

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ASHLEY HARRISON AND ANTONIO
HARRISON, INDIVIDUALLY AND AS
PARENTS AND NEXT FRIENDS OF AALIYAH
HARRISON, A MINOR,

Petitioners,

vs.

Case No. 20-5386N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent

and

ORLANDO HEALTH, INC., D/B/A WINNIE
PALMER HOSPITAL FOR WOMEN AND
BABIES,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on Respondent Florida Birth-Related Neurological Injury Compensation Association's ("NICA") unopposed Motion for Summary Final Order, filed on March 16, 2021.

STATEMENT OF THE CASE

Whether Aaliyah Harrison ("Aaliyah") suffered a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes,¹

¹ All references to the Florida Statutes are to the 2018 versions, unless otherwise specified.

for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

PRELIMINARY STATEMENT

On November 24, 2020, Ashley Harrison and Antonio Harrison, Individually and as Parents and Next Friends of Aaliyah, filed a Petition for NICA Benefits with the Florida Division of Administrative Hearings (“DOAH”). Although Petitioners filed the Petition under protest, they alleged that Aaliyah was eligible for NICA benefits because she suffered a compensable birth-related neurological injury.

The Petition named Yasmine Kareem, M.D., as the obstetrician who delivered Aaliyah on March 30, 2019, and Winnie Palmer Hospital for Women and Babies (“Hospital”) as the Hospital where she was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Kareem, and the Hospital on December 20, 2020.

On December 30, 2020, the Hospital filed an unopposed motion to intervene in this proceeding and amended that motion on January 4, 2021. On January 4, 2021, the undersigned granted the Hospital’s motion.

After receiving one extension, NICA filed its Response to Petition for Benefits on February 11, 2021. NICA argued that its experts reviewed the medical records, conducted an examination of Aaliyah, and opined that the claim was not compensable. At a teleconference held on February 16, 2021, Petitioners indicated that they did not dispute NICA’s determination as to compensability; however, counsel for Intervenor requested an opportunity to confirm his client’s position on that issue. In an Order dated February 16, 2021, the undersigned extended the deadline for the parties to file a joint status report confirming their positions on the issue on or before March 2,

2021. On March 2, 2021, NICA filed a Status Report indicating that both Petitioners and Intervenor did not contest NICA's determination that the claim was not compensable and that, accordingly, it would be moving for summary final order. In an Order dated March 2, 2021, the undersigned gave NICA until March 16, 2021, to file such a motion.

On March 16, 2021, NICA filed an unopposed Motion for Summary Final Order. NICA supported its motion with affidavits from a pediatric neurologist and an obstetrician, which were filed on March 24, 2021, and March 31, 2021, respectively. NICA argued that the claim was not compensable because, although there was an oxygen deprivation event during labor, delivery, and the immediate post-delivery period, it did not cause Aaliyah to suffer a brain injury. NICA also argued that Aaliyah suffers from permanent and substantial mental impairment and gradually improving physical impairment, which were not likely caused during labor, delivery, or the immediate post-delivery period, and that a genetic condition should be investigated instead.

FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Aaliyah.
2. On March 30, 2019, Ms. Harrison gave birth to Aaliyah, a single gestation of 37 weeks, at the Hospital. Aaliyah was delivered by cesarean section and weighed 2,700 grams.
3. Yasmine Kareem, M.D., provided obstetrical services and delivered Aaliyah.
4. The undisputed record evidence consists of affidavits and reports of two physicians: Donald Willis, M.D., a board-certified obstetrician; and Luis Bello-Espinosa, M.D., a board-certified pediatric neurologist who conducted an independent medical examination ("IME") of Aaliyah.

5. Dr. Willis reviewed the medical records and summarized his opinions about Aaliyah's delivery and the attendant complications in a report dated January 11, 2021.

6. Dr. Willis noted that Ms. Harrison was admitted to the Hospital due to worsening chronic hypertension at 37 weeks' gestational labor. After two days of cervical ripening and induction, during which Aaliyah's fetal heart rate became decelerated, a Cook Balloon was placed to assist cervical dilation. At that point, a prolapsed umbilical cord was noted, and a caesarian section was performed.

7. At birth, Aaliyah was flaccid with no respiratory effort. The Hospital administered bag and mask ventilation for over three minutes. Her APGAR scores were three at one minute, five at five minutes, and nine at ten minutes. Aaliyah was taken to intensive care, placed on a machine for respiratory depression, and underwent body cooling for suspected hypoxic-ischemic encephalopathy ("HIE"). An MRI performed five days after the birth revealed subtle changes suggestive of HIE, though Aaliyah did not suffer multi-organ failure and an EEG performed six days after her birth was normal. Aaliyah was subsequently diagnosed with global developmental delay.

8. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that an obstetrical event resulting in oxygen deprivation to the brain likely occurred during the birth, but it was unlikely that such an event caused a brain injury.

9. Dr. Bello-Espinosa reviewed the medical records, conducted an IME on Aaliyah, and summarized his opinions in a report dated February 7, 2021, as to whether Aaliyah suffers from permanent and substantial mental and physical impairment caused by an oxygen deprivation event.

10. Dr. Bello-Espinosa noted that Aaliyah was diagnosed with mild HIE at birth and that an MRI conducted on the fifth day after her birth indicated subtle changes suggestive of hypoxic-ischemic injury. However, Aaliyah's

EEG was normal, she did not suffer neonatal seizures, and her neurological examinations rapidly improved after birth.

11. Dr. Bello-Espinosa conducted an IME on February 5, 2021. Aaliyah's neurological examination demonstrated developmental language and motor impairments, stereotypic behavior, poor joint attention, and poor play skills for her age. However, Dr. Bello-Espinosa did not find signs of upper or lower motor neuron dysfunction that would suggest cerebral palsy.

12. Based on the medical records and his IME, Dr. Bello-Espinosa opined to a reasonable degree of medical probability that Aaliyah suffers from substantial and permanent mental impairment but only moderate and gradually improving physical impairment, which probably was not permanent. Dr. Bello-Espinosa also opined that Aaliyah's impairments were not likely due to a brain injury caused by oxygen deprivation during birth and that, instead, an underlying genetic condition should be investigated.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and exclusive jurisdiction over the subject matter of this case. § 766.304, Fla. Stat.

14. The Legislature established the Plan "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

15. An injured infant, his or her 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. NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response and to submit relevant written information as to whether the injury is a birth-related neurological injury. § 766.305(4), Fla. Stat.

16. If NICA determines that the infant suffered a compensable birth-related neurological injury, it may award compensation to the claimants, as

approved by the assigned administrative law judge (“ALJ”). § 766.305(7), Fla. Stat. But, if NICA disputes the claim, as it does here, the dispute must be resolved by an ALJ in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

17. In determining compensability, the ALJ must 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.

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat.

18. The term “birth-related neurological injury” is defined as follows:

[I]njury 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. This definition shall apply to live births only and

shall not include disability or death caused by genetic or congenital abnormality.

§ 766.302(2), Fla. Stat. Thus, a birth-related neurological injury has four components: “(1) an injury to the brain or spinal cord; (2) which is caused by oxygen deprivation or mechanical injury; (3) during labor, delivery, or resuscitation in the immediate postdelivery period; and (4) which renders the infant permanently and substantially impaired.” *Bennett v. St. Vincent’s Med. Ctr., Inc.*, 71 So. 3d 828, 837 (Fla. 2011).

19. Petitioners have the burden to establish by a preponderance of the evidence “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.” § 766.309(1)(a), Fla. Stat.; *see also* § 120.57(1)(j), Fla. Stat. (providing that findings of fact, except in penal and licensure disciplinary proceedings or as provided by statute, “shall be based upon a preponderance of the evidence”); *Balino v. Dep’t of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (holding generally that “the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal”).

20. If Petitioners meet their burden, section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. Conversely, if Petitioners do not meet their burden, the undersigned is required to issue an order dismissing the Petition. *Id.*

21. Based on the Findings of Fact above, the undisputed evidence establishes that, although an oxygen deprivation event likely occurred during the delivery, it neither caused Aaliyah to sustain a brain injury nor rendered her permanently and substantially mentally and physically impaired. Thus, she did not suffer a “birth-related neurological injury.” § 766.302(2), Fla. Stat.

22. Accordingly, based on the Findings of Fact above and the undisputed evidence, Aaliyah is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioners' claim is not compensable, NICA's unopposed Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 5th day of April, 2021, in Tallahassee, Leon County, Florida.



ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
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this 5th day of April, 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).