

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-042

Decision No. LIB-I-048

Counsel for Claimant:

Majed Dakak, Esq.
Blecher & Collins, P.C.

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) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986. Specifically, claimant asserted that as a result of her proximity to grenade blasts and gun-fire during the hijacking she suffered damage to her ability to hear. 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 April 7, 2011, the Commission denied the claimant's physical injury claim on the ground that the claimant had failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for physical injury. Specifically, the Commission determined that

the claimant failed to establish that she sought medical treatment for her injuries within a reasonable time as required under the Commission's physical injury standard.

On April 29, 2011, the claimant filed a "Notice of Objection to Proposed Decision and Request for Oral Hearing." On October 24, 2011, the claimant submitted an objection brief containing further evidence and argument in support of her objection. The brief was accompanied by, among other documents, the sworn statements of a Mr. Massey Casper and a Dr. Prakash Katakia. The hearing on the objection was held on November 17, 2011.

Counsel for the claimant argued, in the objection brief and during the hearing, that the evidence claimant had previously submitted in support of her asserted injury — consisting largely of the claimant's own deposition testimony from a 1987 court proceeding, and the testimony of a physician who examined her in 2010— was sufficient to satisfy the Commission's standard. However, counsel, in further support of the objection, also submitted newly-discovered evidence regarding the medical treatment of claimant following the attack. Further, in response to questions raised by the Commission during the oral hearing, claimant's counsel submitted a post-hearing submission on December 15, 2011, which included additional medical evidence further explaining, and supporting, the nature and extent of claimant's injury.

DISCUSSION

As noted above, the Commission denied this claim because claimant failed to establish that she sought medical treatment for her injuries within a reasonable time. In response, claimant has submitted new evidence including, *inter alia*, a sworn statement of Mr. Massey Casper —the flight attendant on Pan Am Flight 73 responsible for oversight of the claimant due to the fact that she was an unaccompanied minor; the sworn statement of Dr. Katakia who allegedly treated claimant after the attack; several medical records

pertaining to treatments received by claimant from 1976 through 1993; a medical opinion dated September 2, 2011 from Dr. Djalilian confirming his opinion dated December 21, 2010, based on his review of the newly-discovered records; the full transcript of a deposition taken of claimant in 1987 as part of her lawsuit against Pan American Airways regarding the injuries claimed herein; and evidence of the efforts employed by both claimant and claimant's counsel to obtain further medical records. In addition, claimant provided a post-hearing submission which includes an assertion by her that based on the audiometric test conducted on June 4, 2010, she has suffered a monaural impairment to her hearing of approximately 20.6%, based the American Medical Association guidelines*. In addition to the supplemental evidence and argument submitted, the claimant herself testified at the oral hearing.

The claimant provided credible testimony at the hearing, describing in detail the ordeal that she and the other passengers endured. Specifically, claimant testified that after the shooting began, but before she escaped from the airplane she experienced "a discrete pain like something went into [her] ear," and her "hearing was muffled." She further testified that a doctor had come to the hotel where she was staying, but that she was not examined by him at that time because when she asked Mr. Casper if she "could tell him about her ear," she recalls that he said "if it still hurts tomorrow we can tell the doctor." In addition, she testified that upon returning to Bombay she saw a doctor who gave her eardrops for the pain in her ears and that upon returning to the United States her mother made her own drops which claimant continued to use "for a while."

The medical records pertaining to treatments received by claimant from 1976 through 1993 are incomplete. However, the Commission notes that prior to the attack

* American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition.

claimant does not appear to have suffered from ear pain, with the exception of a few normal childhood infections. In his sworn statement, Dr. Katakia stated that when he examined claimant several days after the hijacking, he had concluded that claimant "had sustained some trauma to her ears," and loss of hearing. The medical records dating from 2001 to 2004 illustrate that the claimant was suffering ear and facial pain at that time, the cause of which was indeterminable. Further, those records indicate that magnetic resonance imaging of her brain and temporomandibular joint were performed to rule out causes of claimant's pain, such as brain lesions or joint disease. In addition, as a result of Dr. Djalilian's examination of the claimant on June 4, 2010, his review of the results of the hearing test conducted in his office on that date, and his review of her medical records, he determined that the claimant suffers from asymmetric hearing loss in her left ear, which condition is consistent with the trauma described by claimant.

Based on claimant's testimony corroborated by the medical records, the declarations of Dr. Katakia and Mr. Casper, and the 1987 deposition of claimant, the Commission finds that, as a result of claimant's proximity to grenade blasts and gun-fire during the hijacking, claimant suffered damage to her hearing for which she sought and received medical treatment in Bombay several days after the attack. Based on these findings the Commission concludes that the claimant has satisfied the Commission's standard for physical injury under the December Referral. Accordingly, the Commission now finds claimant entitled to compensation as set forth below.

COMPENSATION

In the *Claim of* 5 U.S.C. §552(b) ; Claim No. LIB-I-001, Decision No. LIB-I-001
(6)
(2009), the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission's standard in this claims program. The

Commission also held that compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. *Id.* Accordingly, the Commission determines that the claimant, 5 U.S.C. §552(b)(6), is entitled herein to an award of \$3,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

Therefore, the Commission withdraws its denial of the claimant's claim as set forth in the Proposed Decision, and issues an award as set forth below, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27. This constitutes the Commission's final determination in this claim.

AWARD

Claimant, 5 U.S.C. §552(b)(6), is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

Dated at Washington, DC, January 25, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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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.~~
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 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.

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), which, among other things, 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, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On July 22, 2009, the Commission received from claimant a completed Statement of Claim and accompanying exhibits supporting the elements of her claim, including evidence of: claimant's U.S. nationality; her inclusion as a named party in the complaint filed in *Patel, et al. v. Socialist People's Libyan Arab Jamahiriya*, 06-cv-626 (D.D.C.) (part of 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 *Patel*; and her physical injuries.

The claimant,⁵ U.S.C. §552(b)(6), states that when she was eleven years old, she was a passenger on Pan Am Flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. According to the Statement of Claim and accompanying exhibits, claimant suffered damage to her ears due to her close proximity to grenade

blasts and gun fire during the hijacking, which caused her to experience continuing ear pain and hearing loss. In support of her claim, the claimant has provided non-contemporaneous medical documentation, her sworn deposition taken in 1987 detailing her experience and injury, and a recent medical opinion based upon a review of the claimant's medical records. Claimant has also provided documentation from the Student Health Services organizations at two Universities indicating that additional medical records were unavailable.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined in the December Referral Letter; namely the claims of individuals who: (1) are U.S. nationals, (2) have been named as parties in a Pending Litigation 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 to meet the nationality requirement, 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 a copy of her U.S. passport as well as a sworn affidavit attesting to her continuous U.S. nationality. Based on this and other evidence in the record, the Commission finds that this claim was held by a U.S. national at the time of the injury upon which the claim is based and that it has been so held 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 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 her as a party. Additionally, the claimant has provided a Stipulation of Dismissal dated December 16, 2008, 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

Claimant has provided, with her Statement of Claim, a copy of the Second Amended Complaint in the Pending Litigation in which she states a cause of action for, *inter alia*, battery and assault under Counts VI and VII of the complaint. Based on this evidence, the Commission finds that the claimant set forth a claim for injury other than emotional distress alone in the Pending Litigation.

In summary, 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 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*, 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.

Id. at 8-9.

Physical Injury

The claimant has submitted several medical reports relating to treatment she has received for the ear pain which she has alleged was caused by her presence on

Pan Am Flight 73. The Commission notes, however, that the earliest record submitted is dated December 3, 2001, some 15 years after the incident. Furthermore, the Commission notes that even if the two universities, from which claimant has requested medical records, were able to produce such records, presumably they would have been generated some seven years after the incident. The claimant has not submitted any other documentary evidence which establishes that she sought medical treatment for her injuries within a reasonable time as required by the Commission's physical injury standard.

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).

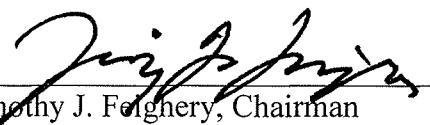
Based on the evidence and information submitted in support of claimant's asserted injuries, the Commission finds that the claimant has not met her burden of proof in this claim in that she has not satisfied the Commission's standard for physical injury.

In light of the foregoing, the Commission concludes that the claimant,^{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 she must have endured during the terrorist incident in question, her claim based on a physical injury suffered as a result of that incident must be and is hereby denied.

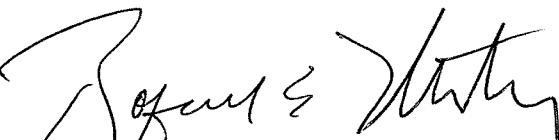
The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

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).