

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YUSLEIDIS SOTO, as parent and
natural guardian of SULEIDIS
LOPEZ SOTO, a minor,

Petitioner,

vs.

Case No. 19-0273N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ELIZA G. BRUSCATO, M.D.,
MARTHA J. KUFFSKIE, M.D., AND
ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on September 16, 2019.

STATEMENT OF THE CASE

On December 3, 2018, Petitioner, Yusleidis Soto, as parent and natural guardian of Suleidis Lopez Soto ("Suleidis"), 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 the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

Petitioner identified Cielo Gnecco, M.D., as the physician who provided obstetrical services at Suleidis's birth on May 27, 2017, at Orlando Health, Inc., d/b/a Winnie Palmer Hospital ("Winnie Palmer"), in Orlando, Florida.

DOAH served Dr. Gnecco with a copy of the Petition on January 24, 2019, and served Winnie Palmer that same date. NICA was also served with a copy of the Petition on January 24, 2019.

A Petition for Leave to Intervene was subsequently filed on behalf of Eliza G. Bruscato, M.D., and Maria J. Kuffskie, M.D., on February 28, 2019, which was granted. The Petition to Intervene alleged that Dr. Bruscato and Dr. Kuffskie provided the obstetrical services to Suleidis at her birth.

On September 16, 2019, NICA filed a Motion for Summary Final Order, requesting the administrative law judge enter an order finding that the claim was not compensable because Suleidis did not suffer a "birth-related neurological injury" as defined in section 766.302(2).

On September 23, 2019, the undersigned issued an Order to Show Cause as to why NICA's motion should not be granted. As of

the date of this Summary Final Order of Dismissal, Petitioner has not responded to either the Order to Show Cause or NICA's motion.

FINDINGS OF FACT

1. Suleidis was born on May 27, 2017, at Winnie Palmer located in Orlando, Florida.

2. Upon receiving a copy of the Petition, NICA retained Donald Willis, M.D., a board-certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Michael S. Duchowny, M.D., a pediatric neurologist, to review Suleidis's medical condition. NICA sought to determine whether Suleidis suffered a "birth-related neurological injury" as defined in section 766.302(2).

3. Specifically, NICA requested its medical experts opine whether Suleidis experienced an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury which occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period; and, if so, whether this injury rendered Suleidis permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Suleidis's medical records and described her birth as follows:

In summary, a reported monochorionic, diamniotic (identical twin) had a demise of one fetus at 31 weeks, followed by vaginal delivery of the surviving twin 4 weeks later. The baby was not depressed at birth.

Umbilical cord blood pH was 7.3. Newborn hospital course was uncomplicated. Although the birth weight was just under 2,500, this was a twin pregnancy.

Dr. Willis also noted that the baby was vigorous at birth, and no resuscitation was required.

5. Dr. Willis then opined, within a reasonable degree of medical probability, that:

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

6. Dr. Duchowny also reviewed Suleidis's medical records, as well as personally examined Suleidis on August 27, 2019.

Dr. Duchowny observed that:

Suleidis's neurological evaluation is consistent with substantial mental and motor impairment. She has spastic quadriplegic (double hemiparetic) cerebral palsy, oromotor incoordination, alternating esotropia, microcephaly, absence of receptive and expressive communication, and multiple pathologic reflexes. Her developmental level approximates that of a 2-3-month-old infant.

Review of the medical records reveals that Suleidis was born vaginally at Winnie Palmer Hospital at 36 weeks' gestation via spontaneous vaginal delivery. Apart from fetal demise of Twin B at [31] weeks' gestation, the pregnancy was further complicated by maternal sickle cell trait and chorioamnionitis (maternal temp = 100.8 F.) Rupture of the membranes 8 hours before delivery yielded thick meconium-stained fluid. Suleidis weighed 2480 grams (5 pounds 7 oz.) and had Apgar scores of 8 and 9 at 1

and 5 minutes. An arterial cord gas was 7.30. Her neonatal course was unremarkable with normal voiding, stooling and breast-feeding.

7. Following his independent medical examination, Dr. Duchowny diagnosed Suleidis with cerebral palsy. He further opined, within a reasonable degree of medical probability, that Suleidis's "neurological impairments are permanent and substantial." However, he concluded that her injuries "were acquired in utero and did not result from intrapartum oxygen deprivation or mechanical injury." Therefore, he did not recommend that Suleidis be included in the NICA Plan.

8. A review of the records filed in this matter reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Duchowny. Their opinions are credible and persuasive.

9. Based on the conclusions of Dr. Willis and Dr. Duchowny, NICA determined that Petitioner's claim is not compensable. NICA subsequently filed the Motion for Summary Final Order asserting that Suleidis has not suffered a "birth-related neurological injury" as defined by section 766.302(2). Petitioner has not filed a response to NICA's motion.

CONCLUSIONS OF LAW

10. The undersigned, as an administrative law judge, has exclusive jurisdiction over the subject matter of this proceeding. § 766.304, Fla. Stat.

11. 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.

12. 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.

13. 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.

14. In this matter, however, NICA determined that Petitioner's claim is not compensable under the Plan. Therefore,

NICA filed a Motion for Summary Final Order requesting entry of such a ruling.

15. In considering 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).

16. 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.

17. "The [NICA] Statute is written in the conjunctive and can only be interpreted to require permanent and substantial

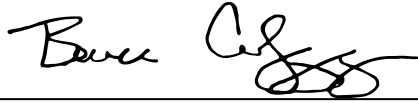
impairment that has both physical and mental elements." Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997).

18. The undisputed evidence establishes that Suleidis did not sustain a "birth-related neurological injury" as defined in section 766.302(2). Both Dr. Willis and Dr. Duchowny conclude that Suleidis's injury did not occur during labor, delivery, or resuscitation in the immediate postdelivery period. Dr. Duchowny did find that Suleidis suffers from a permanent and substantial motor and neurological impairment. However, he determined that Suleidis's medical condition occurred prior to her birth and not during the period of time that would entitle Suleidis to participate in the NICA Plan. Therefore, based on all the evidence in the record, Suleidis 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 9th day of October, 2019, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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).