

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER ANN MUNGILLO, INDIVIDUALLY
AND COLTON SUMMERLIN, INDIVIDUALLY,
AND AS NATURAL PARENTS AND
GUARDIANS OF KYLIE LEIGH SUMMERLIN,
A MINOR AND KINLEY ANN SUMMERLIN, A
MINOR,

Petitioners,

Case No. 20-1440N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

LEE MEMORIAL HEALTH SYSTEM RAVI
CHOKSHI, M.D.; JOSEPH F. LANG; CHARLES
BURLISON, M.D.; OB HOSPITALIST GROUP,
LLC; MEDNAX, INC.; MEDNAX SERVICES,
INC.; PEDIATRIX MEDICAL GROUP, INC.;
PEDIATRIX MEDICAL GROUP OF FLORIDA,
INC.; JUDITH KRAMMER, M.D.; AND BENJA,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Amended Unopposed Motion for Final Summary Order as to the Claim of Kinley Ann Summerlin (Respondent's Amended Motion), filed May 18, 2021.

STATEMENT OF THE CASE

On March 13, 2020, Petitioners, Jennifer Ann Mungillo and Colton Summerlin, individually and as natural parents and guardians of Kinley Ann

Summerlin (Kinley), 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 Ravi Chokshi, M.D. and Charles K. Burlison, M.D., as the physicians who provided obstetric services for the birth of Kinley at HealthPark Medical Center, in Fort Myers, Florida, on September 18, 2017.

On March 26, 2020, DOAH mailed a copy of the Petition to Respondent, Drs. Burlison and Chokshi, and HealthPark Medical Center via certified mail. Respondent was served with the same on March 27, 2020.

On June 10, 2020, Lee Memorial Health System¹ and Dr. Chokshi jointly filed a Petition for Leave to Intervene, which was granted. On June 10, 2020, Joseph F. Lang, M.D.; Charles Burlison, M.D.; and OB Hospitalist Group, LLC jointly filed a Petition for Leave to Intervene, which was granted.

On August 17, 2020, Respondent filed its Response to Petition for Benefits, wherein Respondent maintained that the claim was not compensable because Kinley did not sustain a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes. Respondent requested that a bifurcated hearing be scheduled to address the issues of compensability and notice first, and, if required, to address the amount of an award in a second hearing. On August 27, 2020, the undersigned issued an Order Requiring Response directing the parties to communicate and advise whether a final hearing would be required; and, if so, an estimate of the time required to conduct the hearing and several mutually agreeable dates to conduct the hearing.

¹ Lee Memorial Health System n/k/a Lee Health owns and operates HealthPark Medical Center.

The parties filed a Joint Status Report, and, on October 2, 2020, the final hearing was noticed for January 19 and 20, 2021. Thereafter, the parties engaged in significant discovery and, on December 23, 2020, requested a continuance of the hearing. The continuance was granted and the final hearing was rescheduled for February 25 and 26, 2021.

On February 17, 2021, Respondent filed its Unopposed Motion to Cancel Final Hearing, which was granted. On March 10, 2021, Respondent's Unopposed Motion for Summary Final Order was filed; however, the same was denied, without prejudice on April 23, 2021. Respondent's Amended Motion was filed on May 18, 2021.

FINDINGS OF FACT

1. Kinley was born on September 18, 2017, at HealthPark Medical Center, in Fort Myers, Florida.

2. Kinley was a twin, and her weight at birth exceeded 2,000 grams.

3. As set forth in greater detail below, the unrefuted evidence establishes that Kinley did not sustain a "birth-related neurological injury," as defined by section 766.302(2).

4. Donald Willis, M.D., a board-certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Ms. Mungillo and Kinley and opine as to whether Kinley sustained an injury to her brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred during the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

5. Dr. Willis conducted the review and in his supporting affidavit provides as follows:

Based upon my education, training, and experience, it is my professional opinion, within a reasonable degree of medical probability, that there was no

apparent obstetrical event that resulted in oxygen deprivation and/or mechanical trauma to the brain or spinal cord during labor, delivery, or in the immediate post-delivery period.

6. Respondent also retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review the medical records of Ms. Mungillo and Kinley, and to conduct an Independent Medical Examination (IME) of Kinley. The purpose of his review and IME was to determine whether Kinley suffered from a permanent and substantial mental and physical impairment as a result of an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

7. Dr. Bello-Espinosa reviewed the pertinent medical records and, on August 15, 2020, conducted the IME. In his supporting affidavit, he summarized his opinions as follows:

Based on my education, training, and experience, it is my professional opinion, within a reasonable degree of medical probability that Kinley Summerlin has no substantial or permanent mental impairment and no substantial or permanent physical impairment. There is no evidence to indicate that Kinley has any residual neurological impairments that occurred during labor, delivery, or the immediate post-delivery period.

8. The undisputed and unopposed findings and opinions of Drs. Willis and Bello-Espinosa are credited. The undersigned finds that Kinley did not sustain an injury to the brain or spinal cord 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 rendered her permanently and substantially mentally and physical impaired.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

10. The Plan was established by the Legislature “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.

11. 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. Respondent, 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.

12. If Respondent determines that the injury alleged is a claim that 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 (ALJ) to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, compensability is disputed, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

13. In discharging this responsibility, in the matter’s present posture, the ALJ is required to make the following threshold 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).

§ 766.309(1), Fla. Stat.

14. 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.

15. If the ALJ determines that the injury is not a birth-related neurological injury, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

16. The undisputed and unopposed evidence establishes that there was not an injury to Kinley’s brain 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 rendered her permanently and substantially mentally and physically impaired. Thus, it is concluded that she did not sustain a compensable birth-related neurological injury, as defined in section 766.302(2), and, therefore, is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED that Respondent's Amended Motion is granted and the Petition is dismissed with prejudice.

DONE AND ORDERED this 4th day of June, 2021, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of June, 2021.

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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).