

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JORDAN LETT AND WALTER BIVINS, AS
PARENTS AND NATURAL GUARDIANS OF
KANNON LETT, A MINOR,

Petitioners,

vs.

Case No. 20-2378N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

WEST FLORIDA HOSPITAL AND JENNIFER
PAYNE, M.D.,

Intervenors.

SUMMARY FINAL ORDER OF DISMISSAL

On September 4, 2020, the Florida Birth-Related Neurological Injury Compensation Association (NICA) filed a Joint Motion for Summary Final Order (Joint Motion) on behalf of Petitioners, NICA, and Intervenors, contending that all parties to this proceeding agree that the injury suffered by Petitioners' child is not compensable. After review of the documents filed in this case, the Joint Motion is granted.

STATEMENT OF THE ISSUE

The issue for determination is whether Kannon Lett (Kannon), the minor child of Jordan Lett and Walter Bivens, has suffered a birth-related neurological injury as that term is defined in section 766.302(2), Florida

Statutes (2018), compensable by the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On May 14, 2020, Jordan Lett and Walter Bivens, as the parents and natural guardians of Kannon Lett, filed a Petition for Determination of NICA Coverage Filed Under Protest (The Petition). The Petition identified Jennifer Payne, M.D., as the physician providing obstetrical services, and West Florida Hospital as the hospital where Kannon was born. On May 29, 2020, NICA, Dr. Payne, and West Florida Hospital were served with copies of the Petition by certified mail. Certified return receipts indicate that all three were served.

On June 17, 2020, Petitioners filed a Motion for Leave to File Amended Petition for Determination of NICA Coverage Filed Under Protest (Amended Petition), for the purpose of correcting the style of the Petition. The motion was granted June 19, 2020. On July 2, 2020, Dr. Payne and West Florida Hospital filed a Petition for Leave to Intervene, which was granted by Order dated July 14, 2020.

On August 24, 2020, NICA filed a Response to Petition for Benefits, advising that after review of the medical records and examination of the child, it had determined that the injury suffered is not compensable under the Plan. Accordingly, on August 25, 2020, an Order was issued directing the parties to advise the undersigned no later than September 8, 2020, whether there was a need for a hearing on compensability, and, if so, to provide dates for conducting the hearing. In response, the Joint Motion for Summary Final Order was filed. While the Joint Motion indicates that it is supported by two exhibits, i.e., the reports of Dr. Willis and Dr. Sheth, the documents were not attached to the Joint Motion. On September 9, 2020, NICA refiled the Joint

Motion with the exhibits attached. Also filed on September 9 was a Motion to Determine Confidentiality of Document. A similar motion regarding the same documents was granted by Order dated August 25, 2020, an Order that is reiterated here as to the September 9, 2020, confidentiality motion.

FINDINGS OF FACT

1. Kannon was born on February 16, 2019, at West Florida Hospital. He was a child born of a single gestation, and weighed nine pounds, seven ounces, or 4,270 grams, at birth.

2. NICA retained Donald C. Willis, M.D., as a medical expert specializing in maternal-fetal medicine. NICA submitted his expert report dated June 15, 2020, with its Response to Petition for Benefits. Dr. Willis concluded that there was an apparent obstetrical event that resulted in oxygen deprivation to the brain during delivery and continuing into the immediate post-delivery period, and that the oxygen deprivation resulted in brain injury. However, Dr. Willis did not provide an opinion as to the severity of the injury.

3. Raj D. Sheth, M.D., conducted an examination of the child on August 12, 2020, and reviewed pertinent medical records related to his birth and subsequent treatment. Dr. Sheth opined that the infant was born with shoulder dystocia and left upper extremity weakness, which are likely to be permanent. However, he is age-appropriate developmentally, and, given that a birth-related neurological injury must result in a substantial mental and physical impairment to be eligible for benefits under the Plan, Dr. Sheth opined that Kannon's injuries are not compensable.

4. The parties to this proceeding do not dispute the conclusions of Drs. Willis and Sheth.

5. Based on the evidence presented in support of the Motion, Kannon is not eligible for compensation under the Plan because the evidence does not indicate that he suffers substantial mental and physical impairments.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

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

8. An injured child, his or her personal representative, parents, dependents, or next of kin may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response to a petition, and to submit relevant written information related to whether the alleged injury is a birth-related neurological injury.

9. If NICA determined that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant(s), provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by an administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

10. A birth-related neurological injury is defined by section 766.302(2), which provides:

(2) “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 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

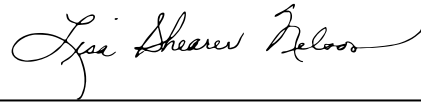
11. If the administrative law judge determines that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides a rebuttable presumption that the injury is a birth-related neurological injury.

12. In this case, there is no dispute among the parties that there was an apparent obstetrical event that resulted in oxygen deprivation resulting in a brain injury. However, there is also no dispute that while there is an injury, the child is not permanently and substantially mentally and physically impaired. Accordingly, the injury suffered by Kannon is not compensable under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law above, Petitioner's claim is not compensable under the Plan, and the Amended Petition is dismissed with prejudice.

DONE AND ORDERED this 15th day of September 2020, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
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this 15th day of September, 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).