FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of 5 U.S.C. §552(b)(6) Against the Great Socialist People's Libyan Arab Jamahiriya	Claim No. LIB-II-164 Decision No. LIB-II-183

Counsel for Claimant: Richard D. Heideman, Esq.
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Oral Hearing held on December 12, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at Fiumicino Airport in Rome, Italy on December 27, 1985. The claim was made under Category E of the *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral"). By its Proposed Decision entered June 20, 2012, the Commission denied the claim on the ground that claimant had not met her burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the Commission cited equivocation in the medical records and inconsistencies regarding the cause of claimant's progressive hearing

loss, the absence of key medical records, and in particular, the absence of contemporaneous medical records.

On August 3, 2012, the claimant filed a notice of objection and requested an oral hearing, asserting various legal and factual errors in the Commission's Proposed Decision. The oral hearing was initially scheduled for September 14, 2012, but was postponed at claimant's request. On December 10, 2012, claimant submitted further documentary evidence in support of her objection, including, *inter alia*, audiological evaluations on claimant's left ear from 2009 and 2012, medical records pertaining to stapedectomy procedures claimant had undergone in 1983 and 1984 (prior to the terrorist incident), and excerpts from medical literature regarding otosclerosis—an ear condition that was diagnosed in claimant prior to the Rome Airport attack—and blast-related hearing loss. The hearing on the objection was held on December 12, 2012.

In her notice of objection, claimant argued that she had in fact suffered a physical injury during the Rome Airport attack sufficient to meet the Commission's standard under Category E. Specifically, claimant contended that the Commission had applied to her a standard of proof higher than that required of other, similarly-situated claimants, and had "erred in its evaluation of the substantial evidentiary record[.]" According to claimant, this record included evidence that "the extent of [her] current hearing loss was caused by the terrorist attack and not her pre-existing hearing issues . . . ."

The claimant testified in person during the hearing and responded to questions from the Commission concerning her experience during the Rome Airport attack and her progressive hearing loss alleged to be the result of the incident. In addition, claimant's

counsel presented the testimony of Mitchell K. Schwaber, M.D., an otolaryngologist who has treated claimant since 2002.

On January 3, 2013, approximately three weeks after the oral hearing, claimant submitted further materials in support of her claim, including a "Summary Supplemental Report" ("Supplemental Report") from Dr. Schwaber, the results of a 2011 audiological evaluation of Robert Sirkin, claimant's father, excerpted copies of various scholarly articles cited by Dr. Schwaber in his Supplemental Report, and copies of medical records from the period between 1996 and 2004, including records not previously filed that were requested by the Commission during the oral hearing.

DISCUSSION

I. The Nature of the Injury for Which Compensation is Sought

Claimant asserts that as a result of the Rome Airport attack, she suffered acoustic trauma resulting in sensori-neural hearing loss, which, according to claimant's expert, presently amounts to a 58.9 percent binaural hearing impairment, but which will deteriorate further with time. The claim is complicated by the fact that claimant suffered from a pre-existing hearing condition—otosclerosis—which claimant acknowledges also caused her to suffer from hearing loss. Claimant's contention, however, is that (a) the sensori-neural hearing loss is an independent, stand-alone injury that meets the Commission's standard for physical injury in this program; and (b) this specific injury was caused by the claimant's exposure to the gunfire and grenade explosions of the Rome Airport attack. These were the core issues argued by claimant on objection, and in relation to which claimant and her medical expert provided testimony during the

objection hearing. They are the core issues decided by the Commission in this Final Decision.

II. Claimant's Testimony Regarding the Rome Airport Attack and Her Subsequent Hearing Loss

During the oral hearing, claimant provided detailed testimony as to the sequence of events that transpired on the day of the Rome Airport attack, and described the progression of her hearing loss in the months and years that followed. She testified that, on the day of the incident, she was transiting through Rome Airport on her way from the U.S. to Israel to work on a kibbutz for a university semester. Claimant was twenty years old at the time. She stated that she was standing in the terminal near the El Al Airlines ticket counter when she heard "a popping noise, which [she] later realized was machine gun fire." She then "turn[ed] . . . toward that noise, and [she] saw a grenade roll by." The grenade exploded; according to claimant, the explosion was directed towards the right side of her body, and was, according to her estimate, approximately ten to twenty feet away from her when the blast occurred. She testified that, at that point, she "froze" and "just stood there, and then [she] was on the ground."

Claimant testified that an Italian security guard fell on top of her as she lay, face-down, on the ground. She stated that she tried to lift her head up, but that the guard kept pushing her head down. According to claimant, the guard was firing a weapon in the direction of the gunmen. Claimant testified that, at this point, her head was pointing toward the attackers, and that the guard's weapon was "very close" to her right ear when it was being fired. She recalled that he fired multiple shots, but that he "was not the only one that was firing." Claimant testified that "[t]here were explosions . . . . I know there was machine gun fire." She described the resulting noise as an "incredibly loud sound."

When the firing stopped, claimant and fifteen to twenty other people gathered to the side of the El Al ticket counter, where they stayed for several minutes before a guard eventually advised them to run. Claimant recalled that "those of us who could, did." She testified that she ran out of the terminal "until [she] couldn't run anymore[,]" and sat down in the parking lot. She experienced "ringing" in her ears, and felt "a pressure as if you . . . have a cold or there's something that's muting your sound . . . ." However, she noted that "there wasn't sharp pain[,]" and that she was not bleeding from her ears. She also noted that she had not been struck by shrapnel or any other debris. Claimant added that she did not go to the hospital to seek treatment for any physical injuries.

Eventually, claimant began searching for her friends. She testified that it was approximately five or six hours before she was able to call her parents in the United States to advise them of her condition. She stated that she spoke with her father, and after their conversation, she decided to continue with her plans to go to the kibbutz. Two days later, she returned to Rome Airport to fly to Tel Aviv.

During her time at the kibbutz, claimant was required, among other things, to take daily Hebrew classes. However, she testified that she did not complete the Hebrew course successfully because she had trouble with foreign languages, and that this was "[her] first inkling of some difficulty." She explained that the "nuances of foreign language require you to be able to hear well, and . . . I was not hearing well." Nonetheless, claimant remained in Israel for several more weeks and returned to the United States in late March.

Claimant provided only limited testimony concerning her hearing loss in the years immediately following the attack and did not discuss her use of hearing aids starting in

1986 and the right stapedectomy she underwent in 1989, procedures which were discussed in the Commission's Proposed Decision. However, she indicated that after the attack, her word discrimination test results decreased "dramatically." Claimant was asked whether, when she returned to school after her stay at the kibbutz, she ever sought an accommodation for a hearing disability; she replied "no." However, she pointed out that she was not "noticing small things," and that she got her first hearing aid the spring following her return to the United States.

Claimant testified that she first began to suspect a link between her hearing loss and the Rome Airport attack when her right ear "started dropping so much that it was drawing attention." She explained that this first became evident in 1995 and 1996, when "the normal course of treatment and the stapedectomies were doing nothing to help." Notably, claimant testified that she did not discuss the Rome Airport attack with any of her doctors, claiming that "I wasn't looking for cause, I'm not sure cause would have changed anything." Indeed, claimant indicated that she did not discuss the incident with many people at all. Asked why, she responded, "That wasn't how I was going to define myself." She added that none of her treating physicians ever asked her whether she had ever experienced any loud noises.[1]

Claimant testified that she developed vertigo in 1996, which resulted in repeated episodes of vomiting that would last several hours. In response, claimant sought medical treatment at the University of California at San Francisco hospital. The Commission found in its Proposed Decision that claimant underwent a right revision stapedectomy in

[1] During the oral hearing, the Commission noted that claimant's father had filed an affidavit prior to the Proposed Decision, and that he claimed to have supervised claimant's health care before and after the attack. The Commission asked claimant whether her father had ever mentioned the Rome Airport attack to claimant's physicians during that time period. She responded that she did not know.

September of that year, although claimant did not discuss this procedure in her testimony. However, she noted that she went completely deaf in her right ear that same year, although she retained some hearing in her left hear, which she stated remains the case today.

The Commission asked claimant several questions concerning her initial hearing loss and related treatment prior to the Rome Airport attack. Asked what gave rise to the 1983 left stapedectomy, claimant responded that she had failed a school hearing test. As to why she had undergone the hearing test in the first place, claimant testified that her parents "thought that [she] might have some hearing loss." With regard to the 1984 left revision stapedectomy in 1984 (one year prior to the terrorist incident), claimant testified that the results of the 1983 procedure "weren't what [the doctor] wanted." Claimant emphasized, however, that she had not been aware of any worsening of her hearing during this time. Indeed, she characterized her hearing between 1983 and the revision procedure in 1984 as "stable," although she qualified this by noting simply that she could not detect the hearing impairment even though medical records may have indicated a problem. As to the period between the 1984 revision procedure and the Rome Airport attack, claimant testified that she "didn't sense a hearing impairment."

Claimant acknowledged in her testimony that her father also suffered from otosclerosis, and that she understood the condition to be hereditary. The Commission asked whether any of her other family members also suffered from any hearing impairment; she said this was not the case. She added, however, that even though her father shared the same condition as claimant, he did not require a hearing aid until approximately the age of 75.

Claimant testified that nobody has ever suggested that she had experienced complications with any of her medical procedures or received substandard care. In addition, she denied that she had ever experienced any other episodes of acoustic trauma. As to her present condition, she testified that she "can't use the phone anymore[,]" and that her hearing impairment has limited her professional opportunities. She also has difficulty communicating with her students and in social situations.

III. Medical Evidence and Expert Testimony

The Commission heard extensive testimony from Dr. Schwaber, a board-certified otolaryngologist (sub-certified in otology and neurotology) who, as noted above, had treated claimant for her hearing impairment since 2002. Dr. Schwaber began by providing a description of claimant's otosclerosis, which had pre-dated the Rome Aiport incident. He testified that otosclerosis is a "hereditary condition" that "almost never skips females." He explained that it usually develops "in late teens and early twenties, which fits Amy's story," and that, in the vast majority of cases—around 98% to 99%—the condition is confined to the area where the hearing bone attaches. However, in approximately one or two percent of cases the condition can spread into the nerve or other structures. The Commission asked whether claimant fell into this category; Dr. Schwaber responded that, according to a set of 2007 x-rays (provided prior to the Commission's Proposed Decision), "she did not have otosclerosis spreading into the hearing nerve."

Dr. Schwaber was asked by the Commission to explain exactly why he believed that claimant's hearing loss was caused by a blast injury, rather than by otosclerosis; he responded that he saw no more otosclerosis in claimant's ears, i.e., that it had all been

removed. The Commission further asked if he was concluding that claimant's hearing impairment was deeper in the ear, affecting the nerves, and that there was no medical reason for those nerves to be damaged other than acoustic trauma. Dr. Schwaber responded "correct." Asked to elaborate on the specific condition he observed in claimant, Dr. Schwaber explained that in such cases, the membranes in the inner ear become dilated and contract repeatedly, which results in episodes of vertigo and "hearing that comes and goes." Ultimately, the membranes collapse, damaging the nerves and resulting in complete deafness or the loss of the ability to understand words. Dr. Schwaber testified that he believed that such a degeneration of the inner membranes was responsible for claimant's progressive hearing loss—both the total loss of hearing in her right ear and the partial loss in her left ear. He further testified that such progressive hearing loss would be expected to continue.

The Commission further asked Dr. Schwaber about his observation in a January 2007 Clinic Note (evaluating claimant for a cochlear implant), discussed in the Commission's Proposed Decision, that claimant suffered from "[p]robable cochlear otosclerosis" in her left ear, and that her "progressive hearing loss may very well be due to otosclerosis . . . ." Dr. Schwaber responded that when evaluating a patient for a cochlear implant, he "ha[s] to put a diagnosis in order to get paid." He testified that that was what he did here, and that his "commentary" was simply to provide a possible etiology. He said that he had written this diagnosis despite the fact that a CT-scan at the time appeared to show no otosclerosis in claimant's inner ear. Dr. Schwaber was asked why it was still not possible that otosclerosis was indeed the cause of the progressive hearing loss; his response was, in essence, that he did not realize it in 2007, but that

starting the next year, in 2008, the medical literature demonstrated that CT-scans are 95% accurate, at least on this issue. Thus, even though the CT-scan showed no otosclerosis in claimant's inner ear in 2007, he was not sure *at that time* that there in fact was none.

In light of this testimony, Dr. Schwaber was asked by the Commission whether otosclerosis could still explain the sensorineural hearing loss. He responded that it "certainly can explain some of that hearing loss, for sure, not all of it . . . ." As to the allocation of causation, Dr. Schwaber responded that "at least 15%, maybe a little more, is related to the otosclerosis—that's based on other patients, the literature, her dad—and probably 55, 60% of the hearing loss is due to the swelling of the membranes, presumably related to the trauma, and then some of it I'm sure is aging." As to whether, apart from acoustic trauma, it was nonetheless possible for otosclerosis to cause sensorineural hearing loss, Dr. Schwaber testified that "[i]t is . . . except that now we know that it almost always has CAT-scan evidence of it."

In his post-hearing Supplemental Report, Dr. Schwaber expanded on this testimony. He again states that it is extremely rare for otosclerosis to cause sensorineural hearing loss by invading the cochlea—only 2% to 3% of otosclerosis cases—but that, even where this has occurred, "the sensori-neural hearing loss is mild, not profound, and the patients exhibit excellent word understanding notwithstanding the loss." Moreover, he states that "[o]nce otosclerosis has invaded the bony cochlea or the cochlear duct, it cannot be removed by any means." For this reason, "[i]f a CT-scan shows there is no otosclerosis in the cochlea or the cochlear duct, then there has never been otosclerosis in the cochlea or the cochlea duct." Because Dr. Schwaber found no evidence of

otosclerosis in the CT-scans in 2007,[2] he concludes that claimant's pre-existing otosclerosis "did not cause, and could not have caused, her profound sensori-neural hearing loss."

Dr. Schwaber also states in the Supplemental Report that "[b]ut for Amy's exposure to acoustic trauma in the Rome terrorist attack, I would have expected her hearing loss to follow the pattern of her father's own hearing loss." According to Dr. Schwaber, claimant's father, who is 82 years old, had, as of August 2011, 100% word discrimination in the right ear and 76% in the left ear, and only began to use a hearing aid recently. By contrast, claimant's word discrimination in her left ear, as of April 2012, was between 16% and 24%.

Based on Dr. Schwaber's testimony and submissions, the Commission is satisfied that while claimant suffered some hearing loss due to otosclerosis, she also suffered from hearing loss—specifically, a progressive sensori-neural hearing loss—that has as its source something other than otosclerosis. The Commission is further persuaded by Dr. Schwaber's testimony (including his post-hearing submission), that claimant's progressive sensori-neural hearing loss would meet the standard for physical injury established in this program if the cause of this injury is determined to be acoustic trauma resulting from the gunfire and grenade explosions that occurred during the Rome Airport attack. The Commission now turns to this issue of causation.

With regard to the possible source of claimant's sensori-neural hearing loss, Dr. Schwaber stated that he was unaware of the alleged blast injury until around 2007 and

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[2] Dr. Schwaber states that "CT-scan imaging is the only reliable tool for detecting the presence of otosclerosis in the cochlea and the cochlear duct, and it is a very reliable method." (citation omitted.) He notes that in a 2009 study of 209 ears, it was found that "'the sensitive of HRCT scan to otosclerosis was 95.1%.' In medical terms, 95.1% is as close to certainty as it is possible to be—it is medical certainty." (citation omitted.)

had never asked the claimant whether she had a history of such an injury. Dr. Schwaber was also asked whether he ever consulted with Dr. Sirkin, claimant's father, regarding claimant's condition, and whether Dr. Sirkin had ever mentioned the Rome Airport attack. Dr. Schwaber responded that while he had consulted with Dr. Sirkin, Dr. Sirkin had never mentioned the Rome Airport attack to him.

Dr. Schwaber testified that, upon learning of claimant's total loss of hearing in her right ear in 1995 or 1996, when claimant developed vertigo, he wondered about the etiology of her condition, and surmised that it was attributable to "hydropic swelling that had developed in the inner ear . . . ." Dr. Schwaber added that the first medical data regarding the connection between blast injuries and swelling in the inner ear did not even come about until 1997. He acknowledged that even he may not have been fully aware of the possible connection between those two phenomena when he first began treating claimant in 2002.

The Commission asked whether this condition could be genetic; Dr. Schwaber responded that one recent medical report suggested that there may be a gene for this type of progressive hearing loss. However, he did not discuss any further support for this proposition.

Asked whether he had ever seen a single blast result in this much trauma, Dr. Schwaber responded that he had seen such events result in "major high-frequency loss," and on two or three occasions, seen it progress. He added that this progression would not necessarily occur over a short period of time; rather, "[t]he literature says it's over decades."

Dr. Schwaber testified that the labyrinthectomy that claimant underwent in 1997 was performed "[b]ecause of the vertigo[,]" but that it was "extremely, extremely rare" for otosclerosis to cause the degree of symptoms claimant experienced. Similarly, Dr. Schwaber testified that although he noticed in the 2007 records that claimant experienced tinnitus, he was unaware of this symptom appearing before then (although he added that labyrinthectomies usually "quiet[] everything," which would have been the case in claimant's right ear).

As to what *did* cause claimant's hearing loss, Dr. Schwaber explains in his Supplemental Report that the "kind of severe, disabling vertigo that Amy suffered is caused by inner ear trauma, specifically by pressure in the inner ear and the ongoing rupturing, dilating, contracting and breaking down of the inner ear membranes. This kind of inner ear trauma is called 'post-traumatic hydrops'[3] or 'Meniere's disease.'" Significantly, he asserts that "Meniere's disease cannot be caused by otosclerosis, not even by otosclerosis that has invaded the cochlea. Rather, it can only be caused by various forms of trauma, including acoustic trauma." Moreover, he states that the "profound sensori-neural hearing deficits caused by acoustic trauma typically do not appear immediately, and . . . are more likely to appear, and to progressively worsen, over a period of years." In support of this proposition, he cites a 1997 scholarly article which states that "in '[a]ll forms of post-traumatic Meniere's disease, the symptoms manifest in a delayed fashion following the insult, usually years.'"[4]

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[3] "Hydrops" is an "excessive accumulation of clear, watery fluid in any of the tissues or cavities of the body[.]" *Stedman's Medical Dictionary* 913 (28th ed. 2006). "Endolymphatic hydrops," which appears to be the variety suffered by claimant, refers to "dilation of the membranous labrinth of the inner ear . . . It is the pathologic finding in Ménière disease." *Id.*

[4] Paul DiBiase & Moisés A. Arriaga, *Post-Traumatic Hydrops*, 30 Otolaryngologic Clinics of N. Am. 1117, 1121 (1997). Dr. Schwaber cites other articles that reach similar conclusions, including one finding that "the permanent otologic damage caused by blast injury cannot be determined before one year after the

Addressing the Commission's concern in the Proposed Decision that acoustic trauma is not referenced in any of the medical records pre-dating the filing of the claim, Dr. Schwaber states in his Supplemental Report that he is not surprised at the absence of any such reference. Consistent with his live testimony, he explains this with the observation that "sensori-neural loss due to acoustic trauma was not so well understood at the time Amy received her [procedures] for otosclerosis in the 1980s and 1990s."

Dr. Schwaber makes other observations in his Supplemental Report that he asserts support the conclusion that claimant's progressive hearing loss was due primarily to acoustic trauma sustained during the Rome Airport attack. For example, he cites claimant's difficulty hearing words in her Hebrew class during her stay at the kibbutz, which he claims "suggest[] poor word discrimination—the classic indicator of inner ear injury due to acoustic trauma." He also points to an audiology report from May 2003, provided in the post-hearing submission, in which, in the section titled "Diagnosis," he includes the notation "(hydrops?)."

However, of particular concern to the Commission in determining the issue of causation is the fact that Dr. Schwaber did not address the claimant's medical records from before the December 1985 attack that contain references to sensori-neural hearing loss and the symptoms of Meniere's disease. For example, an August 7, 1984 audiology report indicates that claimant complains of "very mild sensorineural loss on the left." A separate report from the same day indicates that claimant suffers from "Unilateral mixed loss[5] for the left ear." The admission note from claimant's left stapedectomy in July

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traumatic event." Ben I. Nageris et al., *Otologic and Audiological Lesions Due to Blast Injury*, 19 J. Basic & Clinical Physiology & Pharmacology 185, 190 (2008).

[5] "Mixed" hearing loss refers to a "combination of conductive and sensorineural hearing loss." *Stedman's Medical Dictionary* 856.

1983 also refers to "mixed loss." In addition, a discharge summary apparently relating to claimant's left revision stapedectomy in 1984 includes, under "Brief Summary of Present Illness," the notation "SNH.L.[6] post stapes procedure." "SNH.L." is also referenced under "Physical Examination: (Significant Findings)."

The pre-incident medical records also contain references to symptoms that are typical of Meniere's disease, as described by Dr. Schwaber in his testimony, written reports, and in the articles cited therein. For instance, the August 8, 1984 medical notes indicate that claimant complained of "fleeting episodes of unsteadiness" and nausea. A day earlier, the notes indicate claimant was experiencing a "sensation of lightheadness" and "slig[ht] Rt nausea." The audiology report from the same day notes that claimant complains of "tinnitus, dizziness + some sharp pains." All of these symptoms appear to be suggestive that claimant suffered from Meniere's disease before the Rome Airport attack. They are at least consistent with the symptoms described in the 1997 article cited by Dr. Schwaber and in the dictionary definition of the disease.[7]

The Commission recognizes that, in his testimony, Dr. Schwaber suggested that otosclerosis could cause vertigo, but that the degree of claimant's symptoms in 1996 and 1997 were only rarely associated with otosclerosis. However, the Commission notes that claimant's "dizziness" and "lightheadedness" in 1984 were accompanied by nausea and tinnitus—also symptoms of Meniere's disease. Additionally, Dr. Schwaber testified, having reviewed the medical records, that he was unaware of claimant having ever

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[6] "SNHL" is an abbreviation for sensorineural hearing loss. *See* Nat'l Insts. of Health, *Sensorineural deafness*, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/003291.htm (last visited February 7, 2013).

[7] *See* DiBiase & Arriaga, *supra* note 4, at 1117 ("Meniere's disease is a clinical syndrome marked by fluctuating and sometimes progressive sensorineural hearing loss, intermittent attacks of vertigo, and tinnitus. Other common features include aural fullness and pressure as well as diplacusis."); *Stedman's Medical Dictionary* 561 ("an affection characterized clinically by vertigo, nausea, vomiting, tinnitus, and fluctuating and progressive sensory hearing loss associated with endolymphatic hydrops.").

exhibited tinnitus before her 1996 vertiginous episodes. But as noted above, the August 1984 audiology report clearly indicates that claimant complained of tinnitus. If nothing else, this would seem to suggest that Dr. Schwaber had not seen the 1984 report and was thus working with a materially incomplete set of records. While this does not necessarily undermine the opinions he expressed based on the materials he had, it does raise the question whether he would have reached a different conclusion had he seen this report. Indeed, Dr. Schwaber did not address in his live testimony or written reports any of the several medical records that claimant suffered from sensori-neural hearing loss prior to the December 1985 attack. In the absence of further information, it is therefore difficult for the Commission to conclude that claimant's sensori-neural hearing loss resulted from the 1985 incident.

In addition, as the definition of the condition and Dr. Schwaber's testimony make clear, Meniere's disease is often characterized by *progressive* sensori-neural hearing loss. It therefore seems possible that claimant's symptoms in 1984 were simply the first manifestations of what would become more serious sensori-neural hearing loss due to Meniere's disease in later years. Since Dr. Schwaber did not address these symptoms appearing in the pre-incident records, his testimony and written reports shed little light on this aspect of the claim.

The Commission also takes note of Dr. Schwaber's statement in his Supplemental Report that "Meniere's disease . . . can only be caused by various forms of trauma, including acoustic trauma." However, the 1997 DiBiase article that Dr. Schwaber himself cited in his report indicates other causes for this disease. It states that "[p]ossible etiologies for Meniere's disease are allergy, autoimmune, genetic inheritance,

acoustic trauma, physical trauma to the temporal bone, post-infectious, and anatomic." DiBiase & Arriaga, *supra* note 4, at 1117. Even among cases where endolymphatic hydrops are caused by trauma, the article indicates that "this etiology is more controversial than hydrops following temporal bone trauma." *Id.* at 1119. In addition, it is "much less common than that following physical trauma." *Id.*

Moreover, with regard to the possibility that, apart from otosclerosis, claimant also inherited this type of hearing loss from her father or another family member, the Commission notes that this very issue was raised during the oral hearing. As discussed earlier, the Commission asked Dr. Schwaber whether the degeneration of claimant's inner ear membranes was a genetic condition; he responded there may be such a gene, but did not address the issue further.

This last question is particularly important in this claim because the available medical evidence suggests there may indeed be a possible genetic explanation for claimant's sensori-neural hearing loss. The September 2011 audiological evaluation report for Dr. Sirkin, claimant's father, indicates that he, too, has a history of symptoms associated with Meniere's disease. Specifically, the "Pertinent History" of the report lists, among other things, "aural fullness, tinnitus, [and] vertigo[.]" As noted earlier, these are said to be symptoms of Meniere's disease or endolymphatic hydrops. Given this specific symptomology, it is possible that claimant inherited her progressive hearing loss, albeit to a far greater degree, from her father. More important, because neither claimant nor Dr. Schwaber addressed the possible genetic basis of claimant's symptoms and/or possible Meniere's disease in any meaningful way, the Commission has

insufficient evidence on which to base a finding that claimant's sensori-neural hearing loss was likely caused by acoustic trauma resulting from the Rome Airport attack.

The Commission is particularly troubled by the fact that, despite the extensive medical documentation that was submitted with this claim, none of those medical records ever referenced acoustic trauma. As noted above, Dr. Schwaber testified that, over the course of the nearly quarter century from the time of the Rome Airport attack until the filing of this claim, neither claimant nor her father ever raised the issue of acoustic trauma. He did testify that medical awareness regarding the connection between acoustic trauma and swelling in the inner ear was not known until 1997, but that is still twelve years before the filing of this claim.[8] Given that claimant testified she had never experienced any other incident of acoustic trauma, the Commission finds it highly unlikely that the omission of the incident from the medical records can be explained by the alleged lack of medical understanding (or by mere oversight).

CONCLUSION

The Commission has sympathy for all that claimant has experienced due to her hearing loss and recognizes her efforts to obtain detailed information, including extensive medical documentation, related to that loss. However, the Commission is unable to conclude that claimant suffered a discernible, more than superficial physical injury resulting from the Rome Airport attack. The 1984 medical records indicate that claimant suffered from some form of sensori-neural hearing loss prior to the incident, and the

[8] Dr. Schwaber explained that "[u]ntil recently, physicians also did not fully appreciate or understand the dynamic of sensori-neural hearing loss due to acoustic trauma." While there may be some validity to this, the evidence submitted by the claimant, including the post-hearing submissions, indicates quite clearly substantial medical literature on the subject beginning from the mid-1970s, including articles authored by one of claimant's former treating physicians, Harold F. Schuknecht, M.D. *See, e.g.*, Trevor J.I. McGill & Harold F. Schuknecht, *Human Cochlear Changes in Noise Induced Hearing* Loss, 86 Laryngoscope 1293 (1976).

authorities cited, notwithstanding the Supplemental Report, suggest that acoustic trauma is not the only potential cause of such hearing loss. .

Therefore, for the reasons discussed above, and based on the evidence and information submitted in this claim, the Commission again concludes that the claimant has not met her burden of proving that she has satisfied the Commission's standard for physical injury.[9] Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed.

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

Dated at Washington, DC, February 15, 2013
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj C. Desai, Commissioner

[9] 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) (2012).

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of 5 U.S.C. §552(b)(6) Against the Great Socialist People's Libyan Arab Jamahiriya	Claim No. LIB-II-164 Decision No. LIB-II-183

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman Kalik, PC

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at Fiumicino Airport[1] in Rome, Italy on December 27, 1985.

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,*

[1] Also known as Rome Leonardo da Vinci Airport or Leonardo da Vinci-Fiumicino Airport.

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 E. According to the January Referral, 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 lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

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).

BASIS OF THE PRESENT CLAIM

On July 6, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts a claim under Category E of the January Referral, along with exhibits supporting the elements of her claim. The exhibits include evidence of claimant's U.S. nationality, her presence at the scene of the terrorist incident, and her alleged physical injuries for which she now claims compensation.

The claimant states that she was present at the Fiumicino Airport in Rome, Italy on December 27, 1985, when four terrorists armed with machine guns began shooting and throwing hand grenades at passengers waiting near the El Al Airlines ticket counter. Claimant states that "[m]ultiple hand grenades exploded very near to me, in fact within approximately 5 feet of me." She further describes how a "security guard laying on top of me fired his pistol in order to kill a terrorist . . . ." According to claimant, the "high intensity explosions and gunfire caused serious blast injury and 'acoustic trauma' to [her]." She describes how these alleged injuries "have caused the loss of 100% of my hearing in my right ear, and 80% of my hearing in my left ear."

Of particular significance in this claim is the fact that, according to the records presented, claimant was diagnosed with a medical condition causing hearing loss in 1983—two years prior to the incident—which required at least two surgeries in her left ear. However, claimant asserts that her *post-incident* hearing loss, which eventually required that she wear hearings aids, and for which she has undergone numerous surgeries, including the implantation of a right cochlear implant, was the result of acoustic trauma suffered during the Rome Airport attack, and was unrelated to her pre-existing medical condition. She states that her "hearing loss has evolved and manifested over time[,]" and that her "hearing has continued to deterioriate[.]"

Claimant states that her hearing loss has caused difficulty in her career as a teacher, as she must read lips when communicating with her students. She also describes how her hearing loss has adversely impacted her interactions with her family and causes embarrassment in her business dealings because she "frequently miss[es] key statements in meetings or misunderstand[s] people's names."

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under Category E of the January Referral; 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 against Libya. January Referral, *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 in order to meet the nationality requirement, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided copies of her birth certificate, indicating that she was born in New Britain, Connecticut, and her current U.S. passport. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident 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 Category E of the January Referral, 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. January Referral, *supra*, ¶ 7. This list includes the "December 27, 1985 attack at the Leonardo da Vinci Airport in Rome, Italy, as alleged in *Estate of John Buonocore III v. Great Socialist Libyan Arab Jamahiriya* (D.D.C.) 06-cv-727/*Simpson v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-529." *Id.*, Attachment 2, ¶ 6. In her Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the December 27, 1985 Rome Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of her claim.

Pending Litigation

Finally, Category E of the January Referral Letter states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral, *supra*, ¶ 7. Attachment 2 to the January Referral identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, are the *Buonocore* and *Simpson* cases. Claimant has stated under oath in her Statement of Claim, and the pleadings in the *Buonocore* and *Simpson* cases 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 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, *supra*, ¶ 7. The Commission held in *Claim of* 5 U.S.C. §552(b)(6) , Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

(1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and

(2) must have received medical treatment for the physical injury within a reasonable time; and

(3) must verify the injury by medical records.

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

Physical Injury

According to her Statement of Claim and accompanying exhibits, claimant, who was traveling to Israel with a group of college friends at the time of the incident, was standing near the El Al Airlines ticket counter at Fiumicino Airport when, as noted above, four terrorists opened fire with machine guns and tossed hand grenades at waiting passengers. A narrative description of the incident provided with this claim states that "[m]ultiple hand grenades exploded very near to Amy, one within only five feet of her." In an affidavit, claimant states, and a contemporaneous newspaper article further describes, how an Italian security guard simultaneously threw himself on top of claimant and, while in that position, shot one of the terrorists as the terrorist prepared to toss another grenade in their direction. Describing the grenade explosions and the machine gun and pistol fire, claimant states that the noise was "deafening and painful[,]" and "caused temporary complete deafness and ringing in both of [her] ears, especially in the right ear, which was the ear closest to the security guard's weapon."

Claimant asserts that, as a result of these "high intensity explosions and gunfire, I sustained very serious blast injuries and acoustic trauma—physical tears and ruptures to the inner ear membranes in both of my ears." She explains that during her stay in Israel, she "began to realize that my hearing had deteriorated since the Attack." Claimant's

father, himself a medical doctor, recalls in an affidavit that "[w]hen Amy returned to the United States after the Rome Airport Attack, it was clear, and I personally witnessed, that her hearing in both of her ears, especially in her right ear, was deteriorating rapidly and dramatically." Claimant notes that, "upon my return to the United States in March, 1986, I was forced to obtain a hearing aid for my right ear . . . ."

Claimant describes various procedures that she has undergone to treat her hearing loss, although she notes that "these surgeries have not improved my hearing, rather, my hearing has continued to deteriorate and I now have 100% deafness in my right ear, and 70% deafness in my left ear. The hearing in my left ear continues to deteriorate."

In support of her claim, claimant has provided, *inter alia*, medical records; two separate affidavits from her recounting the incident and describing her alleged physical injuries; a copy of a contemporaneous newspaper article describing the incident and noting claimant's presence at the scene of the attack; an affidavit from claimant's father describing claimant's physical condition and medical treatment following the incident; a narrative description of the incident detailing claimant's experience during the attack, her alleged physical injuries, and her subsequent medical treatment; an affidavit sworn by Traci Kamil, one of claimant's traveling companions on the day of the attack, also noting claimant's presence during the incident; and various scholarly articles discussing acoustic trauma and hearing loss.

The claimant has not provided any medical records contemporaneous with the Rome Airport attack. She has, however, provided extensive medical documentation from the years following the incident through the present day, as well as a record from two

years prior to the incident. These records reveal a complicated medical history focused primarily on claimant's progressive hearing loss, and describing numerous procedures treating this condition, including some from before the terrorist incident.

Some of the post-attack medical records include patient history information. This history reveals that in 1983—two years prior to the Rome Airport attack—the claimant was diagnosed with otosclerosis, a condition characterized by "abnormal bone growth in the middle ear that causes hearing loss."[2] As a result, claimant underwent left stapes[3] surgery in 1983, and a left stapes revision surgery, in which the prosthesis that had previously been inserted was replaced, in 1984. No records have been provided of these procedures; however, claimant has submitted the results of a July 5, 1983 audiological evaluation. It is not clear whether this evaluation was conducted before or after claimant's initial stapes surgery. The only analysis of the results that has been provided is in the form of a letter from claimant's counsel. This letter, which is unsupported by any medical opinion, asserts that claimant's word discrimination in both ears was 96% at the time, which, counsel further asserts, is a "very high rating." None of the other data in the evaluation has been discussed, and there is no evidence in the record to indicate whether the evaluation revealed any measurable hearing loss or damage to the ear.

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[2] U.S. Nat'l Library of Med., Nat'l Insts. of Health, *Otosclerosis*, MedlinePlus, http://www.nlm.nih.gov/medlineplus/ency/article/001036.htm (last updated Aug. 3, 2010; *see also Stedman's Medical Dictionary* 1395 (28th ed. 2006) (defining otosclerosis as "a disease of the otic capsule (bony labyrinth) characterized by formation of soft, vascular bone and resulting in progressive conductive hearing loss because of fixation of the stapes and sensory hearing loss because of involvement of the cochlear duct.").

[3] The stapes is a "stirrup-shaped bone in the middle ear. The stapes transmits sound vibrations from the incus, another little bone in the middle ear, to the oval window adjacent to the inner ear." *Definition of Stapes*, MedicineNet.com, http://www.medterms.com/script/main/art.asp?articlekey=25697 (last updated Dec. 12, 2003).

Turning to claimant's alleged injury during the attack itself, claimant asserts that she suffered structural damage to her inner ear as a result of acoustic trauma and "dramatic and rapid hearing loss in both of her ears." Claimant has not, however, provided any medical records contemporaneous with, or from the months immediately following, the attack. Claimant alleges, and the 2007 report of her cochlear implant evaluation tends to reinforce the claim, that "she became a candidate for hearing aids in 1986 . . . and began to use hearing aids in 1987." Records from physician evaluations during the 1986-87 period have, however, not been provided.

Other medical records indicate that in April 1989, claimant consulted with Alan Scheer, M.D., a physician in New York City, and underwent a right stapedectomy[4] on May 15, 1989. A letter from Dr. Scheer to claimant, dated November 5, 1991, summarizing claimant's records, notes that, with regard to the right stapedectomy, the "postoperative audiogram showed that the hearing increased but not up to the potential of the bone conduction level." In the seven years that follow the stapedectomy, there are no records of claimant's condition, or of any medical treatment received by her.

In 1996, claimant switched from using hearing aids to a CROS[5] system, in which a signal is sent from a better hearing ear to the ear that does not hear as well. *Contralateral Routing of Signal Hearing Aid, mediLexicon,* http://www.medilexicon.com/medicaldictionary.php?t=39471 (last visited June 20, 2012). The reason for the change was that "the severity of hearing loss did not allow for aided benefit in the right ear." The same year, on September 16, 1996, claimant

[4] A stapedectomy is an "[o]peration to remove the stapes in whole or in part with replacement of the stapes by a metal or plastic prosthesis; used for otosclerosis with stapes fixation to overcome a conductive hearing loss." *Stedman's Medical Dictionary, supra* note 2, at 1827.

[5] "CROS" is an abbreviation for "contralateral routing of signal." *Id.* at 462.

underwent a right revision stapedectomy; both the pre- and post-operative diagnoses are noted as "vertigo and hearing loss." Subsequently, on March 17, 1997, claimant was diagnosed with "Right labrythine[6] dysfunction in [her] deaf ear" and underwent a right labrynthectomy.[7] The Operation Report notes that claimant "has a history of otosclerosis" and that "her right ear is deaf."

In 2002, claimant commenced treatment under Mitchell K. Schwaber, M.D., an ENT physician practicing in Nashville, Tennessee. At the time, Dr. Schwaber determined that claimant suffered from "profound" hearing loss in her right ear, and "mild to profound" hearing loss in her left ear. In a 2010 letter to claimant's counsel, Dr. Schwaber states that in 2002 he "did some additional diagnostic testing and did not see any significant otosclerosis at that time on the CT scan[.]"

In January 2007, claimant was evaluated by Dr. Schwaber for the possibility of a cochlear implant, particularly in her right ear, and she was found to be within the candidate range. The records of this visit indicate that claimant "has profound sensorineural hearing loss in the right ear and a progressive moderately severe to profound sensorineural loss in the left ear with a significant decrease in understanding in the left ear over the past year." Dr. Schwaber took note of claimant's diagnosis of otosclerosis at age eighteen, and stated in a Clinic Note: "It appears that the progressive hearing loss may very well be due to otosclerosis . . . ." Under the "Impression" heading of the Clinic Note, he states: "Probable cochlear otosclerosis, left. Right: Non-hearing ear following the labyrinthectomy."

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[6] The term "labyrinth" refers to the "internal or inner ear, composed of the semicircular ducts, vestibule, and cochlea." *Id.* at 1038.

[7] A labyrinthectomy is defined as "Excision of the labyrinth; a destructive operation to destroy labyrinthine function." *Id.*

Claimant underwent a right cochlear implant on February 14, 2007. The diagnosis at the time of the operation was described as "Bilateral progressive sensorineural hearing loss due to otosclerosis and prior labrinthectomy." There is no evidence that claimant has undergone any further surgical procedures since that time.

In determining whether this claim satisfies the Commission's standard for physical injury under Category E, the key question is whether claimant's hearing loss was caused, in whole or in sufficient part, by acoustic trauma resulting from the Rome Airport attack in 1985. In this regard, a particularly relevant question is whether claimant's progressive loss was the result of her pre-existing otosclerosis, or some other condition, rather than any blast injury she may have sustained during the Rome Airport attack.

In assessing this question, the Commission finds it significant that there is not a single reference to acoustic trauma in any of the extensive submitted medical records that pre-date the filing of the claim. In an attempt to clarify the issue of causation, the Commission staff requested, during development of the claim, that claimant provide certain information; in particular, documentation concerning claimant's prior otosclerosis as well as any medical records contemporaneous with the terrorist incident. In response, claimant submitted the opinions of Dr. Mitchell Schwaber (identified above) and Donna Schwaber, Au.D., both dated October 6, 2010, explaining that even though claimant previously had otosclerosis, CT scans from 2002 and 2007 showed "no otosclerosis in the inner ear." Accordingly, they conclude, "this means that Ms. Mulron presently suffers from nerve-based *sensory* hearing loss that is the result of the blast injury, rather than structural *conductive* hearing loss that is the result of otosclerosis." Further, Dr. Mitchell Schwaber reasons that, because of the "facts and circumstances" surrounding

claimant's condition, her hearing loss since the incident was the result of *sensory* hearing loss resulting from acoustic trauma during the attack. The "facts and circumstances" he identifies to support his conclusion include, among other things: 1) the need for a labyrinthectomy in 1996; 2) a "decrease in understanding," and 3) the fact that hearing aids were ultimately not effective, but the cochlear implant was.

Taken together with the medical documentation in the file, these letters raise additional questions and present inconsistencies that make it impossible for the Commission to conclude that acoustic trauma from the Rome Airport attack caused claimant's hearing loss. For instance, as noted above, Dr. Mitchell Schwaber notes in his January 8, 2007 report that otosclerosis may be the cause of claimant's hearing loss. Yet his 2010 letter states emphatically that subsequent CT scans in both 2002 and 2007 showed no otosclerosis in the inner ear. Moreover, the reports of the CT scans ordered by Dr. Schwaber in 2007 do not appear to address the question of whether the claimant still had otosclerosis. While this does not necessarily conflict with Dr. Schwaber's conclusion in 2010, it does appear to be at odds with his statement in the February 14, 2007 Report of Operation associated with claimant's right cochlear implant, referenced above, in which he identifies both the preoperative and postoperative diagnosis as "Bilateral progressive sensorineural hearing loss due to otosclerosis and prior labyrinthectomy." This statement is also noteworthy in that it indicates that otosclerosis *can* cause nerve-based hearing loss. Indeed, none of the records submitted appear to rule this out as a possibility.

In addition, apart from a brief mention in Dr. Mitchell Schwaber's 2010 letter that stapedectomy surgeries have a "very high success rate" in correcting conductive hearing

loss, none of the medical records provided address the possibility that, in fact, claimant did suffer from surgical or other complications associated with the various procedures she underwent, or address the potential effects of any such complications. This is of particular concern in this claim given not only the number of procedures claimant has undergone, but also the fact that two of these surgeries—one in each ear—were "revision" stapedectomies. While these revisions may in fact be routine, claimant has failed to produce any documentation describing when and why such procedures would normally be performed. Specifically, claimant has neglected to explain, and the medical documentation does not make clear, whether the revisions were required due to complications arising from the initial procedures. In the absence of such evidence, the Commission cannot rely on the claimant's physician's opinions that, because claimant did not exhibit otosclerosis in 2002 or 2007, her sensory hearing loss was therefore caused by acoustic trauma which she must have sustained during the terrorist incident.

It is likely that many of the Commission's concerns could be resolved by an examination of certain records that were *not* submitted with this claim, such as, for example, records of claimant's 1983 and 1984 stapedectomies, her 1986 audiology evaluation in New York that resulted in her wearing hearing aids, her 1989 right stapedectomy, or most importantly, medical records from the weeks and months after the incident. On this point, Dr. Mitchell Schwaber asserts in his letter that the absence of contemporaneous medical records does not detract from his conclusions because "the *full extent* of the hearing loss due to blast injury and associated physical trauma to the inner ear frequently evolves and manifests over time, and is not necessarily immediately apparent at the time of the blast." This cautious statement begs the question whether

claimant's hearing loss could have *partially* manifested at the time of the incident, or shortly thereafter, or whether the effects would necessarily be detected, not *immediately*, but in the weeks following the incident. These questions are of particular concern because, as noted earlier, claimant states in her affidavit that she suffered "physical tears and ruptures to the inner ear membranes in both of [her] ears." Moreover, her father states in his affidavit that, following the attack and claimant's return to the United States a few months later, her hearing loss was "deteriorating rapidly and dramatically[,]" and that he personally "supervised all of Amy's health care in this period, both before and during the Rome Airport Attack." Despite these assertions, claimant has not provided any medical records from this period, either those that might document the "physical tears and ruptures to [her] inner ear membrances" or those that demonstrate that her hearing loss was "deteriorating rapidly and dramatically." Indeed, the earliest medical record following the incident submitted with this claim was Dr. Scheer's 1991 summary of claimant's medical history, which makes no reference to acoustic trauma or claimant's involvement in the Rome Airport incident.

Finally, the Commission takes note of an expert medical opinion, dated August 8, 2011, from Amy L. Budoff, M.D., a board-certified otolaryngologist, that draws largely the same conclusions as Drs. Mitchell and Donna Schwaber regarding the cause of claimant's progressive hearing loss. Dr. Budoff concludes, without explanation, that the blasts "resulted in total deafness in [claimant's] right ear and a 70% sensorineural (nerve) deafness in her left ear . . . ."[8] Because of the conclusory nature of this statement, and the

[8] Dr. Budoff does explain how acoustic trauma can result in hearing loss *generally*; however, because of the unique circumstances of this particular case, her conclusions, without more, cannot be applied to the specific case of claimant's hearing loss. As has been discussed throughout this decision, there are other potential intervening causal factors that must be addressed, such as prior otosclerosis and/or surgical

fact that Dr. Budoff apparently did not conduct a physical examination herself, the Commission is not able to, and therefore does not, rely on this opinion. Further, although Dr. Budoff says there is no evidence of otosclerosis in the inner ear, for the reasons described earlier, the Commission is unable to draw the conclusion that this necessarily leaves acoustic trauma from the Rome Airport attack as the only likely explanation of claimant's hearing loss, particularly in light of her complicated medical history.

Given the equivocal nature of the medical records, the apparent inconsistencies surrounding the possible cause of claimant's hearing loss, the absence of key records surrounding claimant's medical treatment, and the absence of medical records contemporaneous with the attack, the Commission concludes that the claimant has failed to establish to the Commission's satisfaction that her progressive hearing loss was caused in whole or in part by acoustic trauma suffered during the Rome Airport attack. In this regard, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

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

45 C.F.R. § 509.5(b) (2011).

In this case, based on the entirety of the evidence, the Commission finds that the claimant has failed to provide evidence sufficient to establish that she "suffered a discernible physical injury, more significant than a superficial injury"; that she "received

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complications. Although Dr. Budoff mentions in passing that claimant had prior otosclerosis, she does not adequately address the possibility of sensory hearing loss resulting, either directly or indirectly, from this condition. Her opinion therefore suffers similar defects as those in Dr. Mitchell and Donna Schwaber's opinions and is of limited usefulness to the Commission.

medical treatment for the physical injury within a reasonable time"; and that the injury be verified by medical records, all three of which are required under the Commission's physical injury standard.

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

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

Dated at Washington, DC, June 20, 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).