

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-116
} } Decision No. LIB-II-166
} Against the Great Socialist People's }
} Libyan Arab Jamahiriya }
Counsel for Claimant: Stuart Newberger, Esq.
Oral hearing held on September 13, 2012. Crowell & Moring, LLP

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation based on the alleged severity of physical injuries suffered by 5 U.S.C. § 552(b)(6) as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986. The claim was submitted under Category D 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").

On June 5, 2012, the Commission entered a Proposed Decision denying this claim on the grounds that claimant failed to establish that the severity of his injuries rose to the level of a special circumstance warranting additional compensation under Category D, that is, compensation beyond the \$3 million already awarded to him in this program for his injuries.

On July 11, 2012, the claimant filed an objection to the Commission's decision and requested an oral hearing. By letter dated July 17, 2012 the Commission requested that claimant submit any additional evidence that he wished it to consider in support of his objection. In response, under cover of a letter dated August 23, 2012, claimant submitted "Claimant's Objection and Request for Oral Hearing Before the Commission" ("Objection Brief") including, among other documents, the declarations of a Dr. David McCalman, II—claimant's primary care physician—dated August 21, 2012, and a Dennis Keith Sepulvado Sr.—claimant's supervisor prior to the hijacking—dated August 20, 2012. The hearing on the objection was held on September 13, 2012.

DISCUSSION

Category D of the January Referral 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.

January Referral at ¶ 6. As noted in the Commission's Proposed Decision, claimant satisfies the first and third requirements: he received an award under the December Referral, and his Pending Litigation against Libya had been dismissed prior to his submitting this claim. The only issue on objection, therefore, is whether the severity of claimant's injury is a special circumstance warranting additional compensation.

At the oral hearing, claimant provided additional evidence about his injuries. Claimant testified that while in Pakistan, his wounds were cleaned and bandaged prior to his being transported via a medical evacuation airplane to the U.S. military hospital in

Wiesbaden, Germany. He stated that he underwent surgery in Wiesbaden to remove "the larger pieces of shrapnel" so as to enable him to make the return trip to the United States. He further stated that after his return to the U.S. he kept getting recurring blood infections, which were treated with antibiotics, and that eventually, he underwent surgery to remove "some additional shrapnel...that had blue jean particles wrapped around [them]."¹ Claimant further testified that because the shrapnel cut the ligaments in his lower legs, he could not raise his right foot and consequently was required to wear a leg brace for approximately eighteen months. Claimant also testified that he wears long pants everyday because of the scarring to his legs. In addition to his testimony, claimant also presented physical evidence at the hearing consisting of a sample of the actual shrapnel fragments removed from his legs and the foot brace used to support his foot.

Claimant also testified about the effect his injuries have had on his major life functions. The key point claimant emphasized was that his injuries allegedly left him unable to continue in the career he had pursued prior to the hijacking as an oil rig professional. Claimant stated that after the hijacking he tried to operate his family owned farm, but, due to his injuries, he was unsuccessful. However, claimant stated that he was able to find work in the lumber industry, although, the compensation for such alternative work was not at the same level as he had earned on the oil rigs; rather, he testified, the "[o]il field industry was [] very high-paying -- it's a high-skill, high-paying job... ." Moreover, he testified that he had been advancing in the industry, having been promoted several times in the years prior to the hijacking.

The two new declarations that claimant submitted provided more evidence about both his injuries and the impact on his life. Dr. McCalman describes the extent of

¹ Claimant testified that he had been wearing blue jeans on the day of the hijacking.

claimant's injuries and also supports the disability rating that claimant's previous physician, Dr. Bowness, had provided relating to claimant's right leg. Mr. Sepulvado, claimant's former supervisor, describes the physical requirements necessary to work on an oil rig and states that, based on his knowledge of the industry, the claimant's injuries rendered him, for all practical purposes, unable to work on a rig in any capacity.

Analysis

Category D of the January Referral requires the Commission to determine whether the "severity of the injury is a special circumstance warranting additional compensation." January Referral, ¶6. In assessing whether compensation is warranted in this claim, the Commission considers the factors articulated in its decision in *Claim of* 5 U.S.C. § 552(b)(6) Claim No. LIB-II-109, Decision No. LIB-II-112 (2011). These factors, assessed in light of the totality of the evidence, include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions.

The first factor is the nature and extent of the injury. In its Proposed Decision, the Commission stated that "[t]here is no evidence that claimant sought or required additional medical intervention after the initial wounds had healed" and "no indication of the severity" of his "foot drop." None of claimant's new evidence suggests that he received any additional treatment over and above that described in the materials submitted prior to the Commission's Proposed Decision. Further, the new evidence in the record, including claimant's testimony, leads to the conclusion that claimant's "foot drop" condition was resolved. Claimant did continue to experience some level of weakness in his foot, but after wearing the prescribed foot brace for approximately 18 months, he no longer has a severe "foot drop."

The second factor is the extent (if any) of physical disfigurement. The Commission found in its Proposed Decision that the disfigurement was not "a prominent feature of claimant's overall outward appearance due to the nature and location of the scars." The only new evidence claimant offered on this point is his own testimony at the hearing that he wears long pants everyday because of the scarring on his legs. This testimony is insufficient to alter the Commission's determination on this point.

Finally, the claimant asserted that the consequences of his injuries have significantly interfered with his major life functions and in particular his ability to work. In support of this assertion, claimant has submitted the disability rating determinations of Drs. Bowness and McCalman, the declaration of his former supervisor Mr. Sepulvado, and his own testimony. While this evidence supports claimant's contention that he did not return to work on an oil rig—his career previous to the hijacking—it does not support a finding that claimant was unable to engage in remunerative work or that the injuries substantially limited his major life functions. The reference to "major life functions" in 5 U.S.C. § 552(b)(6) does not include a specific chosen career where, as here, the claimant has the capability to work in a variety of other fields. Further, the claimant has not proven that the compensation he would have received working on an oil rig would have been greater than that which he actually received from his subsequent employment. In any event, even if true, this fact would not, in and of itself, be sufficient grounds to qualify for additional compensation under Category D.

Accordingly, the Commission concludes that the evidence is insufficient to make a finding that the severity of claimant's injury is such as would warrant an award of compensation under Category D in addition to the \$3 million that has been awarded to him for this injury in this program.

CONCLUSION

For the reasons set forth above, the Commission concludes that 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, December 21, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, 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 on the alleged severity of physical injuries suffered by 5 U.S.C. §552(b)(6) as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport 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”).

The present claim is made under Category D. According to the January Referral, Category D of the January Referral 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 Letter lists the lawsuits 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 the claimant suffered shrapnel wounds to both legs, that these injuries met the Commission's standard for physical injury, and 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-011, Decision No. LIB-I-020 (2010).

BASIS OF THE PRESENT CLAIM

On June 28, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under Category D of the January Referral together with exhibits supporting the elements of his claim, including evidence of his U.S. nationality and the extent of his injuries. In support of his claim for additional compensation, claimant, in his statement, appears to contend that he suffered both physically and psychologically as a result of this attack. Claimant asserts that, as a result of the shrapnel wounds to his legs and his experience during the hijacking, "the ability to

carry on [his] life as a whole has significantly changed.” The evidence submitted includes the claimant’s statement, photographs of his legs, and medical records.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction here is limited, under Category D of the January Referral, to 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 date of the hijacking continuously through the effective date of the Claims Settlement Agreement. That determination applies equally to satisfy the nationality requirement here.

Award Under the December Referral

To fall within Category D 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 under the December Referral based on its finding that the claimant suffered a physical injury sufficient to meet the Commission’s standard. Accordingly, the Commission determines 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*, ¶ 6. The Commission determined in its decision on claimant's physical injury claim under the December Referral that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya, et al.*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination also applies here.

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 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* 5 U.S.C. §552(b)(6), 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 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 support of his Category D claim for additional compensation, claimant has incorporated by reference the record of his claim under the December Referral and has submitted his own statement along with photographs of his legs. In his statement, claimant asserts that "[his] right leg was basically paralyzed from mid-calf down to the end of [his] toes...[therefore, he] was...fitted with a leg brace to help aid [his] ability to move around with crutches and also prevent the leg muscles from stretching"; that due to the presence of the shrapnel in his legs he "began having blood infections [and] [a]bout 18 to 20 months after the hijacking, [he] had more surgery to remove some shrapnel in [his] left lower thigh muscles, which had blue jean material attached, thought to be causing the infections"; and that "[a]fter two years of wearing a leg brace and additional time of physical therapy, [he] felt that [he] was as physically healed as [he] would get." He states that he "was advised...to not let anyone (surgeon) attempt to remove the shrapnel which was causing the paralysis because the nerves are so small and delicate that the danger of increased permanent damage could result."

With regard to his professional life, claimant asserts that, as a result of his injuries, "[his] wife had the role of sole income earner, in addition to seeing to [his] other needs" and that he was unable to continue in his career in offshore drilling because "[he] was not able to pass the rigorous employment physical which was required." He further asserts that "nine years after the hijacking, [he] started a small excavating company;" however, it was necessary that he "modify some foot operated equipment as best as possible." As for his personal life, claimant asserts that "[t]he days of [his] enjoyment of

water skiing, playing tennis and all other physical sports [he] once enjoyed are gone because of the weakness and discomfort of [his] ankle and knees." With regard to claimant's disfigurement, he has submitted recent photographs of his legs, which reveal multiple visible scars on both of his legs.

In support of his December Referral physical injury claim, claimant had submitted two letters dated in 1988 from his orthopedic surgeon, Dr. Lawrence J. Bowness, along with the report of a medical exam conducted in 2009 by his family practitioner, Dr. David M. McCalman II. In a letter dated March 1, 1988, Dr. Bowness states that he has diagnosed the claimant as having:

1. Personel [sic] nerve palsy right leg, due to shell fragment wounds, with partial return of nerve function to muscles and skin
2. [m]ultiple shell (grenade) fragment wounds of both legs [and]
3. [p]ost status arthroscopy left knee...[which] can be considered permanent.

In Dr. Bowness' June 6, 1988 letter, he estimates claimant's "partial permanent disability as being fifty-five percent of the right leg and forty percent of the left leg." Dr. McCalman, in his report dated August 3, 2009, states that claimant "still has physical impairment related to [his] injury...[along with] 'diffuse multiple shrapnel fragments'." He notes further that claimant "has continuing difficulty with nerve damage in the right lower extremity...known as 'foot drop'...noticeable on exam...[which] require[s] him to make adjustments with his work and daily routine."

With regard to the psychological trauma suffered because of the hijacking, the
5 U.S.C.
Commission notes its finding in §552(b)(6) *supra*, "that 'the injury' referred to under this Category is the injury for which an award was issued by the Commission under the December Referral." In this case, as noted above, the Commission determined that the compensable injury under the December Referral was the injury to claimant's legs, not

the emotional injury resulting from the hijacking for which he also claimed compensation. Moreover, the Commission notes that it has previously determined that compensation under the December Referral is limited to claims for physical, not psychological, injury. *See, e.g., Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-033, Decision No. LIB-I-046 (2011); *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-041, Decision No. LIB-I-030 (2010). For these reasons, claimant's claim for additional compensation based on psychological trauma is rejected.

In assessing the evidence concerning that portion of the claim for additional compensation based on the physical injury suffered by the claimant, the Commission 5 U.S.C. §552(b)(6) considers the factors articulated in its decision in which include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions.*

In the present claim, while the physical injury suffered by the claimant—shrapnel wounds to his legs causing nerve damage and leading to blood infections—is serious, it is not among the most severe injuries in this program. There is no evidence that claimant sought or required additional medical intervention after the initial wounds had healed. The evidence concerning his “foot drop” is inconclusive at best insofar as it indicates that the condition was observable upon examination but gives no indication of the severity.

With regard to disfigurement, suffered by the claimant, the photographs he submitted depict visible healed shrapnel wounds disfiguring his legs, highlighted in the photographs. However, due to the nature and location of the scars, the Commission does

* It is the claimant's burden to provide evidence to establish the validity of its claim. *See* 45 C.F.R. 509.5(b) (2011) (“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.”).

not find the disfigurement to be a prominent feature of claimant's overall outward appearance.

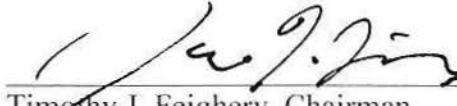
Regarding the effect that claimant's injuries have had on his life activities, he asserts that the injury has had a negative impact on his ability to work. Claimant asserts that he was not able to continue his employment in offshore drilling because he could not pass the rigorous employment physical; that he was out of work for nearly 10 years; and that when he returned to work he required modifications to perform the required duties of his employment. Beyond Dr. Bowness' disability rating determined in 1987, however, the claimant has failed to provide evidence to establish these assertions. For example, claimant has not provided any disability determinations subsequent to Dr. Bowness', or any letters from potential employers evidencing a denial of employment based on his physical impairment. Moreover, even Dr. Bowness' disability rating appears to have been prepared specially for litigation in claimant's lawsuit against Pan Am arising out of the hijacking, and claimant provides no evidence that it was used as a basis for a disability determination by any agency (such as, for example, the United States Social Security Administration).

In summary, based on the record before it, the Commission concludes that claimant has failed to establish that the severity of his injury is such that it would qualify for additional compensation under Category D.

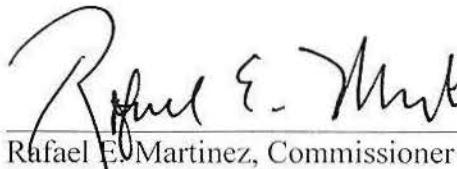
Consequently, the Commission concludes, based on the evidence submitted, that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D, beyond its award of \$3 million under the December Referral.

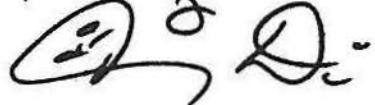
Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, June 5, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner


Anuj C. Desai, 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) (2011).