

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASIYE BASAKLI O/B/O GIOVANNI
FAULKNER, A MINOR,

Petitioner,

vs.

Case No. 22-0430N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

HOLMES REGIONAL MEDICAL CENTER,
INC.,

Intervenor.

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Unopposed Motion for Summary Final Order (Motion) filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on August 9, 2022.

STATEMENT OF THE CASE

On January 28, 2022, Petitioner, Asiye Basakli, on behalf of Giovanni Faulkner (Giovanni), a minor, filed a Petition, Under Protest, 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 identified Rachel Cartechine, M.D., as the physician who provided obstetric services at the birth of Giovanni on November 4, 2020, at Holmes Regional Medical Center (HRMC), located in Brevard County, Florida.

DOAH served Dr. Cartechine, HRMC, and NICA with a copy of the Petition on February 11, 2022. On March 7, 2022, the undersigned entered an Order Granting Petition for Leave to Intervene, allowing HRMC to intervene in this matter.

On May 5, 2022, NICA filed a Response to Petition for Benefits, which stated its determination that the instant claim is not compensable as the injury does not meet the definition of a “birth-related neurological injury” as defined in section 766.302(2), Florida Statutes. On May 25, 2022, the parties filed a Status Report, which stated that Petitioner did not challenge NICA’s finding of non-compensability and would not request a final hearing, but that because Intervenor was in the process of obtaining records to evaluate its position on the claim, Intervenor requested that the undersigned schedule a final hearing. On June 1, 2022, the undersigned noticed this matter for a final hearing on November 21, 2022.

On August 9, 2022, the parties filed a Status Report, which indicated that Petitioners and Intervenor did not contest NICA’s determination of non-compensability, that NICA would file an unopposed motion for summary final order, and requested that the undersigned cancel the final hearing in this matter.

On August 9, 2022, NICA filed its Motion. The Motion reflects that Petitioners and Intervenor do not oppose the Motion.

FINDINGS OF FACT

1. Giovanni was born on November 4, 2020, at HRMC, located in Brevard County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Giovanni. In a medical report dated February 24, 2022, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, vacuum extraction was applied to assist vaginal delivery due to a non-reassuring FHR pattern during labor. Delivery was complicated by a shoulder dystocia, which resulted in a brachial plexus injury. The baby was depressed at birth with Apgar scores of 2/6/7 and a cord blood pH of only 6.97. Persistent hypotension occurred after birth due to blood loss from a subgaleal hematoma. Cooling protocol was initiated for perinatal depression. MRI on DOL 6 identified diffuse cortical edema, compatible with hypoxic brain insult.

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in some degree of brain injury. I am not able to comment about the severity of the injury.

3. NICA retained Luis E. Bello Espinosa, M.D. (Dr. Espinosa), a medical expert specializing in pediatric neurology, to examine Giovanni and to review his medical records. Dr. Espinosa examined Giovanni on April 30, 2022. In a medical report dated April 30, 2022, Dr. Espinosa summarized his examination of Giovanni and opined, in pertinent part, as follows:

Giovanni is a 19-month 26-days-old boy [sic] with a history of perinatal depression and who underwent therapeutic hypothermia after he was assessed to have mild hypoxic-ischemic encephalopathy. Giovanni had no seizures in the NICU. An MRI of the brain obtained on the 8th day of life showed diffuse cortical edema with mild diffusion restriction, compatible with subacute hypoxemic

ischemic insult, as well as an acute small focus of periventricular insult along the posterior body of the right lateral ventricle. Background of subacute/chronic bilateral periventricular insult.

On his evaluation today Giovanni has normal development. His neurological examination is also normal. There are no clinical findings to indicate evidence of upper or lower motor neuron signs. There were no findings to indicate corticospinal, extrapyramidal, or cerebellar dysfunction.

Results as of question 1: Does the child suffer from both a substantial mental impairment and a substantial physical impairment?

Giovanni does not suffer of substantial mental or physical impairment at this time.

Results as of question 2: If so, are both the mental and physical impairments permanent?

Giovanni does not have permanent mental and physical impairments.

Results of question 3: Are such permanent and substantial mental and physical impairments consistent with an injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury occurring during labor, delivery or the immediate post-delivery period?

Giovanni today has no substantial mental or physical impairments as result of the reported findings on his MRI of the brain which depicted diffuse cortical edema with mild diffusion restriction, compatible with subacute hypoxic ischemic insult, as well as an acute small focus of periventricular insult along the posterior body of the right lateral ventricle.

Results as of question 4: Did the permanent and substantial mental and physical impairments themselves occur during labor, delivery or the

immediate post-delivery period (which period continues until the baby is medically stable)?

Giovanni does not have mental or physical impairments due to events that occurred during labor delivery or the immediate post-delivery period.

Considering the clinical presentation, I do feel there not enough [sic] evidence to recommend Giovanni is included in the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Espinosa that Giovanni did not suffer an injury that meets the definition of a birth-related neurological injury under section 766.302(2). Dr. Espinosa's opinion is credited.

CONCLUSIONS OF LAW

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

6. The Legislature established the Plan "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.

7. 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. NICA, 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.

8. 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 administrative law judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

9. In discharging this responsibility, the administrative law judge must make the following 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).

(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. An award may be sustained only if the administrative law judge concludes that the “infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth.” § 766.31(1), Fla. Stat.

10. Section 766.302(2) defines the term “birth-related neurological injury” 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.

11. To be compensable under the Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby’s brain or spinal cord injury during labor, delivery, or resuscitation in the immediate post-delivery period resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. *Fla. Birth-Related Neurological Inj. Comp. Ass’n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

12. The evidence, which the parties do not refute, established that Giovanni did not suffer a birth-related neurological injury under the definition of section 766.302(2). Therefore, Giovanni is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, it is

ORDERED that:

The Petition filed by Aisye Basakli, on behalf of Giovanni Faulkner, a minor, is dismissed with prejudice. The final hearing scheduled for November 21, 2022, is hereby canceled.

DONE AND ORDERED this 15th day of August, 2022, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of August, 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).