

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-II-193

Decision No. LIB-II-148

Counsel for Claimant:

Elizabeth Smith, Esq.
Motley Rice LLC

ORDER AND AMENDED FINAL DECISION

This multi-part claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by 5 U.S.C. §552(b)(6) in connection with the September 5, 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan. The claim was originally brought under Categories A, B, and E of the *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").

By its Proposed Decision entered February 23, 2012, the Commission denied the claim on the grounds that claimant had failed to satisfy the requirement of continuous U.S. nationality; i.e., claimant failed to establish that she was a national of the United States continuously from the date the claim arose until the date of the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("CSA"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008.

However, for the sake of administrative efficiency, and considering the late stage of claims processing in the Libya Claims Program, the Commission also addressed the other elements of the claim. On this basis, the Commission also denied the claim on the grounds that 1) the claim was ineligible for adjudication on the merits under Categories A and B because claimant was not a party in the Pending Litigation; and 2) as to Category E, claimant had not met her burden of proving an injury sufficient to meet the Commission's physical injury standard.

Addressing the Category E claim, the Commission cited the lack of contemporaneous medical records or other evidence from the time of the incident and noted that the only medical records submitted were prepared after the filing of the claim. In addition, most of the conclusions in the recent medical records regarding causation appeared to derive from a single, recent affidavit from Dr. Ejaz Ahmad Vohra, a physician who allegedly treated claimant immediately after the incident; however, the Commission found that affidavit lacking in sufficient detail and credibility.

By letters dated March 9, 2012, and March 12, 2012, the claimant filed a notice of objection to the Commission's Proposed Decision on her Category E claim; no objections were made to the Commission's Proposed Decisions on her claims under Categories A and B. On October 4, 2012, claimant submitted an objection brief containing further evidence and argument, including evidence of her continuous U.S. nationality, as well as sworn statements from three persons employed by claimant's uncle in Karachi at the time of the incident. Approximately three weeks later, on October 24, 2012, claimant submitted further documentation, including a supplemental statement from Dr. Vohra. The following day, claimant submitted a supplemental report from Vital Imaging Medical

Group, which had prepared the radiological imaging reports provided to the Commission with the initial claim submission. The oral hearing was held on October 26, 2012.

During the hearing, counsel reasserted that claimant had “sustained a wrist fracture[] of [her] right wrist, [an] ankle fracture[], and rib fractures” as well as a “concussion[] and abrasions and cuts[]” as a result of jumping from the airplane evacuation slide during the Pan Am 73 hijacking. She contended that Dr. Vohra’s supplemental affidavit provided sufficient detail regarding the nature of claimant’s alleged physical injuries to satisfy the Commission’s standard. In addition, she argued that claimant’s injuries and treatment in Pakistan were substantiated by the newly submitted affidavits from the individuals who were present when the claimant and her sister were allegedly brought to the home of their uncle after the incident. Following the oral hearing, claimant submitted a post-hearing brief, together with further documentation in support of her claim, including, *inter alia*, original film copies of the November 2011 radiological images previously submitted and an October 23, 2012 report from Dr. Hasan Syed, an orthopedic surgeon.

The Commission issued its Final Decision on February 15, 2013, affirming its denial of the claim in the Proposed Decision. In its decision, the Commission held that while the additional medical records submitted on objection did provide greater detail about the alleged physical injuries—particularly claimant’s alleged wrist and ankle injuries—the precise nature and severity of the injuries was still unclear. Moreover, the medical evidence tying them to the 1986 incident was still insufficient to establish the requisite causal connection. The Commission further found that the witness statements provided by the former employees of claimant’s uncle similarly contained little detail as

to the claimant's injuries. In addition, the Commission cited the apparent lack of any follow-up medical treatment in the United States, which suggested that claimant's injuries were relatively minor and required no formal treatment. Indeed, the claimant did not recall receiving any follow-up treatment and had suffered no apparent residual effects except for minor, occasional discomfort in her wrist and ankle. Under these circumstances, the Commission determined that the claimant had failed to meet her burden of proving that she satisfied the physical injury standard under Category E.

On March 21, 2013, claimant filed a Petition to Reopen on the basis of newly discovered evidence. That evidence consists of a photograph, with what appears to be a date stamp of "86 9 23," "showing the petitioners with casts on their right arms."¹ Claimant states she only "discovered the existence of the photograph ... on March 19, 2013 when a family member in Pakistan told a family friend that he was in possession of a photograph of [claimant and her sister] from the time period . . . of Pan Am Flight 73." She further states that she had "previously searched for photographs[.]" including via requests of family members, but that "[n]o such photos were said to exist." In the petition, claimant argues that this evidence is material because the Commission had denied the claim "largely because [she] was unable to locate any contemporaneous records of [her] injuries." In this respect, she asserts that the newly submitted photograph "is a contemporaneous record[]" which "shows [claimant] with [a] cast[] on [her] right arm[]." Claimant contends that this photograph, "in combination with the evidence . . . previously submitted[.]" warrants a reversal of the Commission's decision denying her

¹ The photograph provides additional evidence only of claimant's alleged right wrist injury; therefore, claimant's other alleged injuries, including to her left wrist, ankles, and ribs, are not addressed in this Amended Final Decision.

claim in that it proves that she “sustained discernible physical injuries, more significant than superficial injuries, and received medical treatment for those injuries.”

DISCUSSION

The Commission’s regulations permit claimants to petition to reopen a claim after a Final Decision on the ground of newly discovered evidence. Subsection 509.5(*l*) of the regulations states,

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 [1] 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; [2] that it was not for want of due diligence that the evidence did not come sooner to the claimant's knowledge; and [3] 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. [4] The petition must include [a] a statement of the facts which the petitioner expects to prove, [b] the name and address of each witness, [c] the identity of documents, and [d] the reasons for failure to make earlier submission of the evidence.

45 C.F.R. § 509.5(*l*) (2012) (numbering and lettering added).

(1) Through counsel, claimant states that she did not learn of the photograph until March 19, 2013. This was more than a month after the Final Decision in this claim. Claimant herself confirms this, stating in a declaration that she “did not become aware of the existence of this photograph until after the Final Decision was issued in my claim.”

(2) Claimant states that she had “previously searched for photographs,” but that none “were said to exist.” Thus, as required by the Commission’s regulations, “it was not for want of due diligence that the evidence did not come sooner to the claimant’s knowledge.” (3) As described in more detail below, the photograph is the only contemporaneous piece of evidence in this claim and is thus “material, not merely

cumulative” and “would produce a difference decision.” Finally, claimant’s petition includes the four formal statements necessary for a petition to reopen described in the final sentence of § 509.5(l): the petition recites the facts that the submitted evidence purports to prove, all documentation is clearly identified, the name and address of the sole witness in the submission is provided, and the reasons for failure to make earlier submission of the photograph are set forth.

Upon consideration of this matter in the light of the entire record, good cause having been shown for failure to make earlier submission of the newly discovered evidence, it is

ORDERED that the request to reopen and amend the claim be granted; and that an Amended Final Decision be entered as follows:

As noted throughout these proceedings, claimant asserts that she sustained, among other injuries, a fracture to her right wrist while exiting the airplane during the Pan Am 73 hijacking. During the oral hearing, she testified that “I know that I broke my wrist, was casted, and hurt my legs.” She added that she had suffered from “discomfort” in her right wrist ever since the hijacking.

For his part, Dr. Vohra stated in his sworn statements that, following the incident, claimant was taken to her uncle’s house near Karachi, where he provided medical treatment to her. He explained that, at some point, claimant was taken to a local medical facility for x-rays to be taken, and that a cast was then placed on claimant’s arm. Having both conducted a physical examination and reviewed the radiology reports, Dr. Vohra concluded that claimant had suffered a “torus fracture[] of the distal radius or distal ulna, which is typically caused when trying to break a fall” He stated that such fractures,

“also known as buckle fractures, are a common type of wrist fracture in children.” Significantly, however, neither claimant nor Dr. Vohra had any contemporaneous medical records evidencing either the injury or treatment, although claimant’s assertions were more or less corroborated by the statements of the various witnesses present at the time of claimant’s stay at her uncle’s house.

As discussed in detail in the Commission’s Final Decision, the recent Vital Imaging reports are consistent with claimant’s description of an old injury to the right wrist. For instance, one report notes that the “MRI demonstrates a full thickness incomplete tear of the triangular fibrocartilage of the distal ulna . . .”; the report states that this “is typical of and consistent with a torus fracture.” It also states that “this finding is consistent with an old injury versus an acute injury because of the absence of edema.” The report concludes that the observed condition is “consistent with the patient’s report of falling from the airplane in 1986, having a cast on the right arm, and [sustaining] a torus fracture of the wrist as a result of the fall.”

In its Final Decision, the Commission determined that the evidence cited above was insufficient to establish either the nature and severity or the cause of the alleged injury. Noting that the claimant bears the burden of proving her claim,² the Commission concluded that this evidence was insufficient to satisfy the Commission’s “physical injury” standard.³ In particular, the Commission identified two fundamental problems

² See *Claim of* ⁵ U.S.C. §552(b)(6) Claim No. LIB-II-193, Decision No. LIB-II-148, at 12-13 (quoting 45 C.F.R. § 509.5(b) (2011)).

³ As the Commission stated in its Proposed Decision, in order for claims for physical injury under Category E to be compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and
- (2) must have received medical treatment for the physical injury within a reasonable time; and
- (3) must verify the injury by medical records.

with this evidence: (1) the evidence failed to establish the nature and severity of the injuries, and it was thus unclear whether the injuries rose to the level of being “more significant than . . . superficial”; and (2) though the recent medical evidence was *consistent with* a past physical injury, there was no evidence connecting that possible injury to the Pan Am Flight 73 hijacking. The Commission reasoned that, despite the detailed observations in the recent medical records, it was difficult to ascertain whether the MRI results provided actual evidence of an old fracture, or simply a fibrocartilage tear more properly characterized as a superficial injury. Indeed, in addition to the fibrocartilage tear, the original MRI report referred simply to “traumatic ligamentous laxity” caused by an “old injury,” with “[n]o other abnormalities.” The supplemental report also referred to the possibility of “degenerative changes.” Moreover, as noted above, claimant could not recall seeking or receiving any follow-up treatment in the United States after the incident (apart from informal consultations with family friends who were medical professionals). In light of this evidence, the Commission concluded that there did “not appear to be any tangible evidence of a fracture in claimant’s right wrist”

The photograph submitted with the present petition provides the Commission with an important piece of evidence that was previously lacking. Specifically, it constitutes the first *contemporaneous* documentation evidencing the alleged fracture to claimant’s right wrist. A date stamp in the bottom left-hand corner of the photograph indicates that it was taken on September 23, 1986 (appearing as “86 9 23”), approximately two and a half weeks after the hijacking, and three days before claimant’s departure from Pakistan

Id. at 6-7 (citing Claim No. LIB-II-039, Dec. No. LIB-II-015 (2010)).

as reflected by the exit stamp in her passport. The photograph's authenticity is confirmed in a declaration from Khurram Shafi, a relative of claimant's in Pakistan, who asserts that it was he who took the photograph, and that he did so on the date indicated. It is further supported by declarations from claimant and her sister, both of whom state that the photograph is of them.

The photograph depicts claimant (and her sister) with a cast on her right arm, consistent with claimant's live testimony and Dr. Vohra's reports. In this respect, it corroborates Dr. Vohra's claim that claimant was fitted with a cast following the incident. Further, it would appear to confirm the opinion in the recent Vital Imaging MRI reports that claimant had suffered a right wrist ("torus" or "buckle") fracture that could be attributed to jumping from an airplane in 1986.

While this newly submitted photograph does not, by itself, provide conclusive, contemporaneous evidence of the precise nature of the injury, viewed in context with all of the other evidence in the record, it does support the conclusion that claimant suffered a right wrist fracture as a result of the Pan Am Flight 73 hijacking that was more than superficial. Therefore, considering the totality of the evidence submitted, as well as the Commission's disposition of claims in this program with similar evidentiary records,⁴ the Commission finds that claimant has satisfied the standard for physical injury set forth in the Proposed Decision. Accordingly, claimant ^{5 U.S.C. §552(b)(6)} is entitled to compensation as set forth below.

COMPENSATION

In *Claim of* ^{5 U.S.C. §552(b)(6)} *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the

⁴ See, e.g., Claim No. LIB-I-031, Decision No. LIB-I-040 (2011).

Commission's standard under Category E, and that compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. 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.

The Commission accordingly withdraws the denial in its FINAL DECISION in this claim, and enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006).

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, May 14th, 2013
and entered as the Amended Final Decision
of the Commission.


Rafael E. Martinez, Commissioner


Anuj C. Desai, Commissioner

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Counsel for Claimant:

Elizabeth Smith, Esq.
Motley Rice LLC

Oral Hearing held on October 26, 2012.

FINAL DECISION

This multi-part claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by ⁵ U.S.C. § 552(b)(6) in connection with the September 5, 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan. The claim was made under Categories A, B, and E of the *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"). By its Proposed Decision entered February 23, 2012, the Commission denied the claim on the grounds that claimant had failed to satisfy the requirement of continuous U.S. nationality; i.e., claimant failed to establish that she was 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 ("CSA").

However, for the sake of administrative efficiency, and considering the late stage of claims processing in the Libya Claims Program, the Commission also addressed the other elements of the claim. On this basis, the Commission also denied the claim on the grounds that, 1) with regard to Categories A and B, claimant was not a party in the Pending Litigation, and the claim was therefore ineligible for adjudication on the merits under those categories; and 2) with regard to Category E, claimant had not met her burden of proving an injury sufficient to meet the Commission's standard for physical injury.

In particular, the Commission cited the lack of contemporaneous medical records or other evidence (apart from cancelled U.S. passports) from the time of the incident and noted that the only medical records submitted were prepared after the filing of the claim. In addition, most of the conclusions in the recent medical records regarding causation appeared to derive from a single recent affidavit from Dr. Ejaz Ahmad Vohra, a physician who averred that he had treated claimant immediately after the incident, but the Commission found that affidavit lacking in sufficient detail and credibility.

By letters dated March 9 and March 12, 2012, the claimant filed a notice of objection to the Commission's Proposed Decision on her Category E claim; no objections were made to the Commission's Proposed Decisions on her claims under Categories A and B. The oral hearing was initially scheduled for May 17, 2012, but was postponed at claimant's request. On April 16, 2012, claimant's counsel notified the Commission that he had been discharged by the claimant, and on May 4, 2012, the claimant notified the Commission that she had retained new counsel. A new oral hearing date was set for September 13, 2012; however, the hearing was again postponed at claimant's request.

On October 4, 2012, claimant submitted an objection brief containing further evidence and argument in support of her objection, including, *inter alia*, claimant's California birth certificate; cancelled U.S. passports (including from the time of the incident) and a recent U.S. passport valid through the date of the CSA; a list of persons, alleged to be a passenger list from Pan Am Flight 73, that includes claimant's name; an excerpt from a medical text containing a discussion of pediatric wrist fractures such as those asserted by claimant; witness statements from claimant's uncle's former housemaid, driver, and security guard, all three of whom claimed to have seen claimant at her uncle's home following the incident; and copies of correspondence between claimant's counsel and various medical facilities and insurers seeking records of medical treatment in the years following the incident.

On October 24, 2012, claimant submitted additional documentation in support of her claim, consisting of a supplemental statement from Dr. Vohra, together with letters sent to him from local medical facilities in Karachi indicating the absence of medical records pertaining to claimant, and a sworn statement from a childhood friend of claimant describing claimant's condition after returning home following the incident. The following day, October 25, claimant submitted a supplemental report from Vital Imaging Medical Group, which had also prepared radiological imaging reports that were provided to the Commission with the initial claim submission. The oral hearing was held on October 26, 2012.

In her objection brief and during the oral hearing, claimant argued that, in light of the newly submitted evidence, her claim satisfies the continuous nationality rule. As to the merits of her claim, claimant argued that she had in fact suffered a physical injury

during the Pan Am Flight 73 hijacking severe enough to meet the Commission's standard under Category E. Claimant contended that Dr. Vohra's supplemental affidavit provides sufficient detail regarding the nature of claimant's alleged physical injuries to satisfy the Commission's standard. She further argued that her injuries and treatment in Pakistan are substantiated by the newly submitted affidavits (translated from Urdu to English) from the above-referenced individuals who were present when the claimant and her sister were allegedly brought to the home of their uncle following the incident.

Claimant asserted that the absence of contemporaneous medical records can be explained by the fact that she received private medical treatment from Dr. Vohra in her uncle's home, rather than at the hospital, and that Dr. Vohra "generally kept records in his private practice at the time[.]" Claimant also described her unsuccessful efforts to obtain other medical records from facilities in both Pakistan and the United States. Finally, claimant noted that the Commission applies a "flexible evidentiary standard" and cited two claims in the Libya Claims Program in which the Commission issued an award even though the claimant did not submit contemporaneous medical records.

Approximately two weeks after the hearing, on November 13, 2012, claimant submitted further documentation in support of her claim, including, *inter alia*, original film copies of the November 2011 radiological images previously submitted;¹ copies of the above-mentioned letters from medical facilities in Karachi noting the absence of medical records relating to claimant; an October 23, 2012 report from Dr. Hasan Syed, an orthopedic surgeon, discussing claimant's alleged injuries as reflected in the MRI reports,

¹ Claimant submitted an additional film copy of her right ankle MRI, which was not included in the November 13 submission, three days later, on November 16.

Dr. Vohra's statements, and the narrative of the claimant herself; and a post-hearing brief summarizing the evidence presented.

DISCUSSION

Jurisdiction

In its Proposed Decision, the Commission found that, while claimant had provided a copy of her cancelled U.S. passport, which evidenced her birth in California and U.S. nationality through January 1991, she had failed to provide evidence of continuous U.S. nationality through the date of the CSA. As noted above, claimant has now provided copies of her birth certificate, as well as additional cancelled U.S. passports valid through 2001 and a U.S. passport valid from 2001 to 2011. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and has been so held until the effective date of the CSA. Because the Commission already found in its Proposed Decision that claimant satisfies the other jurisdictional requirements for Category E claims, the Commission also concludes that this claim is within the Commission's jurisdiction pursuant to the January Referral and is entitled to adjudication on the merits under Category E.

Merits

I. Claimant's Testimony Regarding the Pan Am Flight 73 Hijacking

During the oral hearing, claimant provided live testimony concerning her experience aboard Pan Am Flight 73 and responded to questions from the Commission concerning her alleged physical injuries. Although claimant acknowledged that she does not remember much of what occurred or the details concerning her treatment following the incident—she was six years old at the time—she does have vivid memories of the

hijacking itself and recounted her ordeal from boarding the plane through her alleged stay at her uncle's home.

Claimant testified that, after she was seated on the plane with her mother and sister, somebody "[came] back with a gun" and her sister told her mother that "we're being hijacked." They were then "taken from [their] seats and herded into the aiseways. . . ." Claimant recalled that, toward the end of the hijacking, the lights went out and she heard "loud blasts." Eventually, the doors that were located near them opened, and claimant recalled looking out and noting that "it was pitch black . . . you couldn't see really" She testified as to "the feeling of having to make a leap from the floor of the plane to the ground, but somehow being pushed . . . and feeling the brunt of the slide underneath." She stated that she does not remember sliding and indeed "do[es]n't even remember seeing the slide." However, she does remember a feeling like "there was nothing there." She remembers "tumbling down[,]" and that "[i]t wasn't smooth . . . it wasn't a slide, it was more of a fall and a tumble" Asked during the hearing whether she remembers any impact while going down the slide, claimant responded that she did not. However, she did recall feeling the slide "at some point" after being "forced out of the plane[,]" and testified that she does "remember enough to know that [she] hit the slide." Claimant testified that, after they had all exited the airplane, her mother grabbed them and claimant remembers "flying through the air."

After crossing the tarmac and exiting the airport, claimant recalled being taken to a local hospital, although she does not recall any treatment she may have received there. She does, however, remember being taken to her uncle's home nearby shortly thereafter. Claimant testified that she does not remember the details of her stay there, including any

medical treatment she received; she only remembers “being in that room” She added that she does not remember anything after the stay at her uncle’s home until they arrived back home in the United States.

With regard to her alleged physical injuries, claimant testified that she has always had an awareness of her injuries and stated, “I know that I broke my wrist, was casted, and hurt my legs.” However, it is unclear whether this knowledge comes only from what others have told her or is based on her own memories. With regard to when exactly during the hijacking her alleged wrist fracture occurred, claimant stated, “I don’t know at what point it broke.” In any event, she testified that she has suffered from “discomfort” in her right wrist that has been “ongoing” ever since the hijacking. In addition, she remembered “for a long time, [her] mom wrapping [her] legs.” During the wrapping, claimant recalled that she “would be in pain.” She also recalled “being in strollers for a long time after your normal age[,]” to the point of “almost being embarrassed”

Claimant does not have any memory of any physician examining her wrist or ankle following the hijacking or in the years since then. Indeed, she does not remember seeking any medical treatment for these alleged injuries prior to undergoing the MRI examination in preparation for this claim.² Likewise, she testified that she has not mentioned these alleged injuries to her examining physicians in annual physicals or checkups.

Asked during the hearing whether she experiences any residual effects of her alleged ankle injury, claimant responded, “I feel the discomfort in it, but it’s just always been, so I’ve never been able to compare it to not having it.” When asked whether it

² Claimant did testify that her mother occasionally sought advice from family friends who were doctors; however, claimant did not provide any details on these informal examinations, and it was unclear from her testimony whether her alleged physical injuries were ever discussed.

swells, she responded, “Not that I would know . . . I don’t notice that.” With regard to the alleged injury to her wrist, claimant testified that she experiences pain “every once in a while. For example, if it’s used more” However, she testified that she “go[es] about [her] day-to-day life . . . I don’t even pay attention to it.” She further acknowledged that she does not take any medication for this pain.

Claimant’s testimony provides a cohesive, if incomplete, narrative of what occurred to her and her family during the hijacking and its immediate aftermath. However, the claimant’s fragmentary recollections concerning the nature and severity of her original injuries require an examination of the other evidence submitted for details on this key aspect of her claim.

II. Alleged Physical Injuries and Medical Records

During the oral hearing, claimant’s counsel reasserted that, as a result of the incident, both claimant and her sister³ “sustained wrist fractures of their right wrist, ankle fractures, and rib fractures.” In addition, they also suffered “concussions and abrasions and cuts.” However, as noted above, the Commission found in its Proposed Decision that many of the conclusions reached in the recent medical records submitted in support of these contentions were derived from Dr. Vohra’s recent affidavit, which the Commission found to be vague as to the nature and extent of claimant’s injuries and was therefore insufficient to carry the claimant’s burden of satisfying the Commission’s physical injury standard. In response, Dr. Vohra’s October 2012 supplemental statement, submitted on objection, attempts to provide greater detail concerning his treatment of claimant and the reasons for the lack of medical documentation.

³ Claimant’s sister also filed a similar claim for her alleged physical injuries under Category E.

As to the treatment rendered to claimant immediately after the incident, Dr. Vohra restates, in his supplemental statement, that he treated claimant in her uncle's home, and that claimant had suffered "primarily musculoskeletal injuries." He explains,

If I had determined that the patients had bullet wounds, or compound or open fractures, I would have immediately admitted them to the hospital. However, they had closed fractures, which initially required non-use of the injured extremity, application of ice with a cloth or towel, using a pressurized wrap, cloth or towel to prevent swelling and elevating the extremities

Dr. Vohra states that at some point, claimant was taken to Karachi X-ray Centre for an x-ray examination, and that, subsequently, a cast was placed on claimant at Ziauddin Hospital. Dr. Vohra further states that he has attempted to obtain records from those facilities, but that his search has been unsuccessful.⁴ He does not indicate whether or not he generated any records of his own treatment of claimant, only that he has been "unable to find the records." Nonetheless, he does recall that claimant suffered a "torus fracture[] of the distal radius or distal ulna, which is typically caused when trying to break a fall" He does not recall, however, which wrist was injured. Dr. Vohra explains that "[t]orus fractures, also known as buckle fractures, are a common type of wrist fracture in children[,] that they "do not require surgical intervention and, in children, they typically heal within a 2 to 3 week time frame with a cast."

With regard to claimant's alleged ankle injury, Dr. Vohra states that claimant "required 3 weeks of immobility in bed and adequate rest." He "placed a wrap around the feet and ankle[] to reduce swelling and to maintain the proper anatomic alignment" He further states that "[i]ce . . . was wrapped and applied to the ankle[],

⁴ A letter from Ziauddin Hospital, attached to Dr. Vohra's supplemental statement, states that under the hospital's retention policy, records of treatment were only retained for five years. A letter from Karachi X-Rays & CT Scan/Ultrasound Centre also states that no records regarding claimant were found, but does not specify whether this is attributable to a retention policy or because claimant was not evaluated there.

and the legs were elevated for at least a couple of hours each day.” Dr. Vohra explains that a “brace, cast, or splint is not necessary as long as there is adequate rest of the ankles, compression and proper anatomic alignment.” As for claimant’s alleged rib fracture, Dr. Vohra notes that there is generally no treatment available “besides rest and immobility[]”; therefore, he treated claimant “using a pillow and towels to stabilize the area.”

The Vital Imaging Medical Group supplemental report, dated October 24, 2012, provides further details concerning the November 12, 2011 MRI exam that was the subject of Vital Imaging’s first report, which the Commission reviewed prior to the Proposed Decision. The supplemental report largely restates the findings in the first report, but provides a more detailed analysis of its conclusions. For instance, with regard to claimant’s right wrist, the supplemental report notes that the “MRI demonstrates a full thickness incomplete tear of the triangular fibrocartilage of the distal ulna” It states that the “residual TFCC tear noted in the MRI is typical of and consistent with a torus fracture.” It also states that “this finding is consistent with an old injury versus an acute injury because of the absence of edema.”

While the supplemental report indicates that “it is not possible to date [claimant’s] wrist injury with specificity using MRI,” it notes that the findings are “consistent with the patient’s report of falling from the airplane in 1986, having a cast on the right arm, and are consistent with a torus fracture of the wrist as a result of the fall.” It adds that claimant’s reports of pain in her right arm are also consistent with this finding. In addition, the supplemental report restates its earlier finding of an “[a]nomalous extension of the flexor digitorum superficialis^[5]” in the left wrist, likely from “a hyperextension

⁵ “Flexor digitorum superficialis” is defined as a “superficial muscle of the palmar side of the forearm that flexes[,] especially the second phalanges of the four fingers[.]” Merriam-Webster, MedlinePlus,

injury that occurred as the result of the fall[,]" although the report indicates that this would not have likely resulted in a fracture.

The Vital Imaging supplemental report also contains further details concerning claimant's alleged ankle injuries. As noted in the Proposed Decision, the MRI report indicated that, with regard to claimant's right ankle, the "peroneus brevis tendon is split" and there is "ankle mortise^[6] effusion."⁷ According to the supplemental report, "[a]s the foot undergoes dorsiflexion, as in cases due to a fall from a height, the peroneus tendon gets compressed . . . causing a tear. . . . One of the results of this is intermittent irritation causing ankle mortise effusion." The report also notes that claimant's MRI results are "characteristic of an old fracture because with recent injury, there are associated and distinguishing characteristics such as edema and swelling in the tendon[,]" which do not appear in claimant's MRI. Similarly, with regard to claimant's left ankle, the supplemental report states that the "ankle mortise effusion noted on the MRI . . . is consistent with an old fracture." The original MRI report, however, makes no reference to any fracture, stating only that, while there is "ankle mortise effusion," it is "indicative of joint instability caused by old trauma as noted by Dr. Vohra's report."

The October 2012 report from Dr. Syed largely confirms the findings in the Vital Imaging MRI reports, although, as with the records discussed in the Commission's Proposed Decision, his conclusions appear to be derived solely from Dr. Vohra's findings and the conclusions contained in the MRI reports. Moreover, Dr. Syed apparently did not

<http://www.merriam-webster.com/medlineplus/flexor%20digitorum%20superficialis> (last visited Jan. 28, 2013).

⁶ "Mortise" refers to the "seating for the talus formed by the union of the distal fibula and the tibia at the ankle joint." *Stedman's Medical Dictionary* 1228 (28th ed. 2006).

⁷ "Effusion" is defined as "[t]he escape of fluid from the blood vessels or lymphatics into the tissues or a cavity[,]" or a "collection of the fluid effused." *Id.* at 616.

conduct his own physical examination of claimant to confirm his findings. This report is therefore of limited usefulness to the Commission in deciding this claim.

By contrast, the January 2012 report of orthopedic surgeon Charles Sadler, M.D., which was submitted with the original claim, did include findings from a physical examination of claimant. Dr. Sadler's report focuses primarily on the alleged pain in claimant's right wrist and left ankle. In this regard, he notes that the "objective imaging findings of the right wrist and left ankle correlate with physical exam findings of these areas: right wrist tenderness and painful range of motion; left ankle swelling and tenderness." As the Commission found in the Proposed Decision, however, Dr. Sadler's findings regarding causation rely heavily on Dr. Vohra's reports and claimant's own statements. Indeed, Dr. Sadler goes so far as to say that "[t]here are no alternative traumatic explanations of these objective findings other than the 1986 remote trauma," based, it seems, solely on statements by claimant and Dr. Vohra. As noted in the Proposed Decision, the section labeled "Past Medical History" contains only a single sentence indicating that claimant stated that the only injury to her left ankle or right wrist arose from the alleged trauma in 1986.

The various witness statements submitted with this claim do not describe claimant's alleged physical injuries in detail; however, they do confirm claimant's account of what occurred immediately after and in the weeks following the incident. Three of the witnesses were employed by claimant's uncle at the time—the driver, housekeeper, and security guard—and attested to claimant's stay at the house immediately following the attack. The security guard stated that he witnessed the claimant, her sister, and her mother arrive there after the incident, and that "the three

ladies were injured, and were weeping.” The driver also saw the three when they arrived at the house and stated that he “used to take them to the hospital thereafter off and on.” The affidavit of the housekeeper offers more detail concerning the injuries. She states that she “personally took care of [claimant and her sister].” She describes how the “doctor used to come see them off and on[,]” and that “[t]heir both arms were covered in plaster.” She also describes how she “helped in changing their clothes, feeding them, and giving them their medicines.”

As noted above, claimant has also submitted a recent affidavit from Sabrina Mottiwala, a childhood friend. Ms. Mottiwala “remember[s] seeing Faiza limping when she would walk around the house with my sister.” She also recalls one occasion (also shortly after the incident) when she and the claimant were “at a birthday party or a park[,]” and “Faiza was crying because someone was making fun of the way she was limping.”

With regard to the newly submitted medical records, the Commission notes that these records, particularly Dr. Vohra’s supplemental report and the Vital Imaging Medical Report, do attempt to provide greater detail concerning claimant’s alleged physical injuries and the results of the 2011 MRI examination; however, the evidence tying the identified abnormalities to physical injuries said to have been sustained in 1986 is, at best, thin, and in light of other evidence in the record, appears more suggestive of superficial injuries requiring very little medical treatment or follow-up care. For example, although the “full thickness incomplete triangular fibrocartilage tear” in the distal ulna of claimant’s right wrist is attributed to old trauma in the MRI reports, there is little to suggest either a fracture or the age of the injury. The reports make no objective

findings regarding residua of a fracture, apart from the fibrocartilage tear, and the muscles, tendons, nerves, bones, and other structures of the wrist, according to the reports, appear normal. Indeed, there is no specific suggestion of a fracture in the original MRI report, only a possible “old injury” and “traumatic ligamentous laxity.”

Moreover, the supplemental report indicates that a fibrocartilage tear such as this may be the result of “degenerative changes” (although said to be unlikely at this age). Additionally, as the Commission found in the Proposed Decision, conclusions pertaining to the cause of the injury appear to come only from claimant’s and Dr. Vohra’s own recollections, which, as have been noted, are not supported by any medical records. With regard to claimant’s left wrist, the “[a]nomalous extension of the flexor digitorum superficialis” identified in the MRI report and supplemental report appears to reflect only an injury to that particular muscle, with no other abnormalities. The reports state only that that this is consistent with a “hyperextension injury.”

Given the unclear nature of the original physical injuries to claimant’s wrists, as reflected in the MRI reports and the questionable basis by which the alleged injuries were attributed to the 1986 hijacking, the Commission is unable to conclude that claimant suffered non-superficial wrist injuries—particularly a right wrist fracture—warranting compensation under Category E. As noted above, the MRI reports describe evidence of old tears in the tissue; however, there does not appear to be any tangible evidence of a fracture in claimant’s right wrist or any significant injury to the left wrist. Although claimant alleges that she experiences pain and discomfort in her right wrist, no medical records have been submitted to substantiate this assertion beyond a brief reference in Dr Sadler’s recent medical report to “complaints of pain right” under the “Right Wrist”

heading. Under these circumstances, the Commission cannot conclude that the medical records by themselves are sufficient to meet claimant's burden to prove that she suffered wrist injuries during the hijacking that rise to the level of a discernible, non-superficial physical injury.

With regard to claimant's alleged ankle injuries, the MRI reports attribute the "split of the peroneus brevis tendon" in the right ankle to "a fall from a height" The supplemental report suggests that this finding, together with the "ankle mortise effusion," is "characteristic of an old fracture" because of the absence of, for instance, "edema and swelling in the tendon." However, it is unclear how the observed condition is indicative of a fracture, or how the absence of edema or swelling is not indicative of another injury that may have occurred in the twenty-seven years since the incident. Again, as with the alleged wrist fracture, the determination of cause appears to derive entirely from claimant's and Dr. Vohra's own recollections, unsupported by other medical records. With regard to the left ankle, the MRI reports also identify "ankle mortise effusion," albeit "without evidence of muscles or tendons tear." The supplemental report, as with the right ankle, suggests this is indicative of "ligamentous instability from an old fracture" and classifies the injury as not recent due to the absence of edema. For his part, Dr. Vohra, in his supplemental statement, avers only that claimant suffered an ankle fracture, although he does not recall which ankle was injured and has no contemporaneous medical records corroborating this diagnosis.

As with claimant's alleged wrist fracture, the precise nature of the original ankle injury is unclear from the MRI reports. Although the torn tendon in the right ankle is said to be consistent with an old fracture, there does not appear to be any direct evidence of a

fracture, and the reports appear to leave open the possibility that the injury was confined to the tendon. Moreover, the results of the MRI give no indication whatsoever of the severity of the alleged injury. Further, the absence of edema or swelling, while excluding a recent injury, does nothing to identify 1986 as the actual date of injury, a significant point insofar as claimant has submitted no relevant medical documentation prior to 2011. These concerns apply even more so to the left ankle, where there is no evidence at all of muscle or tendon damage—merely effusion, with no mention of a fracture, only “joint instability caused by old trauma.”

Claimant testified that she feels “discomfort” in her ankle, but as noted above, has no recollection of any treatment at her uncle’s home in Karachi or of any subsequent treatment in the United States. Although she recalls her mother wrapping her legs for some time, during which she would experience pain in her legs, there is no other evidence to corroborate this claim. Regarding treatment at the time of the incident, Dr. Vohra’s statement reflects only that he placed claimant on bed rest and placed ice and wrapping on her ankle. Again, no contemporaneous records have been produced concerning this injury. As with the wrist injuries, the Commission finds that the medical records, by themselves, are insufficient to meet claimant’s burden to prove that she suffered ankle fractures during the hijacking that rise to the level of a discernible, non-superficial physical injury.

With regard to the alleged rib fractures, claimant has produced no medical records of any kind to substantiate this claim. Dr. Vohra mentions the alleged fractures in his supplemental statement, but only states that he treated them with “proper bed rest and positioning[.]” Claimant did not mention rib fractures at all in her oral testimony. For

these reasons, the Commission does not find any evidence to support this aspect of the claim.

In sum, the Commission finds that the evidence presented is insufficient to support a finding that claimant suffered the alleged fractures to her ankles and wrists. As discussed above, the medical reports contain fundamental uncertainties regarding both the nature of the original injuries and their severity, as well as their cause. In addition, the apparent lack of any follow-up medical treatment in the United States suggests that claimant's injuries, if any, were relatively minor and required no formal treatment. Indeed, claimant does not recall that she ever sought or received such treatment and has suffered no apparent residual effects except for minor, occasional discomfort in her wrist and ankle—discomfort that is, again, supported only by her own testimony. Under these circumstances, claimant has failed to meet her burden to prove that she satisfies the physical injury standard under Category E.

Finally, claimant cites two claims in the Libya Claims Program in which the Commission issued awards for physical injury without contemporaneous medical records and argues that the Commission should do the same here. In Claim No. LIB-I-007, Decision No. LIB-I-024 (2011), the claimant had suffered a torn meniscus that required arthroscopic surgery a few weeks after the incident. Although no contemporaneous medical records were available, claimant had visible scars that a physician, in a sworn declaration, noted were consistent with having undergone arthroscopic surgery for a torn meniscus. The claim was also supported by recent medical reports, contemporaneous news articles, affidavits, and claimant's live testimony. In Claim No. LIB-I-016, Decision No. LIB-I-038 (2011), the claimant alleged that he suffered a gash in his foot

and dislocated his toes in the door of an airplane. Again, although no contemporaneous medical records were available, claimant was able to show his deformed foot to the Commission during the hearing, and a recent medical report confirmed that the deformity was consistent with the trauma that claimant had alleged. Further, the report stated that to correct the condition would require surgery. Thus, in both of the cases cited, the claimant suffered discernible, significant injuries capable of visual confirmation, injuries that were substantiated by recent medical reports. Here, by contrast, claimant's injuries cannot be confirmed visually, did not appear to require, or will not require, surgical intervention to treat, and in any event, appear to be far less significant based on the available evidence. The cited claims are, therefore, not contrary to the Commission's conclusion here.

CONCLUSION

For the reasons set forth above, the Commission remains unpersuaded that the injury in this claim meets the Commission's standard under Category E. The Commission is sympathetic to the claimant for the ordeal she endured during that horrific event. Nonetheless, the Commission is constrained to conclude that the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed.

In reaching this conclusion, the Commission reiterates that a number of the victims of the Pan Am Flight 73 hijacking who were unsuccessful in making claims for physical injury under the December Referral did receive compensation as hostages under Category A of the January Referral. Category A, however, limited the Commission's jurisdiction to Pending Litigants. Because claimant was not a Pending Litigant, she is thus jurisdictionally ineligible for compensation under Category A. The Commission

emphasizes this point so as to make clear that in reaching its conclusion in this claim, it does not wish to minimize the terror claimant must have experienced aboard Pan Am Flight 73 or otherwise appear to prejudge any claim that she was held hostage. Indeed, it appears that claimant was held by the hijackers under precisely the same circumstances as those who later prevailed under Category A. Therefore, other than the fact that she was not a Pending Litigant, all other requirements for a hostage claim appear to have been met in this particular claim. However, the Commission is constrained by the jurisdictional language of the January Referral and is therefore unable to adjudicate this claim as one for hostage taking or unlawful detention under the January Referral.

This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, February 15, 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)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-193

Decision No. LIB-II-148

Counsel for Claimant:

Aaron S. Podhurst, Esq.
Podhurst Orseck P.A.

PROPOSED DECISION

This multi-part claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by 5 U.S.C. §552(b)(6) in connection with the September 5, 1986 hijacking of Pan Am flight 73 in Karachi, Pakistan.

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, B, and E. 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 B consists of:

claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State provided that (1) the claim was set forth as a claim for emotional distress, solatium, or similar emotional injury by the claimant named in the Pending Litigation; (2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim; (3) the claimant has not received any compensation under any other part of the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral; and (4) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 4. Finally, Category E consists of:

claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Id. at ¶ 7. Attachment 1 to the January Referral lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

The January Referral, as well as a December 11, 2008 referral letter 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, 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).

BASIS OF THE PRESENT CLAIM

On September 7, 2010, the Commission received from the claimant a completed Statement of Claim in which she asserts claims under Categories A, B, and E of the

January Referral, along with exhibits supporting the elements of her claim. This submission included evidence of claimant's U.S. nationality, her presence at the scene of the terrorist incident, and her alleged physical injuries for which she now claims compensation.

The claimant, who was six years old at the time of the incident, states that she, along with her mother and older sister, was on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986, when they were held hostage by armed hijackers for seventeen hours while the plane sat on the tarmac. In her Statement of Claim, claimant asserts that, in the chaos following the incident, her mother "threw" her and her sister from the plane and onto the tarmac below in an effort to save their lives. As a result, she alleges that she suffered various cuts and bruises, orthopedic injuries to her lower body, and a concussion. Claimant states that "these injuries required extensive care and follow up with private physicians." In addition, she alleges that, as a result of the hijacking, she has suffered "extreme emotional and psychological trauma . . . until this day, including . . . post traumatic stress disorder, sleep disorder, and a lifelong fear of flying."

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the categories of claims defined under the January Referral. As noted above, Categories A, B, and E of the January Referral all require that the claimant be a U.S. national. January Referral, *supra*, ¶ 3-4, 7. Categories A and B further require that the claimant be a named party in a Pending Litigation case against Libya which has been dismissed. *Id.* ¶ 3-4. Category E, on the other hand, requires that the claimant *not* have

been a plaintiff in the Pending Litigation. It does require, however, that a claimant assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral. *Id.* ¶ 7.

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 cancelled U.S. passport, valid from January 1986 to January 1991, evidencing her birth in California and her U.S. nationality at the time of the incident. While the Commission requested that the claimant provide evidence of U.S. nationality through the date of the Claims Settlement Agreement, the claimant has not done so. Because the claimant has failed to meet the nationality requirement, her claim must be dismissed on this basis alone. However, for the sake of administrative efficiency, and considering the late stage of claims processing under this program, the Commission will nonetheless proceed to review and decide the other elements of the claim, including its merits.

Pending Litigation

Categories A and B require that the claimant have been a plaintiff in the Pending Litigation listed in Attachment 1 to the January Referral. January Referral, *supra*, ¶¶ 3, 4. Claimant states in her Statement of Claim, and the relevant pleadings confirm, that she

was not a party to a Pending Litigation case. Consequently, claimant does not satisfy this jurisdictional element for compensation under Categories A and B.

On the other hand, Category E requires that the claimant *not* have been a plaintiff in the Pending Litigation. As noted above, claimant has stated in her claim form, and the Commission's records confirm, that she was not a party to the Pending Litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of her claim under Category E.

Claim for Death or Injury Resulting From a Covered Incident

To fall within Category E of the January Referral, the claimant must also assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral. January Referral, *supra*, ¶ 7. This list includes the "September 5, 1986 hijacking of Pan Am flight 73, as alleged in *Patel v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-626." *Id.*, Attachment 2, ¶ 9. In her Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the September 5, 1986 Pan Am flight 73 hijacking. The Commission therefore finds that the claimant has satisfied this element of her claim under Category E.

Merits

Standard for Physical Injury

As stated in the January Referral, to be eligible for compensation, a claimant asserting a claim under Category E must meet "the standard for physical injury or wrongful death, as appropriate, adopted by the Commission" for purposes of this referral. January Referral, *supra*, ¶ 7. The Commission held in *Claim of* ^{5 U.S.C. §552(b)(6)}

5 U.S.C. §552(b)(6) Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; 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 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to her Statement of Claim and accompanying exhibits, claimant suffered injuries on September 5, 1986 during the hijacking of Pan Am Flight 73 in Karachi, Pakistan by armed gunmen. Claimant avers that, towards the end of the hostage ordeal, her mother “was forced to throw [her] and [her] sister out of the plane onto the tarmac to spare [their] lives.” As a result, claimant asserts that she suffered serious physical injuries that included “cuts, bruises, abrasions to large areas of [her] body; soreness; orthopedic injuries to [her] feet, ankle, and legs; a concussion as a result of a severe blow to the my [sic] head when landing on the tarmac; severe bleeding from [her] head as a result of the severe blow to [her] head; [and] continuing headaches as a consequence of the concussion.”

According to various statements submitted with this claim, claimant was taken with her mother and sister to a local hospital following the incident; however, due to the “chaos and dysfunction occurring[,]” they left the hospital and traveled to the home of

claimant's brother, approximately twelve miles from the airport. Claimant's mother alleges that they received medical treatment there from a private physician, where they remained for approximately three weeks until the physician discharged them and allowed the family to return home to the United States. There is no allegation that claimant received any further medical treatment for her physical injuries after this time.

In support of her claim, claimant has provided, *inter alia*, sworn statements from her mother and father describing the incident, as well as claimant's alleged physical injuries and her subsequent medical treatment; a visa page from claimant's cancelled U.S. passport, bearing Pakistani exit stamps from September 5, 1986, and September 26, 1986; a 2010 sworn statement from Dr. Ejaz Ahmad Vohra, the physician who allegedly treated claimant and her mother and sister in Karachi following the incident, describing claimant's physical injuries resulting from the hijacking and the treatment he provided; reports of several recent medical examinations allegedly providing evidence of prior trauma; and a copy of a letter to claimant from San Dimas Community Hospital in California indicating that no records were extant relating to claimant's injuries from 1986 (and noting the 10-year time frame after which medical records are destroyed).¹

At the outset, the Commission notes that no contemporaneous medical records, or other contemporaneous corroborating evidence from the time of the incident (for example, photographs or news reports), have been provided in support of this claim. Indeed, none of the evidence submitted, apart from claimant's cancelled U.S. passport, pre-dates the filing of her claim. In this regard, claimant's father states, in his sworn

¹ In her request for records, claimant requested copies of x-rays or other medical records ordered by her doctor in September or October 1986. Claimant noted that "[o]ur doctor at the time had ordered the X-rays to establish whether the injuries, described in the attached Affidavit by the physician in Pakistan, Dr. Vohra, who treated us immediately following the hijacking, had healed properly."

statement, that “[his] wife was so concerned about having to recount the experience in front of our daughters that we would not even reveal the injuries to any of the subsequent pediatricians our daughters visited.” He also states that “[w]e did not take any pictures, or save any medical records, for potential litigation from the incident because our first and foremost priority was to rid our children of this horrific memory.”

In his sworn statement, Dr. Vohra states that when claimant arrived at her uncle’s home, he was advised that “all three [family members] had experienced varying degrees of unconsciousness immediately after their fall.” He further states that he “performed physical and neurological examinations[,]” and “ordered radiographic studies which included x-rays of the ankles on all three patients, x-rays of the wrists on all three patients, chest x-rays for all 3 patients and either an x-ray or some other brain scan in connection with their loss of consciousness [sic].” With specific regard to claimant, Dr. Vohra attests that she had “sustained fractures of two or more ribs, one or both wrists and at least one ankle.” He states that he placed a cast on her wrist and “instructed her to remain in bed due to the injuries to her ankles and most importantly in connection with the concussion due to ongoing symptoms, including but not limited to dizziness and loss of balance.” He further states that he visited claimant on up to five occasions during her recuperation, until he discharged her after approximately three weeks. At that time, Dr. Vohra states, claimant “was able to ambulate without any loss of balance”

Dr. Vohra states that he attempted to obtain the records of his treatment of claimant and her family from “the various offices [he] practiced[,]” but that, given the passage of time, he was unable to obtain such records. Consequently, claimant is unable to provide any medical records in support of Dr. Vohra’s alleged treatment of her

following the incident. As noted above, there is no evidence that claimant sought or received further treatment for her alleged physical injuries—such as, for example, the removal of casts—after she returned to the United States.

More recent medical records, and in particular several MRI reports from November 2011, do appear to reveal some evidence of injury and/or abnormalities; however, the cause of these conditions, and the severity of the alleged underlying injuries, is unclear. One of these reports indicates that claimant suffers from an “[a]nomalous extension of flexor digitorum superficialis^[2]” in her left wrist; the report concludes that “[g]iven the history of old trauma from Dr. Vohra’s report this is consistent with a prior hyperextension injury of the wrist” A similar report pertaining to the right wrist notes that claimant complains of “occasional right wrist discomfort,” and indicates the presence of a “[f]ull thickness incomplete triangular fibrocartilage tear[,]” which is similarly attributed to “an old injury as reported by Dr. Vohra.” In addition, an MRI report of the right ankle indicates that the “peroneus brevis tendon is split” and notes the presence of “ankle mortise effusion,” which is “consistent with a post traumatic split of the tendon from an old fracture[.]” A report on the left ankle also indicates an “ankle mortise effusion,” which, according to the report, “is indicative of joint instability caused by old trauma as noted by Dr. Vohra’s report.” MRI reports of the left and right ribs are both described as “unremarkable.”

Although these MRI reports note that the various conditions are consistent with the trauma described by the claimant, the repeated reference to Dr. Vohra’s report

² “Flexor digitorum superficialis” is defined as a “superficial muscle of the palmar side of the forearm that flexes[,] especially the second phalanges of the four fingers[.]” Merriam-Webster, MedlinePlus, <http://www.merriam-webster.com/medlineplus/flexor%20digitorum%20superficialis> (last visited Feb. 16, 2012).

suggests that the doctors' conclusions are based largely on Dr. Vohra's statements in the affidavit that was provided in support of this claim. This is further supported by the notation in the patient history section of one of the MRI reports, which states that "[t]he patient has a history of old trauma with fracture noted by Dr. Vohra." Another one of the reports notes that "[t]here is no history of acute trauma so the effusion is indicative of joint instability caused by old trauma as noted by Dr. Vohra's report." It is clear, therefore, that, on the issue of causation, the examining physicians' conclusions were based entirely on Dr. Vohra's recent statements, together with claimant's own denial of any acute trauma experienced in the approximately twenty-five years since the incident.

Finally, it should be noted that a January 2012 report of a physical examination reaches the same conclusions regarding causation as the 2011 MRI reports; the conclusions contained in this physical examination, however, are similarly based on Dr. Vohra's statements and, apparently, claimant's own denial of any intervening injuries. For instance, the report indicates, *inter alia*, that "[t]here is a history by Dr. Vohra of significant trauma to the right wrist and left ankle circa 1986." The section labeled "Past Medical History" states only that "[claimant] denies any memory of any other injury to her left ankle or right wrist at any time other than the 1986 remote trauma." In addition, the report states that the "current symptoms are, however, minor that she desires no medical attention." It also states that "[c]urrently, none of these problems appear sufficiently symptomatic or disabling to require medical treatment. They would, therefore, not be expected to be documented in any recent record of medical treatment."

Given that all of the medical evidence submitted is from, or flows from, the same source—Dr. Vohra's December 2010 declaration—it is particularly important that this

declaration be sufficient to carry the weight of this claim. The Commission does not find it to be. Dr. Vohra's declaration is, understandably perhaps, given the passage of time, vague as to the details of both his record search and the nature and extent of claimant's injuries. In terms of his record search, while he describes his efforts to obtain the records from a local hospital, he fails to explain why he no longer has any records of his examination and treatment of the claimant in the home of her uncle on the night of the attack, or during any of his subsequent examinations. In terms of the injuries themselves, his declaration hedges in a way that is not helpful to the Commission as fact-finder. For example, he states that the claimant "sustained fractures of two or more ribs, one or both wrists and at least one ankle." If there were fractures of the wrists and ankles, he does not state what bones were in fact fractured. He claims to have placed a cast on one of claimant's wrists, and removed it after only three weeks, but fails to describe how he treated the alleged ankle fracture or fractures, or how he treated, if at all, the other wrist. As noted above, Dr. Vohra's declaration aside, the claimant has presented no medical documentation whatsoever apart from medical reports generated after the filing of the claim. Moreover, none of the reports provide substantiating evidence of the exact nature and severity of the alleged underlying injury.

In light of these and other fundamental uncertainties, the Commission concludes that the claimant has failed to present evidence sufficient to prove that she suffered physical injuries in 1986 sufficient to satisfy the Commission's standard. In this regard, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

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

45 C.F.R. § 509.5(b) (2011).

In this case, based on the entirety of the evidence, the Commission finds that the claimant has failed to provide evidence sufficient to establish that she “suffered a discernible physical injury, more significant than a superficial injury”; that she “received medical treatment for the physical injury within a reasonable time”; and that the injury be verified by medical records, as required under the Commission’s physical injury standard.

In light of the foregoing, the Commission is constrained to conclude that the claimant, ^{5 U.S.C. §552(b)(6)} does not qualify for compensation under Category E of the January Referral. Accordingly, her claim must be and is hereby denied.

In reaching this conclusion, the Commission notes that, in this program, a number of victims of the hijacking of Pan Am Flight 73 made claims under the December Referral that were unsuccessful, but because they were Pending Litigants, were able to qualify for compensation under Category A of the January Referral, as hostages. As noted above, because claimant was not a Pending Litigant, she is jurisdictionally ineligible, under the terms of this Referral, for compensation under Category A. The Commission emphasizes this point so as to make clear that in reaching these conclusions, it does not wish to minimize the terror claimant may have experienced aboard Pan Am 73 or otherwise appear to judge negatively on the merits of her assertion that she was held hostage. Indeed, it would appear that claimant may have indeed been held by the hijackers under precisely the same circumstances as those who later became parties to the

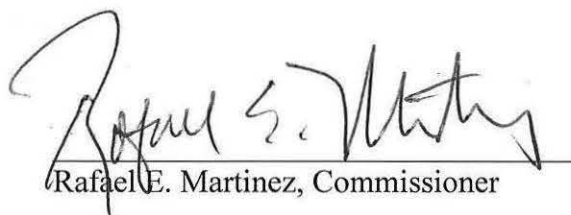
Pending Litigation. However, the Commission is constrained by the jurisdictional language of the January Referral, and, as noted above, is therefore unable to adjudicate claimant's hostage claim on the merits.

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

Dated at Washington, DC, February 23, 2012
and entered as the Proposed Decision
of the Commission.



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) (2011).