

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)	}	Claim No. LIB-II-093
	}	
	}	Decision No. LIB-II-061
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

Oral hearing held on June 20, 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) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986. This claim was submitted under Category E of the January 15, 2009 *Letter 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 Proposed Decision entered July 12, 2011, the Commission denied the claimant's physical injury claim on the ground that the claimant failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for physical injury. The claimant, by letter dated August 8, 2011, objected to the Commission's decision and requested an oral hearing. The Commission, by letter dated April 12, 2012,

requested that claimant submit any additional evidence that she wished it to consider in support of her objection. However, no further evidence was submitted in response.

The hearing on the objection was held on June 20, 2012. During the hearing, the claimant requested additional time to submit further evidence to the Commission, which request was granted. The claimant submitted additional material on July 2, 2012, consisting of a letter from Letty Moss-Salentijn, D.D.S., Ph.D., dated July 2, 2012.

#### DISCUSSION

As noted in the Commission's Proposed Decision, Category E of the January Referral 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.

January Referral at ¶ 7.

#### *Claimant's Physical Injury*

The evidence submitted in support of the claim (including evidence submitted in support of the objections to the Commission's Proposed Decision) includes claimant's sworn statement describing the events; two letters dated June 17 1991, from a Dr. Jacobs and a Dr. Ashe; the deposition testimony of her mother,<sup>5</sup> U.S.C. § 552(b)(6) taken on March 27, 1989; the sworn statement of former FBI Agent Lewis Subelsky; documentation regarding the reasons for the unavailability of contemporaneous medical records; a handwritten list of medical insurance claims noting the date of service and identity of the medical provider; the live testimony of the claimant herself and that of her mother and father during the oral hearing; the results of a hearing test conducted April 5,

2012 along with a covering letter from a Dr. Fry dated April 5, 2012 submitted by claimant at the oral hearing; and, finally, the aforementioned letter from Dr. Moss-Salentijn.

During the hearing, the claimant explained the results of her April 5, 2012 hearing test and described the effects of her injury both as a child and continuing through to adulthood. Claimant testified that while her “hearing is very good and all within the normal range...there is a consistent differential where [she] can detect the low frequency sounds in [her] left ear substantially though not significantly from a hearing perspective before [she] can register them in [her] right ear, [e.g.] in [her] right ear [she] can first detect speech at 15 decibels in [her] left at 5.” Further, claimant testified that while now she has “very good hearing, [and] she [does not] have issues with balance or pressure anymore,” when she was younger she had balance issues because her “right ear drum is a little stiffer than [her] left.” This condition, she testified, caused her to have “a series of reasonably serious injuries that just resulted from falling off of things falling on things, [e.g. she] fractured [her] arm...[and she] fell and knocked out [her] front teeth.” In addition, claimant testified that her audiologist had informed her that, in the case of perforated eardrums, patients may or may not experience scarring of their eardrum and that in cases where scarring is not present—such as is the case in the present claim—patients generally experience a greater sensitivity consistent with complaints about loud noises and hearing everything as very loud.

Claimant’s mother<sup>5</sup> U.S.C. § 552(b)(6) testified that “it was the first grenade that really caused [claimant’s] injury because she was screaming that her ears were hurting...she was checked in Wiesbaden...the pediatrician discovered that [claimant] had

a ruptured eardrum and that was confirmed by ...Dr. Jacobs.” Further, claimant’s mother testified that “Dr. Jacobs recommended that we take [claimant] to the hearing specialist, Dr. Hu”; that claimant was “monitored for a long time, because she was still having problems with her ears;” and that at “playground time” claimant “would not go because she would start crying that her ears were hurting.” In addition claimant’s mother testified that claimant “had balance problem[s] and she fell down.” Specifically, at approximately age 5 “she fell down and she crushed her elbow and she had a six-hour surgery.”

The report from Dr. Fry dated April 4, 2012, indicates that claimant has “[n]ormal hearing in both ears with no significant difference in hearing between the 2 ears[; however,] her left ear displays greater sensitivity than her right ear to speech and to low frequency sounds.”

#### *Analysis*

As noted in the Proposed Decision in this claim, the Commission’s standard for physical injury in this program requires that claimant establish that she suffered a discernible physical injury, more significant than a superficial injury. The Commission has carefully and thoroughly reviewed the entire record in this claim, including claimant’s compelling and credible testimony at the oral hearing, and the supplemental documentation submitted at and after the hearing. After examination of this evidence, however, fundamental questions remain as to the nature and extent of the injuries asserted.

In its Proposed Decision in the present claim, the Commission found that neither Dr. Jacobs’ nor Dr. Ashe’s letters were sufficient to establish the actual injury asserted – i.e., a perforated eardrum—from which the complaints of auditory hyperesthesia are

alleged to flow. The aforementioned report of Dr. Fry also fails to establish the asserted injury. Further, based on the evidence before it, the Commission is not persuaded that balance issues identified during claimant's childhood resulted directly from the hijacking incident. 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

For the reasons set forth above, the Commission remains unpersuaded that the injury in this claim meets the Commission's standard under Category E. The Commission is sympathetic to the claimant for the ordeal she endured during that horrific event. Nonetheless, the Commission is constrained to conclude that the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed.

In reaching this conclusion, the Commission reiterates its statement from the Proposed Decision that, in this program, a number of victims of the hijacking of Pan Am Flight 73 made claims for physical injury under the December Referral that were unsuccessful, but because they were Pending Litigants, were able to qualify for compensation under Category A of the January Referral, as hostages. Because claimant was not a Pending Litigant, she is jurisdictionally ineligible, under the terms of this Referral, for compensation under Category A. The Commission emphasizes this point so

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\* The Commission's regulations provide:

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).

as to make clear that in reaching its conclusion, it does not wish to minimize the terror claimant must have experienced aboard Pan Am 73 or otherwise appear to judge negatively on the merits of any assertion that she was held hostage. Indeed, it would appear that claimant was held by the hijackers under precisely the same circumstances as those who later became parties to the Pending Litigation. All other requirements for hostage claims would appear to have been met in this particular claim. However, the Commission is constrained by the jurisdictional language of the January Referral, and is therefore unable to adjudicate this claim as one for hostage-taking or unlawful detention under the January Referral.

This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, December 12, 2012  
and entered as the Final Decision  
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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)	}	Claim No. LIB-II-093
	}	
	}	Decision No. LIB-II-061
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	

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 <sup>5 U.S.C. §552(b)(6)</sup> 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 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 May 12, 2010, the Commission received from the claimant a Statement of Claim, in which the claimant asserts a claim under Category E of the January Referral Letter, along with accompanying exhibits supporting the elements of her claim. The submission included evidence of claimant's U.S. nationality, her presence during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986, and her injuries.

The claimant states that when she was three years old, she was a passenger on Pan Am Flight 73 which was hijacked by terrorists on September 5, 1986, in Karachi, Pakistan. According to the Statement of Claim and accompanying exhibits, claimant suffered damage to her ears due to her close proximity to a grenade blast during the hijacking, which caused her eardrum to rupture, resulting in continuing ear pain and heightened sensitivity to loud noises for several years after the incident. In support of her claim, the claimant has provided letters dated June 17 1991, wherein her treating

physicians, Dr. Jerry Charles Jacobs and Dr. David Ashe, describe treatment claimant received immediately following this incident and thereafter. Dr. Jacobs noted that he first examined the patient on September 18, 1986 and “found the left ear canal full of debris” and determined that claimant “had suffered a perforation of her eardrum as a consequence of the grenade explosion.” Upon removal of the debris it was noted that the perforation had healed. Dr. Ashe noted that claimant reported “auditory hyperesthesia in response to loud noises ... [which] is consistent with increased irritability of the sensory neural mechanism secondary to noise damage.”

## DISCUSSION

### Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission’s jurisdiction here is limited to the category of claims defined under the January Referral Letter; namely, 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 *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 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 her U.S. passport valid from July 2008 through July 2018. Based on this and other evidence in the record, the Commission finds that this claim was held by a U.S. national at the time of the incident upon which the claim is based and that it has been so held until 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 “September 5, 1986 hijacking of Pan Am flight 73, as alleged in *Patel v. Socialist People’s Libyan Arab Jamahiriya* (D.D.C.) 06-cv-626.” *Id.*, Attachment 2, ¶ 9. In her Statement of Claim, the claimant sets forth a claim for injury suffered as a result of this terrorist attack. Accordingly, the Commission finds that the claimant has satisfied this element of her 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, is the *Patel* case. Claimant has averred under oath in the Statement of Claim, and the pleadings in the *Patel* case confirm, that she was not a plaintiff in the Pending Litigation against Libya.

Based on this evidence, the Commission finds that the claimant has satisfied this element of her claim.

In summary, 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 (2010), 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*

As noted above, the claimant alleges that she suffered a ruptured eardrum, and resulting continual ear pain and heightened sensitivity to loud noises for several years after the incident. She further states that this damage to her ears was caused by her close proximity to a grenade blast on the airplane during the hijacking.

Claimant asserts in her statement of claim that she “received treatment for [her] injuries at Wiesbaden air force base, from [her] pediatricians in New York, and from Dr. Robert M. Hui, a specialist at the Columbia University Medical Center School of Otolaryngology.” Claimant acknowledges, however, that the only medical records in her possession, and submitted with the claim, are “letters that Dr. Jacobs and Dr. Ashe prepared in connection with my parents’ 1993 settlement with Pan Am airlines.” Claimant added that she had “requested records of [her] consultations . . . from Columbia Presbyterian Hospital . . . [and] of [her] treatment at Wiesbaden airforce base.” Claimant has since advised the Commission that the aforementioned “letters are the only documents available.”

The Commission has reviewed the June 17, 1991 letters of Drs. Jacobs and Ashe, and finds them to be inconclusive on the issue of whether claimant suffered a ruptured eardrum on the airplane in Karachi in 1986. Dr. Jacobs’ letter indicates that his examination of claimant’s ear was confined to identifying that her “left ear canal was full of debris.” The letter further notes that “Dr. Hui cleaned out the debris so the eardrum, which I could not see, could be seen and advised that it had healed.” It appears clear from this 1991 letter that Dr. Jacobs, in his examination of claimant on

September 18, 1986, did not actually examine the eardrum, but, at best, concluded that the “probability, given the history and these findings [of debris in the ear canal], was overwhelming . . . that Denali had suffered a perforation of her eardrum.” Unfortunately, the claimant has been unable to provide the Commission with the medical records of this 1986 examination that could corroborate these later recollections of Dr. Jacobs.

The letter of Dr. Ashe, unlike that of Dr. Jacobs, does not appear to reflect a later recounting of a contemporaneous examination; rather, it is unclear when Dr. Ashe first examined the claimant. Dr. Ashe notes that claimant “receives medical care in this office with annual physical exams.” He concluded that “although her physical exam is grossly normal, this complaint [auditory hyperesthesia] is consistent with increased irritability of the sensory neural mechanism secondary to noise damage.”

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).

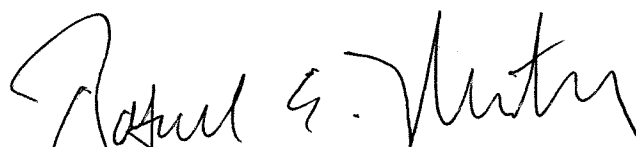
Taken together, the two non-contemporaneous physician letters submitted to the Commission do not provide a sufficient evidentiary basis to meet claimant's burden of proof. Dr. Jacobs' letter, on its face and standing alone, is insufficient to establish the actual injury – perforated eardrum – from which the complaints of auditory hyperesthesia are alleged to flow. Dr. Ashe's letter fundamentally suffers from the same evidentiary defects. Consequently, based on the evidence and information submitted in support of claimant's asserted injuries, the Commission

concludes that claimant has failed to establish either the extent of the injury actually suffered, or that the severity of the injury was more than superficial, as that term is used in the Commission's formulation of its physical injury standard. Accordingly, the Commission finds that the claimant has not met the burden of proof in that her claim does not satisfy the standard for physical injury determined by the Commission in order to be eligible for compensation under Category E of the January Referral Letter. Therefore, while the Commission sympathizes with the claimant for the ordeal that she must have endured during the terrorist attack in question, her claim based on injuries suffered as a result of that attack 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, July 12, 2011  
and entered as the Proposed Decision  
of the Commission.

  
Timothy J. Feighery, 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) (2010).