

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MARY MATHIS, INDIVIDUALLY, AND DANIEL
BROWN, INDIVIDUALLY, AND ON BEHALF
OF KYMANI BROWN, A MINOR,

Petitioners,

vs.

Case No. 21-1559N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Unopposed Motion for Summary Final Order (Respondent's Motion), filed January 28, 2022. Petitioners do not oppose Respondent's Motion.

STATEMENT OF THE CASE

On April 28, 2021, Petitioners filed a Petition for Benefits, Under Protest, 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 Samir Shakfeh, M.D., as the physician who provided obstetric services to Mary Mathis, for the birth of Kymani Brown (Kymani), at Oak Hill Hospital, in Brooksville, Florida, on March 16, 2019.

On May 17, 2021, DOAH mailed a copy of the Petition to Respondent, Dr. Shakfeh, and Oak Hill Hospital via certified mail. Respondent was served with the same on May 19, 2021.

Motions to intervene were filed, and granted, on behalf of HCA Health Services of Florida, Inc., d/b/a Oak Hill Hospital; Samir Shakfeh, M.D., and Citrus Specialty Group, Inc., d/b/a Advanced Women's Health Center; and Ahmed Kafafy, M.D., Kirsy Acosta-Ortiz, CRNA, and Anesthesiologist Associates Oak Hill Division, P.A. (Intervenors).

On July 16, 2021, Respondent filed its Response to the Petition, wherein Respondent maintained that the claim was not compensable because Kymani 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 separate hearing.

On July 22, 2021, the undersigned issued an Order Requiring Response directing the parties to communicate and advise, on or before August 13, 2021, 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.

Pursuant to Respondent's Status Report, filed August 12, 2021, the parties jointly requested an extension of time to provide a case management plan, including dates for a final hearing. The requested extension of time was granted by Order dated August 16, 2021. The parties provided a proposed case management plan on September 13, 2021, and the same was adopted by Order dated September 17, 2021. The final hearing was scheduled for January 27, 2022.

Thereafter, the parties engaged in robust discovery. On December 15, 2021, the parties' Joint Motion for Extension of Discovery Deadline and to

Continue Final Hearing was filed. An Order granting the same was issued on December 17, 2021, and the final hearing was rescheduled for March 8, 2022.

On January 27, 2022, Intervenors filed their Joint Notice to Withdraw Motions to Intervene, which was granted the same day. On January 28, 2022, Respondent's Motion was filed. Respondent's Motion contends that Petitioners' claim is not compensable as Kymani did not suffer a birth-related neurological injury, as defined in section 766.301(2), and, therefore, the Petition is due to be dismissed with prejudice. As noted above, Respondent's Motion is unopposed.

FINDINGS OF FACT

1. Kymani was born on March 16, 2019, at Oak Hill Hospital in Brooksville, Florida.

2. Kymani 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 Kymani 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 Mary Mathis and Kymani and opine as to whether Kymani 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 July 8, 2021, Dr. Willis summarized his findings and opinions, in pertinent part, as follows:

In summary, labor at term was complicated by epidural anesthesia resulting in a high block with resulting maternal respiratory distress and

hypotension. During maternal resuscitation, FHR dropped to the 80's and was "not coming back." Cesarean section was done for FHR decelerations. The baby was depressed at birth with Apgar scores of 1/4/7 and required intubation and mechanical ventilation. Seizure activity developed shortly after birth. Cooling protocol was initiated for suspected HIE. After cooling, EEG showed no seizure activity and MRI on DOL 9 was reported as normal.

Although there was some degree of oxygen deprivation to the baby at birth and during the immediate resuscitation period, fortunately, the oxygen deprivation did not result in any identifiable brain injury.

6. Respondent further retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist. Dr. Bello-Espinosa was retained to review the available medical records and conduct an examination of Kymani to determine whether she suffers from an injury, which rendered her permanently and substantially mentally and physically impaired; and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

7. Dr. Bello-Espinosa conducted the examination on June 11, 2021. In his report following the examination, he issued his findings, which are set forth, in pertinent part, as follows:

Kymani is a 2-year 3-month-old girl with a history of perinatal depression, initial low APGAR scores who required vigorous stimulation and assisted respiratory ventilation during the immediate postnatal period, including endotracheal intubation. A hypoxic-ischemic encephalopathy was suspected due to brief seizure-like activity 30-minutes after birth. She did not receive antiseizure medications. She received therapeutic hypothermia. However, there were no perinatal or

postnatal electroclinical or electrographic seizures under continuous 72-hour video EEG monitoring session. Her neurological examination was normal. An MRI of the brain, including an MR Spectroscopy, obtained on day 6th of life, was normal.

On her evaluation today, Kymani has a history of delayed acquisition of motor and language skills. Her mother stated Kymani had frequent brief clinical [sic] of what appears to be generalized tonic seizures, mainly febrile, during her first year of life. The examination today shows no evidence of cranial nerve dysfunction, no evidence of abnormal upper or lower motor neuron signs, neither evidence of myelopathic, myopathic, or neuromuscular junction or myopathic processes.

8. In his report, Dr. Bello-Espinosa opines that Kymani did not have: (1) substantial physical or mental impairments; (2) permanent physical or mental impairments; (3) injuries due to oxygen deprivation of the brain; or (4) permanent mental or physical injuries related to the labor, delivery, or immediate post-delivery periods.

9. The undisputed and unopposed findings and opinions of Drs. Willis and Bello-Espinosa are credited. The undersigned finds that Kymani 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 physically impaired.

CONCLUSIONS OF LAW

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

11. 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.

12. 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.

13. 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.

14. In its present posture, the ALJ is required to make the following threshold determination 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).

§ 766.309(1), Fla. Stat.

15. 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.

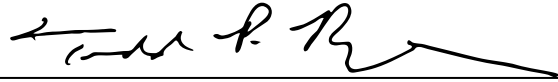
16. If the ALJ determines that the injury is not a birth-related neurological injury, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

17. The undisputed and unopposed evidence establishes that there was not an injury to Kymani’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 2nd day of February, 2022, 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 2nd day of February, 2022.

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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).