

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NOVA WILHELM O/B/O LILIA WILHELM, A
MINOR,

Petitioner,

Case No. 22-0432N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

On July 15, 2022, Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), filed a Motion for Summary Final Order. The Motion is unopposed and relies on the reports and affidavits of Donald Willis, M.D., and Michael Duchowny, M.D., filed July 20, 2022.

STATEMENT OF THE CASE

Whether Lilia Wilhelm (“Lilia”) suffered a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes (2021), for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

PRELIMINARY STATEMENT

On February 7, 2022, Petitioner, Nova Wilhelm, on behalf of Lilia, a minor, filed a Petition, Under Protest, for Benefits Pursuant to Florida Statutes Section 776.301 et seq., with the Florida Division of Administrative Hearings (“DOAH”). The Petition named Kristen Shepherd, M.D., as the obstetrician who delivered Lilia on July 31, 2018, and Sarasota Memorial Hospital as the hospital where she was born.

DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Shepherd, and the hospital on February 11, 2022.

After receiving two extensions, NICA filed its Response to Petition for Benefits on May 16, 2022. NICA argued that its experts reviewed the medical records, conducted an examination of Lilia, and opined that the claim was not compensable. In an Order dated May 18, 2022, the undersigned required the parties to file a status report as to their respective positions on the issue of compensability. On June 16, 2022, the parties filed a Joint Response to Order indicating that Petitioner did not intend to challenge NICA's determination of non-compensability and, thus, a final hearing was unnecessary. In an Order dated June 21, 2022, the undersigned gave NICA 30 days to move for a summary final order.

On July 15, 2022, NICA filed its Motion for Summary Final Order. The Motion confirmed that Petitioner did not dispute NICA's position of non-compensability and that the Motion was unopposed. On July 20, 2022, NICA filed supporting affidavits and reports from Dr. Willis and Dr. Duchowny.

FINDINGS OF FACT

1. Petitioner is a parent and legal guardian of Lilia.
2. On July 31, 2018, Ms. Wilhelm gave birth to Lilia, a single gestation of almost 41 weeks, at the hospital. Lilia was delivered by cesarean section and weighed 3,560 grams.
3. Dr. Shepherd provided obstetrical services and delivered Lilia.
4. The undisputed available evidence consists of affidavits and reports of two physicians: Dr. Willis, a board-certified obstetrician; and Dr. Duchowny, a board-certified pediatric neurologist.
5. Dr. Willis reviewed the medical records and offered his opinions about Lilia's delivery in a report dated February 27, 2022. Dr. Willis summarized his opinions as follows:

In summary, labor was induced for post-dates. The fetal heart rate tracing was abnormal on admission with reduced fetal heart rate variability. Recurrent fetal heart rate decelerations occurred as labor was induced. Despite delivered [sic] by Cesarean section for intolerance to labor, the baby was not depressed at birth. Apgar scores were 8/9. No resuscitation was required. The newborn hospital course was essentially uncomplicated. MRI was done at one year of age for developmental delay and found evidence of a remote cerebral infarction with leukomalacia.

There was no obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period. The baby did suffer a cerebral infarction at some time prior to one year of age, but this was not due to birth related oxygen deprivation or trauma.

6. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that no obstetrical event occurred during birth that caused Lilia to suffer oxygen deprivation or mechanical trauma to her brain or spinal cord.

7. Dr. Duchowny reviewed the medical records, conducted an independent medical examination ("IME") on Lilia on May 11, 2022, and offered opinions as to whether Lilia suffers from permanent and substantial mental and physical impairment caused by oxygen deprivation in a report dated May 15, 2022.

Dr. Duchowny summarized his opinions as follows:

In summary, Lilia's examination demonstrated a spastic right hemiparesis affecting the upper and lower extremities, microcephaly, expressive language delay, speech articulation deficit and oromotor incoordination. While her gait was asymmetric due to her right hemiparesis, she could ambulate in a stable fashion without losing her balance. Lilia's social and behavioral development are progressing at an age-appropriate level. Receptive language competence is fully developed and she does not evidence a visual field deficit.

Review of medical records reveals that Lilia was born at term by repeat Caesarian section and had a birthweight

of 7 pounds 14 ounces. Apgar scores were 8 and 9 and there were no postnatal problems prior to nursery discharge. As stated by her father, Lilia was observed to have right-sided weakness at her 9-month pediatric visit. An MR imaging study on June 18, 2019 revealed an old left middle cerebral artery territory infarction, a smaller old right middle cerebral artery territory infarction and periventricular leukomalacia. A thrombophilia evaluation was unremarkable.

Lilia's medical records are consistent with in-utero and not intra-partum acquired cerebrovascular events. There is no evidence to suggest oxygen deprivation or mechanical injury. I am therefore not recommending that Lilia be considered for inclusion in the NICA program.

8. Based on the medical records and the IME, Dr. Duchowny opined to a reasonable degree of medical probability that Lilia suffered an in-utero acquired cerebrovascular event rather than oxygen deprivation or mechanical injury during birth.

CONCLUSIONS OF LAW

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

10. 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.

11. 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.

12. 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.

13. In determining compensability, the ALJ first determines if the child suffered a “birth-related neurological injury” based on the available evidence.

14. Pursuant to section 766.302(2), 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.

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).

15. Petitioner has 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”).

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

17. Based on the Findings of Fact above, the undisputed available evidence establishes that no obstetrical event occurred during birth that caused Lilia to suffer oxygen deprivation or mechanical trauma to her brain or spinal cord. Thus, Lilia did not suffer a birth-related neurological injury and she is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioner’s 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 28th day of July, 2022, 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 28th day of July, 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).