

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADRIAN GARCIA RODRIGUEZ AND
MILDREY SOSA MACADO, INDIVIDUALLY,
AND AS PARENTS AND NATURAL
GUARDIANS OF ADRIAN DAVID GARCIA
SOSA, THEIR MINOR SON,

Petitioners,

vs.

Case No. 20-2524N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

UNIVERSITY OF SOUTH FLORIDA BOARD
OF TRUSTEES, AND FLORIDA SCIENCES
CENTER, INC., D/B/A TAMPA GENERAL
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 September 29, 2020.

STATEMENT OF THE CASE

On April 28, 2020, Adrian Garcia Rodriguez and Mildrey Sosa Macado, as parents and natural guardians of Adrian David Garcia Sosa (“Adrian”), a minor, filed a Petition for Benefits (Filed Under Protest) (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 Sarah Obican, M.D., and Pamela Kelly, C.N.M., as the medical professionals who provided obstetrical services at Adrian’s birth on January 23, 2017, at Florida Sciences Center, Inc., d/b/a Tampa General Hospital (“Tampa General”) in Tampa, Florida.

DOAH served Dr. Obican and Ms. Kelly with a copy of the Petition on June 8, 2020, and served Tampa General that same date. DOAH also served NICA with a copy of the Petition on June 8, 2020.

The University of South Florida Board of Trustees moved to intervene in this matter on June 11, 2020, which was granted. Tampa General also moved to intervene on July 9, 2020, which was also granted.

On September 8, 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 29, 2020, NICA filed a Motion for Partial Summary Final Order requesting the Administrative Law Judge (“ALJ”) enter a summary final order finding the claim not compensable under the NICA statute because Adrian did not suffer a “birth-related neurological injury” as defined in section 766.302(2), Florida Statutes (2020). On October 29, 2020, Petitioners filed a Motion In Opposition to NICA’s Motion for Partial Summary Final Order.

FINDINGS OF FACT

1. Adrian was born on January 23, 2017, at Tampa General located in Tampa, Florida.

2. The Petition alleges that Sarah Obican, M.D., and Pamela Kelly, C.N.M., were the medical professionals who participated in Adrian'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 Adrian's medical records and condition. NICA sought to determine whether Adrian suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Adrian 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 Adrian permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Adrian's medical records and noted, within a reasonable degree of medical probability:

In summary, there was an abnormal FHR pattern at time of repeat Cesarean section. The mother was not in labor. Delivery was atraumatic and resuscitation described as uneventful. ... Cyanosis occurred when the baby was placed on the mother's abdomen after delivery. Newborn hospital course was complicated by multisystem organ failures. EEG was consistent with seizures. ...

There was no apparent oxygen deprivation and or mechanical trauma to the brain of [sic] spinal cord during labor or delivery. Due to the complexity of the newborn hospital course, I do not have an opinion concerning any oxygen deprivation that

¹ No evidence was presented to the ALJ establishing whether Dr. Obican or Ms. Kelly were "participating physicians" under the Plan at the time Adrian was born. *See* §§ 766.302(7) and 766.314(4), Fla. Stat.

could have occurred during the immediate post-delivery period.

5. Dr. Bella-Espinosa, on the other hand, did comment on whether Adrian's injuries occurred during the immediate post-delivery period. Dr. Bella-Espinosa reviewed Adrian's medical records, as well as conducted an independent medical examination ("IME") of Adrian on August 28, 2020. Dr. Bella-Espinosa opined, within a reasonable degree of medical probability:

The [mother] underwent a cesarean section without complication.

* * *

The infant was initially placed skin to skin and the mother attempted to breastfeed during which the infant turned cyanotic.

6. During the IME, Dr. Bella-Espinosa observed that:

Adrian is a 3-year 7-month-old boy with a history of fetal macrosomia, born to an insulin diabetic mother, who after having ... minimal variability with late decelerations before delivery, at birth had a normal APGAR score with no evidence of acidosis, who in the immediate period however developed recurrent hypoglycemia despite glucose supplementation. ... [O]ver the past three years, he remains to have drug-resistant daily seizures.

* * *

Adrian has ... signs of severe intellectual disability, severe developmental language, and motor delays, severe autistic behavior, as well as an abnormal neurological examination His clinical presentation at this time is indicative of a severe developmental epileptic encephalopathy as could be seen in children due to multiple etiologies such as acquired neonatal metabolic, vascular, ischemic, inflammatory or infectious processes, as well as potential additional structural, genetic, or chromosomal etiologies. ... His epilepsy is severe.

7. Dr. Bella-Espinosa concluded his report stating that “Adrian suffers from substantial permanent mental impairment and substantial physical impairment.” However, Dr. Bella-Espinosa explained that:

The impairments are not consistent with an injury to the brain or spinal cord that may have occurred due to oxygen deprivation, or mechanical injury occurring during labor, or the immediate post-delivery period. ... Adrian’s substantial physical and mental impairment appears to have not occurred during the immediate post-delivery period.

8. A review of the file reveals no evidence directly disputing the findings and opinions of Dr. Willis and Dr. Bella-Espinosa that Adrian’s “impairments are not consistent” with injuries that occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.² Their opinions are credible and persuasive.

9. Based on the statements from Dr. Willis and Dr. Bella-Espinosa, NICA determined that Petitioner’s claim was not compensable. NICA subsequently filed a Motion for Partial Summary Final Order asserting that Adrian did not suffer a “birth-related neurological injury” as defined by section 766.302(2).

10. Petitioners submitted a motion opposing NICA’s Motion for Partial Summary Final Order. Petitioners, however, do not disagree with NICA’s position that Petitioners’ claim is not compensable under the Plan. Instead, Petitioners assert that the NICA statutes (section 766.301, et seq.) violate the Florida Constitution; therefore, the undersigned does not have the authority to determine whether Adrian should be included in the NICA Plan. It must

² Petitioners, with their motion opposing NICA’s Motion for Partial Summary Final Order, submitted affidavits from several medical professionals addressing the level of care Adrian received from the treating medical staff. These opinions support a finding that Adrian currently suffers from permanent injury to his brain, as well as experienced respiratory distress following his birth. However, the affidavits do not substantiate the argument that Adrian’s injuries actually occurred during Adrian’s birth, delivery, or in the immediate post-delivery period. Accordingly, Dr. Willis’s and Dr. Bella-Espinosa’s opinions are persuasive on this issue.

be noted, however, that an ALJ is without authority to rule on the facial constitutionality of a statute authorizing agency action. *See Key Haven Assoc. Enterprises, Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982); *Communications Workers of Am., Local 3170 v. City of Gainesville*, 697 So. 2d 167, 170 (Fla. 1st DCA 1997)(“The Administrative Procedure Act does not purport to confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds.”).

CONCLUSIONS OF LAW

11. 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 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. Stat.

12. 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.

13. 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.

14. 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.

15. 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 a finding that Adrian is not eligible for NICA Plan benefits.

16. 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.

17. 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.

18. “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).

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

Dr. Bella-Espinosa noted Adrian's grave injury. However, they credibly opined that Adrian's impairment did not occur during labor or delivery. Dr. Bella-Espinosa further persuasively attested that Adrian's injury did not happen during the immediate post-delivery period.

20. Therefore, based on all the available evidence in the record, the undersigned determines that Adrian 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 3rd 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
Division of Administrative Hearings
this 3rd 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).