

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JORDYN DAVIS AND CODY DUNLAP, ON  
BEHALF OF AND AS PARENTS AND  
NATURAL GUARDIANS OF EMBERLYN  
DUNLAP, A MINOR,

Case No. 20-0296N

Petitioners,

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

SAMIR MOHAMMAD SHAKFEH, M.D., AND  
HCA HEALTH SERVICES OF FLORIDA, INC.  
D/B/A OAK HILL HOSPITAL,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on the unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), on August 19, 2020.

STATEMENT OF THE CASE

Whether Emberlyn Dunlap (“Emberlyn”) suffered a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes (2019),<sup>1</sup> for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

<sup>1</sup> All references to the Florida Statutes are to the 2019 versions, unless otherwise specified.

PRELIMINARY STATEMENT

On January 10, 2020, Petitioners Jordyn Davis and Cody Dunlap, on behalf of and as parents and natural guardians of Emberlyn, a minor, filed a Petition for Benefits with the Florida Division of Administrative Hearings (“DOAH”). Petitioners filed the Petition under protest to establish that Emberlyn did not suffer a compensable “birth-related neurological injury,” that timely and appropriate NICA notice was not provided, and that, accordingly, Emberlyn is ineligible for NICA benefits.

The Petition named Samir Mohammad Shakfeh, M.D., as the obstetrician who delivered Emberlyn on January 19, 2019, and HCA Health Services of Florida, Inc., d/b/a Oak Hill Hospital (“Hospital”), as the hospital where Emberlyn was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Shakfeh, and the Hospital on January 29, 2020.

On February 11, 2020, Dr. Shakfeh moved to intervene in this proceeding and amended that motion on February 13, 2020. The undersigned granted Dr. Shakfeh’s amended motion on February 14, 2020. On February 24, 2020, the Hospital moved to intervene in this proceeding and amended its motion on February 26, 2020. The undersigned granted the Hospital’s amended motion on February 27, 2020.

After receiving two extensions of time, NICA filed its Response to the Petition for Benefits on July 16, 2020. The Response asserted that the claim was not compensable because, although Emberlyn suffered a brain injury caused by an oxygen deprivation event during labor, delivery, and the immediate post-delivery period, it did not cause permanent and substantial physical and mental impairment.

On July 31, 2020, the undersigned held a pre-hearing conference, at which all parties agreed that Emberlyn did not suffer a compensable birth-related neurological injury and that the case should be resolved by summary final order. On August 19, 2020, NICA filed its unopposed Motion for Summary Final Order (“Motion”). On September 8, 2020, NICA filed supporting affidavits and reports of two medical experts, Donald C. Willis, M.D., an obstetrician, and Luis Bello-Espinosa, M.D., a pediatric neurologist.

#### FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Emberlyn.
2. On January 19, 2019, Ms. Davis gave birth to Emberlyn, a single gestation of 38 weeks, at the Hospital. Emberlyn was delivered by spontaneous vaginal birth and weighed 2,530 grams.
3. Samir Mohammad Shakfeh, M.D., provided obstetrical services and delivered Emberlyn.
4. The undisputed evidence in the record consists of affidavits and reports of two physicians—Dr. Donald Willis, a board-certified obstetrician, and Dr. Luis Bello-Espinosa, a board-certified pediatric neurologist who conducted an independent medical examination (“IME”) of Emberlyn.
5. Dr. Willis reviewed the medical records and summarized his opinions about Emberlyn’s delivery and the attendant complications in a report, dated February 23, 2020.
6. According to Dr. Willis, Ms. Davis’s pregnancy was uncomplicated until just before her delivery when an ultrasound suggested fetal growth delay. At that point, Ms. Davis was admitted to the Hospital for induction of labor.
7. The labor was complicated by recurrent episodes of variable fetal heart rate decelerations with the development of rebound tachycardia prior to delivery and a maternal fever of 102.3 degrees. Emberlyn’s low birth weight was consistent with fetal growth delay or small-for-gestational age.

8. Emberlyn was depressed at birth, limp, and without respiratory effort. The Hospital administered bag and mask ventilation for about 30 seconds, after which Emberlyn began spontaneous respiratory effort. Her APGAR scores were four at one minute, five at five minutes, and eight at ten minutes.

9. About 30 minutes after birth, Emberlyn showed decreased perfusion and tone with grunting. She began suffering seizures that day and her arterial blood gas showed metabolic acidosis. On day four, an MRI showed restricted diffusion consistent with a hypoxic brain injury.

10. Based on the medical records, Dr. Willis opined to a degree of medical probability that an obstetrical event resulting in oxygen deprivation to the brain occurred during labor, delivery, and continuing into the immediate post-delivery period. Dr. Willis further opined that the oxygen deprivation event caused brain injury, though he could not comment on the severity.

11. Dr. Bello-Espinosa reviewed the medical records, conducted an IME on Emberlyn, and summarized his opinions in a report, dated July 10, 2020, as to whether Emberlyn suffers from permanent and substantial mental and physical impairment caused by an oxygen deprivation event.

12. After being diagnosed with small-for-gestational age, perinatal depression, respiratory distress, and metabolic acidosis, Emberlyn was transferred to Johns Hopkins Children's Hospital. On day one, she suffered episodes of apneas and developed hyponatremia, hypocalcemia, and hypomagnesemia. On day two, Emberlyn exhibited left-sided rhythmic jerking of her arm and leg with simultaneous twitching of her left face, which lasted about five minutes. Dr. Bello-Espinosa confirmed that the MRI taken on day four showed restricted diffusion in the brain most likely secondary to ischemic injury.

13. Thereafter, Emberlyn remained stable until her discharge on January 30, 2019. A developmental evaluation performed the day after her discharge found that Emberlyn was at high risk for developmental delay due to hypoxic ischemic encephalopathy and seizures. Since her discharge, she

has not suffered any seizure activity and has not been on anti-seizure medication since she was seven months old.

14. On February 6, 2019, a follow-up MRI found that the previous areas of restricted diffusion were no longer visualized. Though subtle changes in right frontal and left temporal occipital regions existed, the diffusion changes noted in the first MRI spared the basal ganglia, posterior limbs of the internal capsule, and the cerebellum.

15. Dr. Bello-Espinosa conducted an IME on July 10, 2020. Emberlyn was small for her age, but she appeared well-developed and well-nourished. She was alert, tracked, had very good attention, and was able to follow simple directions. Her neurological, motor, and sensory examinations were normal.

16. Based on the medical records and his IME, Dr. Bello-Espinosa opined to a degree of medical probability that Emberlyn does not suffer from permanent and substantial mental or physical impairment.

#### CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the parties and exclusive jurisdiction over the subject matter of this case. § 766.304, Fla. Stat.

18. The Legislature established the Plan “for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims” occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

19. 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. NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response and to submit relevant written information as to whether the injury is a birth-related neurological injury. § 766.305(4), Fla. Stat.

20. If NICA determines that the infant suffered a compensable birth-related neurological injury, it may award compensation to the claimants, as

approved by the assigned administrative law judge (“ALJ”). § 766.305(7), Fla. Stat. But, if NICA disputes the claim, as it does here, the dispute must be resolved by the ALJ in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

21. In determining compensability, the ALJ must 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 post delivery 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 post delivery period in a hospital.

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

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat.

22. The term “birth-related neurological injury” is defined as follows:

[I]njury 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 post delivery 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.

§ 766.302(2), Fla. Stat. Thus, a “birth-related neurological injury” has four components: “(1) an injury to the brain or spinal cord; (2) which is caused by oxygen deprivation or mechanical injury; (3) during labor, delivery, or resuscitation in the immediate postdelivery period; and (4) which renders the infant permanently and substantially impaired.” *Bennett v. St. Vincent’s Med. Ctr., Inc.*, 71 So. 3d 828, 837 (Fla. 2011).

23. Petitioners have the burden to establish by a preponderance of the evidence “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.” § 766.309(1)(a), Fla. Stat.; see also § 120.57(1)(j), Fla. Stat. (providing that findings of fact, except in penal and licensure disciplinary proceedings or as provided by statute, “shall be based upon a preponderance of the evidence”); *Balino v. Dep’t of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (holding generally that “the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.”).

24. If Petitioners meet their burden, section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. Conversely, if Petitioners do not meet their burden, the undersigned is required to issue an order dismissing the petition. *Id.*

25. Based on the Findings of Fact above, the undisputed evidence establishes that, although Emberlyn sustained a brain injury caused by oxygen deprivation during labor, delivery, and the immediate post-delivery period, the brain injury did not render her permanently and substantially mentally and physically impaired. Thus, Emberlyn did not suffer a “birth-related neurological injury.” § 766.302(2), Fla. Stat.

26. Accordingly, based on the Findings of Fact above and the undisputed evidence, Emberlyn is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioners' claim is not compensable under the Plan, NICA's Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

Done And Ordered this 30th day of October, 2020, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
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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).