

Category D, that is, compensation beyond the \$3 million already awarded to her in this program for her injuries.

On July 9, 2012, the claimant filed a "Notice of Objection" and requested an oral hearing. By letter dated July 17, 2012 the Commission requested that claimant submit any additional evidence that she wished it to consider in support of her objection. In response, on October 22, 2012, claimant submitted, inter alia, a brief along with her own declaration and that of a co-worker, ^{5 U.S.C. §} , and medical _{552(b)(6)} records dating from 2000 through the present. The hearing on the objection was held on November 9, 2012.

DISCUSSION

Category D of the January Referral consists of:

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

January Referral at ¶ 6. As noted in the Commission's Proposed Decision, claimant satisfies the first and third requirements: she received an award under the December Referral for blast injuries to her ears, and her Pending Litigation against Libya had been dismissed prior to her submitting this claim. The only issue on objection, therefore, is whether the severity of claimant's injury is a special circumstance warranting additional compensation.

In her objection brief and during the oral hearing, claimant argued that the injuries to her ears meet the standard adopted by the Commission under Category D. At the oral hearing, claimant provided additional evidence about her injury. Claimant testified that she recalled experiencing ear pain and muffled hearing as a child for a few years after the hijacking incident, and that this pain was initially constant but diminished over time. At the present time, claimant stated that she experiences “cycles” of intermittent pain along with migraine headaches. She testified that her mother utilized home remedies to sooth claimant’s ear pain at night, that “any time [she] had any flu, cold, or body ache [her] left ear would be hurting,” and that she has sought out medical treatment but she has been unable to find a cure for the symptoms she experiences.

Claimant also testified about the effect her injuries have had on her major life functions. For example, claimant testified that she sometimes has difficulty sleeping because she “hears sounds...when it is very quiet” and, therefore, she uses background noise to sleep. Further, claimant testified that she experiences problems with balance, problems that render her unable to participate in certain activities such as snowboarding and bike riding. Additionally, claimant testified that she has difficulties hearing at work and sometimes has to leave work due to pain associated with her ears. Claimant stated that she fears these issues will affect her future employment.

Claimant’s counsel noted at the oral hearing that Dr. Djallilian’s report indicates that the degree of claimant’s hearing loss results in her brain essentially not using the left ear to hear. Furthermore, counsel emphasized that if the claimant’s balance issues continue to get worse, “she will be limited in every major life activity.”

In his declaration, 5 U.S.C. § 552(b)(6) stated that he has noticed that claimant seems distracted and unable to focus at times and seems to be off balance when walking. Further, 5 U.S.C. § 552(b)(6) stated that claimant told him that she suffers from frequent migraine headaches and has trouble sleeping.

The recently submitted medical evidence consists of medical records created in the course of claimant's treatment for various injuries to her feet. Both in her objection brief and during the oral hearing, claimant argued that these records "demonstrate that [she] becomes disoriented at times and suffers severe injuries to other body parts as a result of the symptoms associated with her ear injuries."

Analysis

Category D of the January Referral requires the Commission to determine whether the "severity of the injury is a special circumstance warranting additional compensation." January Referral, ¶6. In *Claim of* 5 U.S.C. § 552(b)(6), Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), the Commission held that only the most severe injuries would constitute such a "special circumstance." In assessing whether compensation is warranted in this claim, the Commission considers the factors articulated in its decision in 5 U.S.C. § 552(b)(6). These factors, assessed in light of the totality of the evidence, include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions.

The first factor is the nature and extent of the injury. In its Proposed Decision, the Commission stated that the nature of claimant's injury "has not required significant medical care such as hospitalization, physical therapy or extended care." The only new evidence submitted by claimant on this point consists of medical records related to foot

injuries she has recently suffered. These medical records, however, fail to establish a nexus between the injury to claimant's ear in 1986 and these recent (2012) foot injuries.

The second factor is the extent (if any) of physical disfigurement. The Commission stated in its Proposed Decision that "claimant alleges no physical disfigurement of any kind." In her objection, the claimant has not submitted any additional evidence on this point.

Finally, the claimant asserted that the consequences of her injuries have significantly interfered with her major life functions. The Proposed Decision concluded that none of the problems associated with claimant's hearing loss were severe enough to put her in the category of those claimants with the "most severe" injuries. None of the new evidence changes that conclusion. Claimant's hearing testimony and declaration, along with 5 U.S.C. § 552(b)(6) declaration, simply reiterate facts that the Commission took into account in the Proposed Decision; this evidence does not change anything about the *severity* of claimant's injuries and their impact on her major life functions. Moreover, as noted above, claimant's medical records (the only other evidence) involve recent foot injuries that have not been shown to be connected to her ear injuries.

Accordingly, the Commission reiterates its conclusion that claimant's injury is not sufficiently severe to warrant an award of compensation under Category D in addition to the \$3 million that has been awarded to her for this injury in this program.

CONCLUSION

For the reasons set forth above, the Commission concludes that 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.

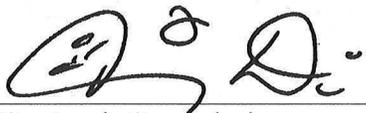
Dated at Washington, DC, January 8, 2013
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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-II-177
Against the Great Socialist People's Libyan Arab Jamahiriya	}	Decision No. LIB-II-168
Counsel for Claimant:	}	Majed Dakak, Esq. Blecher & Collins, P.C.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is 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.

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 January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral").

The present claim is made under Categories A and D. According to the January Referral, Category A consists of

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to [the Secretary of State's] referral of December 11, 2008.

Id. at ¶ 3. Category D of the January Referral consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 6. Attachment 1 to the January Referral Letter lists the lawsuits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter ("December Referral") from the State Department, 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 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and 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 President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 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 July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

By Proposed Decision entered on April 7, 2011, the Commission denied the claimant's physical injury claim submitted pursuant to the December 2008 Referral. The claimant objected to the Commission's decision and requested an oral hearing which was held on November 17, 2011. Having considered the evidence submitted in support of her objection, as well as the claimant's own testimony during the oral

hearing, the Commission found that the injury to claimant's hearing met the Commission's standard for physical injury and, consequently, determined that the claimant was entitled to compensation in the amount of \$3 million. *Claim of* ^{5 U.S.C. §552(b)(6)}
, Claim No. LIB-I-042, Decision No. LIB-I-048 (2012). The Commission issued its Final Decision in the claim to this effect on January 25, 2012.

BASIS OF THE PRESENT CLAIM

On July 8, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts claims under Categories A and D of the January Referral together with exhibits supporting the elements of her claim, including evidence of her U.S. nationality and the extent of her injury. In support of her claim for additional compensation, claimant submitted a letter dated May 1, 2012, from a Dr. Djalilian describing the symptoms suffered by her and the effects such symptoms have on her everyday life. This evidence is supplemented by that submitted in support of claimant's December Referral claim which includes the claimant's statement, medical records, and medical opinions.

DISCUSSION

Category A Claim

As noted above, the Commission made an award to the claimant in the amount of \$3 million for her December Referral claim of physical injury. The language of the January Referral provides that in order for a claim to be included under Category A the claimant must establish that he or she "did not receive an award pursuant to [the Secretary of State's] referral of December 11, 2008." By the Commission's Decision

dated January 25, 2012, the claimant has in fact received an award under the December Referral. Thus, the claimant is unable to meet this critical element of Category A. Accordingly, the Commission concludes that this claim for compensation under Category A of the January Referral must be, and hereby is, denied.¹

Category D Claim

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited, under Category D of the January Referral, to claims of individuals who: (1) are U.S. nationals; (2) received an award under the December Referral; and (3) have dismissed their respective Pending Litigation cases against Libya. January Referral, *supra*, ¶ 6.

Nationality

The Commission determined in its decision on claimant's physical injury claim under the December Referral that the claim was owned by a U.S. national from the date of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies equally to satisfy the nationality requirement here.

Award Under the December Referral

To fall within Category D of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the

¹ Claimant filed her Category A claim in July 2010 in order to comply with the Commission's deadline for filing such claims. This was prior to the Commission's January 2012 determination of her December Referral claim. Thus, at the time claimant filed her Category A claim, she did not yet know whether the clear language of the January Referral would have rendered her ineligible for a Category A claim.

Commission awarded the claimant \$3 million based on her physical injury claim under the December Referral. Accordingly, the Commission determines that the claimant has satisfied this element of her Category D claim.

Dismissal of the Pending Litigation

The January Referral also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 6. The Commission determined in its decision on claimant's physical injury claim under the December Referral that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya, et al.*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination applies here.

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

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether "the severity of the injury is a special circumstance warranting additional compensation." In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D. The Commission further held that in determining which injuries are among the most severe, it would consider the nature and extent of

the injury itself, the impact that the injury has had on claimant's ability to perform major life functions and activities—both on a temporary and on a permanent basis—and the degree to which claimant's injury has disfigured his or her outward appearance.

For each Category D claim that is before the Commission, the present claim included, claimants have been requested to provide “any and all” medical and other evidence to establish “the extent to which there is permanent scarring or disfigurement that resulted from the physical injuries suffered; and/or the extent to which the severity of the injury substantially limits one or more of the claimant's major life activities.”

The crux of claimant's Category D claim is that the injury she suffered to her hearing—known as “noise-induced hearing loss” (or “NIHL”)—and the tinnitus and ear pain associated with it are sufficiently severe to warrant an award of additional compensation beyond the \$3 million she received for her claim under the December Referral. In support of this claim, claimant has submitted, among other documents, a letter dated May 1, 2012, from Dr. Djalilian describing the symptoms suffered by claimant and the effects such symptoms have on her everyday life; audiometric results relating to hearing tests conducted on June 4, 2010; several medical records pertaining to various medical treatments received by claimant from 1976 through 2004; and the sworn statement of a Dr. Katakia, who allegedly treated claimant after the attack in 1986.

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

1986 attack, 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, a condition that is consistent with the trauma described by claimant. In Dr. Djalilian’s letter dated May 1, 2012, he asserts that claimant “has a constant ringing in her ears...constant pain in her left ear and head...difficulty hearing in many everyday situations...[and] severe motion sickness.” He further states that “[t]he difference in the inner ear balance function...affected [claimant’s] balance” and, therefore, “[s]he is unable to walk up or down stairs without holding to the railing...has difficulty walking in supermarket aisles without holding onto the cart...[and] difficulty walking in the dark.”

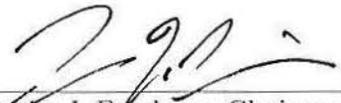
In assessing this evidence, the Commission considers the factors articulated in its decision in ^{5 U.S.C.} §552(b)(6) including the nature of the injury; the extent (if any) of physical disfigurement; and the effect on the claimant’s major life functions. First, the

nature of the physical injury—consisting of damage to her ear resulting in hearing loss—has not required significant medical care such as hospitalization, physical therapy or extended care. Further, claimant alleges no physical disfigurement of any kind. Moreover, she has not established that she is substantially limited from engaging in any of her major life activities. As described above, Dr. Djalilian noted that, in addition to claimant’s difficulty in hearing, she also suffers both motion sickness and balance-related issues due to the difference in the inner-ear balance function between her two ears. However, none of the problems associated with the loss of hearing (difficulty localizing sounds; frustration others feel when claimant cannot hear them from her left side), the inner-ear balance function (walking up or down stairs without holding onto the rail; walking in the dark) or the motion sickness (avoiding boats or the back seats of cars) are severe enough to put her in the category of those claimants with the “most severe” physical injuries.

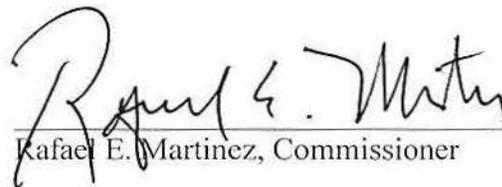
Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D, beyond its award of \$3 million under the December Referral.

Accordingly, this claim must be and is hereby denied.

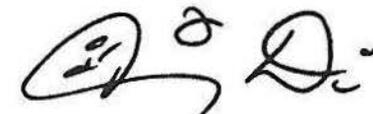
Dated at Washington, DC, June 5, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, 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) (2011).