

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-II-150

Decision No. LIB-II-115

Joshua M. Ambush, Esq.  
Joshua M. Ambush LLC

Oral Hearing held on March 15, 2012

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon injuries said to have been sustained by 5 U.S.C. §552(b)(6) as a result of the terrorist attack at Lod Airport in Israel on May 30, 1972. On December 15, 2011, the Commission issued a Proposed Decision denying the claim on the grounds that the claimant failed to establish either the extent of the injury actually suffered as a result of the attack, or that the severity of the injury was more than superficial, as that term is used in the Commission's physical injury standard. By letter dated January 3, 2012, the claimant filed a notice of objection to the Proposed Decision and requested an oral hearing, and on February 24, 2012, the claimant submitted a brief in support of her objection. The oral hearing was held before the Commission on March 15, 2012. On March 28, 2012, the claimant sent the Commission a letter stating that she had no further medical records in support of her claim.

### CLAIMANT'S OBJECTION

At the oral hearing and in her objection filings, claimant argued that the recently conducted medical evaluations, previously provided to the Commission, corroborate her claim by documenting the existence of shrapnel scars and a hearing injury that resulted from the Lod Airport attack. She further argued that the Commission has placed an "insurmountable" burden of proof on her; that such burden is greater than that which the Commission has previously required; and that the denial of the claim is a taking in violation of the Fifth Amendment's taking clause. The claimant did not provide any additional medical evidence as part of her objection filing.

### DISCUSSION

The Commission's Proposed Decision denied the claim because the claimant failed to establish either the extent of the injury actually suffered as a result of the Lod Airport attack, or that the severity of the injury was more than superficial, as that term is used in the Commission's physical injury standard.<sup>1</sup> As the Commission noted in its Proposed Decision, 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; (2) must have

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<sup>1</sup> In a footnote to her "Brief in Further Support of Her Objections," claimant makes certain assumptions concerning the Commission's conclusions that are incorrect. First, claimant contends that the Commission did not accept the evidence proffered in support of the fact of injury. While the Commission noted in its Proposed Decision that there was evidence in the record to indicate that the claimant was not injured during the attack (*see* Proposed Decision at footnote 2), the Commission's decision was based solely on the claimant's failure to prove the extent of the injury and that the injury was more than superficial. Thus, even assuming the fact of injury, the Commission concluded that there was insufficient evidence to support the conclusion that the nature and extent of claimant's injury was sufficient to meet the Commission's standard for physical injury in this program. For the same reason, it is not correct, as claimant further asserts, that the Commission improperly considered the absence of the claimant's name from a program for the memorial service held in the Cathedral of St. John the Divine on June 15, 1972 as bearing on her credibility.

received medical treatment for the physical injury within a reasonable time; and (3) must verify the injury by medical records.

As the Commission further noted in the Proposed Decision, the claimant did not submit any contemporaneous medical records in support of her claim; nor did she do so at the oral hearing or subsequently. Rather, she had submitted recent medical reports from Dr. Boyd Callazo, Dr. Mariano E. Gonzalez-Diez, and Dr. Moraima Marrero Vera. Dr. Callazo had examined the claimant on May 28, 2010, just shortly before claimant submitted her claim to the Commission and nearly 40 years after the attack. Dr. Callazo's report recounts the claimant's description of the attack and states that "[i]n the scalp, patient has numerous, small scars. Some are just a dot, and others are in small crescent forms. It is difficult to discern them among the follicules [sic] and hair[;]" and that claimant's "[r]ight arm presents several, mostly faded small scars scattered among age spots." In his report, Dr. Callazo further states that the "[p]atient refers [to] occasional blood in stools since 'the explosions', but never has received treatment for these symptoms.... I questioned why she never went to a clinic, doctor or hospital and she answered that as her parents had done and taught her, a neighbor would give her a home remedy." Dr. Callazo also states that he diagnosed the claimant with post-traumatic stress disorder, otologic injury (hearing loss), and hematuria.

Dr. Moraima Marrero Vera had evaluated the claimant on October 18, 2011, nearly 40 years after the attack, and concluded in her report that the "audiological findings show asymmetric sensorineural hearing loss at middle and high frequencies (2000-8000Hz), minor in the right ear and going from minor to moderately severe in left ear. Excellent speech discrimination in quiet environment in both ears." Dr. Mariano E.

Gonzalez-Diez evaluated the claimant on October 21, 2011, also nearly 40 years after the attack, and noted that “[i]f the noise from the gunfire originated at the patient’s left side it will cause an acoustic trauma on that ear with subsequent tinnitus. This is what she refers.” Dr. Gonzalez-Diez then concluded that “the tinnitus of the left ear was caused by the noise exposure sometime in the past. The patient refers it began after exposure to gunfire in 1972. She expresses it has been distressing to her during the last forty years.”

The Commission stated in its Proposed Decision that it had reviewed the medical reports submitted by the claimant, and found them to be inconclusive as to whether claimant suffered shrapnel injuries, hearing loss, or hematuria as a result of the attack at Lod Airport in 1972. The Commission noted that the claimant had not submitted any medical records contemporaneous to the attack, and did not assert that she sought professional medical treatment for her injuries upon her return to Puerto Rico in 1972, nor at any time during the 38 years that passed between the attack and the recent submission of medical evaluations.

Claimant’s assertions that the Commission has placed an “insurmountable” burden of proof on her and required greater evidence than it has in the past are without merit. As the Commission noted in the Proposed Decision, Section 509.5(b) of the Commission’s regulations provides that the claimant has the burden of proof in submitting evidence and information sufficient to establish the validity of her claim. 45 C.F.R. 509.5(b) (2011). The Commission has consistently required physical injury claimants to prove the fact and extent of the injury actually suffered as a result of the attack and to establish that said injury was more than superficial, as that term is used in the Commission’s physical injury standard. The Commission has given careful

consideration to the entire record in this claim. However, as the Commission found in the Proposed Decision, the claimant's prior submission does not provide a sufficient evidentiary basis to meet her burden of proof. Nor has the claimant provided additional evidence with her objection to persuade the Commission to change its holding.

In particular, the claimant has failed to establish that the severity of the alleged Lod Airport attack injuries are, or were, more than superficial, as that term is used in the Commission's formulation of its physical injury standard. The medical reports submitted are based on examinations conducted nearly 40 years after the attack in conjunction with the filing of this claim and the doctors qualify their conclusions by specifically stating they are based on what the claimant told the doctors at these evaluations. The medical reports describe the scars as "dots" and as "small" and "difficult to discern among the follicules [sic] and hair." In this program, the Commission has faced many claims for injuries based on shrapnel wounds; some have been entirely superficial, while others have been serious injuries requiring significant medical intervention. Without some evidence of the relative severity of this injury, the Commission cannot conclude that it warrants compensation in this program.

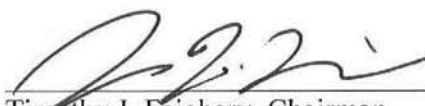
Likewise, the Commission notes that the claimant has not met her burden of proof to substantiate that the severity of the alleged audiological injury is more than superficial as that term is used in the Commission's formulation of its physical injury standard. The audiological injury is described in the medical reports as "sensorineural hearing loss at middle and high frequencies" which goes "from minor to moderately severe in left ear" but it also states that the claimant at age 92 has "[e]xcellent speech discrimination in quiet environment in both ears." The assertion that the injuries suffered are more than


superficial is also undermined by the evidence that the claimant did not seek, or apparently require, professional medical treatment for her injuries upon her return to Puerto Rico in 1972, nor at any time during the 38 years that passed between the attack and the recent medical evaluations conducted in conjunction with her claim. Accordingly, the Commission affirms its decision that the claimant has not met her burden of proof in that her claim does not meet the criteria required in order to be eligible for compensation under Category E of the January Referral Letter.

With regard to claimant's constitutional argument, the Commission notes its previous holding that consideration of constitutional issues is outside the scope of the Department of State's referral to the Commission. *See Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-005, Decision No. LIB-I-014, at 5 (2010) (Final Decision). Therefore, this portion of the claimant's objection must also be rejected.

Accordingly, while the Commission is sympathetic to the suffering claimant describes, 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, June 20, 2012  
and entered as the Final Decision  
of the Commission.

  
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Timothy J. Feighery, Chairman

  
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Rafael E. Martinez, Commissioner

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PROPOSED DECISION

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

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

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

*Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission*  
("January Referral 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 2, 2010, the Commission received from the claimant a Statement of Claim in which she asserts a claim under Category E of the January Referral Letter, along with exhibits supporting the elements of her claim. This submission included documents pertaining to claimant's U.S. nationality, her presence at the scene of the terrorist incident, and her alleged injuries for which she now claims compensation.

The claimant states that she was present at the terrorist attack at Lod Airport in Tel Aviv, Israel on May 30, 1972, and alleges that she suffered shrapnel wounds to her head, right arm, and right leg, in addition to hearing loss, post-traumatic stress disorder, and hematuria (blood in the urine) as a result of the attack. Claimant states that she "felt a bullet graze [her] right leg and right arm[.]" and "felt grenade shrapnel strike [her]." In support of her claim, the claimant has provided a sworn declaration, the affidavits of two fellow victims recalling that the claimant was present at the Lod Airport attack, a newspaper article from 1974 discussing the attack, and several recent medical reports.

#### 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; 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* <sup>5 U.S.C. §552(b)(6)</sup>, 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 sworn declaration in which she states that she was born in Vega Baja, Puerto Rico on March 2, 1919; a copy of her baptism certificate indicating that she was baptized in Puerto Rico; a copy of her current Puerto Rico voter registration card; and a list of wounded foreigners from the Lod Airport attack provided by the Israeli State Archives, which identifies the claimant by an approximation of her married name <sup>5 U.S.C. §552(b)(6)</sup> as being from Puerto Rico, and which also references her U.S. passport number, beginning with the letter "Z".<sup>1</sup> Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and 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 "May 30, 1972 attack at Lod Airport in Israel, as alleged

<sup>1</sup> "Z" series passports were issued to U.S. citizens between 1960 and 2002 as full validity passports. See <https://secure.ssa.gov/apps10/poms.nsf/lnx/0302640050>.

in *Franqui v. Syrian Arab Republic, et al.* (D.D.C.) 06-cv-734.” *Id.* at Attachment 2, ¶ 1. In her Statement of Claim, the claimant sets forth a claim for physical injuries 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 *Franqui* case. Claimant has averred under oath in the Statement of Claim, and the pleadings in the *Franqui* case confirm, that she was not a plaintiff in that litigation. 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* <sup>5 U.S.C. §552(b)(6)</sup> <sub>5 U.S.C. §552(b)(6)</sub> 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*

According to her Statement of Claim and accompanying exhibits, claimant alleges that as a result of the terrorist attack she suffered shrapnel and bullet wounds to her head, right arm, and right leg, as well as hearing loss, post-traumatic stress disorder, and hematuria. More particularly, claimant states that she “sustained bullet wounds in [her] right leg and right arm which did not penetrate but tore off chunks of skin. [She] had grenade shrapnel wounds in the skin along [her] hairline and the top of [her] head, [her] right calf, and on [her] right arm on the outer part of the bicep.” She further claims that “[e]ach shrapnel wound was about half an inch long.”

Claimant asserts in her sworn declaration that “[a]fter the attack, [she] was taken to a hospital in a bus organized by the Israelis. They cleaned and bandaged shrapnel wounds in [her] leg and [her] arm. [She doesn’t] remember the name of the hospital.” The claimant has also submitted the affidavit of her son, 5 U.S.C. §552(b)(6), who was present at the attack. Mr. 5 U.S.C. §552(b)(6) states that his mother “was wounded in the attack and was taken to the hospital by bus.” In addition, the claimant has also submitted an article from the Hickory Daily Record from 1974 in which Mr. 5 U.S.C. §552(b)(6) states that “fragments struck his mother, 5 U.S.C. §552(b)(6), in the arm and leg.”

The Commission notes that the claimant has not submitted any contemporaneous medical records in support of her claim. As mentioned above, claimant has submitted very recent medical reports from Dr. Boyd Callazo, Dr. Mariano E. Gonzalez-Diez, and Dr. Moraima Marrero Vera. Dr. Callazo examined the claimant on May 28, 2010, just shortly before she submitted her claim to the Commission and nearly 40 years after the attack. Dr. Callazo's report recounts the claimant's description of the attack and states that "[i]n the scalp, patient has numerous, small scars. Some are just a dot, and others are in small crescent forms. It is difficult to discern them among the follicules [sic] and hair[;]" and that claimant's "[r]ight arm presents several, mostly faded small scars scattered among age spots." Dr. Callazo further states that the "[p]atient refers [to] occasional blood in stools since 'the explosions', but never has received treatment for these symptoms.... I questioned why she never went to a clinic, doctor or hospital and she answered that as her parents had done and taught her, a neighbor would give her a home remedy." Dr. Callazo also states that he diagnosed the claimant with post-traumatic stress disorder, otologic injury (hearing loss), and hematuria.

Dr. Moraima Marrero Vera evaluated the claimant on October 18, 2011, and concluded that the "audiological findings show asymmetric sensorineural hearing loss at middle and high frequencies (2000-8000Hz), minor in the right ear and going from minor to moderately severe in left ear. Excellent speech discrimination in quiet environment in both ears." Dr. Mariano E. Gonzalez-Diez evaluated the claimant on October 21, 2011, and concluded that "the tinnitus of the left ear was caused by the noise exposure sometime in the past. The patient refers it began after exposure to gunfire in 1972. She expresses it has been distressing to her during the last forty years."

The Commission has reviewed the medical reports submitted by the claimant, and finds them to be inconclusive as to whether claimant suffered shrapnel injuries, hearing loss, or hematuria as a result of the attack at Lod Airport in 1972. Claimant has not submitted any medical records contemporaneous to the attack<sup>2</sup>, and does not assert that she sought professional medical treatment for her injuries upon her return to Puerto Rico in 1972, nor at any time during the 38 years that passed between the attack and the recent medical evaluations submitted.

Taken together, the three very-recent, non-contemporaneous medical reports and the affidavit of claimant's son submitted to the Commission do not provide a sufficient evidentiary basis to meet claimant's burden of proof.<sup>3</sup> 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 her 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.

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<sup>2</sup> Indeed, a contemporaneous, non-medical record suggests that the claimant was not in fact injured during the attack: the claimant is not listed as one of the individuals identified as "wounded" in the written program for the service held in the Cathedral of St. John the Divine on June 15, 1972, which counsel has previously submitted to substantiate different claims he has filed on behalf of other claimants before the Commission in the Libya Claims Program.

<sup>3</sup> Section 509.5(b) of the Commission's regulations provides:

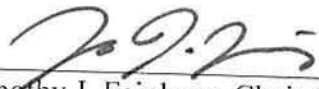
The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

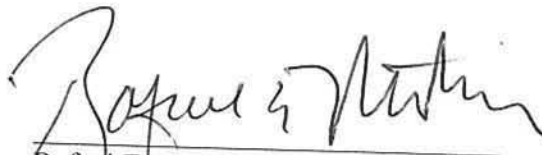
45 C.F.R. 509.5(b) (2010).

In regards to Dr. Callazo's diagnosis of post-traumatic stress disorder, as noted above, under subsection 4(a) of the ICOSA, the Commission's jurisdiction is limited to the categories of claims defined in the January Referral Letter. Under Category E of the January Referral Letter, the Commission may only provide compensation for claims for physical injury and wrongful death. The Commission has previously determined that compensation 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) (Proposed Decision); *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-041, Decision No. LIB-I-030 (2010). Accordingly, the Commission finds that the part of this claim related to post-traumatic stress disorder fails to satisfy its physical injury standard.

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, December 15, 2011  
and entered as the Proposed Decision  
of the Commission.

  
\_\_\_\_\_  
Timothy J. Feighery, Chairman

  
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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).