

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)	}	Claim No. LIB-I-015
	}	
	}	Decision No. LIB-I-021
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	
Counsel for Claimant:	}	Stuart H. Newberger, Esq. Crowell & Moring LLP

ORDER

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

By Proposed Decision entered September 23, 2009, the Commission denied the claimant's physical injury claim on the grounds that the claimant had failed to meet his burden of proving that his alleged injuries satisfied the Commission's standard for physical injury. The claimant objected and requested an oral hearing which was held on July 21, 2011. The Commission in its Final Decision dated August 31, 2011, denied the present claim on the grounds that the claimant had failed to establish an injury that was caused by the hijacking incident.

Upon receipt of the Final Decision, claimant sent a letter dated September 9, 2011, to the Commission to request that his claim be reconsidered. The Commission replied to claimant on March 12, 2012, indicating that because he is represented by counsel any such request must be presented to the Commission through his counsel. In his reply dated March 12, 2012, claimant stated that he discussed the matter with his counsel and was advised that they would not pursue his petition, however if he wished he could contact the Commission directly. By email dated December 12, 2012, claimant's counsel has now stated that they "respectfully endorse and request that the Commission consider [claimant's] submission."

Claimant requests reconsideration of his claim based upon the truthfulness of his testimony and the fact that "three doctors confirmed the impact on [his] back [was] due to jumping from the plane." Specifically, the claimant states the following as fact: he jumped from the wings landing on his back; he did not "take the risk of medical system and drugs in Pakistan"; upon returning to the United States he lost his job and medical coverage and, therefore sought informal medical advice from community doctors; he has always taken pain medication for the injury; he uses a back brace; he was misdiagnosed as having a birth defect, spina bifida; and he continues to suffer pain and horrific nightmares.

Subsection 509.5(k)(l) of the Commission's regulations provides:

At any time after a final Decision has been issued on a claim, . . . but not later than 60 days before the completion date of the Commission's affairs in connection with the program under which such claim is filed, a petition to reopen on the ground of newly discovered evidence may be filed. No such petition will be entertained unless it appears therein that the newly discovered evidence came to the knowledge of the party filing the petition subsequent to the date of issuance of the Final Decision or the date on which the Proposed Decision was entered as the Final Decision; that it was not for want of due diligence that the evidence did not come sooner to the claimant's knowledge; and that the evidence is material, and not merely cumulative, and that reconsideration of the matter on the basis of that evidence would produce a different decision. The petition must include a statement of the facts which the petitioner expects to prove, the name and address of each witness, the identity of documents, and the reasons for failure to make earlier submission of the evidence.

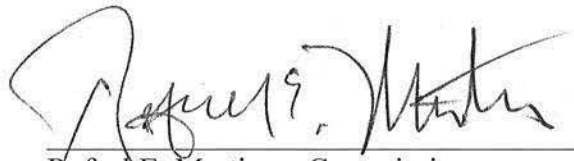
The claimant has not submitted any new evidence for the Commission's consideration; rather, he has cited specific information which was included in the record considered by the Commission in its Final Decision in this claim. As noted above, a petition to reopen a claim will only be granted in cases where new evidence, not previously considered by the Commission, is discovered and submitted to the Commission. Consequently, the Commission finds that claimant's petition to reopen his claim fails to satisfy the Commission's regulations.

Accordingly, it is ORDERED that the request for reopening of this claim for further consideration be and it is hereby dismissed and, therefore, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed.

Dated at Washington, DC, January 8, 2013
and entered as the Order of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

2010, the claimant provided additional evidence in support of his claim, including court documents from claimant's lawsuit against Pan Am, additional medical records and a medical opinion dated November 20, 2009. On June 30, 2011, the claimant, through counsel, filed "Claimant's Objection and Request for Oral Hearing Before the Commission" ("Objection Brief"), setting forth claimant's arguments in objecting to the Proposed Decision. The oral hearing was held on July 21, 2011.

DISCUSSION

I. Applicable Standard for Physical Injury Claims

As an initial matter, claimant asserts that the Commission should apply a broad and liberal interpretation to its physical injury standard because other claimants of this same settlement fund (*i.e.*, the LaBelle Discotheque victims) were allegedly held to a less strenuous standard (*i.e.*, presence at the site alone). In support of this assertion, counsel cited the Commission's decision in the *Claim of ESTATE OF VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No LIB-II-043 (2011), wherein the Commission stated that "[f]undamental principles of equity require that in any claims program similar damages be available to similarly-situated claimants."

Claimant's reliance on *MILAGROS FLORES* is inapposite. In that case, the Commission concluded that the claimant's decedent was killed as a result of one of the "Covered Incidents" specified in the January Referral Letter (*i.e.*, the 1972 Lod Airport terrorist attack). In determining the appropriate amount of compensation for that wrongful death, the Commission noted the language of the January Referral Letter, in which the State Department recommended that the Commission "take into account the fixed amounts awarded by the Department of State for wrongful death claims." Indeed,

the January Referral Letter disclosed the amount paid directly by the State Department to each eligible wrongful death claimant. In that circumstance, the Commission took due notice of the Department's recommendation, and the equitable consideration that similar damages be awarded to similarly-situated claimants, and determined to compensate wrongful death victims in the same amount as the State Department awarded to eligible wrongful death claimants included in the Pending Litigation.

With regard to the *criteria* for physical injury claims, however, the December Referral Letter did not identify the standard applied by the State Department in making payments directly to claimants for physical injury and the Commission is unaware of any such standard. Instead, the December Referral Letter asked the Commission to adopt a standard for physical injury to be applied in this program.¹ Consistent with the December Referral Letter, the Commission proceeded to establish a standard appropriate to this program, equitable to the claimants, and consistent with its jurisprudence.

For these reasons and the reasons set forth in *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-008, Decision No. LIB-I-011 (2010), and reaffirmed by the Commission consistently in other claims in this program, the physical injury standard adopted by the Commission in *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), applies here; namely, that a claimant must establish that he suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation; establish that he received medical treatment for the physical injury within a reasonable time; and verify his injury by medical records, in order to establish a compensable claim.

¹ December Referral Letter at para. 3.

II. Claimant's Physical Injury

Claimant asserts that while escaping from Pan Am Flight 73 he injured his back when, after jumping from a wing of the airplane, he landed at the bottom of a nearby escape slide, at a point where the escape slide was touching the tarmac. During the hearing, the claimant described the ordeal that he and the other passengers endured, including the facts surrounding his escape. Claimant further testified that he did not receive medical treatment immediately following the incident, nor did he receive formal treatment when he returned to the United States; instead, he spoke informally with acquaintances who were medical professionals. Based on claimant's testimony, both written and oral, it appears that he first sought formal treatment for his injuries in 1990, at which time claimant was diagnosed with "Spinal Bifida, aggravated due to [his] jump from the wing of the plane." The Commission notes that claimant sought this diagnosis during the pendency of his lawsuit against Pan Am for injuries alleged to have occurred as a result of this incident and that the litigation was settled in 1992. In 2009, claimant was seen by a Dr. Saeed who reported, on October 28, 2009, that claimant has "[d]isk space narrowing with degenerative changes;" however, he states that there is "no apparent spondylosis." Claimant also was seen by a Dr. Borenstein in 2009, who stated in his opinion dated November 20, 2009 that "within reasonable medical probability that Mr. Mahmood's current medical condition is directly related to the injuries he suffered during the events of 9/5/86" and, further, that "[h]e has developed chronic low back pain with associated physical findings as a result." The Commission notes that Dr. Borenstein's office visit notes, dated November 18, 2009, indicate that claimant "has lumbar spondylosis at multiple levels."

The Commission has given careful consideration to the entire record in this claim, including claimant's testimony and the medical opinions of Dr. Borenstein and Dr. Saeed. However, the Commission finds that the claimant has failed to establish an injury that was caused by the hijacking incident. The record, taken specifically and as a whole, is either inconsistent or inconclusive on the precise nature of the injury allegedly suffered by the claimant as a result of the hijacking. The Commission, therefore, affirms its holding that the claimant has not met his burden of proving that his back injury satisfies the Commission's threshold standard for physical injury.

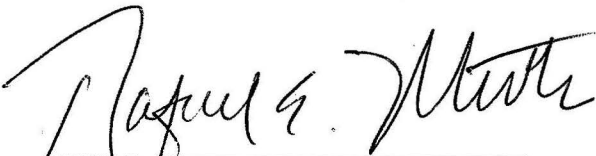
CONCLUSION

In summary, therefore, the Commission affirms that this claim for compensation under the December Referral Letter must be denied. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he endured during the terrorist incident in question, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, August 31, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-I-015

Decision No. LIB-I-021

Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, under a delegation of authority from the Secretary of State, the State Department Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to 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.

Related to the December Referral Letter, a number of official actions 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” December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims Settlement Agreement, and directing the

Secretary of State to establish procedures governing claims by United States 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 this Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On June 10, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the elements of the claimant's claim, including evidence of: his United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and his physical injuries. The claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) states that he was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. He further states that he injured his back while escaping from the final attack by the terrorists who had hijacked the plane.

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 December Referral Letter is limited to claims of individuals who are: (1) United States nationals and (2) named parties in a Pending Litigation which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

Nationality

In the *Claim of* Personally Identifiable Information
Redacted under 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 a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Based on the evidence submitted with this claim, the Commission determines that the claimant was a United States national at the time of the injury on which his claim is based.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must 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-626, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, the claimant has provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated December 16, 2008. 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.

In summary, therefore, the Commission concludes 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 a threshold standard for physical injury adopted by the Commission. In order to develop such a threshold standard for compensability, the Commission has considered both its own jurisprudence and pertinent sources in international and domestic law.

After careful and thorough consideration, the Commission held in the *Claim of*

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

supra, 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 referred to in 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, claimant

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. In his sworn statement, the claimant states that, during the hijackers' final attack on the passengers, he escaped to the wing of the airplane. As there was no escape slide from the wing the claimant decided to jump from the wing to a slide that had been deployed nearby. Claimant states that he landed near the bottom of the

slide on his back. Although, the claimant initially described the treatment he received and noted the name of the treating physician, he did not provide any medical records to support his claim or otherwise to document the injury on which his claim is based. The Commission, by letter dated July 6, 2009, requested specifically that the claimant provide medical records to support his claim. In response by letter dated August 10, 2009, claimant provided a letter of referral dated February 7, 1990 and two letters from the facilities at which claimant was allegedly treated stating that medical records were unavailable. The letter of referral provided by the claimant, dated four years after the incident, only indicates that the claimant is "in need of referral care" without elaborating as to what type of care is needed. Therefore, although this document does corroborate that he was sent for referral, some four years after the incident in question, it does not corroborate the injury described by the claimant or that it was caused by his jumping off the wing of the airplane.

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)(2008).

The Commission finds that the claimant has not met the burden of proof in establishing that the injury on which this claim is based meets the standard for physical injury set forth above because he has failed to provide medical records. In light of the foregoing, the Commission is constrained to conclude that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) does not qualify for compensation under the December Referral Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he must have endured during the terrorist incident in question, his claim

based on a physical injury suffered as a result of that incident must be and is hereby denied.

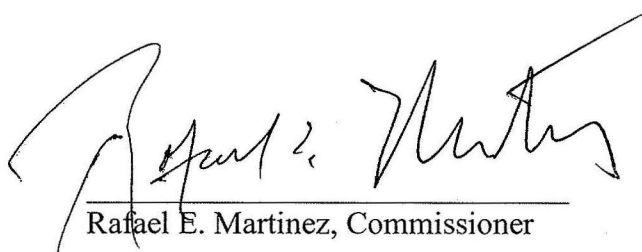
The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

SEP 23 2009



Mauricio J. Tamargo, 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) (2008).