

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JATEN PERCOCO AND SARAH PERCOCO,
AS PARENTS AND NATURAL GUARDIANS
OF MICAH ANTHONY PERCOCO, A MINOR,

Petitioners,

vs.

Case No. 19-4601N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

Allyson Victoria Jones, M.D.; Faith
Carlin, M.D.; Women's Care Florida;
And Galencare, Inc., D/B/A Brandon
Regional Hospital,

Intervenors.

SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on a Motion for Partial Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), on February 25, 2020.

STATEMENT OF THE CASE

On August 23, 2019, Jaten Percoco and Sarah Percoco, as parents and natural guardians of Micah Anthony Percoco (“Micah”), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the “Petition”) with the Division of Administrative Hearings (“DOAH”) for a

determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the “Plan”).

The Petition identified Allyson Victoria Jones, M.D., as the physician who provided obstetrical services at Micah’s birth on May 18, 2019, at Galencare, Inc. d/b/a Brandon Regional Hospital (“Brandon Hospital”) in Brandon, Florida.

DOAH served Dr. Jones with a copy of the Petition on September 11, 2019, and served Brandon Hospital that same date. DOAH also served NICA with a copy of the Petition on September 11, 2019.

Dr. Jones, as well as Faith Carlin, M.D., and Women’s Care Florida, moved to intervene in this matter on October 1, 2019, which was granted. Brandon Hospital also moved to intervene on October 10, 2019, which was also granted.

On January 28, 2020, NICA filed its response to the Petition, taking the position that Petitioners’ claim is not compensable under the Plan. NICA requested DOAH schedule a hearing to determine compensability.

On February 25, 2020, NICA filed a Motion for Partial Summary Final Order requesting the Administrative Law Judge enter a summary final order finding the claim not compensable under the NICA statute because Micah did not suffer a “birth-related neurological injury” as defined in section 766.302(2).

FINDINGS OF FACT

1. Micah was born on May 18, 2019, at Brandon Hospital located in Brandon, Florida.

2. The Petition alleges that Victoria Jones, M.D., was the delivering physician for Micah's birth. No evidence was presented to DOAH regarding whether Dr. Jones was a "participating physician" under the Plan at the time Micah was born. *See* § 766.302(7), Fla. Stat.

3. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review Micah's medical records and condition. NICA sought to determine whether Micah suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Micah 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 post-delivery period. And, if so, whether this injury rendered Micah permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Micah's medical records and noted:

In summary, vaginal delivery was complicated by a shoulder dystocia with a duration greater than 5-minutes. The baby was depressed at birth with Apgar scores of 0/2/3, requiring chest compressions and intubation. The newborn hospital course was complicated by multi-system organ failures, consistent with birth-related oxygen deprivation. Hypoxic ischemic brain injury was identified on head MRI.

There was apparent obstetrical event (shoulder dystocia) that resulted in oxygen deprivation to the brain during delivery and continuing into the immediate post-delivery period. The oxygen deprivation resulted in brain injury.

Dr. Willis concluded, "I am unable to comment as to the extent of the brain injury."

5. Dr. Bella-Espinosa, on the other hand, did comment on the extent of Micah's brain injury. Dr. Bella-Espinosa reviewed Micah's medical records, and conducted an independent medical examination of Micah on January 24, 2020. Dr. Bella-Espinosa opined, within a reasonable degree of medical probability:

Micah is an Eight-month boy with a history of hypoxic ischemic encephalopathy of birth. He did have well established immediate postnatal encephalopathy, but he did not have neonatal seizures despite MRI changes which were indicative of hypoxic-ischemic insult[.] His neurological examination, except for mild residual right arm decreased tone, was normal, with no evidence of encephalopathy, myelopathy, neurogenic or myopathic processes.

Micah is found not to have a substantial physical and mental impairment at this time.

In review of all the available documents, the mild decreased tone on the right arm is indicative of residual changes as a result of the shoulder dystocia. This type of injury is birth related, but he is expected to recover most of his right arm function.

The prognosis of full recovery is excellent. Estimated life expectancy should be normal.

* * *

Considering the clinical presentation and progression, I feel that there is not enough evidence to recommend Micah be included in the NICA program.

6. A review of the file reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Bella-Espinosa. Their opinions are credible and persuasive.

7. Based on the statements from Dr. Willis and Dr. Bella-Espinosa, NICA determined that Petitioners' claim was not compensable. NICA subsequently filed a Motion for Partial Summary Final Order asserting that Micah did not suffer a "birth-related neurological injury" as defined by section 766.302(2). As of the date of this Order, Petitioners have not responded to NICA's motion.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge, has "exclusive jurisdiction to determine whether a claim filed under [NICA] is compensable." §§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stats.

9. The Florida Legislature established the Plan "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

10. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) 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.

11. 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.

12. In this matter, however, NICA determined that Petitioners' claim is not compensable under the Plan. Therefore, NICA filed the Motion for Partial Summary Final Order, requesting an order be entered finding the claim not compensable.

13. In reviewing the compensability of a claim, section 766.309(1) directs the Administrative Law Judge to make the following determinations based upon the 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; and

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

14. The term “birth-related neurological injury” is defined in section 766.302(2) as:

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation . . . 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.

15. “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).

16. In reviewing the injury in this matter, the preponderance of the evidence does not establish that Micah sustained a “birth-related neurological injury” as defined in section 766.302(2). Dr. Willis, other than

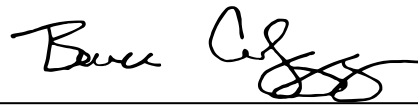
concluding that Micah did experience a birth-related injury, did not comment on the extent of any possible brain injury. Dr. Bella-Espinosa, on the other hand, credibly opined that Micah currently only suffers from a mild decreased tone on his right arm, and is expected to recover most of his right arm function. Dr. Bella-Espinosa further noted that Micah's neurological examination was normal, with "no evidence of encephalopathy, myelopathy, neurogenic or myopathic processes." Dr. Bella-Espinosa concluded that Micah has an excellent chance of full recovery from his birth-related injuries. Based on these statements, the evidence does not support a finding that Micah suffers from a "substantial" mental and physical impairment.

17. Therefore, based on the available evidence in the record, the undersigned determines that Micah 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 13th day of March, 2020, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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 13th day of March, 2020.

COPIES FURNISHED:
(via certified mail)

Jaten Percoco
Sarah Percoco
1327 Oak Valley Drive
Seffner, Florida 33584
Certified Mail No. 7011 3500 0003 3840 6339

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
Certified Mail No. 7011 3500 0003 3840 6346

Mark R. Messerschmidt, Esquire
La Cava & Jacobson, PA
Suite 1250
501 East Kennedy Boulevard
Tampa, Florida 33602
(eServed)
Certified Mail No. 7011 3500 0003 3840 6353

Gabrielle Osborne, Esquire
Beytin, McLaughlin, McLaughlin,
O'Hara, Kinman & Bocchino, P.A.
1706 East Eleventh Avenue
Tampa, Florida 33605
(eServed)
Certified Mail No. 7011 3500 0003 3840 6360

Tana D. Storey, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)
Certified Mail No. 7011 3500 0003 3840 6377

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(eServed)
Certified Mail No. 7011 3500 0003 3840 6384

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
Certified Mail No. 7011 3500 0003 3840 6391

Mary C. Mayhew, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
Certified Mail No. 7011 3500 0003 3840 6407

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).