

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA PLATEL, ON BEHALF OF AND AS
PARENT AND NATURAL GUARDIAN OF
AIDEN JORDAN PLATEL, A MINOR,

Petitioner,

vs.

Case No. 22-1089N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER

This cause came before the undersigned on Respondent, Florida Birth-Related Neurological Injury Compensation Association's (NICA), Motion for Partial Summary Final Order (Motion),¹ filed August 16, 2022.

PRELIMINARY STATEMENT

On March 24, 2022, Petitioner, Jessica Platel, on behalf of and as parent and natural guardian of Aiden Jordan Platel (Aiden), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH). The Petition sought a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

¹ Although titled "partial," NICA's Motion seeks final disposition of the petition for benefits.

The Petition identified Dr. Chia Ling Tung as the physician who provided obstetric services at the birth of Aiden on December 2, 2017, at St. Mary's Medical Center in West Palm Beach, Florida.

DOAH served Dr. Chia Ling Tung, St. Mary's Medical Center, and NICA with a copy of the Petition on April 11, 2022. On July 13, 2022, after an extension of time, NICA filed a response to the Petition, which stated its determination that the instant claim was not compensable, as the injury did not meet the definition of a "birth-related neurological injury," as defined in section 766.302(2), Florida Statutes.² On August 9, 2022, the undersigned issued an Order Requiring Response.

On August 11, 2022, NICA filed a response. The response documented NICA's contact with Petitioner, who advised that she did not agree with NICA's determination. NICA stated that it did not believe a hearing was necessary and intended to file a motion for partial summary final order.

On August 16, 2022, NICA filed the Motion. Petitioner did not respond to the Motion within the applicable response period in Florida Administrative Code Rule 28-106.204. On September 1, 2022, the undersigned issued an Order to Show Cause, within seven days, why NICA's Motion should not be granted. Petitioner did not respond to the Order to Show Cause.

FINDINGS OF FACT

1. Aiden was born on December 2, 2017, at St. Mary's Medical Center in West Palm Beach, Florida.

2. NICA requested that Donald C. Willis, M.D. (Dr. Willis), its medical expert, review Aiden's medical records. Dr. Willis stated his findings and

² References to the Florida Statutes are to the 2022 version, unless otherwise noted.

opinion in a medical report dated July 9, 2022. Dr. Willis's affidavit, attached to the Motion, summarized his findings and he ultimately opined that:

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a medical expert in pediatric neurology. Dr. Duchowny evaluated Aiden on June 29, 2022. Dr. Duchowny's affidavit, attached to the Motion, includes his neurological evaluation report dated July 1, 2022. In the report, Dr. Duchowny summarized his examination of Aiden and ultimately opined that:

Based on the findings from today's evaluation, record review and review of the MR imaging studies, Aiden's neurological injury, although consistent with a substantial mental and motor impairment, was likely acquired prior to this birth. I am therefore not recommending consideration for inclusion in the NICA program.

4. A review of the file in this case reveals that no expert opinions were filed that were contrary to the opinion of Dr. Willis that Aiden did not suffer an injury that meets the definition of a birth-related neurological injury under section 766.302(2). Dr. Willis's opinion is credited. Further, there were no expert opinions filed that were contrary to Dr. Duchowny's opinion that Aiden's neurological deficits were likely acquired prior to his birth. Dr. Duchowny's opinion is credited.

CONCLUSIONS OF LAW

5. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. *See* §§ 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. *See* § 766.303(1), Fla. Stat.

7. The injured infant, his personal representative, parents, dependents, and next of kin may seek compensation under the Plan by filing a claim for compensation with DOAH. *See* §§ 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. *See* § 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. *See* §§ 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 a 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. *See Fla. Birth-Related Neurological Inj. Comp. Ass'n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

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

DISPOSITION

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Jessica Platel, on behalf of and as parent and natural guardian of Aiden Jordan Platel, a minor, is dismissed with prejudice.

DONE AND ORDERED this 14th day of September, 2022, in Tallahassee, Leon County, Florida.



FRANCINE M. FOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 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).