

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MARLENE SHAUNA-GAYLE ALLEN ON
BEHALF OF AND AS PARENT AND
NATURAL GUARDIAN OF ROMARCO LEE
RICHARDS, A MINOR,

Petitioner,

vs.

Case No. 22-1532N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Partial Summary Final Order (Motion), filed August 23, 2022; and Petitioner's Response to Respondent's Motion, filed September 21, 2022.

STATEMENT OF THE CASE

On May 16, 2022, Petitioner filed a Petition 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 named "Dr. Neo" as the physician who provided obstetric services for the birth of Romarco Lee Richards (Romarco) at Plantation General Hospital in Plantation, Florida, on March 9, 2020.¹

¹ On May 23, 2022, Petitioner filed a supplemental document disclosing Krista Kant, M.D., as the obstetrician.

On May 27, 2022, DOAH mailed a copy of the Petition to Respondent, Dr. Kant, and Plantation General Hospital via certified mail. Respondent was served with the same on or before June 8, 2022.

After an extension of time to respond to the Petition was granted, on August 8, 2022, Respondent filed its Response to Petition for Benefits, wherein it maintains that the claim is not compensable as Romarco did not sustain a “birth-related neurological injury,” as defined in section 766.302, Florida Statutes.

On August 18, 2022, a telephonic status conference was conducted with all parties in attendance. On August 23, 2022, Respondent’s Motion was filed, wherein Respondent requests that a summary final order be entered finding that the claim is not compensable because Romarco did not sustain a birth-related neurological injury. Petitioner did not file a timely response to Respondent’s Motion.

On September 13, 2022, the undersigned issued an Order to Show Cause, wherein Petitioner was ordered to show cause in writing, within seven days of the date of the Order, why Respondent’s Motion should not be granted. On September 21, 2022, Petitioner filed a handwritten response with several attachments.

FINDINGS OF FACT

1. Romarco was born on March 9, 2020, at Plantation General Hospital in Plantation, Florida.
2. Romarco was a single gestation, and his birth weight exceeded 2,500 grams.

3. As set forth in greater detail below, the evidence establishes that Romarco did not sustain a “birth-related neurological injury,” as defined by section 766.302(2).

4. William J. Dobak, D.O., an obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Petitioner, Marlene Shauna-Gayle Allen, and Romarco and opine as to whether Romarco sustained an injury to his 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 supporting affidavit, Dr. Dobak opines, to a reasonable degree of medical probability, as follows:

In summary, delivery was at 38 weeks after spontaneous rupture of membranes. The baby delivered spontaneously vaginally and had Apgar scores of 9/9/9. The newborn hospital course was uncomplicated and transcranial ultrasound showed no evidence of subependymal, intraventricular or [sic] intraparenchymal, hemorrhage.

It is my opinion that there was no obstetric event that resulted in loss of oxygen to the baby’s brain during the hospital stay.

6. Respondent also 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 Romarco to determine whether he suffers from an injury which rendered him 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 August 5, 2022. In his supporting affidavit, Dr. Bello-Espinosa opines, to a reasonable degree of medical probability, in pertinent part, as follows:

* * *

6. There were no complications at birth. The APGAR scores were 9/9/9. There was no intervention required at birth, the baby was only at the hospital for two days after birth and received general neonatal care and his general physical and neonatal neurological examinations were normal. Romarco is a 2 year 4-month-old boy with a normal uncomplicated pregnancy, birth and post-natal course. He did not require admission to NICU. He did not have seizures or evidence of HIE. On the examination today Romarco's general physical exam in normal. Romarco's neurological examination shows no evidence of cortico-spinal, extra-pyramidal, brainstem or cerebellar dysfunction. He has significant delay with emergent signs suggestive of autism.

7. Romarco does not suffer from substantial mental or physical impairments.

8. Romarco has no evidence of any mental or physical impairments consistent with injury to the brain or the spinal cord due to oxygen deprivation or mechanical injury during labor, delivery or the immediate post-delivery periods.

9. Romarco did not have any permanent substantial mental or physical impairments due to injury to the brain or the spinal cord as a result of oxygen deprivation or mechanical injury during labor, delivery or the immediate post-delivery period.

8. Petitioner states in her response that Romarco, at delivery, had a cone-shaped head (a condition known as plagiocephaly). She further states that Romarco has received a diagnosis of Autism Spectrum Disorder (ASD). In support of these statements, Petitioner attached several medical letters. One

letter, dated June 7, 2021, from Michael Freimark, M.D., provides that Romarco is being evaluated for developmental delay. A second letter, from Mark Epstein, M.D., a pediatric neurologist, dated May 5, 2022, provides that Romarco has been diagnosed with ASD and Developmental Language Disorder. Additional correspondence addresses the need for Behavior Analysis Services for Romarco's ASD and related disorders.

9. Petitioner's statements and supporting documents, even accepted as true, do not dispute the findings and opinions of Drs. Dobak and Bello-Espinosa. The undisputed findings and opinions of Drs. Dobak and Bello-Espinosa are credited. The undersigned finds that Romarco did not sustain an injury to his 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 him 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. Section 120.57(1)(h), Florida Statutes, provides, in pertinent part, as follows:

Any party to a proceeding in which an administrative law judge has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

18. Here, Respondent established that there is no genuine issue of material fact concerning whether Romarco sustained a compensable birth-related neurological injury. As noted above, the undersigned finds and concludes that Romarco did not sustain a birth-related neurological injury, 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 6th day of October, 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 6th day of October, 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).