

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

Counsel for Claimant:

Claim No. LIB-I-006

Decision No. LIB-I-013

Kathryn Lee Boyd, Esq.
Schwarcz, Rimberg, Boyd
& Rader LLP

Oral hearing held on July 21, 2011.

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)} during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

By Proposed Decision entered September 23, 2009, the Commission denied the claimant's physical injury claim on the ground that the claimant had failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for physical injury.

By letter dated October 2, 2009, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. On June 22, 2011, claimant's counsel filed a Declaration in support of this claim, along with documents verifying claimant's

efforts to obtain medical records, and a copy of the deposition testimony of the claimant dated August 31, 1987.¹ The oral hearing was held on July 21, 2011.

DISCUSSION

The claimant has objected to the Commission's Proposed Decision on the grounds that its application of the medical records requirement in its standard is arbitrary and capricious and that the great weight of the evidence in this claim supports a finding that claimant suffered a compensable injury. Counsel argued in its Supplemental Brief in Support of Claimant ^{5 U.S.C. §552(b)}₍₆₎ Objection to the Proposed Decision, that:

As a federal agency subject to the provisions of the Administrative Procedures Act ("APA"), the Commission applies a preponderance of the evidence standard. Ms. Shah is entitled to meet her burden of proving that the existence of her injury is more probable than not through any relevant, probative, and credible evidence. Having submitted her own sworn statements, as well as that of her sister, who was traveling with her, and her husband, as well as contemporaneous documents independently prepared which clearly list Ms. Shah as one of the injured passengers, Ms. Shah has indisputably met this burden.

Commission's Standard for Physical Injury

As set forth in the Commission's Proposed Decision in this claim, the December Referral letter required, among other things, that the Commission establish a standard for physical injury for claims in the Libya claims program. The Commission determined and set forth that standard in *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), namely, that a claimant must establish that she or he suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation; that she or he received medical treatment for the physical injury within a reasonable time; and verify her or his injury by medical

¹ Claimant was deposed in the course of the lawsuit which she had filed against Pan Am with regard to the injuries she suffered as a result of the Pan Am 73 attack.

records, in order to establish a compensable claim. The Commission has applied this standard consistently to all physical injury claims within its jurisdiction in this program.

Claimant asserts that during the hostage incident on board Pan Am Flight 73 she suffered burns, bruises and shrapnel wounds. She further asserts that “[t]he evidence unquestionably demonstrates that her claim of physical injury ‘is more probable than its non-existence’.” However, as noted above, the Commission’s physical injury standard requires more than establishing an injury occurred; instead, a significant injury, more than superficial must be established.

Claimant’s Physical Injury

The evidence submitted in support of this claim includes claimant’s declaration dated May 20, 2009, the declaration of her sister,^{5 U.S.C. §552(b)(6)} dated July 30, 2009, claimant’s own deposition testimony dated August 31, 1987, contemporaneous news articles identifying the claimant as injured as a result of this incident, documentation regarding the reasons for the unavailability of contemporaneous medical records, and finally, the live testimony of the claimant herself and that of her husband during the oral hearing.

There are several physical injuries for which the claimant here seeks compensation: bruising on her face and legs and shrapnel wounds and burns to her hand. The independent evidence produced provides no information on a critical part of the Commission’s standard for physical injury, namely that the injury be a “discernible physical injury, more significant than a superficial injury.” From the original filing, a newspaper article, described as “[a] newspaper article, source and date unknown, entitled *List of the Injured*” indicated that^{5 U.S.C. §552(b)(6)} was among the passengers on board Pan

Am Flight 73. In claimant's post-hearing submission, she filed a list of passengers compiled by Pan Am which lists claimant as "injured," and a September 8, 1986 article from the Northwest New Jersey Daily Record, which reports that a State Department spokesman identified claimant as suffering "a slight wound in the arm during the shooting and explosions."

During the hearing, the claimant described the ordeal that she and the other passengers endured, and testified that she suffered bruises on her face and legs, shrapnel wounds on her right hand, and burns. She testified that both she and her 2 year old son, who had been shot in the elbow, were taken by ambulance to the hospital where she was initially treated by a nurse who cleaned her wounds. She further testified that the four or five pieces of shrapnel on her right hand were removed by a doctor in Karachi the day following the incident and that the shrapnel was removed with "tweezers, without anesthesia." According to the claimant, following the removal of the shrapnel her hand was bandaged. Claimant testified at the hearing that upon her return to the United States she continued to treat the injuries to her hand without any formal care and that she applied ointment, which had been provided by the Karachi hospital, on an as needed basis. In deposition testimony dated August 31, 1987, claimant stated with respect to her shrapnel injuries that doctors "put some medicine on top of it after pulling the small parts from the grenades." She described no further contemporaneous treatment, such as bandaging, or follow-up treatment, during that 1987 deposition testimony.

With respect to her asserted facial injury, claimant and her husband each testified that she was poked by one of the hijackers in her left cheek and arm with a rifle and thereby sustained a bruise on her face. They each further testified that this injury made it

difficult for her to eat for approximately two to three weeks; that she required pain killers for approximately one and one-half months; and that there was an indentation mark which remained on her cheek for four to five months following the attack. Claimant noted in her testimony with relation to her injuries that this injury "was the worst part." In claimant's supplemental brief following the oral hearing, claimant asserts that this assault resulted "in a permanent indentation and scar." Claimant's 1987 deposition testimony makes no mention of this injury, it merely notes that she was "poked".

As noted in the Proposed Decision, 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).

The Commission has carefully and thoroughly reviewed the entire record in this claim, including claimant's testimony at the oral hearing and the supplemental documentation submitted after the hearing. After examination of all of this evidence, significant questions remain as to the nature and extent of the injuries asserted. No permanent indentation or scarring was visible during claimant's appearance before the Commission. It is unclear whether claimant was admitted to the hospital because of any injuries she herself suffered or because of the severity of the injury to her two-year old son. Ultimately, the evidence is insufficient to satisfy the Commission that the injuries alleged to have been suffered by the claimant were significant enough to constitute anything more than a superficial injury. In this kind of situation, the requirement that the injury upon which the claim is made be verified by medical records – contemporaneous or otherwise -- takes on particular importance. However, there are no such records here, as would resolve the contradictions, ambiguities and unknowns contained in the record of

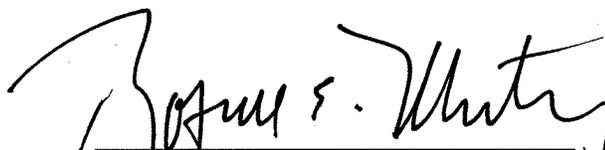
this claim. The Commission must conclude, therefore, that the claimant has not met her burden of proof in establishing that the injury on which her claim is based meets the threshold standard for compensability.

CONCLUSION

In summary, therefore, the Commission affirms that this claim for compensation under the December Referral Letter must be denied. Accordingly, while the Commission sympathizes with the claimant for the ordeal that she must have endured during the terrorist incident in question, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, September 6, 2011
and entered as the Final Decision
of the Commission.


Timothy J. Feighery, Chairman


Rafael E. Martinez, Commissioner

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Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

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 the claimant during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 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 December 11, 2008, under a delegation of authority from the Secretary of State, the State Department Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable*

John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya’s agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, 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 Secretary of State certified, pursuant to the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any

pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICOSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On June 4, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the elements of the claimant's claim, including evidence of: her United States nationality; her inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and her physical injuries. The claimant, ⁵ U.S.C. §552(b)(6)

states that she was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. She further states that she suffered cuts, bruises and burns during the final attack by the terrorists who had hijacked the plane.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who

are: (1) United States nationals and (2) named parties in a Pending Litigation which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

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 for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Based on the evidence submitted with this claim, the Commission determines that the claimant was a United States national at the time of the injury on which her claim is based.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the complaint in Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names her as a party. Additionally, the claimant has provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

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

Merits

Standard for Physical Injury

As stated in the December Referral Letter, to qualify for compensation, a claimant asserting a claim for physical injury must meet a threshold standard for physical injury adopted by the Commission. In order to develop such a threshold standard for compensability, the Commission has considered both its own jurisprudence and pertinent sources in international and domestic law.

After careful and thorough consideration, the Commission held in the *Claim of 5 U.S.C. §552(b)(6)*, *supra*, that in order for a claim for physical injury to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation;
and
- (2) must have received medical treatment for the physical injury within a reasonable time;
and
- (3) must verify the injury by medical records.

Physical Injury

According to her Statement of Claim, claimant *5 U.S.C. §552(b)(6)* was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi,

Pakistan. In her sworn statement, the claimant states that, during the hijackers' final attack on the passengers, she suffered cuts, bruises and burns for which she received some treatment in the airport terminal and further treatment in a hospital in Pakistan. The claimant did not provide any medical records with her original submission to support her claim or otherwise to document the injuries on which her claim is based. The Commission, by letter dated June 30, 2009, specifically requested that the claimant provide medical records to support her claim. In response, however, by letter dated August 10, 2009, claimant provided a sworn statement from her sister which corroborates claimant's statement of injury, but did not provide any medical records.

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.

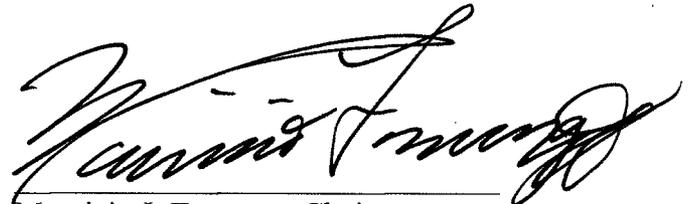
45 C.F.R. 509.5(b)(2008).

The Commission finds that the claimant has not met the burden of proof in establishing that the injury on which this claim is based meets the standard for physical injury set forth above because she has failed to provide medical records. 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 December Referral Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that she must have endured during the terrorist incident in question, her claim based on a physical injury suffered as a result of that incident 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, and entered as the Proposed Decision of the Commission.

SEP 23 2009



Mauricio J. Tamargo, Chairman



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) (2008).