

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID PETER ANDRIS AND JESSEY
LAUREN HOWARD ANDRIS, ON BEHALF OF
AND AS PARENTS AND NATURAL
GUARDIANS OF TOBIAS ANDRIS, A MINOR,

Petitioners,

vs.

Case No. 20-4632N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

SUZETTE RODRIGUEZ, M.D.,

Intervenor.

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 February 9, 2021.

STATEMENT OF THE CASE

On September 28, 2020, Petitioners, David Peter Andris and Jessey Lauren Howard Andris, on behalf of and as parents and natural guardians of Tobias Andris ("Tobias"), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the "Petition"), with the Division of Administrative Hearings ("DOAH") for determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

The Petition identified Suzette M. Rodriguez, M.D., as the medical professional who provided obstetrical services at Tobias's birth on May 3, 2019, at Memorial Hospital West ("Memorial") in Pembroke Pines, Florida.

DOAH served Dr. Rodriguez with a copy of the Petition on October 28, 2020, and served Memorial that same date. DOAH also served NICA with a copy of the Petition on October 28, 2020.

Dr. Rodriguez moved to intervene in this matter on November 11, 2020, which was granted.

On December 29, 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 February 9, 2021, 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 Tobias did not suffer a "birth-related neurological injury" as defined in section 766.302(2) Florida Statutes, and, therefore, the claim is not compensable under the Plan as a matter of law. As of the date of this Order, Petitioners have not responded to NICA's motion.

FINDINGS OF FACT

1. Tobias was born on May 3, 2019, at Memorial located in Pembroke Pines, Florida.

2. The Petition alleges that Suzette M. Rodriguez, M.D., was the medical professional who participated in Tobias's birth. No evidence was presented to the ALJ establishing whether Dr. Rodriguez was a "participating physician"

under the Plan at the time Tobias was born. *See* §§ 766.302(7) and 766.314(4), Fla. Stat.

3. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board-certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Michael S. Duchowny, M.D., a pediatric neurologist, to review Tobias's medical records and condition. NICA sought to determine whether Tobias suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Tobias 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 postdelivery period. And, if so, whether this injury rendered Tobias permanently and substantially mentally and physically impaired.

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

The maternal history of decreased fetal movement prior to delivery and an abnormal [fetal heart rate] tracing for admission with no acidosis on the initial blood gas studies would be most consistent with a stroke (brain injury) occurring prior to birth.

There was no obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor or delivery. The baby suffered a stroke due to an occluded right carotid artery. It appears this event occurred prior to delivery. The mother was not in labor.

5. Dr. Duchowny also reviewed Tobias's medical records, as well as personally examined Tobias (via Zoom video conference) on December 22, 2020. Dr. Duchowny noted that:

Tobias was diagnosed with cerebral palsy at age 1 year. He has extremely limited motor functions although his left hand is better than his right. He moves all limbs but none are functional.

* * *

Tobias had seizures in the NICU and remains on anti-seizure medications. He was formerly suspected of having infantile spasms but his EEG did not reveal hypsarrhythmia.

* * *

Tobias has not encountered respiratory difficulties or pneumonia. He has not been hospitalized since birth. His head has grown normally.

* * *

In summary, Tobias's examination reveals findings consistent with a substantial mental and motor impairment. He has four-limb spasticity, greater on the right, axial hypotonia, generalized hyperreflexia with pathological reflexes and absent verbal communication.

* * *

A review of Tobias's medical records reveals that he was born at Memorial West Hospital at 38 4/7 week's gestation. His mother had noted decreased fetal movement the day before admission and presented for evaluation. Following a non-reassuring fetal heart rate assessment Tobias was delivered by Caesarian section. He weighed 2.87 kg. at birth and had Apgar scores of 4, 5, and 9 at 1, 5 and 10 minutes of life.

* * *

Seizures were noted on the first day of life and treated with Keppra and phenobarbital. Tobias was discharged from the NICU after two weeks.

* * *

An MRI scan of the brain obtained on May 4th (DOL # 1) revealed diffuse [Hypoxic Ischemic

Encephalopathy] findings involving both cerebral hemispheres in the right and left anterior and middle cerebral artery and the right internal carotid territories. ... Follow-up MR imaging revealed the presence of a thrombus in the right common and internal carotid arteries with decreased flow in the right middle cerebral artery and stenosis of the left middle cerebral artery with retrograde perfusion of the right internal carotid artery.

6. Following his independent medical examination, Dr. Duchowny opined, within a reasonable degree of medical probability, that, "Despite Tobias's substantial delays, a review of the medical records reveals that his deficits were likely acquired prior to birth and were not due to mechanical injury or oxygen deprivation during labor, delivery, or the post-delivery period." Therefore, Dr. Duchowny concluded: "I am not recommending that Tobias be considered for inclusion into the NICA program."

7. A review of the records filed in this matter reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Duchowny. Their opinions are credible and persuasive.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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.

11. 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.

12. 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 Tobias is not eligible for NICA Plan benefits.

13. In reviewing the compensability of a claim, section 766.309(1) directs the ALJ to make the following determinations based upon "all 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.

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

injury 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.

15. "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 Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1356 (Fla. 1997).

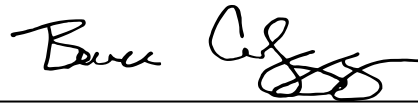
16. In reviewing the injury in this matter, the preponderance of the evidence does not establish that Tobias sustained a "birth-related neurological injury" as defined in section 766.302(2). Both Dr. Willis and Dr. Duchowny noted Tobias's grave injury. However, they credibly opined that Tobias's impairment did not occur during labor, delivery, or resuscitation in the immediate postdelivery period. Dr. Willis further remarked that Tobias suffered a stroke prior to delivery due to an occluded right carotid artery.

17. Therefore, based on all the available evidence in the record, the undersigned determines that Tobias 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 5th day of March, 2021, 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 5th day of March, 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).