

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ZOYA JONES, ON BEHALF OF AND AS
PARENT AND NATURAL GUARDIAN OF ZOE
JONES, A MINOR,

Petitioner,

vs.

Case No. 20-3836N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed December 30, 2020. Petitioner did not file a response.

STATEMENT OF THE CASE

On May 22, 2020, Petitioner 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 Thomas Desmond, M.D., as the physician who provided obstetric services for the birth of Zoe Jones (Zoe), a minor, at St. Mary's Medical Center, in West Palm Beach, Florida, on May 21, 2018.

On August 28, 2020, DOAH mailed a copy of the Petition to Respondent, Dr. Desmond, and St. Mary's Medical Center via certified mail. Respondent was served with the same on August 31, 2020.

On November 16, 2020, after granting two extensions of time, Respondent filed its Response to Petition for Benefits, wherein Respondent maintained that the claim was not compensable because Zoe 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 November 20, 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. On November 30, 2020, the parties filed a joint response wherein Respondent advised that it intended to file a motion for summary final order and Petitioner advised that a hearing was necessary.

On December 4, 2020, the final hearing was scheduled for January 26, 2021. On December 30, 2020, Respondent’s Motion was filed. On January 8, 2021, the undersigned issued an Order to Show Cause requiring Petitioner to show cause in writing why Respondent’s Motion should not be granted. On the same date, the parties filed a joint motion for continuance of the final hearing, which was granted on January 14, 2021.

Petitioner did not timely respond to the Order to Show Cause but, on January 19, 2021, did file correspondence indicating the need for additional time to respond. On the same date the parties filed a status report indicating availability for final hearing. Thereafter, the final hearing was scheduled for April 8, 2021.

On March 11, 2021, Respondent filed a motion seeking to continue the final hearing and requesting a status conference. A telephonic status conference was properly noticed for March 22, 2021. Petitioner failed to attend the conference. On March 22, 2021, the undersigned again issued an Order to Show Cause ordering Petitioner to show cause in writing why Respondent's Motion should not be granted. Petitioner failed to respond to the Order to Show Cause.

FINDINGS OF FACT

1. Zoe was born on May 21, 2019, at St. Mary's Medical Center, a hospital, in West Palm Beach, Florida.

2. Zoe was a single gestation and her weight at birth exceeded 2,500 grams.

3. As set forth in greater detail below, the unrefuted evidence establishes that Zoe 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 Zoya Jones and Zoe and opine as to whether Zoe 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. In his report, dated September 14, 2020, Dr. Willis summarized his findings and opinions as follows:

In summary, the mother presented in labor at term. There was no apparent fetal distress during labor. Spontaneous vaginal delivery resulted in a vigorous newborn with Apgar scores of 9/9. Newborn hospital course was complicated only by the somewhat confusing history for syphilis . . .

The baby suffered a brain injury at some time remote from the CT scan at 2 months of age. The baby as not depressed at birth and the newborn hospital course was not complicated by multi-system organ failures. The brain injury does not appear to be birth related.

* * *

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or in the immediate post delivery period.

6. In his supporting affidavit, Dr. Willis opines, to a reasonable degree of medical probability, that "there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or in the immediate post-delivery period."

7. Respondent also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the medical records of Zoya Jones and Zoe, and to conduct an Independent Medical Examination (IME) of Zoe. The purpose of his review and IME was to determine whether Zoe 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.

8. Dr. Duchowny reviewed the pertinent medical records and, on October 15, 2020, conducted the IME remotely via Zoom teleconference. In his report, prepared November 6, 2020, he summarized his findings and opinions as follows:

In summary, Zoe's neurological evaluation reveals findings consistent with a substantial mental and motor impairment. She has spastic quadriplegic (double hemiparetic) cerebral palsy, oromotor incoordination, microcephaly, absence of receptive

and expressive communication, sensorineural hearing loss in the left ear and pathologic developmental reflexes. Her level of development approximates that of a 3-6 month-old infant.

Review of the medical records reveals that Zoe was born at 40 2/7 weeks gestation at St. Mary's Hospital and weighed 6'12" [sic]. Pregnancy was complicated by several sexually transmitted diseases including a positive RPR that was treated with penicillin but secondarily increased near term. Pregnancy was also complicated by Type 2 HSV genital infection and trichomonas infection treated with metronidazole.

Zoe was delivered vaginally with Apgar scores of 9 and 9 at 1 and 5 minutes. Cord blood gases were not requested and there was no evidence of systemic organ dysfunction. Zoe was discharged from the nursery on the third day of life.

* * *

Based on today's neurological evaluation and medical records review, I believe that while Zoe's neurological impairments and permanent and substantial, they were most likely acquired in utero. The records do not provide support for intrapartum oxygen deprivation or mechanical injury, and the brain imaging findings are more consistent with a prenatally-acquired infections process that affected the brain. For these reasons, I am not recommending that consideration be given for Zoe's inclusion in the NICA program.

9. In his supporting affidavit, Dr. Duchowny opines, to a reasonable degree of medical probability, that Zoe did not suffer 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 which rendered her permanently and substantially mentally and physically impaired.

10. The undisputed and unopposed findings and opinions of Drs. Willis and Duchowny are credited. The undersigned finds that Zoe 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

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

12. 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.

13. 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.

14. 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.

15. In discharging this responsibility, the ALJ is required to make the following threshold determinations 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).

(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.

§ 766.309(1), Fla. Stat.

16. 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.

17. If the ALJ determines that the injury is not a birth-related neurological injury, or that obstetrical services were not delivered by a

participating physician at birth, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

18. The undisputed and unopposed evidence establishes that there was not an injury to Zoe'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 Motion is granted and the Petition is dismissed with prejudice.

DONE AND ORDERED this 1st day of April, 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 1st day of April, 2021.

COPIES FURNISHED:
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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).