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-178 Decision No. LIB-II-106

Oral Hearing held on February 24, 2012.

FINAL 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 the La Belle Discotheque in West Berlin, Germany on April 5, 1986. The claim was made under Category E of the *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'). By its Proposed Decision entered October 28, 2011, the Commission denied the claim on the grounds that claimant had not met his burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the Commission cited the absence of both contemporaneous medical records and more recent medical records by which the severity of claimant's alleged physical injuries could be established, or traced to the La Belle bombing.

By letter dated December 29, 2011, claimant filed a notice of objection and requested an oral hearing, asserting various factual errors in the Commission's Proposed Decision. On February 10, 2012, he submitted an objection brief containing further evidence and argument in support of his objection. The oral hearing was held on February 24, 2012. As requested by the Commission during the hearing, claimant submitted additional documentation in support of his objection on April 24 and July 2, 2012.

In his objection brief and during the hearing, claimant argued that, contrary to the Commission's conclusion, he had suffered physical injuries at the La Belle Discotheque that were severe enough to meet the Commission's standard and that were documented in the medical records submitted. In particular, claimant argued that the Commission misinterpreted information contained in the medical records that, in fact, provided sufficient evidence of his physical injuries. Further, he argued that the absence of contemporaneous medical records could be explained by the refusal of the U.S. Department of Veterans Affairs (VA) to forward to claimant the relevant documentation in response to a Freedom of Information Act (FOIA) request.

DISCUSSION

In its Proposed Decision in this claim, the Commission determined that, although claimant had submitted extensive medical documentation in support of his claim, most of these records pertained to medical examinations conducted after 2008. Moreover, of the documents that did reference physical injuries allegedly sustained by claimant in the La Belle bombing, it was unclear whether the source of this information was claimant's U.S. Army medical file or, as seemed more likely given the context, claimant's own recitation

of his medical history. The Commission also noted that, where claimant's injuries were mentioned, there was insufficient information to establish the nature and severity of the injuries. In addition, some medical records from the late 1980s made no mention of claimant's involvement and injury in the La Belle incident at all. With regard to claimant's present knee problems and the scarring on his forearm, which he alleged were the result of the La Belle incident, it was, similarly, impossible to establish causation, particularly in light of other potential intervening causes reflected in the record.

In support of his objection, claimant submitted, *inter alia*, additional VA medical records; a 2010 affidavit from Mark Murray, M.D., an acquaintance of claimant, attesting to having witnessed claimant injure his left knee in 2008, and noting claimant's statements, at that time, that he had previously fractured his left kneecap while serving in the military in Berlin; claimant's 1987 military discharge sheet (reflecting an honorable discharge); various records related to claimant's FOIA request to the U.S. Department of Veterans Affairs for his military medical files; and a copy of his 1986 Classified Information Nondisclosure Agreement.

In his original submission, claimant alleged that he "was entering the club" when the explosion occurred, and was thrown against a wall. As a result, he alleged that he suffered a concussion, "superficial" cuts to his arm and head, cracked teeth, and "minor fractures of [the] knees." During the oral hearing, claimant described how he had lost consciousness for approximately 20 seconds; and how, when he came to, he remained outside the La Belle Discotheque assisting the wounded. He added that, at that point, his arm "really didn't hurt that much[,]" although he wrapped a bandage around it. Claimant stated that, eventually, he was taken to a local hospital ~~he~~ believes it was the Free

University of Berlin and received twenty-five stitches in his arm. He acknowledged that he did not undergo any procedures on his knees at that time because, according to claimant, medical personnel advised him that intrusive procedures would "probably cause more harm at this stage . . . ." He alleged that on the Monday following the explosion, he visited the clinic at the military base, and ten days later, had the stitches in his arm removed.

The documents submitted by the claimant contain very little evidence to substantiate his assertion that he suffered discernible, non-superficial physical injuries as a result of the La Belle bombing. In his objection brief and during the hearing, claimant offered several reasons for this shortcoming. One of these addressed the Commission's concern in the Proposed Decision that references in his recent medical records to injuries sustained in the La Belle incident were simply claimant's own recitation of his past medical history, and were not derived from independent medical records. Claimant argued that "where there would be a question regarding the origin of said information, it would seem only prudent that those various doctors would have carefully reviewed those past military medical records as part of the examination process."

While claimant's assumption may be correct, he has presented no evidence to support his assertion. Moreover, if recent medical examiners had access to records evidencing claimant's physical injuries for instance, as with claimant's 2010 Agent Orange Program evaluation, which notes that claimant underwent the "[r]epair of shrapnel wounds in the right arm in 1986," such supporting documentation should be available to claimant. No such records, however, have been submitted. The source of the information regarding claimant's injuries in the La Belle incident, therefore, remains unclear.

In his objection brief and during the oral hearing, claimant emphasized that he had exercised considerable due diligence in trying to obtain military medical records documenting the cause, nature, and severity of his alleged physical injuries. In particular, he noted that on August 2, 2010, he sent a letter to the VA (a copy of which was provided with his objection) requesting a copy of his C-file[1] and, through the FOIA, "all information regarding my records, specifically information regarding injuries sustained by me during the 1986 bombing at LaBelle's Nightclub in Berlin Germany . . . ." While claimant acknowledged that his C-file had been sent to him in response to this request, he asserted that the VA "has refused to release said medical records to me."

Claimant has provided copies of his Notice of Appeal, and the June 11, 2012 VA Assistant General Counsel's response, concerning his request. Contrary to what claimant asserts, however, it appears that no documentation concerning his physical injuries was withheld. Rather, the VA Assistant General Counsel stated that their office had contacted claimant's VA Regional Office, the Board of Veterans Appeals (BVA), and the Veterans Health Administration, to search for records responsive to claimant's request. According to the letter, all available records, including eight pages of Service Medical Records in the possession of the BVA, had already been submitted to claimant. No other records were found. Thus, it appears that no additional records exist that could support claimant's claim of physical injury apart from what he has already submitted.

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[1] A "C-folder" is a type of claims folder "identified by a file number [that is] established upon receipt of a veteran's original claim for disability compensation or pension, (disability allowance, or officers' retirement pay) medical benefits, memorandum ratings, and overpayments when there is no indication that a claims folder has been previously established. Subsequently, accumulated papers upon which an award or disallowance is made will be filed in this folder." U.S. Dep't of Veterans Affairs, Department of Veterans Benefits Manual M23-1 (Administrative Operations), Change 87, pt. I, ch.13, § 13.03(a) (1994), *available at* http://www.benefits.va.gov/warms/M23_1.asp.

Other information submitted with this claim runs counter to claimant's assertion that the references in his medical records to past injury in the La Belle bombing were based on contemporaneous or other medical documentation evidencing treatment for such injuries. For instance, claimant stated during the hearing that he took the medical records from his initial treatment in the German hospital to his home base the Monday following the attack (the bombing occurred on a Saturday), and acknowledged that that those records should have become a part of his permanent file. As noted throughout these proceedings, however, those documents have not been submitted, and indeed, there is no evidence of their ever having been part of his service medical records.

In addition, as noted in the Proposed Decision, the Army Review Board Agency denied claimant's application in 2010 for a Purple Heart for injuries sustained during the La Belle incident because, in part, "[t]he applicant's service medical records are not available for review[,]" and because "[t]here is no substantiating evidence that the applicant was present or wounded or was treated for a wound sustained in the incident." In sum, the Commission concludes that no records of claimant's alleged physical injuries currently exist or were withheld by the military following claimant's FOIA request, and that any references in his medical records, particularly recent medical records, to such injuries were based on claimant's own recounting, and not on an examination of contemporaneous records evidencing treatment for those injuries.

Claimant also sought to explain the absence of medical records by indicating that, prior to the incident, he had signed a Classified Information Nondisclosure Agreement ~~a~~ copy of which was submitted with this claim ~~which~~ prevented him from discussing his involvement in the La Belle bombing. Claimant asserts that, "[i]n accordance with that

agreement, I was unable to discuss any information I had regarding the bombing." During the hearing, he stated that he reported to security headquarters on the Monday following the incident, explained what had occurred at La Belle, and was told that he "[didn't] need to share that information with anyone else." The claimant failed to explain how it could be that information specific to any injury and only the injury he may have suffered was classified and thereby covered by the terms of this standard governmental non-disclosure agreement.[2] The Commission finds this to be an insufficient explanation for claimant's inability to produce evidence of contemporaneous medical treatment.

Even with regard to those physical injuries manifesting today which claimant attributes to the La Belle bombing, the cause of those injuries is difficult to verify. For instance, claimant indicated during the hearing that he has continued to suffer from knee problems caused by injury during the La Belle incident. However, the Commission notes, as it did in the Proposed Decision, that claimant suffered a left patellar fracture to his left knee in 2008, which he injured again as a result of a fall in 2010. Several years earlier, in January 2003, a VA doctor noted that he suffered from "[m]ild degenerative joint disease of the knees[.]" In addition, an August 2010 notation in the VA medical records indicates that claimant likely suffers from "degenerative" and "osteoarthritic" changes in his left knee. A notation from a VA orthopedic evaluation in January 2012 appears to confirm this, noting that claimant suffers from "[p]ersistent degenerative changes . . . in both knees[,]" as well as "[m]oderate osteoarthritis in the right knee . . . ." The same exam notes an abnormality in the right knee that "may be secondary to posttraumatic changes

[2] Indeed, given that claimant apparently revealed his injury in the La Belle incident to Dr. Karen Webster, an acquaintance at his gym, in 1993, and to his physicians during physical examinations in recent years, it would appear that he was not prevented from disclosing both the cause and the nature of his alleged physical injuries.

such as calcified hematoma[,]' but offers no further information discussing the cause of the condition. Other than a general complaint of "[r]ight knee pain" in 1999, the VA records contain no other information regarding claimant's knee conditions predating the diagnosis of degenerative changes in 2003 referenced above.

In light of the information contained in claimant's VA medical records, the Commission is unable to conclude that claimant's knee problems are in any way related to physical injuries sustained during the La Belle bombing. While the recent medical records are certain as to a fracture to claimant's left knee, the cause seems more likely to relate to claimant's 2008 fall, and the records do not appear to contain any evidence of a pre-existing fracture or other injury, much less a cause of such injury. Moreover, the diagnoses of degenerative changes and osteoarthritis do not immediately suggest a traumatic injury in 1986, insofar as these changes are documented only in medical records from many years after the incident. Claimant also points to letters he submitted from Drs. Murray and Webster, who indicated that he had previously stated in their presence that he injured his knees in the La Belle bombing; however, in the absence of supporting medical documentation, the Commission is unable to rely on those statements.

The Commission also takes note of a statement made by claimant in a "Chronological List of Health Issues," wherein he indicates that he suffered a "patella tendon rupture in [his] left knee" in 1998,[3] which he noted was "[p]ossibly attributable to initial injury during basic training." In that description, claimant notes the following: "Since that time, I have had progressive problems with knees, shin splints, planterfasciaitis [sic] (3 times) from running in combat boots, jumping out of airplanes and various other military

[3] In one of his objection submissions, claimant indicated that the correct year was 2008, not 1998, which the Commission notes is consistent with the injury described in 2008 in his VA medical records.

activities." While claimant describes, in the same document, the injuries he alleges he sustained in the La Belle bombing, including a "minor fracture of left knee[,]" the document does raise questions as to the nature and severity of the injuries he claims to have sustained during basic training. The possible existence of such injuries, without further information, makes determining the cause of claimant's current knee problems even more difficult.

With regard to the scars noted on claimant's arm in recent medical records, and verified in photographs submitted with this claim, the Commission notes that claimant has not produced any further evidence regarding the cause of these scars. The Commission therefore reaffirms its finding in the Proposed Decision that, in the absence of further documentation, and particularly contemporaneous medical records, it is impossible to determine the source of this scarring.

Finally, as to the absence of claimant's name from the CID casualty list dated April 10, 1986, claimant explained, during the oral hearing, that this list was compiled "in a couple days . . . . [T]here was no extensive . . . search trying to determine whom or all persons that were injured . . . ." This is, of course, a plausible explanation, particularly given that claimant was on leave at the time and sought initial treatment at a German civilian hospital. However, even accepting claimant's explanation as to why he was not listed among the wounded, this neither proves nor disproves that he suffered a physical injury in the attack. In that sense, the fact that his name is not on the list is not dispositive in this claim.

CONCLUSION

The Commission recognizes that claimant has undertaken enormous efforts in trying to obtain medical documentation of his alleged physical injuries suffered at the La Belle Discotheque. However, in order for this claim to be compensable, as with all claims, claimant must demonstrate that he suffered "a discernible physical injury, more significant than a superficial injury," and "verify the injury by medical records." As detailed in the discussion above, claimant has been unable to provide such evidence

Therefore, for the reasons discussed above, and based on the evidence and information submitted in this claim, the Commission again concludes that the claimant has not met his burden of proving that he has satisfied the Commission's standard for physical injury.[4] Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, September 14, 2012
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

[4] Section 509.5(b) of the Commission's regulations provides:

> The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2011).

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
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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-178 Decision No. LIB-II-106

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 the La Belle Discotheque in West Berlin, Germany on April 5, 1986.

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 Letter").

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

> claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Id. at ¶ 7. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

The January Referral Letter, as well as a December 11, 2008 referral letter ("December Referral Letter") 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 Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On July 8, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under Category E of the January Referral Letter, along with exhibits supporting the elements of his claim. This submission included evidence of claimant's U.S. nationality, his presence at the scene of the terrorist incident, and his alleged physical injuries for which he now claims compensation.

The claimant states that he was entering the La Belle Discotheque in West Berlin, Germany on April 5, 1986, when a bomb exploded inside the club, throwing him against a wall. Claimant asserts that he suffered fractures to his knees and that he hit his head and suffered a concussion, causing him to briefly lose consciousness. In addition, claimant states that his teeth slammed together, resulting in cracks to several of his teeth. He also claims that he suffered cuts on his head and arms, for which he claims to have received multiple stitches. Claimant states that he continues to suffer pain as the result of the injuries he sustained during the incident, and that his ability to engage in certain physical activities has adversely affected his professional life.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under the January Referral Letter; in this case, Category E, claims of individuals who: (1) are U.S. nationals; (2) set forth a claim before the Commission for wrongful death or physical injury resulting from one of the Covered Incidents; and (3) were not plaintiffs in a Pending Litigation case against Libya. January Referral Letter, *supra* ¶ 7.

Nationality

In the *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order to meet the nationality requirement, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided a copy of his birth certificate, showing his place of birth in Trenton, New Jersey, his expired U.S. passport (valid from June 1992 to June 2002), and a copy of his current U.S. passport. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, the claimant must also assert a claim for wrongful death or physical injury resulting from one of the

Covered Incidents listed in Attachment 2 to the January Referral Letter. January Referral Letter, *supra*, ¶ 7. This list includes the "April 5, 1986 bombing of the La Belle Discotheque in Berlin, Germany, as alleged in *Clay v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-707 and *Harris v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-732." *Id.*, Attachment 2, ¶ 8. In his Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the April 5, 1986 La Belle bombing. The Commission therefore finds that the claimant has satisfied this element of his claim.

Pending Litigation

Finally, the January Referral Letter states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral Letter, *supra*, ¶ 7. Attachment 2 to the January Referral Letter identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, are the *Clay* and *Harris* cases. Claimant has stated under oath in his Statement of Claim, and the pleadings in the *Clay* and *Harris* cases confirm, that he was not a plaintiff in that litigation. Based on this evidence, the Commission finds that the claimant has also satisfied this element of his claim.

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 Letter and is entitled to adjudication on the merits.

Merits

Standard for Physical Injury

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category E must meet "the standard for physical injury or wrongful death, as appropriate, adopted by the Commission" for purposes of this referral. January Referral Letter, *supra*, ¶ 7. The Commission held in *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

> (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and
>
> (2) must have received medical treatment for the physical injury within a reasonable time; and
>
> (3) must verify the injury by medical records.

Id. at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to his Statement of Claim and accompanying exhibits, claimant suffered physical injuries on April 5, 1986 when a bomb exploded inside the La Belle Discotheque in West Berlin, Germany. Claimant asserts that he "was entering the club after being notified by the German Police of a possible bomb threat at that location" when the explosion occurred, and that the force of the blast threw him against a wall. He states that the explosion "jamm[ed] my knees [sic] up to my chest[,]" and that he hit his head and suffered a concussion, which caused him to "los[e] consciousness for a short

period of time." In addition, claimant alleges that he suffered "superficial" cuts to his arm and head, and that his "jaw and teeth were slammed together, and several teeth were cracked." Claimant states that, following the explosion, a German taxi driver "came to [his] assistance and bandaged some of the cuts on [his] arms and head." He further explains that "[a]t the time, I was unaware of the extent of my injuries, and I began helping other patrons . . . ."

Claimant asserts that he received twenty to twenty-five stitches for the cuts to his head and arms, and that he suffered from ringing in his ears for approximately two weeks. In addition, he states that subsequent x-rays revealed that he had suffered "minor fractures of [the] knees." According to the claimant, his alleged injuries have had lasting effects, including difficulty with sitting for prolonged periods and bending his knees. Finally, claimant asserts that the physical injuries he sustained during the bombing have adversely impacted his professional life, insofar as he failed the physical examination for helicopter flight school and is unable to "perform the physical activities that help alleviate [the] stress[]" associated with his current employment as a private investigator.

In support of his claim, claimant has provided, *inter alia*, medical records from the Department of Veterans Affairs; a brief timeline detailing claimant's military service and physical injuries between 1972 and 1999; various documents evidencing claimant's service in the U.S. military and posting in Berlin, Germany, including at the time of the terrorist incident; letters from acquaintances of the claimant describing statements he made to them concerning his involvement in the La Belle bombing and his physical injuries; a detailed narrative, prepared by claimant, describing, among other things, his involvement in the terrorist incident and his alleged physical injuries; a 2011 letter to

claimant from the Department of Veterans Affairs certifying his eligibility for "compensation for service-connected disability(ies)"; a 1988 job application completed by claimant for a U.S. Army "Club Manager" position, which includes a supervisor's questionnaire in which a former supervisor noted claimant's injury in the La Belle bombing; copies of photographs, articles, and other documents evidencing claimant's involvement in amateur boxing while stationed in Berlin; a set of keys engraved with the name "Disco Club La-Belle Berlin"; and several photographs (date unknown) that appear to depict scars on claimant's right arm and near his right eye.

Despite the wealth of documentation submitted with this claim, claimant has not provided any contemporaneous medical records to support his claim that he suffered physical injuries as a result of the La Belle bombing. Although he has provided extensive medical records from the Department of Veterans Affairs, nearly all of these pertain to medical examinations conducted since 2008. Some of these documents refer to claimant's injury during the La Belle incident; however, it is unclear whether this information was obtained from medical records or simply from claimant's own statements of his medical history. Moreover, the descriptions themselves are somewhat inconsistent. For instance, the electronic record from a 2010 orthopedic consultation notes that claimant suffered knee injuries in the La Belle bombing consisting of a "R patellar dislocation" and a "L patellar fx," while the report of a mental health exam, also from 2010, notes that claimant "fractured his right patella [and] dislocated the left patella." Also troubling to the Commission is the fact that there is no proof to place the claimant at the La Belle disco on the night of the attack, and indeed no record of his claim of having been notified by the German police of a bomb threat at that location.

Moreover, claimant is not identified on the Army's official CID casualty list dated April 10, 1986.

In any event, while the medical records referenced above are consistent regarding claimant's assertion of injuries to his right arm—including one notation from a 2010 medical evaluation stating that claimant had undergone the "[r]epair of shrapnel wounds in the right arm in 1986[,]"—it is, as with claimant's alleged knee injuries, unclear whether this information comes from claimant's own recitation of his medical history or from independent medical records. Even assuming that claimant did suffer injuries during the La Belle bombing, the actual nature and severity of the injuries cannot be determined based on the documentation provided. In this regard, it should be noted that, during his 2010 mental health evaluation, claimant apparently stated that, although he had suffered a left knee fracture and dislocated right knee in the La Belle bombing, he "had been successful in withholding his symptoms until he had another injury last 2008, with his left tendon being raptured [sic]."

On January 25, 2011, the Commission staff requested that claimant submit contemporaneous medical documentation concerning the alleged 1986 shrapnel removal procedure and the knee injuries he claims to have suffered during the incident; however, as noted above, no such records were received. Indeed, the only evidence in the record from the years immediately following the incident that reference claimant's injuries are a 1987 "Physical Data and Aptitude Test Scores Upon Release From Active Duty" form, which includes claimant's handwritten statement that he suffered from pain and discomfort in his knees and a limited range of motion in his right arm as a result of injuries sustained in the La Belle bombing, and a 1988 "Supervisory Supplemental

Questionnaire" submitted by claimant's supervisor at the time of the incident (apparently provided in support of a job application), which indicates that claimant "was injured" in the La Belle night club bombing. Neither of these documents includes information concerning the severity of the alleged injuries. Other documents from that time period make no mention of the incident at all. An "Enlisted Evaluation Report" covering the period from July 1985 through June 1986 includes no mention of claimant's involvement in the incident. In addition, a Letter of Commendation, dated May 8, 1986, notes that claimant received a perfect score on an April 1986 Army Physical Readiness Test (APRT), and that "[t]he physical strength, endurance and mental toughness [claimant] exhibited on this demanding test is truly a remarkable feat."*

Although the more recent medical records submitted by claimant include evidence of knee injuries, the records provide little evidence that these injuries were the result of claimant's involvement in the La Belle bombing. To the contrary, the records indicate that claimant suffered two separate injuries to his left knee, in 2008 and 2010 (the latter apparently resulting in a fracture to his left patella), but that these were the result of claimant having "slipped walking" in one case, and of falling down a staircase in the other. In addition, claimant refers to a third injury to his left patella in 1998, which he considered "[p]ossibly attributable to initial injury during basic training."

Finally, although the recent medical records do mention "old healed scarring" on claimant's forearm, corroborated by several color photographs submitted with this claim, and consistent with the location of claimant's alleged shrapnel injury, the source of this scarring, again, is impossible to determine in the absence of contemporaneous medical

* Claimant alleges, however, that in approximately 1997, he failed a physical examination taken in connection with an application for helicopter flight school, which he attributes in part to his knee injuries.

records. This is particularly the case given claimant's athletic involvement while stationed in Berlin, which, according to documents provided with this claim, resulted in some degree of physical injury. For instance, according to a letter from a woman who knew claimant at the time of the injury, claimant was involved in a 1982 boxing match in which claimant was "struck and lost consciousness." Claimant also states in his narrative that, "having boxed in the military, my jaw has been damaged."

The Commission notes that claimant has provided a copy of a letter sent to the Army Review Boards Agency by Congresswoman Doris Matsui, dated March 10, 2010, requesting that the agency review claimant's application for a Purple Heart due to his alleged injuries resulting from the La Belle bombing. The claimant has provided no documentation regarding the outcome of his request. The Commission contacted the agency to inquire about the disposition of claimant's application, and was advised that claimant's application was denied. According to the Record of Proceedings, the denial was made because "[t]he applicant's service medical records are not available for review[,]" and because "[t]here is no substantiating evidence that the applicant was present or wounded or was treated for a wound sustained in the incident."

Given the absence of contemporaneous medical records, or other medical records by which the source of claimant's knee problems and scarring can be traced to the La Belle bombing, the Commission cannot conclude that the claimant suffered "a discernible physical injury, more significant than a superficial injury." On this point, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

> The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2010).

In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met his burden of proof in that he has failed to provide evidence sufficient to establish that he "suffered a discernible physical injury, more significant than a superficial injury," and that the injury be verified by medical records, as required under the Commission's physical injury standard.

In light of the foregoing, the Commission is constrained to conclude that the claimant, 5 U.S.C. §552(b)(6) does not qualify for compensation under the January Referral Letter. Accordingly, his claim must be and is hereby denied.

The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

Dated at Washington, DC, October 28, 2011
and entered as the Proposed Decision
of the Commission.

Timothy J. Feighery, Chairman

This decision was entered as the Commission's Final Decision on
NOV 3 0 2011

Rafael E. Martinez, Commissioner

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) (2010).