

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-033

Decision No. LIB-I-046

Counsel for Claimant:

Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

Oral hearing held on November 17, 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 Lod Airport in Tel Aviv, Israel on May 30, 1972. By Proposed Decision entered April 7, 2011, the Commission denied claimant's claim on the ground that he had not met his burden of proving an injury sufficient to meet the Commission's standard for physical injury. Specifically, the Commission concluded that claimant's injuries, which he characterized as "severe permanently disabling psychiatric injuries," were not "physical injuries" as contemplated in 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"), and were therefore not compensable under that referral.

On May 3, 2011, the claimant filed a Notice of Objection and Request for Hearing, asserting various legal and factual errors in the Commission's Proposed Decision. The oral hearing was initially scheduled for July 29, 2011, but was postponed at claimant's request. On October 27, 2011, the claimant submitted a hearing brief containing further evidence and argument in support of his objection. The brief was accompanied by several color photographs of claimant's left elbow which purport to depict scars resulting from shrapnel injuries sustained during the Lod Airport terrorist attack, and a medical report from an examination of claimant on September 9, 2011. The hearing on the objection was held on November 17, 2011.

In his objection brief and during the hearing, counsel for the claimant argued that: 1) the evidence submitted establishes that claimant suffered a physical injury in the Lod Airport attack which satisfies the Commission's standard; 2) claimant's psychiatric injuries were "accompanied by bodily injury and physical manifestations of injury" that satisfy the Commission's physical injury standard; 3) the Libya Claims Resolution Act ("LCRA") indicates an intent to provide compensation for claims based on psychiatric injury under the December Referral; 4) international law supports the idea that physical injury claims under the December Referral should encompass claims for "psychiatric injury with physical manifestations of injury accompanied by bodily injury"; and 5) to deny claimant compensation would violate the Takings Clause of the Fifth Amendment of the U.S. Constitution.

DISCUSSION

I. Claimant's Alleged Physical Injury

In its Proposed Decision in this claim, the Commission noted that in a Supplemental Statement to his initial claim filing, the claimant asserted “a purely psychiatric injury as a result of his experience at Lod Airport.” *Claim of*

5 U.S.C. §552(b)(6) Claim No. LIB-I-033, Decision No. LIB-I-046, at 4 (2011) (Proposed Decision). However, claimant argued in his objection that he did, in fact, suffer a purely physical injury (as well as the psychiatric injury also claimed) and that the evidence, including the supplemental evidence filed with his objection, establishes an injury that meets the Commission’s standard. Specifically, claimant asserts that he suffered shrapnel wounds to his left arm, resulting in “long deep scars” that are visible to the present day. As evidence of these injuries, claimant draws the Commission’s attention to statements he made during a February 1978 psychiatric evaluation in which he recalled that a “grenade exploded near him and he was hit in the left thigh[.]”;¹ in addition, he “recalled falling down and injuring his left elbow.” Claimant also references the report of a separate psychiatric evaluation, prepared the same day, in which “[s]hrapnel scars were noted in the left elbow[.]” and in which claimant recalled “how he felt something hit his left arm” during the attack.

As further evidence of his physical injuries, claimant has submitted, as noted above, several photographs of the alleged shrapnel scars on his left elbow, taken in October 2011, and the results of a September 2011 medical evaluation conducted by Alberto Folch, M.D., a general medicine practitioner in Puerto Rico. According to

¹ In his objection brief, claimant acknowledges that he has no medical records documenting the alleged injury to his thigh. Moreover, Dr. Folch makes no mention of scars on either of claimant’s thighs during his 2011 physical examination. *See infra*.

claimant, this report “conclusively links [his] elbow injuries to the Lod Airport Massacre.” In particular, claimant notes Dr. Folch’s observation that claimant has “Two (2) irregular wounds” on his left elbow—“One (1) medial Prone Position One (1) external”—and that, “[d]ue to the irregularity of wounds, the wound must have been provoked by shrapnel.” Dr. Folch states in his report that

I am also able to determine this because I traveled to Tel Aviv in 1972 soon after the attack at Lod Airport with the father of a badly injured person . . . I also treated various victims of the massacre in the years following the attack and am familiar with these types of shrapnel wounds.

Notwithstanding the statements in Dr. Folch’s report, and the obvious scarring on claimant’s elbow, the Commission is unable to conclude that the scars were the result of an injury sustained during the Lod Airport attack,² or that, even assuming that they were, the injury satisfies the Commission’s standard for physical injury claims.³ There is no evidence—other than claimant’s own statements—that he ever received any treatment for a physical injury resulting from the attack.

Claimant argues that evidence of medical treatment for his physical injuries is contained in statements he made to physicians in the years following the incident. In particular, claimant notes the statement contained in the report of a 1978 psychiatric evaluation with José R. Vigoreaux, M.D., in which claimant “recalls being taken outside on a stretcher and into a tent; injected, given pills by mouth and put in an ambulance, which rushed him to a hospital. At the hospital they examined him and treated his

² As to the possibility that there might be other sources of claimant’s arm scarring, the evidence submitted indicates that the claimant was a metal worker (“tin man”) by trade, and operated a “tin shop for repair of automobiles.” Moreover, although Dr. Folch opines that the scarring was the result of shrapnel wounds, there is no indication that he personally treated claimant or even witnessed any treatment administered to him in the aftermath of the attack.

³ In this regard, the Commission notes that in this program, it has denied a number claims for compensation for shrapnel wounds that did not meet the Commission’s standard for physical injury where, as here, there was no evidence that the wounds were more than superficial.

wounds and afterwards sent him to the hotel.” Claimant notes that a similar description of his treatment following the attack is contained in Dr. Folch’s 2011 report. Claimant acknowledges that he is unable to provide contemporaneous medical records; however, he asserts that the statements made to his treating physicians provide sufficient evidence that he received medical treatment for his alleged physical injury within a reasonable time.

Even if claimant’s descriptions of his alleged medical treatment are true, they still fail to support a finding that he suffered a discernible, non-superficial physical injury for which he received medical treatment within a reasonable time. The alleged injection and pills which he was given following the attack are not alleged to relate to a discernible physical injury, and his statements contain no hint as to what treatment he may have received in Israel. Significantly, claimant’s disability determination from the Israeli National Insurance Institute, dated May 30, 1975, indicates that a claim was made only for “[p]sychiatric disorders.” The disability period covered by the report extends from May 31, 1972 to May 29, 1974; no mention is made either of physical injuries or treatment thereof.

Finally, although claimant, through counsel, argues that his statements regarding his physical injuries and subsequent treatment have been consistent, a review of the documents in the file suggests otherwise. In his 1978 evaluation with Dr. Vigoreaux, claimant stated, as noted above, that grenade shrapnel hit his *left* thigh and he fell and injured his left elbow. However, in that same evaluation, claimant was asked about his physical injuries, and he stated that “he has a scar in *right* thigh due to grenade wounds, also bruises, in left elbow upon falling down (emphasis added).” There is no mention of

a grenade wound to the elbow. It is also significant that, in Dr. Folch's 2011 evaluation, no mention is made of scars on claimant's lower extremities, and Dr. Folch specifically notes, as to claimant's left hip, that that are "no visible scars or deformities."

The Commission further notes that, according to three different psychiatric reports from the 1970s, claimant's recall of the events at Lod Airport was somewhat unreliable. During an October 1972 evaluation, it was noted that "[claimant's] judgment is poor. His memory likewise, and although the patient roughly remembers things, he cannot give specific details about anything." Similarly, in a 1975 evaluation, it was noted that "patient's wife helps him in many of the details of the history because he does not remember certain things." In addition, an examining psychiatrist in 1976 noted that "[claimant's] memory for recent events is poor and his memory for remote events is fragmented." Given these variations and inconsistencies, claimant's statements concerning the night of the incident cannot be considered to accurately detail the nature, severity, and treatment of his alleged physical injuries.

Claimant asserts that the Commission has previously issued awards in claims without contemporaneous medical records, and argues that the Commission should similarly not deny this claim for lack of such records. However, the two decisions cited by claimant do little to support his position. In one claim, the claimant presented medical records from three months after the incident, evidencing the presence of shrapnel in claimant's body. Claim No. LIB-II-091, Decision No. LIB-II-054 (2011). A more recent radiological report confirmed the presence of these fragments, and two sworn statements from witnesses confirmed claimant's injury. *Id.* In the other claim, contrary to the claimant's suggestion here, contemporaneous medical records were provided, and the

injuries described therein were corroborated by more recent medical records. Claim No. LIB-II-100, Decision No. LIB-II-070 (2011). Here, claimant has provided neither contemporaneous medical records, nor more recent medical records, that verify the extent and treatment of the physical injuries he is said to have sustained in the Lod Airport attack. With regard to the Lod Airport attack in particular, notwithstanding the passage of time, other claimants have been particularly successful in obtaining relevant evidence to support claims for physical injury; claimant has offered no explanation as to why he has been unable to secure such evidence.

In sum, the Commission concludes that, with regard to the alleged shrapnel wounds to his elbow, claimant has not proven that he suffered a discernible, non-superficial physical injury for which he received medical treatment within a reasonable time, and for which he has been able to provide medical records.

II. Psychiatric Injuries Accompanied by Bodily Injury and Physical Manifestations of Injury

Claimant argues, alternatively, that, as a result of the Lod Airport incident, he has suffered from “severe and permanent psychiatric injuries,” including “chronic psychotic depression and anxiety,” and that such injuries should be compensable as physical injuries under the December Referral. Specifically, claimant asserts that “it is well-recognized in the scientific and medical communities that psychiatric injuries . . . constitute a trauma to the brain in that they alter the brain’s chemistry and functioning and are thus ‘physical.’” Therefore, as claimant’s counsel argued during the oral hearing, the Commission should consider whether there is “such [an] extreme psychiatric condition where you have physical manifestation of injury accompanied by bodily injury

to [claimant's] elbow[.]" that the alleged psychiatric injury should itself be compensable as a "physical injury."

As evidence of the physical nature of his alleged psychiatric injuries, claimant notes—citing his various psychiatric evaluations—that he has suffered from “auditory hallucinations and reduction in cognitive reasoning[.]” as well as a “coarse rapid tremor of the left hand” and heart palpitations, which he attributes to his “chronic psychotic depression and anxiety.”⁴ Moreover, he states that “those doctors who have treated [him] have all concluded that his injuries were spurred by the Lod Airport massacre.” In particular, claimant cites Dr. Folch’s 2011 report, which includes a diagnosis of “Psychotic depressive reaction, chronic severe[.]” coupled with the conclusion that “[he] agree[s] . . . that^{5 U.S.C. §552(b)} condition is a result of the Lod Airport attack.” Claimant also emphasizes the following statement from the same report: “[t]hirty-nine years past [Cantres Melendez] remains in the same mental attitude probably worsened due to his age where physiological brain changes[,] small vessel arterial irrigation is diminished.”

As a threshold matter, even if the Commission were to accept the claimant’s theory, the claimant has not presented *any* medical evidence documenting an actual change in his brain structure as a result of the Lod Airport incident. On this basis alone, the claim must be dismissed.

Moreover, the source of the psychiatric condition asserted has not been established. A 1978 medical report contains details regarding a 1963 psychotic episode, and remarks that “[t]here is some suggestion of psychiatric illness immediately preceding his trip to Israel.” Thus, even if the Commission were to treat psychiatric injury as a

⁴ In his report, Dr. Folch acknowledges that “I am not a psychiatrist,” although he does indicate that “in [his] practice [he has] focused on all aspects of general medicine, including the diagnosis and treatment of psychiatric conditions.”

“physical injury,” it is unclear to what extent the claimant’s symptoms following the Lod Airport incident were in fact the result of that attack.

In any event, as the Commission explained in its Proposed Decision, the plain language of the December Referral limits compensation to claims of “physical injury.” *Claim of* 5 U.S.C. §552(b)(6) *supra*, at 10. The term “physical injury” also appears in the LCRA (which required certification of sufficient funds in any Libya settlement to compensate for “wrongful death or physical injury”), as well as the *Letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate* (July 28, 2008) (“Negroponte Letter”), which repeatedly references the State Department’s intent to provide compensation for “wrongful death or physical injury” claims.⁵ The Commission also finds noteworthy the requirement in the December Referral that “the claim [be] set forth as a claim for injury other than emotional distress alone” December Referral, *supra*, ¶ 3.

In light of the above, and contrary to claimant’s arguments, it is clear that Congress and the Secretary of State intended to limit claims under the December Referral to those for “physical injury,” implying a clear distinction between physical and mental injuries, and providing compensation only for the former. Against this backdrop, the Commission notes that to compensate for psychiatric injuries would effectively erase the distinction between physical and mental injuries, allowing claimants to circumvent the intent of Congress and the State Department as expressed in the December Referral and

⁵ The Negroponte Letter states, in part, the following: “The other pending terrorism cases against Libya by U.S. nationals for wrongful death or *physical injury* are listed in . . . this letter. . . . In determining whether the funds are adequate . . . we intend to require amounts sufficient so that these claimants are guaranteed compensation comparable to what we understand was provided for *physical injuries* in the LaBelle Discotheque settlement . . . without requiring U.S. claimants for wrongful death or *physical injury* to prove liability by Libya or individual economic damages.” (emphasis added).

the LCRA. Whatever interconnectedness may exist between physical and mental injuries, the Commission must adhere to the language of the December Referral. The Commission therefore rejects claimant's argument that his psychiatric injuries, or the physical manifestations of his psychiatric injuries, are compensable as "physical injuries" under the December Referral.

III. Psychiatric Injury Under International Law

Claimant next argues that applicable principles of international law support a broader reading of the term "physical injury" which encompasses claims for purely psychiatric injury. In particular, claimant refers to mostly domestic jurisprudence on the interpretation of the term "bodily injury" found in Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].⁶ According to claimant, that jurisprudence supports an interpretation of "bodily injury" to include psychological injury. Claimant goes on to assert that "[b]ecause 'Bodily,' is a synonym for 'physical,' he respectfully submits that the Warsaw Convention is especially relevant to the Commission's consideration."

The decisions cited by claimant largely focus on the intent of the drafters and the negotiating history in determining whether psychiatric injuries are compensable as "bodily injury" under Article 17 of the Warsaw Convention. Claimant appears to argue

⁶ The English translation of Article 17, as employed by the Senate upon offering its advice and consent to the Convention in 1934, reads as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, art. 17, *supra*, 49 Stat. at 3018.

that the Commission should adopt a similar analytical approach in its interpretation of “physical injury” under the December Referral. However, even if the Commission were to adopt the analysis employed in the cases cited, such an approach would serve only to reinforce the conclusion in the Proposed Decision. As discussed above, the December Referral, the LCRA, and the Negroponte Letter all make clear that only claims for “physical” injury should be compensable under the December Referral. Thus, claimant’s citations to cases interpreting the Warsaw Convention do not appear to support an alternative reading of the term “physical injury” in the December Referral.


IV. Takings Clause Under the Fifth Amendment

Finally, claimant argues that “denying Claimant Cantres Melendez fair compensation under the December referral letter constitutes a taking under Fifth Amendment’s takings clause.” As the Commission has recently held, however, consideration of constitutional issues is outside the scope of the Department of State’s referral to the Commission. Claim No. LIB-I-005, Decision No. LIB-I-014, at 5 (2010) (Final Decision). Accordingly, this portion of the claimant’s objection is also rejected.

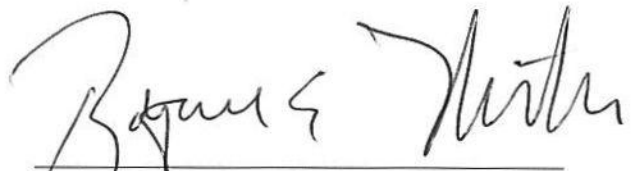
CONCLUSION

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.⁷ Accordingly, while the Commission sympathizes with the claimant, 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, December 15, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

⁷ 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).

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Decision No. LIB-I-046

Counsel for Claimant:

Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by ^{5 U.S.C. §552(b)(6)} at Lod Airport in Tel Aviv, Israel on May 30, 1972. ^{5 U.S.C. §552(b)(6)}

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, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication a category of claims of U.S. nationals against Libya. *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 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 this 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 July 6, 2009, the Commission received from claimant a completed Statement of Claim and accompanying exhibits supporting the claim, including evidence of: his United States nationality; his inclusion as a named party in the complaint filed in *Franqui v. Socialist People's Libyan Arab Jamahiriya*, 06-cv-734 (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 *Franqui* case; and the claimant's injuries.

The claimant, ^{5 U.S.C. §552(b)(6)}, states that he was present in the terminal at Lod Airport in Tel Aviv, Israel on May 30, 1972, when three terrorists armed with automatic rifles began shooting and throwing hand grenades at passengers gathered in the baggage claim area. According to the Statement of Claim and accompanying exhibits, the claimant sustained "severe permanently disabling psychiatric injuries," for which he has undergone extensive treatment in the years since the incident. The claim is unclear, however, as to whether or not the claimant sustained any physical injury during the attack; while certain documents suggest that the claimant sustained a shrapnel wound

to the thigh, other documents make no mention of such an injury. The supplemental statement asserts “a purely psychiatric injury as a result of his experience at the Lod Airport massacre.” 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 medical records; newspaper clippings; various records from the Department for Hostile Action Casualties of the Israeli National Insurance Institute; copies of several articles and various medical texts discussing mental health, particularly in the context of combat and terror incidents; and other documents in support of his claim.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction 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 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 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, First Amended Complaint, and a docket history for Case No. 06-cv-734 (D.D.C.), filed in the United States District Court for the District of Columbia. According to the docket history, the plaintiffs filed a Plaintiffs' Notice of Dismissal with Prejudice on December 31, 2008, and the case was ordered dismissed on January 6, 2009. 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 that the claimant asserts in the amended complaint in the Pending Litigation that he was "injured" in the Lod Airport attack. In addition, the Commission notes that the claimant states causes of action for, *inter alia*, battery, assault, and false imprisonment under Counts I, II, and III of the

complaint. The Commission therefore 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, ^{5 U.S.C. §552(b)(6)} suffered injuries on May 30, 1972 when, as discussed above, three gunmen attacked passengers waiting in the baggage claim area at Lod Airport in Tel Aviv, Israel. Claimant states that

one of the grenades tossed by the terrorists exploded directly adjacent to him, resulting in shrapnel injuries to his left leg and an injury to his elbow when he fell to the ground. The claimant describes how he witnessed people around him bleeding and screaming before he lost consciousness and was taken on a stretcher to a tent outside the airport terminal. He states that he eventually regained consciousness and was given an injection and some tablets before being transported to a hospital.¹ Shortly thereafter, according to the claimant, he returned to his hotel, where he remained for between three to five days before flying home to Puerto Rico.

Documentation provided by the claimant indicates that, upon arriving in Puerto Rico, he was transported from the airport in a wheelchair and taken to the Doctor's Center, a local hospital in the town of Manatí, his place of residence. There, on June 6, 1972, Antonio Abreu, M.D., determined that claimant suffered from anxiety and psychoneurosis, and began treating him for this condition. This treatment continued through at least March 21, 1973. Claimant was treated by a different psychiatrist, Guillermo Santiago, M.D., from October 30, 1972, through at least February 3, 1976; Dr. Santiago concluded that claimant suffered from depressive psychosis. Two other psychiatrists, José R. Vigoreaux, M.D. and Mortimer F. Shapiro, M.D., conducted evaluations of claimant in the years following the incident. They concluded, in their

¹ The Commission notes, however, that there is some question as to whether claimant did, in fact, receive any medical treatment at an Israeli hospital immediately following the incident. Approximately six years after the incident, in a February 6, 1978 psychiatric evaluation prepared by Jose R. Vigoreaux, M.D., claimant was quoted as saying that he was "rushed to a hospital" after being given tablets and an injection at the airport, and that "[a]fter observation and treatment of the wounds, he was sent to the hotel." However, in a separate psychiatric evaluation prepared by Mortimer F. Shapiro, M.D. on the same date, claimant was quoted as having stated that, following the incident, "[h]e was not hospitalized and returned to the hotel." Both of these evaluations indicate that, according to the claimant, he remained in Tel Aviv for between three to five days before flying home to Puerto Rico; however, there is no evidence anywhere in the file, other than claimant's statements to Dr. Vigoreaux, that he received medical treatment at any hospital in Israel.

previously cited written findings, both dated February 6, 1978, that claimant suffered from psychotic depressive reaction. Additionally, according to an affidavit from claimant's family physician, dated December 21, 2009, claimant continues to suffer from "major depression, anxiety disorder, elevated blood pressure and hypothyroidism." Apart from a brief mention of shrapnel scars on claimant's elbow noted by Dr. Shapiro,² none of the above-referenced evaluations references any physical injuries that claimant may have suffered from the Lod Airport attack.³

As evidence of his contention that he sustained physical injuries, claimant has also submitted documents previously provided to the Israeli National Insurance Institute, Department for the Victims of Hostile Actions. These documents indicate that claimant received benefits from 1972 through at least 1976, with a finding of 100% disability,⁴ as a result of injuries sustained during the Lod Airport attack. However, these same documents indicate that claimant filed his claim only for injuries related to "psychiatric disorders." That department's medical committee, on April 13, 1976, noted that claimant complained of "[d]epression, hallucinations, falling . . . no ability to work, tension and unrest[.]" and, as with claimant's other treating psychiatrists, made a diagnosis of psychotic depression, noting that his condition was "permanent and final." As with the psychiatrists' findings, there was no mention of physical injuries suffered during the 1972 incident.

² Dr. Shapiro also conducted a clinical neurologic examination on claimant, describing the results as "normal."

³ Asked by Dr. Vigoreaux about any physical injuries, claimant stated that he had a scar on his thigh from a grenade wound; however, claimant has presented no medical records or other evidence to either verify this injury or establish any causal link with the Lod Airport attack.

⁴ The exact word used, appearing in English in the original document, is "invalidity," although its usage in context appears to be what would normally be considered "disability."

In a supplemental brief filed with his claim, counsel for claimant contends that psychiatric injuries, such as those suffered by claimant, “alter the brain’s chemistry and functioning and are thus ‘physical.’” For this reason, counsel argues that claimant’s psychiatric injuries merit compensation as a physical injury under the December Referral Letter. In support of this contention, he has submitted excerpts from several scholarly journals and other publications discussing the physical manifestations of psychiatric injury, and vice versa, as well as the heightened risk of mental disorders among those exposed to highly traumatic experiences such as combat or terrorist attacks. Counsel also points to the fact that his client received compensation from the Israeli government, and argues that the Commission should also compensate him for his emotional injuries. He further notes that the Commission has, in a previous program, provided compensation for psychiatric injuries. *See Claim of JANE HANNAH EVANS and DAVID M. HANNAH*, Claim Nos. W-5895 and W-8448, Decision No. 21484 (1967).

Claimant’s reliance on compensation from the Israeli National Insurance Institute as evidence that he suffered a physical injury is misplaced. As noted above, the claimant filed for compensation in that program only for psychiatric injury, and there is no indication in the records of the medical committee that purely emotional injuries were not compensable. Similarly, in the *Claim of JANE HANNAH EVANS and DAVID M. HANNAH, supra*, the claim was made under Section 202(d)(2), Title II of the War Claims Act of 1948, which provided compensation for individuals who had suffered “*injury or permanent disability* sustained . . . as a result of military action by Germany or Japan” *Id.* at 2, 5 (emphasis added). Because neither of these programs was limited to *physical* injury, they are not instructive here.

The Commission recognizes the evidence indicating that claimant has, for many years, suffered from a debilitating psychiatric condition that may have been precipitated or aggravated by the Lod Airport attack. However, under the December Referral Letter, the Commission may only provide compensation for claims for physical injury. This specific reference to compensation for “physical injury” claims, and not “personal injury” claims more broadly, makes clear that the Secretary of State drew a clear distinction between physical and mental injuries, and opted to provide compensation only for the former under this referral. Thus, regardless of claimant’s submissions, the December Referral Letter contemplates a distinction between the two types of injuries and precludes the Commission from compensating for anything other than physical injuries. For the Commission to do otherwise would render the term “physical injury” (as opposed to “personal injury”) effectively meaningless.⁵

Moreover, insofar as the Commission is directed to apply “applicable principles of international law” in deciding the claims before it, *see* 22 U.S.C. § 1623(a)(2) (2006), the Commission notes that the distinction between physical and mental injuries is well-established in both international conventions⁶ and decisions of international tribunals⁷.

⁵ That the term “physical injury” was intended to have a specific meaning is clear from the fact that the Referral Letter suggests that passage of the LCRA was predicated on assurances made to Congress that *physical injury* claimants would receive compensation comparable to the amount provided for *physical injuries* in the private settlement made by the Libyan government with victims of the 1986 Labelle Discotheque terrorist attack in Berlin, Germany.

⁶ *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, at 3-5, 19, 1465 U.N.T.S. 85; Rome Statute of the International Criminal Court, arts. 6, 7, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, *entry into force* Jan. 12, 1951, Sen. Exec. Doc. 81-O, 78 U.N.T.S. 277.

⁷ *See, e.g.*, Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 492-494 & n.454, ¶¶ 501-501 (citing, *inter alia*, Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 291); Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶ 746 (citing Prosecutor v. Delalic (“The Čelebići case”), Case No. IT-96-21-A, Judgment, ¶¶ 424, 426); Prosecutor v. Bagosora, ICTR-98-41-T, Decision on Motions for Judgment of Acquittal, ¶ 34 & n.77; South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 253 (July 18).

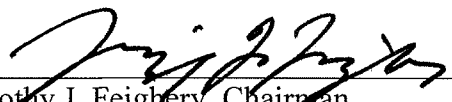
Based on the evidence and information submitted in this claim, and for the reasons set forth above, the Commission finds that the claimant has not met his burden of proof in this claim in that he has not satisfied the Commission's standard for physical injury.⁸

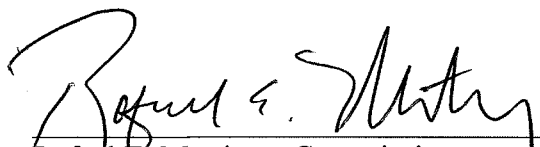
Accordingly, while the Commission recognizes the terror that claimant and the other victims of the Lod Airport massacre undoubtedly experienced during the attack, and the effect the incident may have had on claimant's long-term mental well-being, the Commission is constrained to conclude that his claim is not compensable under December Referral Letter. Therefore, this claim must be, and hereby is, 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.

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).

⁸ 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).