

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-III-020
	}	
	}	Decision No. LIB-III-028
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:

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FINAL DECISION

Claimant objects to the Commission's Proposed Decision denying her claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya"). In a previous claims program, the Commission awarded Claimant \$3 million based on physical injuries she suffered during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In this claim, Claimant seeks additional compensation for these same injuries. In the Proposed Decision, the Commission denied the claim because Claimant had not established that the severity of her injuries constituted a "special circumstance" warranting additional compensation, as required by the State Department's referral letter authorizing the Commission to hear claims in this program.¹ On objection, Claimant has submitted additional evidence and argument in support of her claim. In particular, she cites the

¹ See Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission ("2013 Referral" or "November 2013 Referral").

“permanent injury to the joints in her left ankle[]”—which she asserts requires her to wear an ankle brace and walk with a cane—as well as recent worsening pain and limited movement in both feet. On this basis, Claimant argues that she is entitled to at least an additional \$1.5 million in compensation. After carefully considering all of Claimant’s arguments and evidence, we again conclude that Claimant has not established that the severity of her injuries constitutes a special circumstance warranting additional compensation within the meaning of the 2013 Referral. We therefore affirm the denial of this claim.

BACKGROUND

Claimant brought this claim against Libya under Category D of the 2013 Referral, which consists of “claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the [2009 Referral],” provided, that, *inter alia*, “the Commission determines that the severity of the injury is a special circumstance warranting additional compensation”² In support of her claim, Claimant alleged that she suffered grenade shrapnel wounds to both legs and a gunshot wound to her left heel, injuries that left her with a disfigured left foot and resulted in chronic pain and limited mobility. She stated that she underwent physiotherapy for several months upon her return to Puerto Rico, underwent various procedures over the years to remove remaining shrapnel from her left foot, and continued to suffer pain in both feet. In a Proposed Decision dated September 17, 2015, the Commission denied the claim for additional compensation, finding that the severity of Claimant’s physical injuries was not a special circumstance warranting additional compensation.³

² *Id.* ¶ 6.

³ *See* Claim No. LIB-III-020, Decision No. LIB-III-028 (2015) (“Proposed Decision”).

On October 2, 2015, Claimant filed a timely notice of objection and requested an oral hearing. On February 23, 2016, she submitted a brief containing further evidence and argument in support of her objection. The additional evidence included benefits-related documents from the Israeli National Insurance Institute and an excerpt from the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition (“AMA Guide”). The Commission held a hearing on the objection on March 15, 2016; Claimant testified at the hearing, as did Mark A. Reischer, M.D., a board-certified internal medicine and physical medicine and rehabilitation specialist, and Claimant’s counsel argued on Claimant’s behalf.

DISCUSSION

To prevail in this claim, Claimant has the burden to prove that the severity of her injuries is a “special circumstance” warranting additional compensation beyond the \$3 million already awarded to her.⁴ Thus, to decide this claim, the Commission must determine whether Claimant’s evidence, which now includes Claimant’s testimony, the testimony of Dr. Reischer, the AMA Guide excerpt, and the benefits documents from Israel, suffices to meet that burden.

Claimant makes numerous arguments. She asserts that, due to her foot and ankle injuries, she “has always had pain and trouble with mobility[,]” and that “[s]ince 2009, she has had to wear a brace and walk with a cane.” She asserts that she “suffers from tendon and ligament separation, nerve damage, extreme pain, and limited movement in both of her feet.” As evidence of her injuries and their effects, Claimant points to Dr. Reischer’s testimony concluding that Claimant “suffers from significant gait derangement” caused by

⁴ 2013 Referral, *supra* note 1, ¶ 6.

her injuries in the Lod Airport attack and has a “permanent disability rating of 30% for the whole person.” Claimant also cites Dr. Reischer’s opinion that “she has severe post-traumatic arthritis, injury to her tibial nerve, and muscle atrophy and leg length discrepancy.” Claimant argues that, even though the Proposed Decision “suggests that [her ability] to work professionally [is an] indication that her physical injuries may not have [had] any significant impact on her major life functions, that a claimant is able to work does not mean that they are not severely injured under Category D.” She also restates various assertions in her initial submission, including, *inter alia*, that she was hospitalized for eleven days in Israel and required “at least one emergency surgery to repair the damage to her left foot and ankle[]”; that she spent “six weeks in a cast and [underwent] four months of physical therapy—during which time she was wheelchair bound”; and that she “continued to experience pain and paresthesia in her left leg.”

On the basis of this evidence, Claimant compares the severity of her injuries to those suffered by other claimants who received awards of additional compensation in these Libyan claims programs. She contends that, like the claimants in Claim No. LIB-II-154, Decision No. LIB-II-170 (2013) (Final Decision) (awarding \$1 million in additional compensation) and Claim No. LIB-II-174, Decision No. LIB-II-180 (2013) (Final Decision) (awarding \$1.5 million in additional compensation), her injuries have “permanently affected her mobility.” Further, she maintains that, “[l]ike these claimants, [her] injuries were so severe that [they] caused limitation on her mobility, post-traumatic arthritis, limitation of use of her toes, and a flat foot.” Claimant thus argues that even beyond the evidence those claimants had, she has a 30% whole-body disability rating and has received disability payments from Israel since the time of the injury. Thus, Claimant argues that “an award of at least 1.5 million dollars is warranted here.”

After carefully considering Claimant's evidence and argument in light of the applicable standard in this claim, we again conclude that, even with this new evidence, Claimant has failed to carry her burden of proving her claim.

I. Proposed Decision

In the Proposed Decision, we denied the claim based on the three factors we consider in determining the merits of "additional compensation" claims.⁵ First, the evidence was insufficient to show that Claimant's injuries were among the most severe when compared with all the other claimants who had sought additional compensation in the Libyan claims programs. The Commission explained that, despite Claimant having suffered a gunshot wound to her left heel that required a plaster cast, she was discharged about ten days after the incident in "good general condition" and had no signs of any other trauma. Indeed, what little medical evidence was available made no reference to Claimant having ever been hospitalized for her injuries after returning home, undergoing any major surgeries (apart from one occasion when she had some shrapnel removed on an outpatient basis), or suffering any chronic impairment. Although Claimant maintained that she underwent four months of physical therapy when she returned home, she had not submitted any records documenting or describing this therapy.

The Proposed Decision also cited the lack of clarity about how much Claimant's injuries had impaired her major life functions and activities. Although recent medical records appeared to indicate that Claimant suffered some mobility difficulties, apparently the result of a left ankle deformity and "posttraumatic arthritis," she showed "excellent continued progressive improvement" after starting use of an ankle brace in 2009 and the

⁵ See Proposed Decision, *supra* note 3, at 5-6 (quoting *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 6 (2015)).

ankle instability was well-controlled. More importantly, however, Claimant had not submitted any medical records whatsoever from between 1973 and 2007, preventing the Commission from determining the degree of her impairment during this time or excluding any supervening causes of her foot pain. Although she claimed to have been assigned a disability rating of 19% by a Puerto Rican government agency, she provided no independent evidence of this. Moreover, even assuming she suffered some level of disability, there was no evidence that her injuries rendered her unable to pursue a normal professional career.

Finally, the Commission noted that, although the medical records revealed some degree of disfigurement to Claimant's left foot, the photographs submitted did not suggest a particularly severe deformity. Indeed, the Commission found that "there is no indication that this condition is disfiguring to the extent observed in claims where the Commission has awarded additional compensation on the basis of disfigurement."⁶ And although Claimant's treating physician determined that she was "a candidate for surgical realignment of the left foot and ankle," the Commission found "no evidence that Claimant [had] undergone this procedure or whether it [was] necessary to her continued ability to walk with ease."

II. Claimant's New Evidence

On objection, Claimant testified about her experience during the Lod Airport attack, her medical treatment, and the permanent physical impairments that her injuries allegedly caused. She also provided the testimony of Dr. Reischer, who gave in considerable detail his opinion about Claimant's injuries and impairments based on the medical records

⁶ Proposed Decision, *supra* note 3, at 17.

submitted with this claim, as well as the newly submitted excerpt from the AMA Guide. Finally, Claimant submitted documents evidencing benefits payments from the Israeli National Insurance Institute.

Claimant's Live Testimony: Claimant, who was 16 years old at the time of the terrorist attack, stated that she was in the baggage claim area when the attack began, and that, after the explosion, she “found [her]self behind a desk” and was “injured on [her] left foot.” She recalled that she was unable to stand up, but that somebody eventually grabbed her and placed her inside a van, although she added that she “think[s] [she] lost consciousness by that time.” Claimant testified that she next recalled “seeing a lot of people around me with injuries and I remember my leg and I shouted to them, ‘don’t cut it, don’t cut it!’ because I was bleeding profusely.” She recalled losing consciousness again, then waking up in a room where she was undergoing an x-ray examination. At some point, she was transported to a different location and was placed inside another hospital ward. She suggested that this might have been the next day.

Claimant testified that, when she was in the hospital, doctors were giving her pain medication; they also placed her legs in a “canopy-type of thing” because “both of [her] legs below the knee . . . were burned by the shrapnel.” She further testified that, with her legs in the “canopy,” doctors were able to place linen over them, although she noted that the burned areas were “very painful.” Claimant stated that on the same night as the attack she was told she had undergone surgery to repair an artery and that she had suffered a fracture. She testified that she was in the hospital in Israel for approximately eleven days and that she was discharged because her father had suffered a heart attack and her mother wanted her to be home.

Claimant testified that when she arrived at the airport back home in Puerto Rico, an ambulance took her to the medical center in San Juan, where she stayed for a day or two while doctors assessed her condition; she was then discharged. She claimed that, at the time, her left foot had “a big hole.” She further claimed that she had returned home wearing a below-the-knee cast (which had been put on in Israel), but that doctors in Puerto Rico cut a “window” in the cast to treat the wound underneath. She claimed that the doctors changed her wound dressing and referred her for physical therapy “to learn how to walk.” Claimant testified that the doctors decided to remove the cast about a week after her arrival because she was “having a lot of oozing” According to Claimant, her physical therapy after this point included getting into a whirlpool. She claimed she underwent this treatment for about eight to ten weeks and that every time she submerged her leg in the whirlpool she screamed in pain. She further stated that the wound was not properly closing because it was located at a joint and that anytime she moved, it would “open up.” She clarified that, after the first couple of days in Puerto Rico, all of her treatment was on an outpatient basis.

Claimant explained that, while she was hospitalized in Israel, and during the first two months after her return to Puerto Rico, she had to use a wheelchair to move around, but that thereafter she used both a wheelchair and crutches. She further claimed to have attempted to use crutches as soon as she arrived in Puerto Rico, but was unsuccessful at first “because it was too much” for her. She noted that she had to use crutches because she wanted to start college in August 1972. After about four more months, i.e. in December 1972, she no longer needed a wheelchair and began using only crutches. Between 1973 and 2009, when she began wearing a Richie brace⁷, Claimant had to use crutches “probably

⁷ A Richie Brace is a brand of Ankle-Foot Orthosis (AFO). An AFO is “[a]ny of a class of external orthopedic appliances, braces, or splints devised to control, limit, or assist foot and ankle motion, and provide leg support.” *Taber’s Cyclopedic Medical Dictionary* 1536 (20th ed. 2005).

seven times”: during her pregnancies, and before the pregnancies when she had fallen twice sometime in the late 1970s or early 1980s, although there were later occasions as well.

Claimant testified that she began work as a physical therapist in 1976, about four years after the terrorist attack. She also testified that at the time of her injury, she had wanted to do modeling—and indeed had previously taken classes and been in four shows—but that afterwards, she was limping and her self-esteem was low, and she no longer wanted people to see her.

She said that she visited the doctor on about six occasions between 1976 and 2009, but she maintained that they all wanted to perform surgery on her; specifically, they wanted to perform a fusion of her ankle. However, she testified that she was unable to obtain any records of these visits. In any event, Claimant indicated that she primarily treated herself.

During the oral hearing, Claimant showed the Commission her injured left foot and the Richie brace. She explained that she had begun wearing the brace because she was falling more frequently and “could not do [her] job.” Claimant testified that the “bone that sustains the arches [was] no longer there[,]” that doctors had told her that shrapnel had “crushed” it, and that she didn’t have “any stability at all.” She further testified that, before she got the Richie brace, she would, on her own initiative, use off-the-shelf braces, and that occasionally she would use an air splint.⁸ But the air splint was not providing sufficient relief, and a doctor advised her that she needed something “more rigid to support [her] foot.” He gave her a choice—she could undergo surgery or use a more rigid support. Claimant testified that the Richie brace is not comfortable and that it leaves “red areas all

⁸ An “air splint” is a “lightweight splint used for immobilizing fractured or injured extremities. It is usually an inflatable cylinder, open at both ends, that becomes rigid when inflated, thus preventing the part confined in the cylinder from moving.” *Id.* at 2051.

over[]” due to the pressure. She further asserted that her muscles were very weak from atrophy and that she has hammertoes, which she attributed to the need for stabilization.

Claimant testified that at work she wore pants to conceal the brace from her employer because her job as a physical therapist required her to be able to lift 75 pounds and to hold somebody if they were falling; she further explained that she no longer felt able to do this approximately fifteen years ago. The Commission asked Claimant why she never underwent the surgery she referenced in her testimony; she responded that, because she was diabetic, the healing process would be affected. Claimant indicated that she had become diabetic about ten years ago. She claimed that surgery would affect how she walks and would require her to stop working for at least a year; she further testified that she believed she could lose her job if she were away for that long and that she would have to reveal her condition.⁹

Claimant asserted that, although she uses a cane to walk, she does not use it at work; instead she uses the walls to stabilize herself. She expressed her concern that if her employer saw her using a cane, she “would be fired.”

Claimant also testified that she discovered she had scoliosis when she was in her third year of physical therapist school (around 1975), and that she had been treating herself “on-and-off” for this condition. However, she did not describe what treatment this consisted of, how she found out she had the condition, or whether she had reason to believe this was associated with her injuries from the Lod Airport attack.

Expert Testimony: Dr. Reischer testified that he had personally examined Claimant prior to his testimony; he had also reviewed the medical records and other documents

⁹ Claimant testified that, although she was still employed as of the date of the hearing (March 2016), she was only working part time.

submitted with her original claim,¹⁰ and had relied on the AMA Guide in forming his opinion. In addition, he had spoken with Robert J. Estrada, D.P.M., Claimant's treating physician since 2009. Dr. Reischer opined that Claimant had "suffered a significant injury" and was "left with significant permanent impairment as a result of that injury." He noted that the injury was predominantly to Claimant's left foot and ankle and was accompanied by some nerve and vascular injuries. He added that, as a result of gait abnormalities, Claimant had developed problems in her right foot as well.

Dr. Reischer stated that he found significant injury to Claimant's heel bone ("os calcis" or "calcaneus"), and particularly the sustentaculum tali,¹¹ a portion of that bone that holds up the talus.¹² He testified that this bone was "basically pulverized[]" and was "fundamentally gone." In support of this conclusion, he cited the December 1972 note from the Hospital de Distrito in Puerto Rico, which notes that Claimant had suffered a "comminuted fracture"¹³ of the os calcis. Dr. Reischer testified that, as a result of such an injury, the subtalar joint¹⁴ becomes arthritic, leading to deformity, pain, and arthritis, which in turn exacerbates those conditions. He also noted that this results in decreased range of motion, which will be compensated for by excess motion in other joints. Dr. Reischer maintained that this type of injury becomes more aggravated over time.

¹⁰ The medical records are described in detail in the Commission's Proposed Decision. *See* Proposed Decision, *supra* note 3, at 8-13.

¹¹ The sustentaculum tali provides "support of the talus, [and is] a bracketlike lateral projection from the medial surface of the calcaneus, the upper surface of which presents a facet for articulation with the talus." *Stedman's Medical Dictionary* 1879 (28th ed. 2006).

¹² The talus is the "bone of the foot that articulates superiorly with the tibia and the fibula to form the ankle joint inferiorly with the calcaneus to form the subtalar joint, and anteriorly with the navicular, forming the medial component of the transverse tarsal joint." *Id.* at 1934.

¹³ A comminuted fracture is one "in which the bone is broken into more than two fragments." *Id.* at 769.

¹⁴ The subtalar joint is found "between the inferior surface of the talus and the posterior articular surface of the calcaneus." *Id.* at 1015.

Dr. Reischer also pointed to instances of nerve injury mentioned in the medical records, specifically noting Dr. Estrada's references to plantar nerve damage as well as neuritis and neuralgia (apparently referring to the left foot, although this is not always clear in Dr. Estrada's medical notes). Dr. Reischer testified that such injuries would give rise to continuing pain and numbness, as well as "aggravation of underlying joint dysfunction[.]" adding that, due to the nerve damage, the patient may not even be able to feel the true severity of the injury. Insofar as Claimant had begun suffering from diabetes around 2007, around the same time as her nerve symptoms appeared, the Commission asked Dr. Reischer whether there could have been a connection between the diabetes and the flare-up of nerve problems; Dr. Reischer responded that if diabetes had been involved, then one would expect both feet to be affected by neuropathy because it is typically a generalized problem. Thus, although he did not rule out a connection in this case; he thought it was "less likely by a lot" that Claimant's nerve problems were the result of her diabetes.

In response to the fact that the medical records showed that the Claimant's 2007 visits to the doctor were for her *right* foot, not her left foot, Dr. Reischer stated that Claimant had developed plantar fasciitis because of a gait abnormality on the left side. He therefore concluded, the pain was not diabetes-related and was not neuropathic, but instead was a response to Claimant placing extra weight on her right leg. When the Commission noted that the 2007 records simply stated that Claimant complained of "sudden pain in [the] right foot for 3 days," Dr. Reischer clarified that he did not think it was related to the nerve pain because there was no documentation of this and Claimant was negative for focal weakness and paresthesia. He added that there was no evidence of diabetes in 1972, which led him to conclude that the nerve injuries at that time were the result of the Lod Airport injury.

Dr. Reischer testified that, during his physical examination of Claimant, he noted “weakness[,] . . . limitation of motion[,] . . . deformity[,] . . . atrophy[,] . . . leg length discrepancy, [and that] she was walking with need of a brace and an assistive device.” He further concluded that Claimant had a 30% permanent partial whole body impairment. He based this rating on the AMA Guide, Section 3.2(b) Ch.3, page 75; and table 36, page 76, where this percentage is assigned to individuals with a gait derangement requiring “routine¹⁵] use of cane or crutch *and* a short leg brace (AFO)[.]” (Emphasis added.) He acknowledged this was a current determination, so her disability rating may have been different over the decades for which there was no medical documentation. He also noted that, according to the AMA Guide, if gait derangement is used to determine a disability rating, the rating may not be combined with impairment percentages attributed to more specific lower extremity injuries. He further testified that Claimant’s current 30% disability is higher than the 19% disability Claimant stated she had been assigned by the Puerto Rican agency because of the passage of time, stating that Claimant’s condition has “clearly gotten worse.” He also suggested the Puerto Rican agency would have been using a different guide.

In reference to the criteria Dr. Reischer used to determine the 30% disability rating, he acknowledged that there was no indication in the medical records that Claimant requires a cane in addition to the Richie brace; however, he added that it is not easy to walk with a Richie brace, and that, “by and large,” once a patient uses a Richie brace, he or she will have to use a cane for support, as the brace does nothing for arthritic joints and the resulting pain, but only limits or corrects some of the instability.

¹⁵ Dr. Reischer was asked what the term “routine” in the AMA Guide means. He responded that he believed it simply meant “regular” use, that “she needs it for most of [her] activities.” He was not, however, aware of any specific definition of that term in the AMA Guide itself.

Dr. Reischer also made disability determinations under the AMA Guide for the separate elements of injury to Claimant's lower extremity. Regarding the ankylosis of Claimant's left ankle, Dr. Reischer assigned a 15% whole body impairment based on an abnormal tibial-os calcis angle; he indicated that, based on the x-rays submitted with the claim, the angle was significantly smaller than normal; it was between 90 and 99 degrees, rather than the normal 125 to 135 degrees. He noted that this corresponds to what he saw clinically, which he described as a "collapse of the foot." He also testified that Claimant suffered from "significant arthritis" in her left foot based on the 2009 CT scan: he assigned a 10% whole body impairment for the subtalar joint (0 mm of cartilage at its worst, although he said it was somewhere between 0 mm and 1 mm),¹⁶ 8% for the talonavicular joint (0 mm of cartilage, again at its worst),¹⁷ and 2% for the talotibial or true ankle joint (for mild arthritis).¹⁸ Based on these figures—15% impairment for the os calcis angle and 10% + 8% + 2% for arthritis—Dr. Reischer said the cumulative impairment exceeded 30%.

Dr. Reischer assigned disability ratings to other aspects of Claimant's injury as well, while noting again that, if one uses the gait derangement rating (30% as described above), the impairment ratings for specific abnormalities of the lower extremity could not also be used. According to the AMA Guide, diminished muscle function can be measured in different ways, such as by measuring muscle atrophy or performing manual muscle

¹⁶ Dr. Reischer based this on the finding in the CT scan that there was "severe degenerative disease" and "[s]evere joint space loss [at the] medial aspect of the subtalar compartment with bony eburnation and sclerosis." He explained that "eburnation" refers to "bone on bone." One medical dictionary characterizes it slightly differently, as "[c]hanges in bone that cause it to become dense, hard, and smooth like ivory; often seen at sites of active arthritis." *Taber's Cyclopedic Medical Dictionary* 658 (20th ed. 2005).

¹⁷ He derived this from the 2009 CT scan as well, which refers to "severe joint space narrowing" and "[s]evere bony eburnation and sclerosis at the articulation of the talus with the navicular."

¹⁸ This seems to be based on Dr. Estrada February 27, 2009 statement that Claimant's "[l]eft ankle is within normal limits with mild asymmetrical degenerative changes." Dr. Reischer also notes that the CT scan "suggests some joint space narrowing between the calcaneus and the cuboid." However, Dr. Reischer was unable to provide a precise number on the amount of cartilage lost based on this language, so he did not assign it an impairment rating.

testing.¹⁹ Using the muscle atrophy approach, Dr. Reischer assigned a 3-4% whole body impairment (based on a 2.9 cm difference on the left calf). Measuring muscle weakness using the manual muscle testing approach, and measuring Claimant's left ankle flexion and extension (i.e. bringing up and pushing down), Dr. Reischer assigned a 10% whole body impairment for each, plus a 5% impairment for eversion.²⁰ His determination relied on his finding that Claimant should be categorized under the AMA Guide as having "active movement against gravity only, without resistance" (termed Grade 3) in her lower extremity, which he based on his physical examination of Claimant. Dr. Reischer also made a disability determination for Claimant's diminished range of motion: he indicated that Claimant's calcaneus had an incurable 20-degree angle valgus (which he described as meaning it comes out to the side), resulting in a 5% whole body impairment under the AMA Guide. He added that Claimant also has some dysfunction of her toes on the left side, which he said was probably the result of the nerve injuries she sustained in 1972, but he did not quantify that under the AMA Guide.

Dr. Reischer also opined that Claimant "clearly had a functional scoliosis[]" caused by her joint abnormalities, although he acknowledged that he did not take any x-rays of her spine. He further testified that scoliosis would be expected in a person with injuries such as Claimant's. He added that one could correct for the condition by wearing a 3 cm sole, but that without one she would be in pain. He further stated that using a Richie brace and cane would "certainly not" provide complete relief.

¹⁹ According to the excerpt of the AMA Guide submitted with this claim, "[d]iminished muscle function should be estimated under *only one* of several parts of this chapter, relating to gait derangement . . . muscle atrophy . . . manual muscle testing . . . or peripheral nerve injury."

²⁰ "Eversion" refers to a "turning outward, as of the eyelid or foot." *Stedman's Medical Dictionary* 679 (28th ed. 2006).

Additional Documentary Evidence: Claimant submitted an excerpt from the AMA Guide dealing with lower extremity impairment and various documents pertaining to Claimant's benefits from Israel. These were a letter from the Israeli National Insurance Institute, postmarked September 7, 1997, which merely addresses a change to the manner of payment, and two pay stubs for checks made out to Claimant by the National Social Security Institute in Israel, dated September 1, 1998, and September 7, 2005. While these documents contain no information about Claimant's injuries, they do suggest that, as of 2005, she was still receiving payments from the Israeli government for the injuries she sustained at Lod Airport.

III. Analysis

The Commission considers three factors in determining whether the severity of a victim's physical injuries is a "special circumstance warranting additional compensation" under Category D of the 2013 Referral: "(1) the nature and extent of the injury itself, (2) the impact that the injury has had on a claimant's ability to perform major life functions and activities—both on a temporary and on a permanent basis—and (3) the degree to which the claimant's injury has disfigured his or her outward appearance."²¹

After carefully considering all of Claimant's evidence and arguments in light of the applicable standard, we again conclude that Claimant has failed to carry her burden of proving her claim for additional compensation. In particular, based on the evidence before us, Claimant has not shown that the overall severity of her injuries is comparable to that of those claimants whose injuries we have previously deemed sufficiently severe to warrant more than \$3 million in compensation.

²¹ Proposed Decision, *supra* note 3, at 5-6 (quoting *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 6 (2015) (brackets omitted)).

Nature and Extent of Injury: Claimant's evidence about the nature and extent of her injuries falls short of satisfying the Commission's standard for additional compensation in these Libyan claims programs. In particular, "Claimants seeking additional compensation for physical injuries are required to verify their injuries with medical records."²² Here, the medical records do not support her argument that her injuries were comparable in severity with those claimants to whom we have awarded additional compensation in the past.

First, the 1972 medical records suggest that Claimant's left ankle fracture was not particularly severe, and there is no mention whatsoever of the burn wounds Claimant testified about during the oral hearing. Although the discharge summary indicates that Claimant "was operated on [upon] her admission and there was found a tear of the anterior tibial artery and the deltoid ligament[,]" it reports no major injuries apart from the gunshot fracture to her left heel bone. Indeed, as we noted in the Proposed Decision, the summary states that Claimant was "in good general condition and without any signs of another trauma." Moreover, the "post operative course was uneventful[,]" and she was "in a good position" when she was discharged a mere eleven days later.

Moreover, as we noted in the Proposed Decision, Claimant provided no medical evidence about her alleged physiotherapy in Puerto Rico, and on objection, she has not cured this gap in the evidence. Although she testified that she underwent a type of therapy that involved submerging her leg in a whirlpool, had to "learn how to walk[,]" and required a wheelchair exclusively for the first two months and a combination of wheelchair and crutches for four more months, she does not describe any major surgery or periods of

²² Claim No. LIB-III-014, Decision No. LIB-III-031, at 6 (2016) (Final Decision) (citing *Claim of ESTATE OF ELIZABETH ROOT, supra*, at 11).

hospitalization, either during the initial period after the attack or, indeed, at any time to the present day. In fact, Claimant acknowledged that, apart from one or two days of initial assessment after her evacuation from Israel, when she remained in the medical center in Puerto Rico, she received all of her physiotherapy and treatment on an outpatient basis. As noted in the Proposed Decision, the medical records from the early 1970s mention only that Claimant occasionally visited the doctor complaining of “pain and paresthesia” in her legs and feet, that the small pieces of shrapnel remained in her lower extremities, and that she had suffered an ankle fracture and presented with a “healed wound of the medial aspect of the foot.” However, because we have no medical records to corroborate the specific allegations of physiotherapy, it is unclear how extensive it was, exactly what type of treatment was required, or how it might support a showing that her injuries were severe enough to warrant more than \$3 million in compensation.

In sum, the nature and extent of Claimant’s initial injuries are not among the most severe when compared with all the other claimants who have sought additional compensation in these Libyan claims programs.²³ Therefore, this factor, does not support an award of additional compensation beyond the \$3 million Claimant already received under the Second Referral.

Impact on Claimant’s Major Life Functions and Activities: Claimant has also not shown that the impact on her ability to perform major life functions or activities was significant enough to warrant additional compensation beyond the \$3 million the Commission has already awarded her. The available evidence suggests that Claimant had largely recovered from the worst effects of her injuries within a year of her return to Puerto Rico. While Claimant was hospitalized in Israel for approximately eleven days and

²³ See Proposed Decision, *supra* note 3, at 14-15 (citations omitted).

underwent several months of some kind of physiotherapy upon her return home—and was certainly limited in her mobility during that period—there is little evidence to suggest that she suffered significant disruption to her major life activities and functions after that time.

The medical evidence does indicate that Claimant complained of “pain and paresthesias” in her lower extremities at least through September 1973 (sixteen months after the attack), but there is no indication in any of these records that Claimant required an assistive device for her mobility or any other of her physical ailments. Indeed, Claimant stated in her 2014 declaration that she used crutches regularly only until January 1973, and testified that she used crutches only seven times between 1973 and 2009, none of which is documented in the medical records. The medical records also contain no mention of Claimant requiring a cane after January 1973, and her testimony was equivocal on when she began using one. Although she claimed to have visited the doctor six times between 1976 and 2009, she has provided no documentation of those visits and provided very little information about those visits other than that her doctors wanted to perform surgery, which she apparently declined. In any event, using crutches seven times and visiting the doctor six times in more than thirty years is insufficient evidence of a significant impact on one’s ability to perform major life functions or activities. Claimant has thus failed to establish that she suffered significant impairments to her major life functions and activities that lasted beyond the first year or so after her return to Puerto Rico.

On objection, Claimant relies largely on the AMA Guide disability rating that Dr. Reischer provided. For two reasons, however, the evidence supporting that rating is insufficient to meet Claimant’s burden. First, Dr. Reischer’s determination of Claimant’s current disability, while detailed and helpful, makes certain assumptions that call into question the accuracy of the impairment ratings he assigned. Second, even if we accept all

of Dr. Reischer's testimony and calculations, a disability rating is just one factor we consider, and here, it is insufficient to support an award of additional compensation beyond the \$3 million she has already been awarded.

To start, Dr. Reischer's 30% whole body impairment for gait derangement was based on "routine[] use of cane or crutch and a short leg brace (AFO)[]"; yet the medical records say nothing about Claimant using a cane. Although she testified during the oral hearing that she uses a cane to walk, she did not mention when she began doing so, and she acknowledged that she does not use one at all while at work. Further, the medical records say nothing about Claimant requiring crutches following her physiotherapy. Indeed, all the evidence about Claimant's use of crutches or a cane comes entirely from Claimant's own testimony. We reiterate that a Claimant seeking additional compensation in these Libyan claims programs must "verify their injuries with medical records."²⁴

Although Dr. Reischer testified that once a patient uses a Richie brace, he or she will have to use a cane for support, Claimant's acknowledgment that she does not use one for work belies this point. The current record, even with Dr. Reischer's testimony, fails to support Claimant's argument that she uses or requires a cane or other supportive device with any degree of regularity.²⁵ Claimant has thus failed to establish that her alleged gait derangement warrants the 30% disability rating that Dr. Reischer assigned it.

Certain observations and assumptions in Dr. Reischer's separate impairment ratings for the individual abnormalities in Claimant's left foot also raise questions.²⁶ The

²⁴ See *supra* note 22.

²⁵ As noted above, Dr. Reischer testified that the term "routine," although undefined in the AMA Guide, meant the "regular" use of a cane, such that Claimant "needs it for most of [her] activities." The record contains no evidence that Claimant requires the use of a cane for most of her activities.

²⁶ Moreover, if we were to accept all of Dr. Reischer's testimony, the cumulative rating for all of these disabilities, would have been even greater than a 30% whole body impairment. Given the evidence of the actual impact on Claimant's daily life functions and activities, *see infra*, this strikes us as questionable.

measurements for some abnormalities were given in ranges (e.g., between 90 and 99 degree tibial-os calcis angle, between 0 and 1 mm narrowing of the subtalar joint), raising the risk of overestimation of the impairment. Moreover, other findings were based not on precise measurements, as required by the AMA Guide, but instead on textual descriptions in the CT scan reports (as in the case of the “mild arthritis” in the talotibial joint).

More importantly, however, Dr. Reischer assumed that all of Claimant’s ailments were the result of Claimant’s injuries from the 1972 terrorist attack. While there is support for a causal connection to some degree—for instance, references to “[p]osttraumatic arthritis of the left foot and ankle” in Dr. Estrada’s 2009 report and “loss of normal appearance of the sustentaculum, which is likely related to an old fracture and the grenade injury” in the 2009 Florida Radiology CT scan report—the absence of medical records over a period of more than three decades makes it difficult to attribute the severity of all of these conditions to Claimant’s old fracture in her left foot. This is especially the case because Claimant suffers from other conditions, unrelated to her Lod Airport injuries, that may contribute to her alleged disability. For example, Claimant began suffering from diabetes in 2007, and it is unclear what physical effects her diabetes might have had. While Dr. Reischer opined that diabetes was unlikely to be the cause of Claimant’s nerve pain, because her nerve pain was localized, not generalized (i.e. not observed in both extremities), without access to any medical records between 1973 and 2007, it is difficult to say to any reasonable degree how this condition may have contributed to her current lower foot pain. The uncertainty is heightened by the fact that Dr. Estrada’s mention of Claimant’s diabetes in 2015 is in the specific context of an assessment of Claimant’s left foot pain, where it is listed under “Assessment,” along with references to her ankle injury, tendonitis, neuritis, and arthritis. Notably, the “Plan” at the bottom of Dr. Estrada’s report

specifically connects the diabetes with Claimant's foot: it instructs Claimant to return in six months for an "annual comprehensive diabetic foot exam."

Moreover, Claimant's complaints in 2007 were about *right* foot pain. So, even if Dr. Reischer is correct that any diabetes-related pain would have been generalized, this would suggest that some of her pain was in fact diabetes-related. Moreover, Dr. Reischer indicated that the 2007 report shows that Claimant was negative for focal weakness and paresthesia, and there was no mention of neuropathy; he therefore concluded that the plantar fasciitis in her right foot was caused by her gait abnormality. Yet, according to the report, the pain was acute and had just started three days earlier (i.e., thirty-five years after the Lod Airport attack), and the 2007 report says nothing about gait abnormality or anything at all about Claimant's left foot, the primary one injured in Tel Aviv. It does mention Claimant's 1972 injury, and the fact that she still had shrapnel in "both lower legs," but again, based on the sudden onset of symptoms, the lack of detail in the report, and the absence of any other corroborating medical records from the previous thirty-four years, it is difficult to attribute this condition to the 1972 injuries to a degree sufficient to warrant additional compensation.

Similarly, there is no medical evidence linking Claimant's alleged scoliosis with the terrorist attack. Claimant testified that she discovered she had scoliosis in 1975; however, she did not indicate whether her doctors thought this was related to her Lod Airport injuries or whether it developed independently. The absence of any reference to scoliosis in any of the medical records adds to the uncertainty. Dr. Reischer opined that Claimant had a "functional scoliosis" resulting from her joint abnormalities, but he acknowledged that he did not take any x-rays of her spine and did not explain what he meant by "functional" rather than actual scoliosis. Given the complete absence of any

discussion of scoliosis in the medical records, we cannot conclude that it had an impact on Claimant's ability to perform any major life functions or activities.

In sum, the evidence is insufficient to support the disability ratings ascribed by Dr. Reischer to the attack.²⁷

Moreover, even if we credit Dr. Reischer's disability ratings, the impact on Claimant's major life functions and activities has been less than those claimants who have received additional compensation in these Libyan claims programs. As the Commission has recently stated, the determination of a particular disability rating, "while relevant to the Commission's inquiry, is not sufficient to support an award of additional compensation. Rather, the fundamental issue is the degree to which this disability has prevented Claimant from engaging in major life functions and activities."²⁸

In this case, the effect of the injuries on Claimant's major life functions is relatively minor. For instance, it does not appear that Claimant has been unable to find employment. Although she mentioned that her injuries prevented her from pursuing a modeling career, she has provided no independent evidence of this. In any event, "[t]he reference to 'major life functions' in [our standard for additional compensation] does not include a specific chosen career where, as here, the claimant has the capability to work in a variety of other fields."²⁹

Moreover, Claimant's mobility problems and many of her other impairments are not reflected in the medical records and thus cannot form the basis of an award of

²⁷ As in the Proposed Decision, Claimant was unable to provide any independent evidence verifying her claim that she was assigned a disability rating of 19% by a Puerto Rican government agency. The Commission is therefore unable to credit this aspect of her testimony.

²⁸ Claim No. LIB-III-017, Decision No. LIB-III-024, at 18-19 (2017) (Final Decision).

²⁹ Claim No. LIB-II-116, Decision No. LIB-II-166, at 5 (2012). The Commission's standard for Category D claims under the 2013 Referral is identical to the one applied to similar claims for additional compensation under the 2009 Referral. *See* Claim No. LIB-III-021, Decision No. LIB-III-016, at 6-7 (2015) (Proposed Decision).

compensation beyond the \$3 million she has already received. For example, the medical records make no reference to Claimant requiring a cane, and she acknowledged she does not use one at work, making it difficult to determine the extent to which she requires a cane at all.

Claimant argues that her injuries are comparable to the injuries in Claim No. LIB-II-174, *supra*, and Claim No. LIB-II-154, *supra*, in which the Commission awarded additional compensation. She argues that her claim may even be stronger, since she has a 30% disability rating, and neither of those claimants had any disability rating at all. However, in contrast to this claim, the Claim No. LIB-II-174 claimant had suffered a drop left foot that was clearly reflected in the medical records as attributable to her initial injury. Her documented injuries caused a permanent limp and caused her to suffer other related injuries requiring major surgery and resulting in a limitation on her mobility for decades. In addition, she had “multiple, deep scars” on her legs that were clearly visible during the oral hearing and a visible deformity to her left foot and toes. Although the claimant in Claim No. LIB-II-154 suffered fractures in her feet that appear to be similar to the Claimant here, the Social Security Administration found that claimant to be disabled six years after the terrorist attack, and she was unable to resume working. Moreover, she presented medical records documenting her history of ankle pain from a six-year period beginning about 12 years after the incident. Thus, despite the absence of a formal impairment rating, the claimants in those two cases had far more relevant medical evidence showing (1) the disability itself; (2) the causal link between the disability and the terrorist attack, and (3) an impact on their major life functions and activities.

Finally, even if all of Claimant’s lower extremity pain and alleged orthopedic injuries were attributable to the Lod Airport attack, those ailments do not warrant

compensation in addition to the \$3 million the Commission has already awarded here. As the Proposed Decision explained, the Commission has denied other claims for additional compensation where the claimant suffered similar pain and weakness in his or her legs.³⁰ As in the case of those claims, Claimant here has not demonstrated that the leg injuries had a life-changing impact on her personal or professional life sufficient to warrant additional compensation under Category D.

Disfigurement: For essentially the same reasons as in the Proposed Decision, we also reject Claimant’s argument that the third factor—disfigurement—supports an award.³¹ As the Commission has previously held, “[t]his factor has been important to the outcome of the Commission’s decision to award additional compensation only when the disfigurement has been significant.”³² The degree of disfigurement seen here does not rise to the level seen in other claims in this program in which we have made awards beyond the \$3 million. To the extent there is scarring or disfigurement in Claimant’s left foot, “the disfigurement [is] not ‘a prominent feature of [C]laimant’s overall outward appearance due to the nature and location of the scars.’”³³ In short, this factor does not support an award of additional compensation beyond the \$3 million Claimant has already received.

³⁰ See, e.g., Claim No. LIB-II-116, *supra* (denying claim where Claimant had some residual nerve damage to his leg from shrapnel resulting in observable “foot drop” that has resulted in some weakness); Claim No. LIB-III-012, Decision No. LIB-III-022 (2016) (denying claim despite finding that Claimant continued to suffer right leg and knee pain from shrapnel injuries and suffered related mobility difficulties); Claim No. LIB-II-175, Decision No. LIB-II-139 (2012) (denying claim where, *inter alia*, Claimant continued to suffer pain in her hips and knees and was unable to run for long periods).

³¹ See Proposed Decision, *supra* note 3, at 17.

³² Claim No. LIB-III-012, Decision No. LIB-III-022 (2016) (Proposed Decision) (citing, *inter alia*, Claim No. LIB-III-021, Decision No. LIB-III-016 (2016) (finding severe disfigurement to claimant who lost both of her legs and has to wear prostheses).

³³ Claim No. LIB-II-116, Decision No. LIB-II-166 (Final Decision) (2012) (citing Proposed Decision).

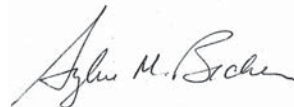
CONCLUSION

The record, including Claimant's compelling live testimony, makes clear that Claimant endured great suffering during the Lod Airport attack. Based on the totality of the evidence submitted in light of the severity of the injuries suffered by all the claimants who have sought additional compensation in these Libyan claims programs, we again conclude that Claimant has failed to meet her burden to show that the severity of her physical injuries is a special circumstance warranting compensation in addition to the \$3 million she has already received. Accordingly, the denial of this claim set forth in the Proposed Decision must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, June 9, 2017
and entered as the Final Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-III-020
	}	
	}	Decision No. LIB-III-028
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:	Joshua M. Ambush, Esq. Joshua M. Ambush, LLC
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PROPOSED DECISION

Claimant brings this claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") based on physical injuries she suffered during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In that attack, Claimant suffered grenade shrapnel wounds to both of her legs and a gunshot wound to her left heel. Claimant states that these wounds have left her with a disfigured left foot and have resulted in chronic pain and limited mobility. Under a previous program, the Commission awarded Claimant \$3 million in compensation for her injuries. She now seeks additional compensation based on the claim that the severity of her injuries is a "special circumstance warranting additional compensation." Because Claimant has failed to demonstrate that her injuries are sufficiently severe to warrant additional compensation beyond the \$3 million she has already been awarded, she is not entitled to additional compensation in this program. Therefore, the claim is denied.

BACKGROUND AND BASIS OF CLAIM

Claimant was in the terminal at Lod Airport in Tel Aviv, Israel, on May 30, 1972, when three terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. She states that, when the attack began, she threw herself to the floor, but was shot in the left foot, sustaining a fracture to her heel. After the attack, Claimant was taken to a local hospital, where she underwent surgery to repair her injured foot. Claimant remained at the hospital for approximately 11 days; she was then discharged and returned home for further treatment. In the years that followed, Claimant visited several doctors, complaining of pain in both legs and feet; the doctors confirmed that numerous metallic fragments remained in her left foot.

Although Claimant was not among them, a number of the Lod Airport victims sued Libya (and others) in federal court in 2006. *See Franqui v. Syrian Arab Republic*, No. 06-cv-734 (D.D.C.). In August 2008, the United States and Libya concluded an agreement that settled numerous claims of U.S. nationals against Libya, including claims “aris[ing] from personal injury ... caused by ... [a] terrorist attack.” *See Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* Art. I (“Claims Settlement Agreement”), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008; *see also* Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008). Two months later, in October 2008, the President issued an Executive Order, which, among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling within the terms of the Claims Settlement Agreement. *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

The Secretary of State has statutory authority to refer “a category of claims against a foreign government” to this Commission. *See* International Claims Settlement Act of 1949 (“ISCA”), 22 U.S.C. § 1623(a)(1)(C) (2012). The Secretary delegated that authority to the State Department’s Legal Adviser, who, by letters dated December 11, 2008, and January 15, 2009, referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement.

In 2010, the Claimant filed a claim under the January 2009 Referral, alleging that she had suffered physical injuries as a result of the Lod Airport attack. By Proposed Decision entered May 10, 2011, the Commission determined that Claimant was eligible for compensation under Category E of that Referral and awarded her a fixed sum of \$3 million. *See* Claim No. LIB-II-089, Decision No. LIB-II-046 (2011) (“Physical-Injury Decision”). Because Claimant did not file an objection to the Proposed Decision, the Proposed Decision automatically became the Commission’s Final Decision on June 20, 2011. *See* 45 C.F.R. § 509.5 (g) (2014).

The Legal Adviser referred an additional set of claims to the Commission on November 27, 2013. *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”). One category of claims from the 2013 Referral is applicable here. That category, known as 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 our January 15, 2009 referral or by this referral, provided that (1) the claimant has received an award for physical injury pursuant to our January 15, 2009 referral or this 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 claimant did not make a

claim or receive any compensation under Category D of our January 15, 2009 referral.

2013 Referral at ¶ 6.

On December 13, 2013, the Commission published notice in the *Federal Register* announcing the commencement of the third Libya Claims Program pursuant to the ICSEA and the 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On May 2, 2014, the Commission received from Claimant a completed Statement of Claim seeking compensation under Category D of the 2013 Referral, together with exhibits supporting the elements of her claim. Her submission also incorporated by reference the evidence she had previously submitted in connection with the physical-injury claim she made under the January 2009 Referral.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the "Category D" paragraph of the 2013 Referral is limited to claims of (1) "U.S. nationals"; who (2) have received an award for physical injury pursuant to the January 15, 2009 referral or this referral and (3) did not make a claim or receive any compensation under Category D of the January 15, 2009 referral. 2013 Referral ¶ 6.

Nationality

This claims program is limited to "claims of U.S. nationals." Here, that means that a claimant must have been a national of the United States continuously from the date the claim arose until the date of the Claims Settlement Agreement. *See* Claim No. LIB-III-001, Decision No. LIB-III-001, at 5-6 (2014).

In its Proposed Decision on Claimant's physical-injury claim under the January 2009 Referral, the Commission found that Claimant was a U.S. national from the time of the attack continuously through the effective date of the Claims Settlement Agreement. Physical-Injury Decision, *supra*, at 4. She therefore satisfies the nationality requirement here.

Prior Award

To fall within the category of claims referred to the Commission, a claimant must have received an award under either the January 2009 or November 2013 Referrals. The Commission awarded Claimant \$3 million based on her physical-injury claim under the January 2009 Referral. Claimant has thus satisfied this element of her Category D claim.

No Claim Under Category D of the January 2009 Referral

With respect to the final jurisdictional requirement, Claimant did not make a claim or receive any compensation under Category D of the January 2009 Referral. Therefore, Claimant meets this element of her claim as well.

In summary, this claim is within the Commission's jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

Standard for Special Circumstances Claims

To make out a substantive claim under Category D, a claimant must establish that the severity of his or her injury is a "special circumstance warranting additional compensation. 2013 Referral ¶ 6.¹ The Commission has previously held that, in making

¹ Strictly speaking, Category D provides *two* ways for a claimant to make out a substantive claim: the claimant must show that either (1) "the severity of the injury is a special circumstance warranting additional compensation"; or (2) "additional compensation is warranted because the injury resulted in the victim's death." See 2013 Referral ¶ 6. Since^{5 U.S.C. §552(b)(6)} survived the Lod Airport attack, only the first basis for entitlement is relevant here.

this determination, it would consider three factors: “[1] the nature and extent of the injury itself, [2] the impact that the injury has had on a claimant’s ability to perform major life functions and activities—both on a temporary and on a permanent basis—and [3] the degree to which the claimant’s injury has disfigured his or her outward appearance.” *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, AT 6 (2015).

Importantly, in all of its “additional compensation” decisions under both the 2009 Referral and the 2013 Referral to date, the Commission has addressed these factors in light of the unique context of the Commission’s Libyan claims programs, under which every successful physical-injury claimant received an initial award of \$3 million. While noting that no amount of money can adequately compensate some victims for their injuries, the Commission has recognized that \$3 million is “exceptionally high when compared to other claims programs” *See* Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). For that reason, the Commission has emphasized that “the eligible claimants in [the Libya claims] program [had], for the most part, been adequately compensated” *Id.* at 6. Starting from that premise, the Commission has held that only the most severe injuries will constitute a special circumstance warranting additional compensation under Category D. As discussed in more detail below, Claimant has not shown that her injuries are among the most severe in this program, and she is thus not entitled to additional compensation beyond the \$3 million the Commission has already awarded her.

Factual Allegations

Claimant states that, on May 30, 1972, she was with two friends inside the terminal at Lod Airport in Tel Aviv, Israel, when three armed terrorists began shooting

automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. Claimant and her friends “threw [them]selves to the floor for protection,” but Claimant was nonetheless “shot in [her] left heel, causing multiple fractures, damage to [her] ligaments and tendons, and loss of bone.” After the attack ended, Claimant was taken to Tel Hashomer Hospital for treatment, where she remained for approximately 11 days.

Injuries Alleged: Claimant asserts that, as a result of the Lod Airport attack, she suffered a gunshot wound to the left heel as well as “multiple open injuries to both of [her] legs from grenade shrapnel” She states that doctors at Tel Hashomer Hospital performed surgery on her left foot “to remove the shrapnel and to repair the damaged ligaments and arteries[,]” and that a cast was placed on her foot.

Claimant further asserts that, upon her return home to Puerto Rico, she “began intensely painful physical therapy at the Arecibo Regional Hospital, for four months, until October 1972. During that time, [she] was unable to put any weight on [her] foot and [she] remained wheelchair bound until October of 1972.” Claimant states that doctors “remove[d] some of the shrapnel in [her] legs, but not all.” She claims that, from “October 1972 through January of 1973, [she] had limited use of [her] left foot, and [she] was required to wear crutches to walk.”

Claimant states that, in the years since the attack, her “mobility has never been the same.” She says that the degeneration in her left foot has caused “tendon and ligament separation because of the way [her] left ankle is now aligned” and that she “walk[s] with a limp with the help of a cane.” She further states that “physical activity, such as running or recreational sports,” is difficult for her and prolonged standing causes her pain.

Claimant alleges that a recurring pain in her left foot, which she characterizes as a “sharp throbbing pain and spasm in the middle of [her] left foot[,]” causes insomnia.

Claimant further asserts she suffers from sciatic nerve damage and has developed problems with her right leg and hip, “as [her] body has tried to compensate to protect the left leg.” To address this, Claimant states that she wears orthotics to “stabilize [her] foot alignment and to alleviate the pain in [her] feet.” She claims that her condition has caused plantar fasciitis in her right foot and severe arthritis in both feet, as well as callouses and a hammertoe. She claims that the pain is getting worse and that the arthritis has begun to affect both of her legs.

Claimant states that she was “determined to be 19% disabled by the government of Puerto Rico’s agency for auto accident compensation as part of the disability review for the National Insurance Institute of Israel[,]” and that she received disability compensation from the Israeli Institute following the attack. She also asserts that the “scarring from the injury greatly damaged [her] self-esteem, and [her] modeling career was cut short.” Claimant maintains that she fears “becoming incapacitated or disabled because of her injuries”; she says, for example, that she cannot wear high heels because her foot deformity places her at risk of falling. She continues to wear both a brace on her left foot, which causes blistering, and an orthotic on her right foot.

Supporting Evidence

Claimant has supported her claim with, among other things, her own sworn declaration (dated December 19, 2014); recent photographs of her injured feet, her left foot brace, and her orthotic; a newspaper article from the time of the incident; and various medical records, some from 1972 and 1973, and others starting in 2007. These medical

records include those from Claimant's initial treatment in Israel, as well as a number of medical reports from Claimant's treatment in Puerto Rico and Florida.²

The discharge summary from Tel Hashomer Hospital indicates that Claimant was admitted on May 30, 1972, having sustained a "gunshot wound in the region of the left heel." Claimant "was in a good general condition and without any signs of another trauma." Upon admission, doctors operated on her left heel and "there was found a tear of the anterior tibial artery and the deltoid ligament." Claimant's foot was placed in a plaster cast, and the "post operative course was uneventful." Ten days later, Claimant was "in a good position with [some] fragments in the soft tissues." She was discharged on June 10, 1972, and advised not to walk on the cast for six weeks. The discharge summary makes no mention of the right foot.

Although Claimant has not submitted any medical records from her alleged four-month treatment period at Arecibo Regional Hospital upon her return to Puerto Rico, she has submitted a copy of a medical note from the Hospital de Distrito, dated December 21, 1972. Claimant had gone to the emergency room complaining of the bullet wound in her left foot. According to the note, doctors observed a "healed wound of the medial aspect of the foot." An x-ray of the left foot revealed "numerous small [metallic] foreign bodies

² Claimant has also provided a 1974 decision of the Superior Court of Puerto Rico addressing the distribution of *ex-gratia* funds that Japan provided to the Commonwealth of Puerto Rico for the benefit of Puerto Ricans harmed by the Lod Airport attack. The Special Commissioners appointed by the court established a point system for distributing those funds and awarded Claimant 1,475 points out of a possible total of 2,000. However, Claimant has not provided any evidence as to how the Special Commissioners made that determination. In particular, other Lod Airport victims in these Libyan claims programs have provided the related "Report From Special Commissioners," a victim-specific document that provides details about how the Special Commissioners determined the point totals in individual cases. In any event, the Special Commissioners' formula differs from the 2013 Referral's mandate and the Commission's standards for determining whether the severity of a claimant's injuries warrants additional compensation in this program (as well as the 2009 Referral's mandate and the Commission's standard for physical-injury claims under the 2009 Referral). See Claim No. LIB-II-064, Decision No. LIB-II-073, 5-7 (2012) (discussing this same Report in the context of another Lod Airport victim); Claim No. LIB-II-088, Decision No. LIB-II-108, 4-6 (2012). The 1974 Superior Court decision by itself is therefore of little help in adjudicating this claim.

at the soft calcis of the foot and ankle.” Several months later, in August 1973, Claimant visited Dr. J. Rosario, complaining of “pain and paresthasias^[3] in both legs and feet[.]” A note describing that visit, dated September 18, 1973, states that x-rays showed “multiple [metallic] foreign bodies in both lower extremities[,] and [on] the same date [a] few of them were surg[i]cally removed.” On the date of the note, which was one month after the procedure, Claimant was “still complaining of pain and paresthasias”

Claimant has not provided any medical records from the 34-year period that followed; indeed, her allegations speak very little to her condition during this time frame, though she does indicate that she “eventually regain[ed] the ability to walk unassisted for a period of time.” The next medical record available is a report from Florida Hospital Centra Care, dated November 30, 2007. Claimant had arrived complaining of an “aching” pain in her *right* foot, starting three days earlier, which she attributed to the Lod Airport attack; she also reported that she had “a lot of shrapnel in both lower legs.” Her right foot was tender, but “without deformities.” An x-ray of the foot revealed multiple old foreign bodies, but no fracture. The 2007 record contains no mention of Claimant’s *left* foot or leg.

About 15 months later, beginning in early 2009, Claimant sought treatment from Robert J. Estrada, D.P.M.,⁴ complaining of left ankle and right foot pain. The report of her initial visit on February 27, 2009, states that Claimant attributed her injuries to the 1972 attack and described the pain in her left ankle and foot as “longstanding.” Dr. Estrada noted that Claimant had the “inability to invert the heels or walk on the toes of the left foot[.]” and he diagnosed Claimant with “[p]osttraumatic arthritis of the left foot

³ Paresthesia is a “spontaneous abnormal usually nonpainful sensation (e.g., burning, pricking)” *Stedman’s Medical Dictionary* 1425 (28th ed. 2006).

⁴ D.P.M. is an abbreviation for Doctor of Podiatric Medicine.

and ankle[,] . . . [p]lantar fasciitis [in her] right foot[,] . . . [and n]euroma” in the right forefoot. Dr. Estrada described Claimant’s condition as a “deformity” and indicated that a CAT scan would be ordered to evaluate “for possible reconstructive surgery and realignment of this area” Radiological images of Claimant’s feet, taken the same day, appear to indicate the presence of small fragments in both her right and left foot.

A CAT scan was performed on Claimant’s left foot and ankle five days later, on March 4, 2009. The resulting report indicates the presence of “multiple metallic densities [in the left] hindfoot, most numerous medially, consistent with history of prior grenade injury.” It also refers to a “deformity of the medial calcaneus with loss of normal appearance of the sustentaculum, which is likely related to an old fracture and the grenade injury.” It also notes “severe degenerative disease” in the left ankle and “degenerative change” in the mid foot, and confirms the presence of an “old fracture.”

Two days later, on March 6, 2009, Claimant met with Dr. Estrada to review the results of an MRI exam. In this report, Dr. Estrada noted the “multiple fragmental densities” in the left foot, which were accompanied by “excessive damage to the medial calcaneus” He also noted the “severe degenerative changes of the subtalar joint compartment” as well as “significant neurological loss” Dr. Estrada noted that Claimant was “a surgical candidate for realignment[,]” and would “be casted for [a] Richie brace”

Claimant met with Dr. Estrada again about two months later, on May 1, 2009. Dr. Estrada noted in his report that Claimant was “showing excellent continued progressive improvement with her Richie brace of the left foot and ankle.” He further indicated that her “posterior tibial tendon dysfunction . . . and her lateral ankle instability is well controlled[,]” and that she had “no lateral ankle pain with ambulation.” However, he

noted that she had “pronation syndrome of the right foot . . . [and] recommended that she . . . be casted for functional orthotic for the right foot to help better balance her with her brace on the left.” He added that she should “otherwise continue with exercise program and gait training.”

Claimant met with Dr. Estrada again recently, on January 15, 2015. In his notes from that visit, Dr. Estrada noted Claimant’s complaints of “persistent left ankle and foot injury pain and discomfort status post injury[,]” as well as “[s]ome progressive difficulty with ambulation.” He further noted that she has a “recent history of stress fracture” with pain in the ankle “getting progressively worse.” He stated that Claimant continues to wear a Richie brace, which eases the pain, but is “sometimes uncomfortable.” Dr. Estrada also observed that Claimant has “edema of the area of the ankle where previous injury is noted.” Radiological images again revealed shrapnel, as well as “progressive subtalar joint, degenerative joint disease” Dr. Estrada’s assessment was of “[m]ild posterior tibial tendinitis with history of neuritis, left[,]” and “[s]ubtalar joint, degenerative arthritis.” He recommended that Claimant get her Richie brace adjusted and that she wear it as often as possible.

In addition to the medical records, Claimant has submitted an online verification of her Florida-issued physical therapist license, originally issued on December 9, 1988. According to this verification, Claimant continued to maintain an active license as of December 17, 2014. The verification does not, however, identify Claimant’s employment status or history, and Claimant has provided no additional evidence on this issue.

Finally, as noted earlier, Claimant has submitted recent color photographs of her left ankle brace, her orthotics, and her injured feet. As Claimant asserts, the left foot does

have some slight discoloration and is shaped differently from the right; however, it is difficult to tell from the photographs whether these are natural variations or the results of her injury.

Application of Special Circumstances Factors to Evidence

In making award determinations for additional compensation, we must take into account the severity of the injuries of all the claimants who have sought additional compensation in these Libyan claims programs. See Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). Moreover, “to the extent that a monetary award can ever adequately compensate for a physical injury,” the Commission views these claims for additional compensation through the lens of the \$3 million previously awarded to Claimant (and all successful claimants in these Libyan claims program)—an amount that is “exceptionally high when compared to other programs.” *Id.* Seen through that lens, Claimant’s evidence is insufficient to meet her burden to prove that the severity of her physical injuries is a “special circumstance” warranting additional compensation.

Nature and Extent of Injury: The evidence is insufficient to show that the initial injuries Claimant suffered in the Lod Airport attack were among the most severe in this program. She certainly did suffer significant physical injuries in the attack, including a gunshot wound to the left heel and shrapnel wounds that left behind numerous small fragments of metal in both legs. Moreover, she spent approximately 11 days in the Hospital in Israel, and made additional visits to the doctor in the months following her return to Puerto Rico, complaining of pain in her legs and feet; at least once, in August 1973, she underwent additional surgery to remove some of the shrapnel.

Even with this evidence, however, the available medical records do not suggest that Claimant’s injuries were sufficiently severe to warrant additional compensation

beyond the \$3 million she has already received. For one, the discharge summary from Tel Hashomer Hospital, describing Claimant's treatment in the immediate aftermath of the incident, indicates that, despite the gunshot wound to her left heel, Claimant was "in good general condition and without any signs of another trauma." While doctors had to perform unspecified surgery on her left heel—and indeed a plaster cast had to be placed on Claimant's foot—the summary also states that the "post operative course was uneventful." And 10 days later, she was described as being "in a good position"

Moreover, despite her assertions, Claimant has presented no evidence, beyond her own statements, of any medical treatment immediately upon returning to Puerto Rico or of any hospitalization in the weeks or months that followed. The only records from this time frame indicate that Claimant occasionally visited the doctor (including at least one visit to the emergency room) complaining of "pain and paresthesia" in her legs and feet, and that on one occasion, some of the shrapnel was removed. The evidence, however, does not indicate that Claimant's injuries were very severe. The medical records refer only to "small metallic foreign bodies" remaining in both lower extremities, an "ankle fracture," and a "healed wound of the medial aspect of the foot." No reference is made to any major surgery, prolonged hospitalization, or chronic impairment during this time. Moreover, while Claimant indicates that she underwent physical therapy for four months upon her return to Puerto Rico, we have no records documenting or describing that therapy; it is thus not clear how significant the physical therapy was—for example, whether it was inpatient or outpatient treatment.

In sum, the nature and extent of Claimant's initial injuries are not, by themselves, among the most severe when compared with all the other claimants who have sought additional compensation in these Libyan claims programs. The Commission has

previously denied additional compensation (that is, compensation beyond the \$3 million initial awards) to other claimants whose physical injuries were similar to or worse than Claimant's. *See, e.g.*, Claim No. LIB-II-148, Decision No. LIB-II-185 (2012) (denying claim for compensation above \$3 million where claimant had bullet wounds to his chest, buttocks and leg; had spent eight days in the hospital after the terrorist attack; had to fly back home while lying on his abdomen and then spent another four weeks in a hospital near his home; and had medical records showing continued pain in his lower leg, thigh and back for the first few years after the attack); Claim No. LIB-II-109, Decision No. LIB-II-112 (2011) (denying claim for compensation above \$3 million where the claimant suffered bullet wounds to her right foot with entry and exit wounds, requiring ten days in the hospital and immediate surgery); Claim No. LIB-II-110, Decision No. LIB-II-111, *supra* (denying claim for compensation above \$3 million where the claimant suffered a through and through gunshot wound to the chest, requiring four days of hospitalization and a course of antibiotics, and which left a 3-inch scar on his chest).

Impact on Claimant's Major Life Functions and Activities: Consideration of the second factor—the impact on Claimant's major life functions and activities—also supports a denial of this claim. Although Claimant describes certain effects on her life, including some that she continues to experience to this day (more than 40 years later), it is not clear that her Lod Airport attack injuries have significantly impaired her major life functions and activities. Recent records from Dr. Estrada indicate that Claimant currently suffers from some mobility difficulties, apparently resulting from a degree of left foot and ankle deformity and “posttraumatic arthritis.” Yet, Dr. Estrada noted that, when Claimant began using a foot brace in 2009, Claimant was “showing excellent continued

progressive improvement with her Richie brace of the left foot and ankle[.]” and that her “ankle instability is well controlled.”

More importantly, Claimant has not submitted any medical records whatsoever from between 1973 and 2007—a period of 34 years. The Commission is therefore unable to determine the degree of Claimant’s impairment and mobility issues during this time, or to exclude within reason any supervening causes of the pain in her feet. All we have is Claimant’s own assertion that she had “the ability to walk unassisted for a period of time,” although it is unclear whether this refers to the entire 34-year period or some other length of time. As noted above, although Claimant asserts that she underwent four months of physical therapy upon her return to Puerto Rico, there are no records documenting or describing the nature and intensity of this therapy, or how seriously Claimant’s mobility was affected.

Claimant’s assertions about her disability rating are also unsupported. Claimant indicates in her affidavit that she was determined by a Puerto Rican government agency to be 19% disabled as part of a disability review for the Israeli National Insurance Institute; however, she has not submitted any records to support this claim, and none of Claimant’s medical records make any reference to any disability determination. Indeed, there is no evidence that Claimant has been unable to pursue a normal professional career due to her injuries. The only evidence concerning her career is that she obtained her physical therapist license in 1988, and although Claimant does not specify how long she has worked in this field, her license, at the time of the filing of the claim (2014),

remained active. She has submitted no record of disability or any other evidence indicating that her injuries have prevented her from working.⁵

In sum, based on the current record, it does not appear that Claimant's physical injuries have had a significant enough impact on her major life functions and activities to warrant additional compensation in this program.

Disfigurement: The third factor—the degree of disfigurement—also supports our conclusion that the severity of Claimant's injuries is not a special circumstance warranting additional compensation. Disfigurement has been an important factor supporting an award of additional compensation only when the disfigurement has been significant. *See, e.g.*, Claim No. LIB-III-021, *supra*, at 17 (finding severe disfigurement to claimant who lost both of her legs and has to wear prostheses); Claim No. LIB-II-116, *supra*, at 5 (denying claim where disfigurement was not a prominent feature of claimant's overall outward appearance). Although the evidence, including recent medical records, indicates that Claimant suffers from some disfigurement to her left foot, the photographic evidence does not suggest a particularly severe deformity and there is no indication that this condition is disfiguring to the extent observed in claims where the Commission has awarded additional compensation on the basis of disfigurement. *See, e.g.*, Claim No. LIB-II-174, Decision No. LIB-II-180 (2013) (Final Decision). And although Dr. Estrada notes that Claimant is a candidate for surgical realignment of the left foot and ankle, there is no evidence that Claimant has undergone this procedure or whether it is necessary to her continued ability to walk with ease. For these reasons, Claimant's disfigurement does not provide any support for an award of additional compensation.

⁵ At the time of the attack, Claimant was 16 years old. She says that she had a "burgeoning career as a model" before the attack, but that afterwards, she was "no longer able to pursue a career in modeling due to her limp, scars on her leg, and resulting low self-esteem." Yet, she provides no evidence of any of this, not even sworn testimonial evidence.

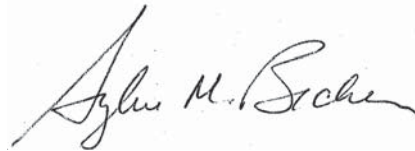
CONCLUSION

Having considered all of Claimant's evidence in light of the severity of the injuries suffered by all the claimants who have sought additional compensation in these Libyan claims programs, the Commission concludes that the severity of the injuries in this claim does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Claimant has endured, she is not entitled to additional compensation beyond the \$3 million the Commission has already awarded her. Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, September 17, 2015
and entered as the Proposed Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2014).