

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOTT STUBBS AND JESSICA STUBBS, ON
BEHALF OF AND AS PARENTS AND
NATURAL GUARDIANS OF SCOTT STUBBS,
JR., A MINOR,

Petitioners,

vs.

Case No. 20-2119N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

GALENCARE, INC., D/B/A BRANDON
REGIONAL HOSPITAL; JULIA KING, D.O.
AND WOMEN'S CARE FLORIDA; AND
KAREM ALVAREZ, M.D.,

Intervenors.

_____ /

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 June 11, 2020.

STATEMENT OF THE CASE

On April 27, 2020, Scott Stubbs and Jessica Stubbs, on behalf of and as parents and natural guardians of Scott Stubbs, Jr. (“Scott”), a minor, filed a Petition for Benefits Filed 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 Karem Alvarez, M.D., Julia King, D.O., and Camille Christelle Imbo-Nlogo, M.D., as the physicians who provided obstetrical services at Scott’s birth on September 14, 2019, at Galencare, Inc., d/b /a Brandon Regional Hospital (“Brandon Hospital”), in Brandon, Florida.

DOAH served Dr. Alvarez, Dr. King, and Dr. Imbo-Nlogo with a copy of the Petition on May 7, 2020, and served Brandon Hospital that same date. DOAH also served NICA with a copy of the Petition on May 7, 2020.

Brandon Hospital moved to intervene in this matter on May 14, 2020, which was granted. Also moving to intervene were Dr. King on May 14, 2020, and Dr. Alvarez on June 17, 2020 (both of which were granted).

On September 4, 2020, NICA filed its response to the Petition, taking the position that Petitioners’ claim is not compensable under the Plan. NICA requested DOAH schedule an evidentiary hearing to determine compensability.

On September 21, 2020, NICA filed a Motion for Summary Final Order requesting the Administrative Law Judge (“ALJ”) enter a summary final order finding the claim not compensable under the NICA statute because Scott did not suffer a “birth-related neurological injury” as defined in section 766.302(2), Florida Statutes. On November 17, 2020, NICA filed a status update with DOAH representing that the Intervenors do not oppose NICA’s motion. NICA further relayed that Petitioners, on the other hand, do oppose NICA’s motion; however, Petitioners did not intend to file a response in opposition to the motion.

FINDINGS OF FACT

1. Scott was born on September 14, 2019, at Brandon Hospital located in Brandon, Florida.

2. The Petition alleges that Karm Alvarez, M.D., Julia King, D.O., and Camille Christelle Imbo-Nlogo, M.D., provided obstetrical services at Scott's birth.¹

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 Scott's medical records and condition. NICA sought to determine whether Scott suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Scott 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 Scott permanently and substantially mentally and physically impaired.

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

The mother was admitted to the hospital at 36 weeks for induction of labor due to severe Preeclampsia.

* * *

The baby was depressed at birth. ... The baby was floppy and cyanotic at birth with an initial heart rate < 100 bpm. Bag and mask ventilation was started with good response. The baby was taken to the nursery on oxygen.

* * *

¹ No evidence was presented to the undersigned regarding whether these doctors were "participating physicians" under the Plan at the time Scott was born. *See* § 766.302(7), Fla. Stat.

Neurologic exam was abnormal after birth and with no improvement and the abnormal [arterial blood gas], cooling protocol was initiate for suspected hypoxic-ischemic encephalopathy (HIE).

* * *

The newborn hospital course was complicated by respiratory distress, elevated liver functions and mild thrombocytopenia Head Ultrasound after birth was normal. Continuous EEG during the initial 4 days of life was reported as normal. MRI on DOL 7 was reported as normal.

* * *

There was an apparent obstetrical event that resulted in oxygen deprivation during labor, delivery and continuing into the immediate post-delivery period. Fortunately, the oxygen deprivation does not appear to have resulted in brain injury, based on a normal MRI on DOL 7.

5. Dr. Willis concluded, within a reasonable degree of medical probability, that “there was no apparent obstetrical event or mechanical trauma to the brain or spinal cord during labor, delivery, or the immediate post-delivery period.”

6. Dr. Bello-Espinosa agreed with Dr. Willis that Scott did not suffer injuries that qualify for inclusion in the NICA Plan. Dr. Bello-Espinosa reviewed Scott’s medical records, as well as conducted an independent medical examination of Scott on August 28, 2020. Dr. Bello-Espinosa opined, within a reasonable degree of medical probability:

Scott is an Eleven and a half month-old boy [with] history of therapeutic cooling for hypoxic-ischemic encephalopathy which occurred at birth. Scott’s comprehensive neurological examination is normal today. There was no evidence of upper or lower motor neuron signs, nor finding to indicate any residual encephalopathy or brain dysfunction. His

development and cognitive abilities are appropriate for his age despite his history of perinatal asphyxia.

Considering the clinical presentation, I do feel that there is not enough evidence to recommend Scott is included in the NICA program.

7. Dr. Bello-Espinosa concluded that Scott does not suffer from a permanent and substantial mental or physical impairment. Dr. Bello-Espinosa did not find any evidence of neurological injury related to Scott's birth.

8. Based on the statements from Dr. Willis and Dr. Bello-Espinosa, NICA determined that Petitioners' claim was not compensable under section 766.302(2).

9. A review of the documents in the record reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Bello-Espinosa. Their opinions are credible and persuasive.

CONCLUSIONS OF LAW

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

11. 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.

12. 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.

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 ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat.

14. In this matter, however, NICA determined that Petitioners' claim is not compensable under the Plan. Therefore, NICA filed the Motion for Summary Final Order, requesting a finding that Scott is not eligible for NICA Plan benefits.

15. In reviewing the compensability of a claim, section 766.309(1) directs the ALJ 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.

16. The term "birth-related neurological injury" is defined in section 766.302(2) as:

[I]njury 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.

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 Neuro. Injury Comp. Ass’n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1356 (Fla. 1997).

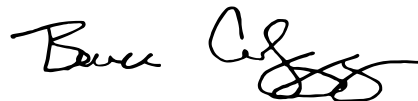
18. In reviewing the injury in this matter, the preponderance of the evidence does not establish that Scott sustained a “birth-related neurological injury” as defined in section 766.302(2). Dr. Willis, while noting that an apparent obstetrical event did occur that resulted in oxygen deprivation, concluded that the oxygen deprivation did not appear to result in brain injury. Similarly, Dr. Bello-Espinosa found no evidence of neurological injury related to Scott’s birth. Dr. Bello-Espinosa added that Scott does not suffer from a permanent and substantial mental or physical impairment.

19. Accordingly, based on the available evidence in the record, the undersigned determines that Scott 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 4th day of December, 2020, 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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this 4th day of December, 2020.

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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).