

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-168

Decision No. LIB-II-110

Counsel for Claimant:

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

Oral hearing held on March 15, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation based on the alleged severity of physical injuries suffered by 5 U.S.C. §552(b)(6) as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986. The claim was submitted under Category D of the January 15, 2009 *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral").

By Proposed Decision entered December 15, 2011 the Commission denied the present claim on the grounds that the claimant had not met his burden of proving that the limitations of his major life activities and/or the disfigurement to his outward appearance were significant enough so as to qualify him for additional compensation.

On January 11, 2012, the claimant objected to the Commission's decision and requested an oral hearing. By letters dated January 17, 2012 and January 31, 2012 the Commission requested that claimant submit any additional evidence that he wished it to consider in support of his objection, including, by way of example, any final determinations regarding disability ratings and/or disfigurement ratings, issued by any authority, based on the physical injuries that he suffered as a result of the hijacking of Pan Am Flight 73; and any evidence to establish and substantiate the duration of hospitalization required as a result of his physical injuries. In response, under cover of a letter dated July 6, 2011, claimant submitted the report of a Dr. Syed Nasir dated June 28, 2011. Further, on March 7, 2012, claimant submitted a "Supplemental Brief in Support of Category D Claim" ("Supplemental Brief") including, among other documents, the report of a Dr. Alamgir Isani dated February 27, 2012.

The hearing on the objection was held on March 15, 2012.

#### DISCUSSION

As noted in the Commission's Proposed Decision, Category D of the January Referral consists of:

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

January Referral at ¶ 6.

As also noted in the Commission's Proposed Decision in the present claim, the claimant alleged that the effects of the damage to his ulnar nerve became apparent approximately six months after the hijacking—when claimant was three years old—at which point his parents sought medical care for him. According to the claimant, he “attended monthly physical therapy sessions [at this time and] for many years” thereafter. The Commission further noted claimant's statement that he experiences cramping which causes difficulty in completing tasks such as driving or typing, and that he has always been embarrassed and self-conscious about his hand's appearance and uncontrollable spasms.

The medical records submitted in support of the present claim indicate that the symptoms claimant has identified persist to the present. With regard to treatment of this condition, a Dr. Poorvi Patel noted, in his report dated April 22, 1987, that “evaluation by a plastic surgeon would be recommended”; Dr. Syed Jafri prescribed on April 29, 2010, physical therapy three times per week for three weeks and Dr. Syed Nasir, in his report dated June 28, 2011, prescribed Neurontin for claimant “to help with tingling in his left hand.” To corroborate the severity of his injury, claimant has also submitted the report of Dr. Isani dated February 27, 2012, which concludes that claimant suffers from a 40% impairment of his left upper extremity, according to the AMA Guidelines 4<sup>th</sup> Edition. In the Supplemental Brief and at the oral hearing, claimant asserted that this determination, along with the disability resulting from the impairment, demonstrates that his injury “seriously affects and limits his major life activities.”

During the oral hearing, the Commission requested that claimant submit a determination of impairment rating as a percentage of his whole body (rather than a percentage of a specific body part). Subsequent to the oral hearing, under cover of a letter

dated April 17, 2012, claimant submitted an Addendum to Dr. Isani's report in which Dr. Isani states that such an impairment would "correspond[] to a 24% impairment of the whole person."

During the oral hearing, the claimant testified that the injury he sustained as a result of the hijacking continues to manifest itself in his daily life in all activities involving the use of his injured hand, namely, "anything that involves...pushing, pulling, [or] grabbing." He described several examples of how his injury limits ordinary life functions. The claimant demonstrated for the Commission that he is unable to "bring his fingers together" and while he can straighten his fingers "they automatically just go back down." In addition, the claimant testified that neither medication nor physical therapy has successfully treated his symptoms and that his doctors had advised him that "this condition" is permanent. Finally, claimant testified that because his injury prevents him from fulfilling the requirements of his supervisor's position he is not able to continue to progress in his current employment path. However, he conceded that it was his belief that he could not perform these functions, not a matter of fact.

Claimant's counsel, during the oral hearing, emphasized the chronic nature of claimant's injury as a special factor for the Commission to consider under Category D. Specifically, counsel noted that unlike other compensable physical injuries that have been before the Commission, which could be treated and corrected immediately, claimant's injury here resulted in chronic damage—specifically the loss of motor capacity that has resulted from the nerve damage—and is "a constant daily reminder" of this experience.

While noting that the claimant "has learned to work around" his injury, counsel argued that this fact does not diminish the chronic nature of the injury or that the

disfigurement is in a visible place that cannot be hidden. Counsel further noted that had this been a workplace injury, the impairment determined by Dr. Isani “under Federal guidelines would have resulted in...a scheduled award under 5 U.S. Code Section 8106 for the loss of two fingers...[which equates to a] 40 percent impairment to the extremity itself as a whole.”

*Analysis*

In assessing whether compensation is warranted in this claim, the Commission considers the factors articulated in its decision in *Claim of* <sup>5</sup> U.S.C. §552(b)(6) , Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), which include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant’s major life functions.

Assessing these factors, the Commission finds the most significant factor, for purposes of its Category D analysis of this claim, to be the disfigurement of claimant's hand, demonstrated to the Commission by the claimant during the oral proceeding. It is clear that the disfigurement is impossible to hide from view in the course of ordinary activities, that claimant is constantly aware of it, and that the associated uncontrollable spasms are a constant source of anxiety, particularly professionally. The Commission finds, based on claimant’s testimony and its own first-hand observation, that claimant has suffered a significant disfigurement to his outward appearance. Taking account of claimant’s disfigurement in conjunction with the chronic nature and limiting effects of claimant’s injury, the Commission further finds, based on the totality of the circumstances, that the severity of claimant’s injury warrants an award of compensation under Category D.

## COMPENSATION

In *Claim of* § U.S.C. §552(b)(6), Claim No. LIB-II-118, Decision No. LIB-II-152 (2012), the Commission held that, in determining the appropriate level of compensation for claimants who satisfy the threshold requirements for Category D claims, it will consider, in addition to the recommendation contained in the January Referral for Category D, such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any disability ratings, if available, and the nature and extent of disfigurement to the claimant's outward appearance.

In this claim, counsel has argued that "this...is more significant than every injury in [the December Referral] because of the chronic day to day nature of it; because of the placement on the hand of the disfigurement; ...and because of the chronic muscle atrophy which prevents [claimant] physically from doing certain things." While, as determined above, the claimant's injury is sufficient to warrant compensation under Category D, the Commission disagrees that the present injury is "more significant than every injury that was the subject of an award under the December Referral." A number of injuries that formed the basis for further compensation under Category D are considerably more severe than those suffered by claimant. In those claims the Commission's awards have ranged from \$3 million to \$4 million.

In consideration of the Commission's awards under Category D, the evidence presented in this case and the Commission's conclusions drawn therefrom, the

Commission determines that \$500,000 is an appropriate amount of further compensation in light of the extent of disfigurement and impairment resulting from claimant's injury. With regard to interest, the Commission held in <sup>5 U.S.C.</sup> §552(b)(6) *supra*, that, as with awards for physical injury made under the December Referral, compensable claims under Category D are not entitled to interest as part of the awards granted therein. Accordingly, the Commission determines that the claimant, 5 U.S.C. §552(b)(6), is entitled herein to an award of \$500,000 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

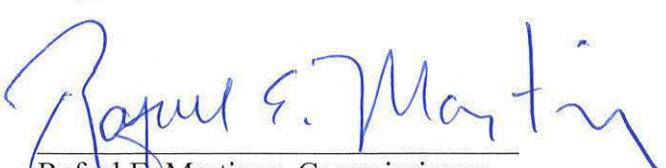
Therefore, the Commission withdraws its denial of the claimant's claim as set forth in the Proposed Decision, and issues an award as set forth below, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006). This constitutes the Commission's final determination in this claim.

AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Five Hundred Thousand Dollars (\$500,000.00).

Dated at Washington, DC, October 26, 2012  
and entered as the Final Decision  
of the Commission.

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

  
\_\_\_\_\_  
Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION  
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Claim No. LIB-II-168

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Counsel for Claimant:

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PROPOSED DECISION

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

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral").

The present claim is made under Category D. According to the January Referral, Category D consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 6. Attachment 1 to the January Referral lists the suits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter ("December Referral") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72,

entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On July 28, 2009, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission determined that the claimant was injured as a result of a bullet wound to his left elbow. Further, the Commission concluded that the injury — which required the removal of the bullet and a several-day hospital stay — met the Commission's standard for physical injury and, consequently, that the claimant was entitled to compensation in the amount of \$3 million. *Claim of* <sup>5 U.S.C. §552(b)</sup><sub>(6)</sub> Claim No. LIB-I-010, Decision No. LIB-I-002 (2009) (entered as Final on September 4, 2009).

#### BASIS OF THE PRESENT CLAIM

On July 7, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim for additional compensation under Category D of the January Referral, along with exhibits supporting the elements of his claim, including

evidence of his U.S. nationality, his receipt of an award under the December Referral, and the extent of his injury. Specifically, claimant asserts that he suffered “serious, untreatable injuries which will affect [him] for the rest of [his] life.” The evidence submitted includes claimant’s statements, medical records indicating the treatment received by claimant for his injury, and photographs of claimant’s left hand.

## DISCUSSION

### Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission’s jurisdiction here is limited to the category of claims defined under the January Referral; namely, claims of individuals who: (1) are U.S. nationals; (2) received an award under the December Referral; and (3) have dismissed their respective Pending Litigation cases against Libya. January Referral, *supra*, ¶ 3.

### *Nationality*

The Commission determined in its decision on claimant’s injury claim under the December Referral that the claim was owned by a U.S. national from the date of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies equally to satisfy the nationality requirement here.

### *Award Under the December Referral*

To fall within the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of his Category D claim.

*Dismissal of the Pending Litigation*

The January Referral Letter also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. The Commission determined, in its decision on claimant's physical injury claim under the December Referral, that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya, et al.*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination also applies here.

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

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether "the severity of the injury is a special circumstance warranting additional compensation." In making this determination, the Commission considers the following. First, the Commission is familiar with the nature of all of the injuries that fall under Category D; as indicated above, in its adjudication of claims under the December Referral, the Commission has already examined and awarded compensation for all of the eligible Category D claims. Second, the Commission's standard for physical injury in this program sets a relatively low threshold for compensable injuries: in order to meet the Commission's standard in this program, a claimant need only establish that he or she suffered an injury that is discernable, and more significant than a superficial injury. *See Claim of* 5 U.S.C. §552(b)(6) , Claim

No. LIB-I-001, Decision No. LIB-I-001, at 8-9 (2009). Third, the amount of compensation awarded for compensable injuries in this program — a fixed amount of \$3 million for each compensable injury — is, in the Commission’s experience, exceptionally high when compared to other claims programs, and extraordinarily high for compensable injuries that were not severe, but which nonetheless met the Commission’s standard. Therefore, to the extent that a monetary award can ever adequately compensate for a physical injury, the eligible claimants in this program have, for the most part, been adequately compensated via the Commission’s awards under the December Referral.

Considering the foregoing, the Commission concludes that only the most severe injuries will constitute a special circumstance warranting additional compensation under Category D. In determining which injuries are among the most severe, the Commission considers the nature and extent of the injury itself, the impact that the injury has had on claimant’s ability to perform major life functions and activities — both on a temporary and on a permanent basis — and the degree to which claimant’s injury has disfigured his or her outward appearance. These factors are applied to the present claim as set forth below.

First, the claimant asserts that in addition to the bullet wound to his elbow — compensated by the Commission under the December Referral — he also suffered an injury to his pelvis as a result of the hijacking incident, which he had not asserted in his December Referral claim. The Commission notes that the January Referral limits Category D to “claims of U.S. nationals . . . for physical injury[,]” where “the Commission determines that the severity of *the* injury is a special circumstance . . .”

(emphasis added). The Commission finds that “the injury” referred to under this Category is the injury for which an award was issued by the Commission under the December Referral. In this case, as noted above, the Commission determined that the compensable injury under the December Referral was the bullet wound to the claimant’s left elbow, not the injury to his pelvis which now forms part of claimant’s request for additional compensation. Further, claimant stated in his declaration dated July 1, 2010, that he was “in the process of obtaining” a medical report substantiating this injury. However, the Commission has not received any evidence substantiating claimant’s assertion that he suffered such an injury. In any event, claimant’s request for additional compensation for an alleged injury to his pelvis is rejected.

Second, in support of his Category D claim for additional compensation relating to the bullet wound, claimant has submitted, among other documents, a supplemental declaration and an additional medical report. In his declaration, claimant asserts that, due to the injury to his elbow and more particularly his ulnar nerve, he suffers from “claw hand,” and “as a result, the last two fingers of [his] left hand are permanently bent and cannot be joined together properly.” Claimant alleges that the effects of the damage to his ulnar nerve did not become apparent for approximately six months, at which point he sought medical care and, as a result, “attended monthly physical therapy sessions ... for many years.” Claimant further asserts that this condition resulted in his being teased as a child, and made it difficult for him to participate in activities that require the use of both hands. For example, claimant explains that “[t]hese two fingers are key when it comes to playing sports such as hockey, putting on a baseball glove and catching a football.” Furthermore, he states that he experiences cramping which causes

difficulty in completing tasks such as driving and typing, specifically he asserts that he is “unable to type with both hands for more than 10-15 minutes without having to shake [his] left hand[,]” or “ hold a steering wheel properly for more than 30-45 minutes without [his] fingers cramping.” Claimant also states that he is embarrassed and self-conscious about his hand’s appearance and spasms.

Claimant has submitted the results of an electrodiagnostic study conducted on May 15, 2010, along with the medical opinions of a Dr. Syed Nasir and a Dr. Syed Jafri in support of his assertions. Dr. Jafri notes in his opinion dated May 15, 2010, that the electrodiagnostic study “reveals evidence of a left ulnar neuropathy.” Dr. Nasir, in his opinion dated June 28, 2011, states that he conducted tests on claimant’s ulnar nerve that revealed “significant damage to [the] left ulnar nerve at the elbow.” The Commission notes that the actual results of the tests conducted by Dr. Nasir have not been submitted. Dr. Nasir describes a “deformation in [claimant’s] left hand pinky and ring finger,” and relates in his report that “due to patients [sic] injury” common tasks that require two hands “are not as easy for <sup>5 U.S.C.</sup> §552(b)(6) ” The photographs of claimant’s left hand that were submitted with the claim reveal some curling of the pinky and ring fingers of his left hand.

Considering the totality of the evidence submitted, the Commission is not persuaded that any of claimant’s major life activities were limited in a sufficiently significant way as a result of his injury, or that there was a sufficiently significant disfigurement to his outward appearance, so as to qualify him for additional compensation. While the injury suffered by the claimant in 1986 undoubtedly has had a lasting impact on him, the evidence is insufficient to establish that those lasting

impacts warrant compensation beyond the \$3 million already awarded him. In this regard, the Commission takes particular note that the photographs indicate that the disfigurement appears to consist of a modest bending or curling of two fingers on the claimant's left hand, and that while certain "daily" or "common" tasks are "not as easy" for him, no evidence has been submitted establishing that there are any tasks that he cannot perform. Although Dr. Nasir states directly that the claimant cannot type with "both hands," however, this statement does not appear to be based on any test performed by the doctor, and moreover is not supported by claimant's own statement, as noted above, wherein he states that he is "unable to type with both hands for more than 10-15 minutes without having to shake [his] left hand." Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D.

Accordingly, this claim must be and is hereby denied.

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).