

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-I-003

Decision No. LIB-I-044

Counsel for Claimant:

Steven R. Perles, Esq.
Perles Law Firm, PC

Oral Hearing held on December 16, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) at the La Belle Discotheque in West Berlin, Germany on April 5, 1986. By Proposed Decision entered April 7, 2011, the Commission denied the claim on the ground that the claimant had not met his burden of proving an injury sufficient to meet the Commission's standard for physical injury under the December 11, 2008 *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral"). In particular, the Commission cited the lack of medical documentation sufficient to verify the cause of claimant's alleged physical injuries, and, with regard to the medical documents that were submitted, the fact that the relevant conclusions regarding claimant's

injuries derived solely from claimant's own statements, rather than the physicians' objective observations.

On May 3, 2011, the claimant filed a Notice of Objection, asserting various legal and factual errors in the Commission's Proposed Decision and requesting an oral hearing. The oral hearing was initially scheduled for July 28, 2011, but was postponed at claimant's request. On November 25, 2011, the claimant submitted further documentary evidence in support of his objection, including, *inter alia*: extensive medical records, including claimant's service records from the U.S. Department of Veterans Affairs (VA) from the period between 1980 and 2011; various court documents, translated from German to English, regarding the criminal prosecution of the La Belle bombers in Germany; an affidavit from Gary Damon, one of the La Belle bombing survivors, attesting to having seen claimant at the scene of the incident; the report of Danny Defenbaugh, a bomb scene forensics expert, describing the nature of the La Belle bomb blast and its relationship to claimant's alleged physical injuries; an affidavit from Cedric Jay Woolfork, another La Belle bombing survivor, also attesting to claimant's presence at the scene of the incident; and two color photographs of claimant, taken in 2008 and 1994. The hearing on the objection was held on December 16, 2011.

The claimant testified in person during the hearing, responded to questions from the Commission, and permitted examination of the scarring to his face and hands that he alleges resulted from the injuries he suffered during the attack. In addition, claimant's counsel presented the testimony of four other individuals concerning, variously, claimant's presence at the scene of the incident, his alleged physical injuries, and the procedures governing the handling of medical records within the U.S. military.

DISCUSSION

I. Claimant's Presence at the Scene of the Incident

Claimant testified in detail during the hearing about his experience on the night of the La Belle bombing and his alleged physical injuries. He stated that he joined the U.S. Army in 1980 and was stationed in Fort Campbell, Kentucky at the time of the incident; however, on the night of the bombing, he was on leave in Berlin trying to reconcile with his then-wife. At the time, the two were separated. Claimant testified that they went to the La Belle Discotheque in the evening to "relive some of the old times . . . [,]" and that at a certain point he wanted to leave while she wanted to remain. Claimant testified that he became angry, at which point he "walked upstairs, and [he] was outside?"

Claimant stated that, just before the explosion, he "walked out the door went to the right and stopped, and next thing I know it was just chaos." He testified that, when the explosion occurred, he was "knocked all over the place[,]" and that the blast left him on the ground outside the disco. Claimant further testified that, after he "came to," he stood up and "immediately went back downstairs because [he] was worried about [his wife]"

As further evidence that he was present at the scene of the La Belle bombing, claimant presented the testimony of Gary Damon, a survivor of the incident. In addition, the Commission reviewed affidavits from Mr. Damon and Cedric Jay Woolfork, another survivor of the bombing. Mr. Damon testified that he was inside the club's restroom when the bomb exploded, and that after the explosion he went back into the club to assist the injured. Mr. Damon stated that he carried one of the injured (Kenneth Ford, who later died from his injuries) outside and attempted to administer first aid. He testified that it was at this point that he saw claimant. Mr. Damon testified that claimant was "right

outside there being attended to by a couple of German women, and next thing you know, they're just whisked away in a cab”

He stated that the two individuals “were holding [claimant] up with something over his head.” In addition, he recalled “the women helping that one gentleman ‘cause he was not very good on his feet . . . he was wobbly. They sat him down on a curb” Mr. Damon added that, at this point, the claimant “was only maybe four feet away sitting on the curb.” He testified that he did not know if the claimant was bleeding because he was busy assisting Mr. Ford. However, in his affidavit, Mr. Damon averred that he witnessed the claimant on the sidewalk “bleeding from either his scalp or his face and he looked like he was in shock.”

During the hearing, Mr. Damon was asked whether he had ever seen the claimant before or after that night, and he responded, “No, I never met him.” However, it was noted that in his affidavit, he stated that he “had seen [claimant] several times in the past, but we were never friends although we may have said hello before.” Mr. Damon testified that he did not know why he wrote that, and that, in fact, he “had never met him before until that night.” In his affidavit, he further recalled that he “never saw Clay after that night and do not know what happened to him or if he recovered from his injuries.” He testified that his memory of the claimant was triggered by recent photographs that had been provided to him. Mr. Damon was asked, given the error in his affidavit regarding whether he had seen claimant before, he had possibly mixed claimant up with someone else. He responded that “if I got confused, [it] would just be because they just look so similar just because in the army everyone’s got short hair and, you know, small build, stocky”

Mr. Damon also clarified that the photographs that he saw of claimant were relatively recent, and were not taken around the time of the La Belle incident.

As noted above, the Commission has also reviewed the affidavit of Cedric Jay Woolfork, another U.S. army service member who was inside the club at the time of the bombing. In his affidavit, Mr. Woolfork states that, prior to the explosion, he was approached by a German woman and invited to dance, at which point he noticed the claimant. He states that he "did not know him closely but I knew he was a soldier and I had seen him around on occasion." He further states that "it may have been his wife I was dancing with, unbeknownst to me[,] and that claimant "was staring at us dance." He notes that "[o]ne of the biggest reasons why I'm very confident that the person I saw that early morning in LaBelle Disco was [claimant] is because of the distinct shape of his ears." Mr. Woolfork states that he did not see the claimant when the bomb exploded, but he believes he "saw [claimant] and a woman who I am not sure I could recognize . . . , but the woman was helping a person who I believe was Clay get up as he appeared to me to be bleeding and his clothes were either smoking or covered with dust but they were not on fire." He notes that he "never saw [claimant] in person after that night and do not know what has become of him."

It is clear from the foregoing testimony and affidavits that neither Mr. Damon nor Mr. Woolfork was well-acquainted with claimant, and that neither individual was able to identify him except through their recollection of certain physical features that they recognized in recent photographs. Under these circumstances, there is sufficient reason to question whether the person they saw was indeed the claimant. Nonetheless, given the circumstances of the event, and the claimant's own testimony alongside the key

particulars testified to by Mr. Damon and attested to by Mr. Woolfork in his affidavit, the Commission is prepared to accept, as an established fact, that the claimant was present at the scene of the La Belle discotheque on the night of the attack in question.

II. Alleged Physical Injuries and Medical Evidence

With regard to his alleged injuries, claimant testified during the hearing that as he re-entered the building after the explosion, he noticed that there was blood on his hand. He soon found his wife, together with another person, and as the three exited the building, his wife and the other person "held claimant up"; once they were outside the club, they told him to sit down. Subsequently, claimant was placed into a vehicle—he does not recall what type of vehicle—and taken to a "treatment facility," although he does not recall whether it was a hospital, only that it was "set up like a triage." According to claimant, he "was totally disoriented[,] although he recalls that he was "bleeding . . . across my left eye and I had blood on my back." He described the injuries to his back as "abrasions." In addition, his "skin was hot, like I had been sunburned," he suffered "lacerations on both thumbs and on my elbow[,] and he "was covered in soot."

Claimant further testified that, after he arrived at the "treatment facility," medical personnel "bandaged me up and more or less sent me on my way." He acknowledged that he was not hospitalized and that he did not receive stitches for any of the lacerations he claims to have sustained. He further acknowledged that when he returned to Fort Campbell approximately two days after the incident, he did not seek follow-up treatment for his alleged injuries. He stated that he changed his own bandages, and was back on active duty three weeks later (he alleges he had three weeks remaining on his leave). Claimant testified that he chose not to seek medical treatment because, at the time of the

incident, he was on a "promotion list," and he was concerned that if his injuries became known, he would be removed from this list. He also testified that, "soon after the bomb blast[,] he began to experience headaches; however, he never sought any medical treatment for those either, although he states that he did take over-the-counter medication such as Tylenol and ibuprofen.

According to claimant, his physical injuries resulted in scars on both thumbs, as well as a scar over his left eye, which he associates with the bleeding over that eye described in his testimony. In addition, he alleges that he continues to experience headaches "four of five times a month." Asked during the hearing whether anything in particular triggers these headaches, claimant responded "No. . . . It just happens." He also added that, in addition to his other injuries, he suffers from the following conditions which he attributes to the La Belle bombing: "insomnia, back problems . . . [and] difficulty being around group[s] of people." However, asked during the hearing to clarify which injuries formed the basis for his physical injury claim, claimant acknowledged that it was the lacerations to his thumbs, the injury to his eye, and the injury to his back.

Neither Mr. Damon, who submitted an affidavit and appeared on claimant's behalf at the hearing, nor Mr. Woolfork, who submitted only an affidavit (but did not testify in person), was able to describe any physical injuries suffered by claimant with sufficient specificity to enable the Commission to conclude that any such injuries rise to the level of significant, non-superficial physical injuries. Mr. Damon alleges only that he saw the claimant being held up and bleeding from his scalp or face; in his affidavit, he appeared to say even less: that he did not know whether claimant was bleeding at all. For his part, Mr. Woolfork indicates only that claimant was being assisted after the blast and that he

“appeared to me to be bleeding.” These statements, and the testimony from Mr. Damon during the hearing, do not assist the Commission in shedding light on the nature and severity of claimant’s alleged physical injuries.

In addition, as noted above, claimant has submitted extensive VA medical records covering the period of his military service, from 1980 (the year of his enlistment in the Army) to his retirement from the military in 2000. Despite the wealth of information contained in these records, however, there is little evidence that claimant suffered any significant physical injuries as a result of the La Belle bombing. Indeed, the incident is not referenced anywhere in the nearly 130 pages of VA medical records that have been submitted. Moreover, many of these records contain information that suggests that claimant had *not* suffered significant physical injuries in 1985. For instance, claimant’s Chronological Record of Medical Care contains no entries between the date of the incident and November 4, 1986, when claimant appeared to undergo only a height and weight check. Entries for November 15 and December 5, 1986 similarly contain no suggestion of a recent physical injury (the latter visit appeared to pertain to a “cold, fever & chills”). Notably, a Consultation Report from 1999—several years after the incident—includes the notation “Unremarkable” under “Past Medical History,” and “None” under “Past Surgical History.”¹

Records from claimant’s retirement physical in late February and March 2000 also raise questions concerning whether he suffered any significant physical injuries during the La Belle bombing. In a March 1, 2000 Report of Medical Assessment, claimant checked “no” next to the questions asking whether he had suffered any injury while on

¹ The consultation appeared solely to be an evaluation for gallstone surgery, as claimant had recently experienced symptoms of cholelithiasis, a condition characterized by the “[p]resence of concretions in the gallbladder or bile ducts.” *Stedman’s Medical Dictionary* 366 (28th ed. 2006).

active duty for which he had not sought medical care, or whether he had any conditions which currently limited his ability to work in his primary specialty. Similarly, in his February 28, 2000 Report of Medical History, next to the questions asking whether he had “had, or . . . been advised to have, any operation[,]” or whether he had “ever been a patient in any type of hospital[,]” claimant indicated only that he had had his gall bladder removed in 1998.

In short, the medical records submitted do not support the claim of injury here. Indeed, the Commission’s examination of these records suggests that these records significantly undermine claimant’s assertion of physical injury at the La Belle discotheque. As noted, claimant asserts in his submissions, and confirmed during the hearing, that his major claim of injury was a cut to his left eyebrow area which left him with scarring. Claimant submitted color photographs of his left eye in support of the objection and permitted the Commission to examine the scar during the hearing. However, the report of a medical exam conducted in April 1980 indicates that claimant already had a scar in that location six years before the terrorist incident. A similar report from November 1985 confirms this, adding that it measured one centimeter. When asked about these records, claimant asserted that before the bombing, the scar “barely covered [his] eyebrow.” He testified that the scar resulting from the bomb blast was in the “same location, it’s just longer[,]” and that prior to the bombing, the scar “did not extend above [his] eyebrow.”

The scars claimant testified he had on his thumbs are likewise not referenced in any of the medical records, including the report of his February 2000 retirement physical, which specifically asks about scars. The only injury to claimant’s thumbs referenced in

the medical records is a sprain to claimant's right thumb in February 1985. There is no indication of lacerations. During the oral hearing, the Commission examined claimant's thumbs to see whether any scars were visible; however, none could be seen.

As noted above, claimant also alleges that he suffered a back injury in the bombing which has left lingering effects to the present day. However, as with the other alleged injuries, there is virtually no evidence in the medical records to substantiate this allegation. For instance, in claimant's February 28, 2000 medical history report, next to the item labeled "Recurrent back pain or any back injury," claimant checked "no." The accompanying Report of Medical Examination makes no reference to back injuries, and next to the item "Spine, Other Musculoskeletal," the examining physical marked "Normal." The only suggestion in the medical records that claimant ever suffered a back injury appears in his Chronological Record of Medical Care. In an entry for October 18, 1990, it is noted that claimant "was carrying his rucksack" when he "tripped and fell[,] and that when he fell, "his body twisted." According to the entry, this was accompanied by pain in the claimant's right-side rib cage; doctors identified claimant's injury as "possible bruised ribs." No further records of treatment for this injury have been submitted. In addition, although the results of recent medical examinations note that claimant has a "large scar in his mid thoracic region," which can be seen in color photographs submitted with this claim, it is not clear that this was the result of the La Belle bombing, and the scar is not mentioned or discussed in claimant's military medical record.

With regard to the absence of documented injuries or treatment in the months and years following the incident, and his decision not to seek medical treatment when he returned to the United States, claimant testified, as noted above, that he was concerned

about the impact such injuries would have on his promotion potential. However, he also testified that some of his injuries, and particularly his alleged hearing loss and head injury, “[weren’t] as dramatic as [they are] now.” With regard to claimant’s “constant tinnitus,” which he alleged in his initial submission, it was noted during the hearing that in 1992, he underwent a hearing screening; a notation from this exam indicates “Hearing Within Normal Limits.” Claimant acknowledged that, at that time, his hearing was normal.

During the oral hearing, claimant’s counsel also presented the testimony of John C. Anigbogu, M.D., a board-certified specialist in physical medicine and rehabilitation, who conducted a physical examination of claimant on June 9, 2011. A copy of Dr. Anigbogu’s report was provided with claimant’s objection materials. Dr. Anigbogu testified that “[claimant’s] complaints are consistent with people that have mild traumatic brain injury [TBI].” He added that it was not unusual that TBI would not appear in claimant’s medical records because such injuries are often not diagnosed at the time of injury, and the fact that many people with mild TBI do not seek treatment. In his report, Dr. Anigbogu attributed the diagnosis of TBI to claimant’s alleged injuries in the 1986 bombing. Dr. Anigbogu also took note of scars on claimant’s back,² the scar over his left eye, and his complaints of “chronic headaches” and tinnitus, all of which Dr. Anigbogu concluded were also the result of the La Belle bombing.

² Dr. Anigbogu was also asked about “[s]cattered back granulomas” identified during his examination and referenced in his report. He testified that he often sees these in patients who have suffered an injury, often glass injuries. He also distinguished these from the scar on claimant’s back. Again, however, Dr. Anigbogu only attributed this to the La Belle incident through claimant’s own statements. In addition, it should be noted that, in the February 28, 2000 Report of Medical History, claimant checked the “yes” box next to “Skin diseases” in his Past/Current Medical History. Given this fact, and the absence of evidence that would tie these skin lesions to the 1986 incident, there is insufficient evidence for the Commission to conclude that these are the result of any physical injury sustained during the bombing.

Despite Dr. Anigbogu's detailed findings, it is unclear what objective data he relied on to reach his conclusions and determine that claimant's alleged injuries were the result of the La Belle bombing. Asked during the hearing whether he had conducted any radiological examinations or other testing, he acknowledged that he had not. Moreover, he had not reviewed any of claimant's medical records before the visit, and the June 9, 2011 visit was the only appointment he had with claimant. Asked whether TBI could be diagnosed in a single office visit, Dr. Anigbogu acknowledged that it could not. Indeed, asked whether he had specifically diagnosed TBI in claimant, Dr. Anigbogu indicated that he had not, only that his symptoms were "consistent with" TBI. Further, Dr. Anigbogu acknowledged that his entire report was based on statements that claimant had made to him regarding his alleged physical injuries during the La Belle incident. Under these circumstances, Dr. Anigbogu's report and testimony are of negligible usefulness to the Commission, as they fail to establish a causal link between claimant's alleged physical injuries and the La Belle bombing, or in the case of mild TBI, that claimant suffers from a physical injury at all.³

Claimant's counsel also presented the testimony of Colonel Paul Schwarz, a retired U.S. Army officer, concerning the handling of military medical records, and the likely fate of any such records pertaining to claimant's treatment immediately following the La

³ Claimant also submitted with his objection materials a letter from Leslie Schaffer, M.D., regarding an "initial neurosurgical evaluation" conducted on June 8, 2011. Dr. Schaffer reached many of the same conclusions as Dr. Anigbogu concerning the scars on claimant's back and above his left eye, as well as traumatic brain injury. However, as with Dr. Anigbogu's evaluation, Dr. Schaffer does not appear to have conducted any radiological testing to verify the alleged TBI, and her account of what happened to claimant similarly appears to be drawn from claimant's own statements of the injuries he suffered. As such, Dr. Schaffer's report suffers from the same defects as those in Dr. Anigbogu's evaluation, and is, therefore, of limited use to the Commission in verifying claimant's injuries and establishing a causal nexus with the La Belle bombing.

Belle incident. This testimony was entirely hypothetical and did not assist the Commission in its determination of this case.

In an affidavit submitted with the objection to the Proposed Decision, Col. Schwarz also described some of the facts surrounding claimant's involvement in the La Belle incident, including that claimant "took his wife, who was more seriously injured, to a military treatment facility where his social security number was recorded by the CID along with a notation of her injuries. As his injuries appeared superficial he was treated and released" As to the source of this information, however, Col. Schwarz stated during the hearing that "that's what [he] had been told." He also testified that, having interviewed dozens of servicemen involved in the bombing, he believed that claimant had, in fact, been injured in the La Belle bombing; however, the primary reason for this belief was that what the claimant had told him was "consistent with the other stories that [he] had heard" It was apparent, then, that all of what Col. Schwarz understood concerning claimant's injuries and experience was derived either from claimant's own statements, or those of other service members, rather than from his own first-hand knowledge. For this reason, the Commission is unable to accept this testimony as evidence that claimant was injured during the attack.

Finally, claimant's counsel also presented the testimony, together with a November 2011 affidavit, of Danny Defenbaugh, a bomb scene forensics expert, regarding the nature of the La Belle Discotheque explosion and its relation to claimant's alleged physical injuries. In his affidavit, Mr. Defenbaugh stated that, based on his "analysis of crime scene photographs . . . of the bar after the explosion of the IED and statements from the convicted terrorists who aided in the construction . . . of the IED as

described in the court record, [he] was able to form an opinion as to the nature of the explosion and what would have been the normal result” Mr. Defenbaugh testified that these types of bombs have a “very large shocking effect[,]” and that given the bomb type and his analysis of the damage he saw in the photographs, glass would be expected to shatter, and it would not be unusual for bystanders’ ears to rupture “for probably up to 200 feet . . . which would bring it out onto the street” He further testified that, based on his review of the documents provided and his analysis of the explosion, the injuries alleged by the claimant—namely, the “sunburning effect” on claimant’s skin, the smell of smoke from his hair, the bleeding cut over his eye, the other small cuts, and a temporary loss of hearing—are consistent with what he would expect from the type of bomb used.

Mr. Defenbaugh was asked during the hearing whether he knew exactly where the claimant was standing during the bombing. In response, he acknowledged that he did not know exactly, only that he was outside based on witness statements and claimant’s own assertions. He testified that his determination of where claimant was standing was drawn from claimant’s description of his injuries, and the statements of the two witnesses who claimed to have seen him there, and stated that it would be “near one of those apertures that would allow the escaped gas and the thermal effect.” According to Mr. Defenbaugh, claimant was “on the outside, probably near the curb area.”

Mr. Defenbaugh’s characterization of the blast and its likely impact on bystanders is no doubt accurate. Indeed, other claimants who have established in this program that they were injured in the La Belle bombing have described such injuries. However, the task before the Commission is to determine whether claimant himself suffered the particular injuries alleged. As noted above, Mr. Defenbaugh acknowledged that his

determination of where claimant had been positioned during the explosion was derived largely from claimant's description of his injuries. As discussed in the preceding section, however, claimant has failed to produce medical documentation sufficient to establish that he suffered any of the physical injuries alleged. To establish claimant's physical injuries by relying on where he was said to be standing, therefore, represents a form of circular reasoning that sheds little light on this claim. For this reason, Mr. Defenbaugh's testimony and affidavit do little to support claimant's allegations of physical injury.

As is evident from the foregoing discussion, claimant has provided no credible evidence that he suffered significant, non-superficial physical injuries as a result of the La Belle Discotheque bombing. The testimony and documentation concerning his scars and continuing physical ailments do not corroborate claimant's asserted injuries, and, as discussed above, contradict his claim. Claimant's assertion that the scar above his left eye was caused by the blast, even though he had a documented scar in exactly the same place at least six years prior to the incident is difficult to credit. Moreover, claimant's explanation that he chose not to seek treatment for fear of endangering his promotion potential does not account for the fact that there is still no evidence of his alleged physical injuries even after his retirement from the military in 2000, when his fears would have ceased to be an issue.

As to claimant's asserted TBI, chronic headaches, hearing loss and/or tinnitus, and back injury, there is simply no evidence either that he suffers from these conditions, or that they are in any way connected to the La Belle bombing. There is likewise no evidence connecting the scars on his back to the La Belle bombing. The same is true of

the scars alleged to be on claimant's thumbs, although, as noted above, these were not even visible during the hearing.

In light of the complete absence of medical documentation evidencing any physical injuries resulting from the La Belle bombing, the inconsistencies between many of claimant's assertions and the records presented, and the fact that he apparently never sought or received medical treatment for any of his alleged injuries, the Commission cannot find that claimant has submitted medical documentation sufficient to establish that he suffered any physical injuries as a result of the La Belle incident, or that he sought medical treatment within a reasonable time, as required by the Commission's standard for compensability.

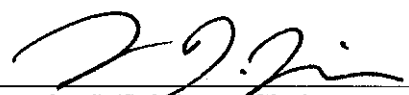
CONCLUSION

As discussed in detail above, claimant has presented virtually no evidence that he suffered any physical injuries as a result of the La Belle Discotheque bombing. Despite the wealth of medical documentation provided, including records from the years just before and after the incident, there is no mention of the La Belle bombing, and none of claimant's asserted physical ailments has been causally linked to a bomb explosion, with the exception of statements made in medical evaluations completed after the filing of his claim. Moreover, neither of the witnesses to the attack is able to describe claimant's injuries with any specificity, and their identification of claimant, given their extremely limited (or non-existent) interactions with him, is questionable at best. In addition, although Mr. Defenbaugh's description of the explosion provided useful insight into the types of injuries that could have been expected from the blast, he had no first-hand

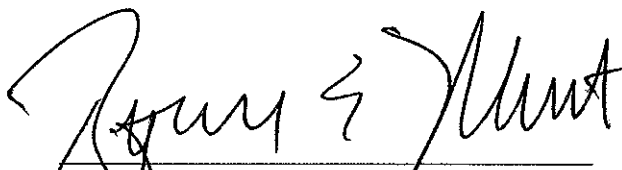
knowledge of claimant's injuries and could only guess at what they were based on claimant's own statements.

Therefore, for the reasons discussed above, and based on the evidence and information submitted in this claim, the Commission again concludes that the claimant has not met his burden of proving that he has satisfied the Commission's standard for physical injury.⁴ Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, September 14, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

⁴ Section 509.5(b) of the Commission's regulations provides:

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

45 C.F.R. § 509.5(b) (2011).

Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya’s agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

The December Referral Letter 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 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 Secretary of State certified, pursuant to the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 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 March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of the Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On May 13, 2009, the Commission received from claimant a completed Statement of Claim and accompanying exhibits supporting the claim, including evidence of: claimant's U.S. nationality; his inclusion as a named party in the complaint filed in *Clay v. Socialist People's Libyan Arab Jamahiriya*, 06-cv-707 (D.D.C.), part of the Pending Litigation referred to in Attachment 1 of the December Referral Letter, in which the claimant set forth a claim for injury other than emotional distress alone; the dismissal of the *Clay* case; and the claimant's alleged physical injuries.

The claimant, ^{5 U.S.C. §552(b)(6)}, states that he was standing outside the La Belle Discotheque in West Berlin, Germany on April 5, 1986, when a bomb exploded inside the club, throwing him against a wall and knocking him unconscious. When he regained consciousness, he went back into the building and found his then-wife. After helping her and another person make their way out of the building, they went to a hospital clinic together. Claimant purportedly suffered first-degree burns to his face, temporary hearing loss, and numerous cuts and bruises, and he avers that while he was at the hospital he received treatment for small cuts to his face before being released. He

states that he was never hospitalized and did not seek further contemporaneous treatment for his alleged physical injuries.

The claimant has provided evidence of his United States nationality, both on the date of the incident and at the time of the Settlement Agreement. Additionally, claimant has provided several recent medical reports; sworn statements in which he describes the incident and his alleged injuries; photographs of the La Belle Discotheque following the bombing; an affidavit from a retired lieutenant colonel in the U.S. army describing his understanding of the incident (although he was not personally present at the scene) and the procedures that likely would have been followed by Army personnel concerning claimant's medical treatment and follow-up; a CID casualty list, dated April 10, 1986, which includes only the name of claimant's then-wife; and other documents in support of his claim.

DISCUSSION

Jurisdiction

The Commission must first consider whether this claim falls within the category of claims referred to it by the Department of State. Under subsection 4(a) of the ICOSA, the Commission's jurisdiction here is limited to the category of claims defined under the December Referral Letter; namely, claims of individuals who: (1) are U.S. nationals; (2) are named parties in a Pending Litigation case against Libya which has been dismissed; and (3) set forth a claim in the Pending Litigation for injury other than emotional distress alone. December Referral Letter, *supra* ¶¶ 2-3.

Nationality

In the *Claim of*^{5 U.S.C. §552(b)(6)}, Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for the nationality requirement to have been met, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided, *inter alia*, a copy of his birth certificate and a copy of his current voter registration card. Based on this evidence, the Commission determines that this claim was held by a U.S. national at the time of the injury on which the claim is based, and that it has been so held from that point until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must also be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the complaint in Case No. 06-cv-707, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, the claimant has provided a copy of an Order dated May 5, 2009, as evidence of the dismissal of this Pending Litigation. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

The December Referral Letter also requires that the claimant must have set forth a claim for injury other than emotional distress alone in the Pending Litigation. December Referral Letter, *supra* ¶ 3. The Commission's records reflect the claimant's assertion in the complaint in the Pending Litigation that he was injured in the La Belle Discotheque bombing. In particular, the Commission notes that the claimant states causes of action for, *inter alia*, assault and battery under Count I of the complaint. Based on this evidence, the Commission finds that the claimant has satisfied this element of his claim.

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

Merits

Standard for Physical Injury

As stated in the December Referral Letter, to qualify for compensation, a claimant asserting a claim for physical injury must meet the standard for physical injury adopted by the Commission for purposes of this referral. In order to develop the appropriate standard for compensability, the Commission considered both its own jurisprudence and pertinent sources in international and domestic law. The Commission concluded in the *Claim of*^{5 U.S.C. §552(b)(6)}, *supra*, at 8-9, that in order for a claim for physical injury to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident related to the Pending Litigation; and

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

(3) must verify the injury by medical records.

Physical Injury

According to his Statement of Claim and accompanying documents, claimant was standing outside the La Belle Discotheque when an explosion from inside the club “lifted [him] off [his] feet” and threw him “back against a wall[,]” rendering him unconsciousness. Claimant states that when he awoke, his hair was singed, his face felt sunburnt, and he had difficulty hearing. He further states that when he stood up to go and assist his then-wife, who was still in the club, his back and shoulders hurt and he had trouble using his arms. He further states that, after locating his wife, he took her to a military clinic, where he was treated for small cuts to his face and released. Claimant avers that he suffered frequent headaches and back and shoulder pain for several weeks after the attack. He claims that since the incident he has suffered from social isolation and depression which persists to this day.

According to the documentation submitted with this claim, claimant never sought follow-up treatment and was not prescribed any medication for the physical injuries he claims to have suffered. Indeed, the earliest medical record provided is the written report of two psychological evaluations conducted on claimant by Kenneth M. Wilson, Psy.D in 2006 and 2008, some twenty years later, which includes no evidence of physical injury stemming from the incident.

Claimant has submitted the results of a medical evaluation conducted at the Mayo Clinic in Jacksonville, Florida in February 2010; however, according to the records from

this visit, claimant presented himself with “no records whatsoever for review.” The examining physicians noted that claimant had arrived with a handwritten note describing his symptoms, and that, although he provided a verbal description of the incident and his medical history, “[h]e was a fair historian at best.” Although claimant complained of continuing chronic tinnitus, the audiology report notes that his “[h]istory is remarkable for military and occupational noise exposure.” An otoscopy revealed “impacted cerumen,” and upon removal of some of this, claimant indicated that the alleged tinnitus had lessened.

According to a forensic reconstruction report written by Susan B. Meek, M.D., J.D., in connection with claimant’s visit to the Mayo Clinic in 2010, claimant had a scar running downward from the middle of his back; however, no evidence beyond claimant’s own statements appears to have been provided to verify the origin of this injury. Indeed, many of the conclusions reached in this report appear to be derived from claimant’s self-described medical history as part of Dr. Wilson’s psychological evaluation and claimant’s own explanations of his injuries and symptoms. Moreover, much of the report is of negligible assistance to the Commission insofar as it consists of references to possible and/or likely injuries that would be suffered by a hypothetical individual involved in blasts comparable to the La Belle Discotheque explosion. Dr. Meek does refer to an X-ray apparently revealing various abnormalities in claimant’s spine that could explain claimant’s lower back pain and arthritis; here again, however, no evidence, apart from claimant’s own statements, has been presented to verify the cause of these conditions.*

* While not essential to its decision given this conclusion on the injury question, the Commission also notes that, apart from the question of physical injuries, claimant likewise has not provided sufficient evidence to prove his presence at the scene of the incident. A contemporaneously-produced CID casualty list does list the name of claimant’s then-wife; however, claimant’s name does not appear on this document, although it

It is important to recall that in these proceedings, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

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

45 C.F.R. § 509.5(b) (2010).

The burden in these proceedings is not onerous. Nonetheless, in this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met the burden of proof in that he has failed to provide evidence sufficient to establish that he "suffered a discernible physical injury, more significant than a superficial injury"; that he "received medical treatment for the physical injury within a reasonable time"; and that the injury be verified by medical records, as required under the Commission's physical injury standard.

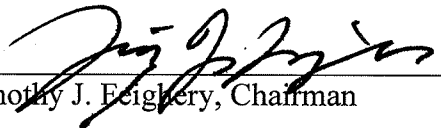
In light of the foregoing, the Commission is constrained to conclude that the claimant, ^{5 U.S.C. §552(b)(6)}, does not qualify for compensation under the December Referral Letter. Accordingly, his claim based on physical injuries suffered as a result of the La Belle Discotheque bombing must be and is hereby denied.

is his social security number that appears next to his wife's name. He explains this discrepancy by pointing out that, amid the confusion surrounding the incident, his wife most likely used her dependent ID card to identify both of them. While this explanation is plausible, claimant cannot be said to have provided sufficient evidence of his involvement in the incident. Evidence such as contemporaneous military reports, newspaper clippings, or affidavits from third parties with first-hand knowledge of claimant's presence at the scene of the bombing would have been highly supportive of his claim.

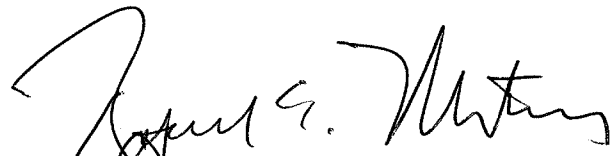
The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

Dated at Washington, DC, and
Entered as the Proposed Decision
Of the Commission.

APR 07 2011



Timothy J. Feighery, Chairman



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).