

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-II-161
	}	
	}	Decision No. LIB-III-134
	}	
Against the Great Socialist People's	}	
Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:

Mauricio J. Tamargo, Esq.
Poblete Tamargo LLP

ORDER

On June 10, 2014, Claimant filed a Petition to Reopen his claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya"). The underlying claim was for physical injuries said to have been sustained in connection with the September 5, 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan. Claimant brought the claim pursuant to "Category E" of the State Department's January 15, 2009 letter referring claims to the Commission in conjunction with the 2008 U.S.-Libya Claims Settlement Agreement. *See 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* ("2009 Referral" or "Referral").

In a Proposed Decision dated January 5, 2012, the Commission denied the claim on the ground that Claimant had failed to satisfy the Commission's standard for physical injury under the 2009 Referral. Claimant did not object to the Proposed Decision, which

was entered as the Commission's Final Decision on January 31, 2013, more than a year later.

Claimant bases his Petition to Reopen upon additional evidence about his alleged injuries, evidence that he says is newly discovered. Because we conclude that Claimant's petition is untimely under the Commission's regulations, the petition is denied.

BACKGROUND

Claimant originally brought three claims under the 2009 Referral: his Category E claim for physical injury, and claims under Categories A and D for hostage-taking and enhanced physical-injury compensation, respectively. Both Category A and Category D included a jurisdictional requirement that a claimant have been a plaintiff in one of the Pending Litigation cases listed in Attachment 1 to the Referral. The Commission denied those two claims because the Claimant did not satisfy that jurisdictional requirement. *See* Claim No. LIB-II-161, Decision No. LIB-II-134, at 5 (2012) ("Proposed Decision"). The Commission also denied his Category E claim because he failed to provide sufficient evidence to establish that he satisfied the Commission's standard for physical-injury claims under the 2009 Referral. *See id.* at 9. Prior to issuing the Proposed Decision, Commission staff had made numerous attempts, both in writing and via telephone, to follow up with the Claimant to assist him in developing his claim prior to adjudication. *See id.* at 8. Yet, he never responded.

The Commission issued that Proposed Decision on January 5, 2012, and soon thereafter, mailed a copy to Claimant's address of record, together with a letter explaining his right to object and to an oral hearing. The deadline for objecting was no later than February 4, 2012, *see* 45 C.F.R. §§ 509.5(e), (g), but the Commission did not receive any objection from Claimant by that date. About five months later on June 4,

2012, the United States Postal Service (“USPS”) returned the mailing, marked “Return to Sender,” to the Commission’s office; USPS records indicated that the USPS had tried to deliver the package on February 1, 2012, but was unable to do so. The Commission made another attempt to contact Claimant, mailing a duplicate copy of the Proposed Decision to him on December 21, 2012. In its cover letter, the Commission stated,

If you wish to object or request an oral hearing, please do so immediately upon receipt of this letter. The Libya Claims Program will be coming to a conclusion very soon, and it is imperative that all appeals be completed at that time. If we do not hear from you, we will finalize the enclosed Proposed Decision, which will terminate your right to an oral hearing and to present further evidence in support of your claim.

According to the Commission’s records, one of the Commission’s staff attorneys spoke with Claimant via telephone on January 23, 2013. In that conversation, the attorney specifically advised Claimant that if he wished to file an objection to the Proposed Decision, he should do so immediately. Claimant did not do so, and the Proposed Decision was entered as the Commission’s Final Decision on January 31, 2013.

By notice in the Federal Register dated March 11, 2013, the Commission announced that May 21, 2013 would be the completion date of the 2009 Referral claims program. *See Completion of Claims Adjudication Program*, 78 Fed. Reg. 15,377 (Mar. 11, 2013). The notice further stated that “[a] petition to reopen a claim filed under [the 2009 Referral] must be filed not later than March 21, 2013 (60 days before the completion date). 45 C.F.R. 509.5(l).” *Id.* No petition to reopen was received from Claimant by the deadline.

On June 11, 2014—more than one year after the closing date of the claims program under the 2009 Referral—the Claimant submitted a Petition to Reopen his Category E claim pursuant to 45 C.F.R. § 509.5(l) on the basis of newly discovered

evidence.¹ He submitted additional evidence on September 3, 2014, and December 2, 2014, evidence which included, *inter alia*, both recent and contemporaneous medical documentation.

In his petition and related submissions, Claimant argues that the Commission “retains authority under the Libya Clams Program, and *Title I* of the *International Claims Settlement Act* [“ICSA”], to reopen claim LIB-II-161 if justice and equity require it[,]” including “in cases where there is newly discovered evidence” Claimant’s counsel explains in a letter that the Claimant suffered two strokes in March 2013, approximately two months after his Category E claim became final in January 2013, and that Claimant’s family informed him that Claimant’s treating physicians believe he may have suffered other strokes earlier. Counsel therefore asserts that, “at the time of the denial, [Claimant] was mentally unable, and then after March 2013, he was physically unable, to assert his appeal, let alone engage in a process to locate medical records for the injuries that he sustained”

DISCUSSION

The Commission’s regulations govern petitions to reopen. Among other requirements, a petition to reopen on the basis of newly discovered evidence must be filed “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” 45 C.F.R. § 509.5(*l*). The program “completion date” for claims under the 2009 Referral was May 21, 2013. Thus, any petition to reopen had to have been filed no later than 60 days before that, or

¹ Claimant has also submitted a claim under the *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral”) for hostage-taking or unlawful detention in violation of international law under Category C of that Referral.

before March 22, 2013. Claimant filed his petition on June 11, 2014, more than a year after that deadline. For that reason, Claimant's petition must be denied.

Claimant makes two arguments in response. First, he says that the Commission has authority to waive or extend its deadlines and should do so here because of the serious stroke he suffered. Second, he argues that the Commission could treat all three Libya Referrals from the Department of State as a single "program" within the meaning of the provision governing petitions to reopen. If it did that, the "program" would still be ongoing, since the Commission is still adjudicating claims under a third (2013) referral, and the petition could thus be treated as timely.

Deadline Extension

The Commission has general authority to extend deadlines in its adjudication of claims. The relevant provision reads as follows:

Enlargement. When by the regulations in this chapter, or by a notice given thereunder or by order of the Commission, an act is required or allowed to be done at or within a specific time, the Commission for good cause shown may, at any time in its discretion:

- (1) With or without motion, notice, or previous order or
- (2) Upon motion, permit the act to be done after the expiration of the specified period.

45 C.F.R. § 501.7(b) (2014).

Despite having this authority, the Commission will not exercise it here for two reasons: (1) after the Commission has completed a particular program, the principle of finality is paramount, as that principle ensures fairness and timely recompense to *all* the claimants in that program; (2) even if there were rare circumstances meriting the reopening of a program after its completion, this is not one of them: considering all of the

surrounding circumstances, Claimant has not shown sufficient “good cause,” as required by the regulations.

First, the Commission has never waived or extended a deadline following the completion date of a claims program. It has only granted petitions to adjudicate a late-filed claim where, although the filing deadline may have passed, the program had not yet been completed, either as required by statute or by notice of the Commission.²

There are good reasons why the Commission has never permitted the reopening of a claim after the formal completion of a program, and they apply with full force here. Chief among these is the importance of having a date certain at which the whole group of claims can be considered fully adjudicated, and at which a full and final distribution of the settlement funds can be made. The Commission’s governing statute, the ICSA, reflects this principle, both in its provisions governing the payment of awards by the Department of the Treasury, *see* 22 U.S.C. § 1627(e) (2012), and those that provide for the finality and non-reviewability of the Commission’s decisions, *see* 22 U.S.C. §§ 1622(g), 1623(h) (2012).

² When it has done so, the Commission has cited 45 C.F.R. § 501.7(b) in some claims, *see Claim of ESTATE OF OSCAR ROSENTHAL*, Claim No. PO-10884, Decision No. PO-1536 (1964) (Decision of the Commission and Order) (allowing a late-filed claim to be adjudicated on the merits based on “principles of equity and justice”), but not in others, *see e.g., Claim of JOHN KORENDA*, Claim No. CU-8255, Decision No. CU-3580 (1969) (holding that the Commission would “accept for consideration on their merits claims filed after the deadline so long as the consideration thereof does not impede the determination of those claims which were timely filed”); *Claim of TOBACCO LEAF PUBL’G CO.*, Claim No. CU-8285, Decision No. CU-5728 (1970).

The Commission and its predecessor, The International Claims Commission, have also *denied* many claims for failure to meet filing deadlines, including in claims programs, like here, where the Commission itself set the filing deadline. *See, e.g., Claim of ABRAHAM SINGER*, Claim No. PO-10810, Decision No. PO-680 (1962); *Claim of FRANZ B. SCHICK & META SCHICK*, Claim No. Y-315, Decision No. Y-1439 (1954). In one such case, the Commission’s predecessor explicitly cited the enlargement authority of section 501.7(b) but denied the claim for lack of good cause shown. *See Claim of ADIL KAMBER*, Claim No. Y2-1868, Decision No. Y2-0723 (Final Decision) (1969) (denying late-filed claim where claimant had been unaware of the filing period).

Most important, the very structure of ICSA's payment provisions contemplates firm completion dates for each claims program. ICSA requires Treasury to make payments in the following order of priority: first, a payment of \$1,000 or the full principal amount of the award, whichever is less; and then, for awards of greater than \$1,000 (which includes every single award in the Libya Claims Program),

[to make] payments from time to time on account of the unpaid principal balance of each remaining award which shall bear to such unpaid principal balance the same proportion as the total amount available for distribution at the time such payments are made bears to the aggregate unpaid principal balance of all such awards

22 U.S.C. § 1627(e) (2012). In other words, Treasury makes payments to successful claimants in a program based on a ratio of two numbers: (i) the total amount of money remaining in the fund and (ii) the aggregate unpaid balance from *all* the Commission's awards in a given program. If the Commission accepted petitions to reopen indefinitely, the Secretary would never know the aggregate unpaid balance of all the awards, one of the two numbers he needs to make any payments. As Treasury explains on its website, "[u]ntil all the awards have been certified by the [Commission], it is not possible to know the full amount that can be paid to each claimant under the [2009 Referral] program." Judgment Fund Branch, U.S. Dep't of the Treasury, *Unpaid Foreign Claims*, http://www.fiscal.treasury.gov/fsservices/gov/pmt/unpdforclaims/libya_claims.htm (last visited Feb. 12, 2015).

Allowing claims programs to be reopened following their completion would make this scheme extremely difficult to administer. Moreover, in the specific context of the 2009 Referral, the Treasury Department has effectively recognized this. Its website notes that the Commission "has completed its adjudication of claims and review of final appeals under the Libya Foreign Claims Program[]" and has "certified its final awards to

Treasury for payment. Therefore, Treasury is prepared to begin making final payments to awardees under the January 15, 2009 Referral.” *Id.* If the Commission began granting petitions to reopen, it might undermine Treasury’s conclusion, in effect necessitating that Treasury stop making payments until the Commission was really finished making awards.

The provisions that declare Commission decisions to be final and nonreviewable by courts are likewise based in part on the fact that claims within a single program are effectively intertwined with each other and that, at some point, a program must end so that the claimants in that program can receive compensation to which they are entitled. In fact, this was part of the rationale for those provisions when they were introduced in Congress.³ The Commission itself has also recognized the importance of having a firm deadline for the completion of claims programs.⁴

If the Commission were to reopen the program for this one claim, there would be no good reason not to keep it open (or reopen it yet again) for other claimants who might allege newly discovered evidence. This would create serious problems, not only in general, but in this program in particular. Based on its determination of both the

³ See 95 Cong. Rec. 8840 (1949) (“The problem is to get the proceeds of this settlement to the Americans who have been deprived. It would serve no interest to allow the work of this Commission to be entangled by judicial interposition.”) (statement of Rep. Abraham Ribicoff); see also *id.* (Rep. Ribicoff further explaining that a group of claimants who had appeared before a congressional committee “did not wish to see this procedure involved in the law’s delays. They were mindful that final settlement in all but the minor cases must be deferred until all cases have been settled. To postpone the realization of their hopes will be in the interest of no one.”).

⁴ “[T]he traditional philosophy of claims programs in the United States envisions strict deadlines for all programs. Payment is intended to go to the basic claimants, not to their grandchildren or great-grandchildren. This Commission has ever been conscious of this fundamental philosophy, and has in fact completed all its programs on time” *Claim of ALBERT FLEGENHEIMER*, Claim No. IT-10,555, Decision No. IT-877, at 4 (1959) (Final Decision). This principle was also hinted at in some decisions issued in the Egypt Claims Program. For example, in a claim in which the Commission had invited claimant’s counsel to provide further information in support of his claims, the Commission stated, “In view of the approaching deadline of June 30, 1990, set for completion of the Egyptian claims program, the Commission concludes that it can wait no longer to issue a decision in this claim” *Claim of ESTATE OF FELIX MOUSSA BENZAKIAN, DECEASED*, Claim No. EG-007, Decision No. EG-139, at 4 (1990).

aggregate amount of all Commission awards and the amount in the fund, Treasury has calculated that “awardees [of the 2009 Referral] will receive, in total, 100% of their awards.” In other words, the funds available exceed the aggregate unpaid balance of the Commission’s awards. Reopening claims under the 2009 Referral could theoretically upend this conclusion, throwing the Treasury payment process into disarray.

Even if this were the only petition to reopen and there were enough money in the fund for all the 2009 Referral awardees to receive 100% of their awards and for Claimant to receive his potential award as well, the broader context of the Libya settlement would counsel against reopening this claim. Since the Commission concluded the 2009 Referral program, the State Department has referred another set of claims to the Commission. *See* 2013 Referral. Thus, there are now numerous other claimants who have claims against the money from the Libya Claims Settlement Agreement. If the Commission awarded money to Claimant now in this claim, it would reduce the amount of money available from the Libya settlement. This could potentially prejudice every successful 2013 Referral claimant. By reducing the money available, a petition to reopen here could mean that successful 2013 Referral claimants end up receiving a smaller percentage of their awards than they otherwise would. This result would be neither just nor equitable.

Claimant contends that the Commission reopened the Albania Claims Program after it was closed. However, the Commission never actually published notice that its adjudication of claims in that program was complete. This is crucial because the principle of finality did not apply in the Albania Claims Program, because Treasury never relied on the program having been completed when it determined how much other claimants in the program would receive.

Even if we viewed justice and equity as not requiring the adoption of a categorical rule against reopening claims after a program is completed, it is clear that any exceptions to that rule should be narrow. Thus, to show “good cause” under 45 C.F.R. § 502.7(b) to reopen a claim after program completion would require a significant showing of injustice to the individual. Claimant has not done so here. In this claim, the Commission made numerous attempts to contact Claimant after issuance of the Proposed Decision, both to inform him of his right to object and, if necessary, to help him develop his claim. In fact, the Commission waited more than a year after issuing the Proposed Decision before making it final so as to give Claimant every opportunity to object, even though the Commission’s regulations provide that a Proposed Decision without objection becomes final after 30 days. *See* 45 C.F.R. § 509.5(g). Indeed, before making the Proposed Decision final, the Commission sent him another copy of the decision, again with instructions on how to object. Then, a month later, a Commission staff attorney even spoke directly with Claimant on the telephone and told him that if he wished to file an objection, he should do so immediately. Claimant still did not object, and it was only then that the Commission made the Proposed Decision final.

Counsel attributes Claimant’s failure to file a petition to having suffered a stroke two months after the Proposed Decision became final, or perhaps even to strokes suffered in the months prior to that. However, given all the circumstances here, Claimant has had ample opportunity to make his claim.

First, experiencing a medical emergency *two months after* a Proposed Decision becomes final, particularly when the decision did not become final until more than a year after issuance of the Proposed Decision, is in and of itself insufficient grounds to waive a program completion deadline. Even if it is true that Claimant suffered a stroke in March

2013, the same month as the deadline for a petition to reopen, there has been no showing that but for the stroke he otherwise would have filed his petition on time. When he finally did bring the petition, it was when his new counsel did so more than a year later. Second, the evidence about possible strokes prior to that is inconclusive and thus insufficient to demonstrate “good cause.” Third, and most important, the opportunity to file a petition to reopen must be seen here in light of the full timetable of this claim. Seen through that lens, Claimant has had more than a full and fair opportunity to bring his claim. Not only did the Commission wait more than a year after issuing the Proposed Decision before making it final, but the Commission also sent him an additional copy of the Proposed Decision, and a staff attorney spoke with him via telephone before the Proposed Decision became final. During that call, the staff attorney specifically encouraged Claimant to object if he believed the Proposed Decision was wrong. And yet Claimant did not do so. So, while Claimant’s stroke certainly could have rendered him unable to bring a petition to reopen in March 2013 as the program was on the verge of completion, he certainly had a sufficient opportunity from 2009 through early 2013 to make his claim and support it with relevant evidence.

Three Libya Referrals as Single “Program”

Claimant’s second argument is that the Commission should treat the three Libya referrals as a single program and the settlement fund as a single account with three different parts. The problem with this argument is that doing so would be contrary to how the Libyan Claims Programs were established by the State Department and how they have been administered by both the Commission and the Treasury Department. As noted earlier, the Commission clearly announced the completion date of the January 2009 Referral program in the Federal Register, specifically noting the date by which petitions

to reopen under that Referral had to have been received. Moreover, Treasury Department records indicate that the Department maintained two separate accounts for the Second and the Third Libya Referral programs, *see* <http://www.fiscal.treasury.gov/fsreports/rpt/combStmnt/cs2014/c94.pdf>. Regardless of the common source of the funds, it is clear, in light of the ICSA payment provisions and the notice on its website, that the Treasury Department relied on a firm completion date so that it could make payments to successful claimants under the 2009 Referral.

Conclusion

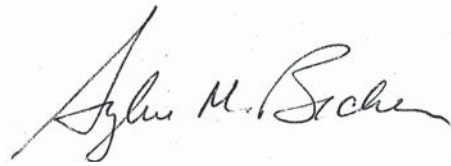
In issuing this Order, the Commission acknowledges the terror that Claimant no doubt experienced aboard Pan Am Flight 73. Moreover, by denying the petition for lateness, the Commission is in no way concluding that the new evidence he has submitted would fail to satisfy the Commission's physical-injury standard. However, principles of finality, driven in turn by the need to ensure timely compensation for numerous other claimants, require that each of the Commission's claims programs have a firm completion date. In this case, the Second Libya Claims Program was completed on May 21, 2013 and, pursuant to 45 C.F.R. § 509.5(l), all petitions to reopen had to have been filed no later than 60 days beforehand, on or before March 21, 2013. 78 Fed. Reg. 15,377. The Commission is therefore unable to adjudicate Claimant's physical-injury claim on the merits.

Accordingly, it is ORDERED that the Petition to Reopen this claim for further consideration be, and it is hereby, denied.

Dated at Washington, DC, February 12, 2015
and entered as the Order
of the Commission.

A handwritten signature in black ink, appearing to read "Anuj C. Desai". The signature is fluid and cursive, with the first name "Anuj" being more prominent.

Anuj C. Desai, Commissioner

A handwritten signature in black ink, appearing to read "Sylvia M. Becker". The signature is cursive, with the first name "Sylvia" being the most distinct part.

Sylvia M. Becker, 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-161

Decision No. LIB-II-134

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon the hostage-taking or unlawful detention of and physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) during 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, D, 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 D 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. 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 ('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).

BASIS OF THE PRESENT CLAIM

On July 6, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under the January Referral, along with exhibits supporting the elements of his claim. This submission included evidence of claimant's

U.S. nationality, his presence at the scene of the terrorist incident, and his alleged physical injuries for which he now claims compensation.

The claimant states that he was on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986, when he and other passengers were held hostage by armed hijackers for sixteen hours while the plane sat on the tarmac. Claimant states that, after an airplane door next to him had been opened, he exited the plane onto the wing, and while attempting to jump to an adjacent inflatable slide, fell short and injured his ankle and the side of his body. He further states that he was taken to a local hospital, where he was fitted with a temporary cast, and subsequently evacuated via U.S. military aircraft to Frankfurt, Germany.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission's jurisdiction here is limited to the categories of claims defined under the January Referral. As noted above, Categories A, D, and E of the January Referral all require that the claimant be a U.S. national. January Referral, *supra*, ¶¶ 3, 6-7. In addition, Category A requires that the claimant not have received an award under the December Referral, that the claimant be a named party in the Pending Litigation listed in Attachment 1 to the January Referral, and that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. Category D, because it requires that the claimant have received an award under the December Referral, also incorporates the requirements that the claimant be a named party in the Pending Litigation, and evidence that this litigation was dismissed. *Id.* ¶¶ 3, 6. 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 his California birth certificate and a copy of his temporary U.S. passport, issued one day after the incident, both of which show his place of birth in California. In addition, the Commission has verified that claimant is currently registered to vote in the State of Texas. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through the effective date of the Claims Settlement Agreement.

Pending Litigation

Categories A and D require that the claimant have been a plaintiff in a Pending Litigation listed in Attachment 1 to the January Referral. January Referral, *supra*, ¶¶ 3,6. Claimant states in his Statement of Claim, and the relevant pleadings confirm, that he was not a party to a Pending Litigation. Because claimant does not satisfy this jurisdictional element for compensation under Categories A and D, the Commission is constrained to conclude that his claim under these categories is ineligible for adjudication on the merits.

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 his claim form, and the Commission's records confirm, that he was not a party to the Pending Litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of his 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 his 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 his claim under Category E.

In summary, therefore, 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 under Category E only.

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 his Statement of Claim and accompanying exhibits, claimant suffered physical injuries on September 5, 1986 during an incident in which, as discussed above, several gunmen hijacked Pan Am Flight 73 in Karachi, Pakistan, as it sat on the airport tarmac shortly before takeoff. Claimant avers that, during the final assault in the main cabin of the aircraft, a passenger seated next to him opened the door, at which point claimant exited the plane. He states that he attempted to jump from the wing onto an adjacent inflatable slide, but fell short, which “caused [him] to injure [his] ankle and bruise [his] side in the fall.” In addition, claimant states that, “[d]espite [his] injuries and pain, [he] was somehow able to stand to walk into the terminal.” He claims that he “received initial medical screening at the airport first aid center and was later transported to a local hospital where [his] leg was x-rayed and a temporary cast [sic] was fitted.” According to claimant, he was “subsequently transported to the Pakistani base in Karachi[,] and from

there was taken to a local hotel and thereafter "evacuated by U.S. military medical evacuation flight in a stretcher to Frankfort [sic], Germany."

In support of his claim, claimant has provided, *inter alia*, an unsworn narrative describing his experience during the incident and his alleged physical injuries, as well as several color photographs from the time of the incident depicting claimant in a hospital bed, in a wheelchair, using crutches, and depicting a large bruise on his left side.

While the photographs submitted by claimant suggest that the claimant suffered from some kind of injury during the Pan Am 73 hijacking, the very nature of claimant's injuries ~~let~~ alone the severity ~~remains~~ unknown. In particular, there is no mention or identification of the particular injury, or of the severity of the injury. The evidence does not indicate, for example, whether claimant's ankle was broken or whether he suffered from a severe or mild sprain. There is no indication of the treatment received. While the photographs indicate that the claimant was in a hospital and in a wheelchair, based on the record before it, the Commission is unable to determine whether or not a discernible injury, more than superficial, was suffered, or for example, whether the treatment of the claimant was precautionary in nature.

The Commission staff sent claimant a letter, dated August 16, 2010, requesting that claimant provide medical documentation evidencing his physical injuries; however, to date no response has been received. Numerous attempts to follow up with the claimant, in writing and via telephone, have gone unanswered. Thus, as it stands, the claimant has not provided evidence sufficient to identify the nature of his injury, or indeed that he suffered a "discernible physical injury, more significant than a superficial injury," as required by the Commission's standard for compensability. On this point, 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) (2010).

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 he "suffered a discernible physical injury, more significant than a superficial injury"; that he "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.

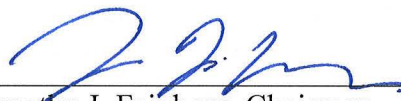
In light of the foregoing, the Commission is constrained to conclude that the claimant, ^{5 U.S.C. §552(b)(6)} does not qualify for compensation under Category E of the January Referral. Accordingly, his claim must be and is hereby denied.

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, he 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 must have experienced aboard Pan Am 73 or otherwise appear to judge negatively on the merits of his assertion that he was held

Indeed, it would appear that claimant was held by the hijackers under precisely the same circumstances as those who later became parties to the Pending Litigation. All other requirements for hostage claims appear to have been met in this particular claim. 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.

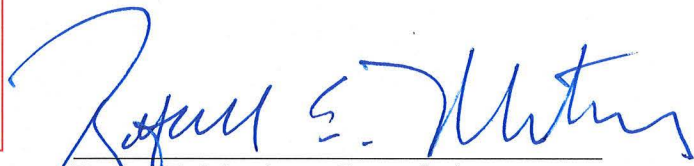
Dated at Washington, DC, January 25, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman

**The decision was entered as the
Commission's Final Decision on**

January 31, 2013



Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2010).