

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KODEY CALIRI AND RACHEL TEAGUE,
INDIVIDUALLY AND AS PARENTS AND
NEXT FRIENDS OF ADALYNN CALIRI, A
MINOR,

Petitioners,

vs.

Case No. 19-3664N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on April 17, 2020.

STATEMENT OF THE CASE

On June 28, 2019, Petitioners, Kodey Caliri and Rachel Teague, on behalf of and as parents and natural friends of Adalynn Caliri (Adalynn), 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 Gary Easterling, M.D., as the physician who provided obstetric services at the birth of Adalynn on April 24, 2018, at Sarasota Memorial Hospital located in Sarasota County, Florida.

DOAH served Gary Easterling, M.D., and Sarasota Memorial Hospital with copies of the Petition on July 17, 2019. DOAH served NICA with a copy of the Petition on July 17, 2019.

On October 14, 2019, NICA filed a Response to Petition for Benefits, asserting that Adalynn did not sustain a “birth-related neurological injury” as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. On October 31, 2019, the undersigned entered an Order requiring the parties to confer and advise as to the need for a hearing, when they would be prepared to proceed to hearing, the issue(s) still in dispute, their estimate of the time required for hearing, and their choice of venue. Based on NICA’s December 2, 2019, Status Report, the undersigned entered a Notice of Hearing by Video Teleconference, setting a hearing to determine compensability on April 28 and 29, 2020, by video teleconference in Tallahassee and Sarasota, Florida.

On March 4, 2020, NICA filed a Supplemental Status Report, which stated that it had conferred with counsel for Petitioners, and further stated that Petitioners no longer requested a hearing on compensability. The Supplemental Status Report further stated that NICA would file a Motion for Summary Final Order for a determination of Compensability.

On April 17, 2020, NICA filed an Unopposed Motion for Summary Final Order, which noted, *inter alia*, that Petitioners do not oppose the Unopposed Motion for Summary Final Order and do not intend to rebut the opinions of NICA’s experts.

FINDINGS OF FACT

1. Adalynn was born on April 24, 2018, at Sarasota Memorial Hospital, located in Sarasota County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Adalynn. In a medical report dated September 5, 2019, Dr. Willis summarized his findings and opined in pertinent part as follows:

In summary, labor was complicated by FHR decelerations requiring Cesarean delivery. Umbilical artery cord pH was 7.12 with a base excess of -7.8, suggesting a significant oxygen deprivation did not occur during labor or delivery. Apgar scores were 3/9. The baby was stabilized in the delivery room on room air and transferred to the MBU. The baby apparently remained stable until about 7 to 12 hours after birth when the baby was noted to be fussy, poor feeding and with increased muscle tone. Seizure activity was noted on the EEG and MRI was consistent with HIE.

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 that would have resulted in brain injury. Brain injury did occur as some time after birth, as documented by EEG and MRI. However, medical records do not suggest the brain injury was birth related.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a Board-certified pediatric neurologist, to examine Adalynn and to review her medical records. Dr. Duchowny examined Adalynn on September 24, 2019. In a medical report dated September 27, 2019, Dr. Duchowny summarized his examination of Adalynn and opined in pertinent part as follows:

In SUMMARY, Adalynn's neurological examination reveals global delay. She has four-limb static hypotonia and dynamic hypertonia with spasticity, hyperreflexia, left exotropia, microcephaly, absent communication, pseudobulbar affect and an in-dwelling gastrostomy. There is a history of seizures that are presently controlled on two anti-seizure medication[s].

A review of medical records further reveals that Adalynn was the product of a term pregnancy and delivery by urgent caesarian section. Her Apgar scores were 3 and 9 at 1 and 5 minutes. Venous umbilical cord blood gases were pH of 7.21 and base excess of - 7.4. She did not require resuscitation and was stable on room air. Liver function tests were elevated but there were no other indications of systemic organ involvement. Seizures commenced at 12 hours of age and were treated with phenobarbital and phytoin. Increased lactic acid was noted.

Adalynn was noted to be hypertonic at birth. MR imaging performed on April 27th (DOL#3) revealed increased signal in the bi-occipital regions and cerebral peducles. A subsequent MRI performed on May 3rd demonstrated increased signal in sensorimotor cortex, centrum semiovale, symmetric globus pallidus, putamen and occipital cortex as well as the pons and cerebral peduncles. MR spectroscopy revealed widespread signal increases in hemispheric grey and white matter.

Based on the imaging findings, microcephaly, developmental delay and increased lactate, metabolic and genetic studies were undertaken and revealed multiple abnormalities. Although a definitive diagnosis has not yet been obtained, the genetic abnormalities in Adalynn's mitochondrial genome are the most likely explanation for her neurological disability, imaging and laboratory values and clinical presentation.

Based on today's evaluation and medical record review, I am not recommending that Adalynn be considered for inclusion in the NICA program.

4. On February 14, 2020, Dr. Duchowny provided an addendum to his prior opinion, following the review of additional medical records provided by Petitioners, which included the results of genetic testing. Dr. Duchowny opined that this additional information "further supports the original

recommendation that Adalynn should not be considered for inclusion into NICA.”

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that there was no apparent obstetrical event that resulted in loss of oxygen to Adalynn's brain during labor, delivery, and the post-delivery period which resulted in brain injury. Dr. Willis’ opinion is credited. There are no expert opinions filed that are contrary to Dr. Duchowny’s opinion that Adalynn should not be considered for inclusion in the NICA program. Dr. Duchowny’s opinion is credited.

6. Dr. Willis reaffirmed his opinions in an affidavit, dated March 20, 2020. Dr. Duchowny reaffirmed his opinions in an affidavit dated April 17, 2020.

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 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.

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 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. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

11. In discharging this responsibility, 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. 766.303(2).

(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.

§ 766.309(1), Fla. Stat. An award may be sustained only if the administrative law judge concludes that the “infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth.” § 766.31(1), Fla. Stat.

12. Section 766.302(2) defines the term “birth-related neurological injury” 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. To be compensable under the NICA Plan, there must have been an obstetrical event, which resulted in loss of oxygen to the baby's brain during labor, delivery, or resuscitation in the immediate post-delivery period resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

14. The evidence, which is not refuted, established that Adalynn did not suffer a birth-related neurological injury. Therefore, Adalynn is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED that:

The Petition filed by Kodey Caliri and Rachel Teague, individually and as parents and next friends of Adalynn Caliri, is dismissed with prejudice.

DONE AND ORDERED this 30th day of April, 2020, in Tallahassee, Leon
County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2020.

COPIES FURNISHED:
(via certified mail)

Allison C. McMillen, Esquire
McMillen Law Firm, P.A.
Suite 105
163 East Morse Boulevard
Winter Park, Florida 32789
(eServed)
(Certified No. 7019 2280 0001 7689 4606)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified No. 7019 2280 0001 7689 4613)

Brooke M. Gaffney, Esquire
Smith, Stout, Bigman & Brock, P.A.
Suite 900
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(eServed)
(Certified No. 7019 2280 0001 7689 4620)

Elizabeth A. Myers, Esquire
Smith, Stout, Bigman & Brock, P.A.
Suite 900
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(eServed)
(Certified No. 7019 2280 0001 7689 4637)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7019 2280 0001 7689 4644)

Mary C. Mayhew, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified No. 7019 2280 0001 7689 4651)

Gary Easterling, M.D.
Suite 203
1950 Arlington Street
Sarasota, Florida 34239
(Certified No. 7019 2280 0001 7689 4668)

Sarasota Memorial Hospital
Attention: Risk Management
1700 South Tamiami Trail
Sarasota, Florida 34239
(Certified No. 7019 2280 0001 7689 4682)

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).