

FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, DC 20579

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's  
Libyan Arab Jamahiriya

Claim No. LIB-II-148

Decision No. LIB-II-185

Counsel for Claimant:

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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at Lod Airport in Tel Aviv, Israel on May 30, 1972.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009,*

*from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission ("January Referral").*

The present claim is made under Category D. According to the January Referral, Category D consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 6. Attachment 1 to the January Referral lists the suits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter ("December Referral") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from

asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On February 18, 2010, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission determined that claimant had suffered gunshot and shrapnel wounds, requiring hospitalization after the attack. The Commission concluded that these injuries met the Commission's standard for physical injury and, consequently, that the claimant was entitled to compensation in the amount of \$3 million. *Claim of* 5 U.S.C. §552(b)(6) , Claim No. LIB-I-034, Decision No. LIB-I-037 (2010) (entered as Final on March 24, 2010).

#### BASIS OF THE PRESENT CLAIM

On July 2, 2010, the Commission received from the claimant a completed Statement of Claim in which he asserts a claim for additional compensation under Category D of the January Referral, along with exhibits supporting the elements of the claim, including evidence of claimant's U.S. nationality, his receipt of an award under the December Referral, and the extent of his injuries. Specifically, claimant asserts that, as a result of his injuries, he has "suffered lasting nerve damage, numbness, severe pain, and . . . limited use of his right leg[.]" "devastating and disabling psychiatric injuries

requiring treatment[,]” “chronic kidney damage,” and “extensive scarring on [the] gluteal region, chest, and leg,” and that these conditions constitute a special circumstance warranting additional compensation under Category D.

In support of his claim, claimant has submitted, *inter alia*, extensive contemporaneous and more recent medical records, radiological images, recent photographs said to depict claimant’s scarring, a contemporaneous newspaper photograph depicting claimant lying on his abdomen during the flight to Puerto Rico after being released from the hospital in Israel, a letter concerning claimant’s discharge from the U.S. Army in January 1976, benefits-related records from the Social Security Administration (SSA), and various scholarly articles concerning kidney injury, post traumatic stress disorder (PTSD), and “crush syndrome.”

## DISCUSSION

### Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction under Category D is limited to the category of claims defined under the January Referral; namely, claims of individuals who: (1) are U.S. nationals; (2) received an award under the December Referral; and (3) have dismissed their respective Pending Litigation cases against Libya. January Referral, *supra*, ¶ 6.

### *Nationality*

The Commission determined in its decision on claimant’s physical injury claim under the December Referral that the claim was owned by a U.S. national from the time of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies to satisfy the nationality requirement here.

*Award Under the December Referral*

To fall within the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of his Category D claim.

*Dismissal of the Pending Litigation*

The January Referral also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 3. The Commission determined, in its decision on claimant's physical injury claim under the December Referral, that the Pending Litigation in question, *Franqui, et al. v. Syrian Arab Republic, et al*, Case No. 06-cv-734, filed in the United States District Court for the District of Columbia, had been dismissed under Plaintiffs' Stipulation of Dismissal with Prejudice. That determination also applies here.

In summary, therefore, the Commission concludes, on the basis of the foregoing, that this claim is within the Commission's jurisdiction pursuant to the January Referral and is entitled to adjudication on the merits.

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether "the severity of the injury is a special circumstance warranting additional compensation." In *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation

under Category D. The Commission further held that in determining which injuries are among the most severe, it would consider the nature and extent of the injury itself, the impact that the injury has had on claimant's ability to perform major life functions and activities—both on a temporary and on a permanent basis—and the degree to which claimant's injury has disfigured his or her outward appearance.

For each Category D claim that is before the Commission, the present claim included, claimants have been requested to provide “any and all” medical and other evidence sufficient to establish “the extent to which there is permanent scarring or disfigurement that resulted from the physical injuries suffered; and/or the extent to which the severity of the injury substantially limits one or more of the claimant's major life activities.”

In this proceeding, the Commission is required to focus solely on the physical injuries suffered by the claimant and to make a determination as to whether further compensation is warranted under Category D for those injuries. Perhaps the most thorough description of the events surrounding his injuries was provided as part of a statement contained in a recent medical examination produced in evidence. In this statement, claimant states that he was waiting in the baggage claim area when the attack began and that he “felt bullets hitting his body with a lot of bleeding.” He stated that he then “fell to the floor” and crawled away, eventually taking cover “behind a counter.” According to claimant, bullets were “bouncing off a concrete wall” just a few feet from him, and “[l]arge chunks of concrete debris, provoked by bullets and grenade shrapnel, hit his body frequently and very hard.” He also stated that the “last thing he remembers he was dragged through the floor and outside of the building; put on a stretcher, placed

on an ambulance and taken to a hospital where they stopped the bleeding. He remembers he had i.v. fluids; one bottle on each arm.”

The contemporaneous medical records submitted with this claim confirm that, following the incident, claimant was admitted to the Haim Sheba Medical Center at Tel Hashomer, where he was treated for “shrapnel wounds due to an explosion.” The hospital discharge summary notes that claimant had suffered “Two Wounds ± 1 Cm Each in Soft Tissues of Chest,” as well as a “Shrapnel Wound in Rt. Buttock” leaving entry and exit wounds and “Three Superficial Wounds on Lower 1/3 of Dorsal Aspect of Rt. Leg . . . .” The record indicates that doctors “Excised the Wounds[,]” although it does not refer to any other surgical procedures. It notes that claimant was discharged on June 7, 1972, but “Requires Further Medical Treatment to His Wounds. He is Able to Fly While *lying* on His Abdomen.”

A Hospital Summary from a Veterans Administration (VA)<sup>1</sup> facility in Puerto Rico indicates that, upon his return home, claimant was hospitalized until July 6, 1972, during which time doctors cleansed his wounds, administered antibiotics, and performed surgery to reconstruct an “unclosed bullet wound.” His wounds were notated as follows: “bullet wounds . . . chest right side – non-penetrating, Rt buttocks and Rt external lower half of Rt leg.” Claimant’s “Course in hospital” was described as “Uneventful,” and his condition at release as “good.” A notation in the “Doctor’s Progress Notes” dated July 24, 1972, indicates that claimant’s bullet wounds were “already healed” and he had “no impairment walking.”

A separate medical record from December 20, 1972—seven months after the incident—indicates that claimant felt “very weak” and complained of, among other

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<sup>1</sup> Claimant served in the United States Army from 1963 to 1965.

things, “low back pain.” The doctor also noted that claimant had scar tissue on the lower part of his right leg, at his pelvis, and other “multiple scars” on his right side. He further noted that claimant had “sharp pains upon pressure at rt. calve . . . muscle and at right sciatic . . . .” As a result, he diagnosed claimant with “neuritis<sup>2</sup> at right pelvis and Rt leg + axilla[,]” in addition to “anxiety neurosis with depression.” It is noteworthy, however, that in a 1978 medical evaluation, the examining physician, having reviewed the 1972 notation, indicates that “[t]he examination offers no findings that would justify this diagnosis.”

Records from the months and years following the incident record similar diagnoses and complaints on the part of claimant. For example, a letter to the Israeli National Insurance Institute from R. Rodriguez Buxo, M.D.,<sup>3</sup> dated May 25, 1974, indicates that, in addition to his mental neuroses, claimant suffered from “axillary (Right) neuritis and low back pains together with progressive pains and cramps in right leg, possibly due to poor deep vascularity and operative procedures at the said extremity[,]” which Dr. Buxo said “doesn’t permit him to be on his feet during prolonged periods and consequently he can’t do any active physical task.” A medical record from 1976 further notes that claimant suffers from “Leg numbness,” and one record from February 1977 mentions that claimant has “limitation of R hip flexion.” Other records from the late 1970s further document claimant’s assertions of pain in his right leg, thigh, and back.

More recent medical records suggest that, despite claimant’s earlier assertions of pain in the right side of his body—and despite the results of an August 2011 medical

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<sup>2</sup> “Neuritis” is a condition characterized by “[i]nflammation of a nerve.” *Stedman’s Medical Dictionary* 1308 (28th ed. 2006).

<sup>3</sup> Although it is not clear from the document itself, claimant states that the December 20, 1972 medical record referenced above was also written by Dr. Buxo.



exam concluding that claimant had sustained right-side nerve damage—these complaints have not resulted in any substantial limitation of claimant’s mobility. For instance, a 1990 medical record describes claimant’s initial injury, but then states that the injury has resulted in “No functional limitation.” In addition, VA medical records from 2005 indicate that claimant “is able to walk w/o limitation, except for occasional tiredness after prolong [sic] ambulation,” and that he “[a]mbulates without assistive devices.” No mention is made of difficulty walking due to leg or back pain.

The medical records, including those from the months and years following the attack, note the presence of scarring resulting from the Lod Airport attack, although this appears to be minimal and is described in a 1979 General Surgical Examination as “well healed.” As evidence of the scarring, claimant has submitted recent color photographs of these scars, which are consistent with the alleged location of his injuries; however, as noted in the 1979 report, they appear to be well-healed and, indeed, are difficult to make out in the photographs that claimant submitted.

Further, claimant has submitted medical records, dating from 2005, indicating that there are “scattered buckshots,” described elsewhere as “metallic BB’s,” present in the right side of claimant’s chest, lower back, and right leg. The report of a September 2011 radiological exam identifies these as “metallic densities” and notes that, “according to history, they represent bullet fragments.” However, the report also states that there is “[n]o significant finding otherwise” and that there is “[n]o acute pathology on plain film.” Claimant has submitted the original films from this examination, confirming the presence of fragments as described in the report.

With regard to his claim that his physical injuries resulted in kidney damage, claimant has submitted medical records indicating that in recent years he developed hypertension and "Type II Diabetes Mellitus." The records indicate that in July 2007, he was diagnosed with congestive heart failure, although the treatment for this condition is not clear. The medical records further indicate that in August 2009, he underwent a kidney transplant after a diagnosis of "end stage renal disease." Claimant has submitted a medical opinion from Alberto Folch, M.D., a general medicine practitioner in Puerto Rico, arguing that claimant "may have developed kidney injury as a result of his injuries." Dr. Folch, citing two studies attached to his report, argues that claimant's physical injuries "would have released large amounts of myoglobin<sup>[4]</sup> into his system," which would have caused damage to claimant's kidneys. According to Dr. Folch, the "development of hypertension before diabetes mellitus is further evidence of this."

The medical records themselves, however, do not indicate the cause of claimant's hypertension or diabetes, only that those conditions were the cause of his congestive heart failure and end-stage renal disease. Moreover, those records suggest that claimant only began to suffer from congestive heart failure and end-stage renal disease in the last several years, approximately 35 years after the Lod Airport attack. Dr. Folch himself, in his review of claimant's medical records, notes that claimant's hypertension became known only in 1988 or 1989, and that he did not suffer from diabetes at that time. Further, one study that he cites assumes a "manifestation of extensive muscle damage"; the other focuses on hospitalized patients and discusses "acute kidney injury," or "AKI," which, according to the medical records, does not appear to have been the cause of

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<sup>4</sup> "Myoglobin" is the "oxygen-carrying and storage protein of muscle, resembling hemoglobin but containing only one subunit and one heme as part of the molecule . . ." *Stedman's Medical Dictionary*, *supra* note 2, at 1273.

claimant's renal failure. In addition, Dr. Folch has not sufficiently drawn a connection between claimant's medical records—specifically, the radiological exams, as well as the blood and other laboratory test results—and the conclusion that trauma from claimant's physical injuries is causally connected to his renal failure. Under these circumstances, the Commission concludes that the claimant has failed to sustain his burden of proving that the physical injuries he sustained at Lod Airport resulted in kidney damage

As noted earlier, claimant also argues that he suffered “severe and chronic psychiatric disabilities” as a result of the incident, and that these injuries should be considered in the Commission's decision under Category D. However, as the Commission held in <sup>5 U.S.C.</sup> §552(b)(6) ; *supra*, the “injury” referred to under Category D is the injury for which an award was issued by the Commission under the December Referral, which, in this case, is the gunshot and shrapnel wounds that claimant sustained during the Lod Airport attack. Further, as also noted in <sup>5 U.S.C.</sup> §552(b)(6) , compensation under the December Referral is limited to claims for physical, not psychological, injury. *Id.* (citing *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> ; Claim No. LIB-I-033, Decision No. LIB-I-046 (2011); *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> ; Claim No. LIB-I-041, Decision No. LIB-I-030 (2010)). Accordingly, to the extent that claimant is seeking additional compensation on the basis of psychiatric harm, his request is rejected.

In assessing this evidence as to the physical injuries in this case, the Commission looks to the three factors we articulated in <sup>5 U.S.C.</sup> §552(b)(6) : the nature of the injury; the extent (if any) of physical disfigurement; and the effect on the claimant's major life functions. First, the claimant's physical injuries—bullet wounds and shrapnel to various parts of his body, including his chest, his buttocks and his lower right leg—were certainly significant.

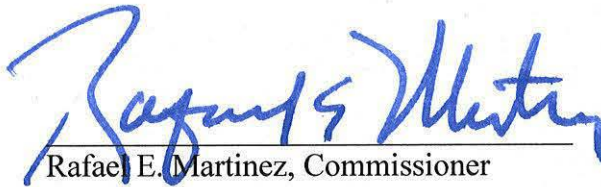
On the other hand, claimant has not demonstrated that any of his major life activities have been limited in a sufficiently significant way as a result of his physical injuries—the gunshot and shrapnel injuries—or that there was a sufficiently significant disfigurement to his outward appearance so as to qualify him for additional compensation. While claimant asserts that he still has pain on the right side of his body, there is no mention of this pain in more recent medical records, nor is there any indication of ongoing treatment for impairments resulting from his initial physical injuries. Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D.

Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, June 20, 2012  
and entered as the Proposed Decision  
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

**The decision was entered as the  
Commission's Final Decision on**

**August 28, 2012**

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2011).