countervailing affidavits. The Petition, along with the Affidavits attached to the motion, establish that there are no genuine issues of material fact regarding the compensability of this claim.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings (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" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

9. An injured infant, his or her 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

10. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

11. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

“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 amultiple 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. (emphasis added).


12. If the administrative law judge determines that the infant meets the statutory threshold for weight and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result of the injury the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

13. In this case, the evidence does not support a finding that the injury is a birth-related neurological injury. This issue is dispositive with respect to compensability. Based upon this evidence, Nicole Anguiano did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law provided above, Petitioner's claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 28th day of June, 2019, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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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).