

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CRYSTAL KAY MATTHEWS, AS LEGAL
GUARDIAN AND REPRESENTATIVE OF IVAN
JACKSON REWIS, MINOR,

Petitioner,

vs.

Case No. 21-1231N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORANGE PARK MEDICAL CENTER, INC.,
D/B/A ORANGE PARK MEDICAL CENTER,
MICHAEL MORPHET, D.O., AND WOMEN'S
CARE FLORIDA, L.L.C.,

Intervenors.

SUMMARY FINAL ORDER

On October 27, 2021, Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), filed a Motion for Summary Final Order (Motion), seeking a determination that the injury suffered by Ivan Jackson Rewis (Ivan), does not constitute a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes. The Motion relies on the affidavits and expert reports of Donald Willis, M.D., and Raj Sheth, M.D., filed November 8, 2021. The Motion represents that neither Petitioner nor Intervenors intend to oppose the entry of a Summary Final Order finding that the injury is not compensable.

STATEMENT OF THE ISSUES

The issue to be determined is whether Ivan suffered a birth-related neurological injury as that term is defined in section 766.302(2).

PRELIMINARY STATEMENT

On April 6, 2021, Crystal Kay Matthews, as legal guardian and representative of Ivan, filed a Petition to Determine Eligibility of Benefits Pursuant to 766.301 et seq., Florida Statutes (the Petition).

The Petition names Michael Morphet, M.D., as the physician providing obstetrical services, and Orange Park Medical Center, Inc. (Orange Park), as the hospital where Ivan was born, on October 26, 2019.

NICA, Dr. Morphet, and Orange Park were all provided copies of the Petition by certified mail, and Orange Park, Dr. Morphet, and Women's Care Florida, LLC, all moved for and were granted Intervenor status.

On April 29, 2021, Intervenor Orange Park filed an Application to Permit Discovery, which was denied as premature, without prejudice to renew the motion once NICA made a preliminary determination on compensability. On July 1, 2021, NICA filed its response, stating that it believed the claim was not compensable, and on July 7, 2021, an Order was issued directing the parties to provide dates for conducting a hearing.

On July 13, 2021, Intervenor Orange Park filed a Motion for Reconsideration of the Order Denying Application to Permit Discovery, which Intervenors Morphet and Women's Care of Florida joined, and Petitioner opposed. A telephone hearing was held on the Motion on July 23, 2021, and on July 23, 2021, an Order was issued allowing Intervenors to conduct the limited discovery they had indicated they were seeking, i.e., review of the medical records provided to NICA, and a deposition of Crystal Matthews, Ivan's grandmother and legal guardian. A status conference was also scheduled, at which time the parties were to report whether a hearing would remain necessary.

On September 24, 2021, Orange Park moved to conduct a compulsory medical examination of Ivan, asserting that Ms. Matthews had testified that Ivan has delays in his speech development, and Dr. Sheth, the pediatric neurologist who examined Ivan for NICA had noted that his tongue movements were poorly coordinated. Orange Park asserted that an examination by a pediatric neurologist of its choosing was necessary to determine whether there was a dispute of material fact as to compensability. The motion did not specify the time, place, manner, conditions, scope of the examination, or the person who would conduct the examination, all of which is required by Florida Rule of Civil Procedure 1.360(1).

A motion hearing was conducted on October 6, 2021, at which time Intervenor confirmed that their inquiry was limited to Ivan's speech development and tongue movements, and no other potential physical or mental impairment had been identified. An Order was issued on October 6, 2021, denying Intervenor's request for a compulsory medical examination, which stated in part:

Even assuming that an independent (as yet to be named) examiner found that there is a permanent issue with regard to Ivan's speech development and tongue movements, it would not be sufficient to make a finding that Ivan is permanently and substantially mentally and physically impaired. ... Put another way, it would not be enough to place Ivan in a "limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." Under these circumstances, Intervenor has not demonstrated good cause to require a compelled examination.

The parties indicated during the telephone hearing that they believed the case could be resolved by Summary Final Order, but in the weeks following, no motion was filed. On October 21, 2021, a Scheduling Order was issued setting deadlines for filing a Motion for Summary Final Order, as well as any

responses thereto, with the caveat that failure to meet those deadlines would result in the scheduling of a hearing.

On October 27, 2021, Respondent's Motion for Summary Final Order was filed, along with a Motion to Determine Confidentiality of Document. The supporting affidavits of Dr. Donald Willis, M.D., and Dr. Raj D. Sheth, M.D., were filed November 8, 2021, along with another Motion to Determine Confidentiality. Both motions are actually notices alerting the Clerk's Office that the documents filed contain confidential information, and those documents have been designated as not available for public viewing.¹

FINDINGS OF FACT

1. Ivan was born October 26, 2019, at Orange Park Medical Center in Orange Park, Florida. At birth, he weighed seven pounds, 11 ounces. Ivan's mother died the following day.

2. Donald Willis, M.D., is an expert in maternal-fetal medicine and is board-certified in obstetrics and gynecology and maternal-fetal medicine. Dr. Willis reviewed the medical records in this case and issued a report dated May 27, 2021. In his report, he noted that Ivan was delivered by emergency Cesarean section, during which a 30-percent placental abruption was noted. His report included the following information:

The baby was depressed at birth. Apgar scores were 2/4/9. ... The baby was flaccid, cyanotic and without respiratory effort at birth. Heart rate was 110 bpm. Bag and mask ventilation was given for 3 minutes, follow[ed] by CPAP. The baby was transferred to the NICU on CPAP for respiratory depression.

Physical exam on admission to the NICU noted little spontaneous movements and flaccid tone. Hypoxic ischemic encephalopathy was suspected

¹ Similarly, the Motion for Summary Final Order does not contain proposed findings of fact or proposed conclusions of law. In the future, it would be helpful if counsel would consider including those proposed findings you are asking the ALJ to find.

and the baby transferred to Shand's Hospital for possible cooling protocol.

The baby arrived at Shand's NICU on CPAP/ Neurologic exam was noted to be normal. The baby did not meet criteria for cooling protocol. Hospital course at Shand's was uncomplicated. The baby was on room air by DOL 1. Sepsis w/o was negative. The baby was discharged home on DOL 5. Head imaging studies and/EEG's were not [performed] during the newborn hospital stay.

* * *

There was an apparent obstetrical event (placental abruption) [that] resulted in some degree of oxygen deprivation to the baby during labor and delivery. However, it does not appear that the oxygen deprivation resulted in brain injury.

3. Dr. Willis's expert opinion is credited.

4. Ivan was examined by Rash Sheth, a board-certified pediatric neurologist. After his evaluation, Dr. Sheth issued a report that contained the following:

Motor examination revealed generalized normal muscle tone in all extremities in a symmetric distribution. There is full range of motion at all joints. There are no adventitious movements and no fasciculations or muscular atrophy. Ivan evidenced intact fine motor coordination characterized by individual finger movements with bimanual hand and finger cooperation. Objects were easily transferred between hands, and he grasped independently with either hand using his thumb and forefinger.

Coordination and gait: He walked independently with good stability he was able to stoop and recover. His gait was normal based. There were no falls, and he had no tremors.

Sensory examination is intact to withdrawal of all extremities to stimulation.

Neurovascular examination reveals no cervical, cranial, or ocular breits and no temperature asymmetries.

In SUMMARY, Ivan's neurological evaluation demonstrates a normal neurological exam. His development is delayed in expressive language with better preserved receptive language. He does have some stereotypical behaviors which would require more detailed assessment for features of autism.

5. Dr. Sheth concluded that "as of the time of this examination and evaluation Ivan's case indicates that he does not suffer from either substantial mental or substantial physical impairment." Dr. Sheth's opinion is credited.

6. Based on the evidence presented, Ivan does not suffer from a birth-related neurological injury.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties and the subject matter of these proceedings pursuant to sections 120.569, 120.57(1), and 766.304, Florida Statutes.

8. The Legislature established the Plan "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.

9. An injured infant and certain other identified people, including the infant's parents, 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. 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 the petition and to submit relevant written information related to whether the child has suffered a birth-related neurological injury.

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

11. The initial inquiry is whether the infant has suffered a birth-related neurological injury as that term is defined in 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 at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or in 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.

12. 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 finds that as a result of the injury, 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.

13. The evidence presented does not support such a finding in this case. While Dr. Sheth found that Ivan had a developmental delay with regard to his speech, he did not find this delay to constitute a substantial and permanent injury. Moreover, section 766.302(2) requires that there be a

substantial and permanent physical *and* mental impairment. Ivan does not meet this criteria, and is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, NICA's Motion for Summary Final Order is granted. Petitioner's injuries are not compensable under the Plan, and the Petition is dismissed.

DONE AND ORDERED this 18th day of November, 2021, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of November, 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).