

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-155

Decision No. LIB-II-171

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on the alleged severity of physical injuries suffered by 5 U.S.C. §552(b)(6) as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated*

January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission ("January Referral").

The present claim is made under Category D. According to the January Referral, 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 our December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to our December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

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

The January Referral, as well as a December 11, 2008 Referral Letter ("December Referral") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement,

barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICOSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On May 13, 2011, the Commission adjudicated claimant's physical injury claim under the December Referral. The Commission determined that claimant suffered physical injuries during the hijacking in the form of shrapnel wounds to various parts of his body, including his brain, which resulted in permanent facial deformation as well as vision and hearing loss. The Commission concluded that these injuries, which required immediate and significant medical treatment, met the Commission's standard for physical injury and, consequently, claimant was entitled to compensation in the amount of \$3 million. *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-029, Decision No. LIB-I-042 (2011).

BASIS OF THE PRESENT CLAIM

On July 2, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under Category D of the January Referral, along with additional medical records. Claimant also directed the Commission to the documentation submitted with his claim under the December Referral (Claim No. LIB-I-029), which included contemporaneous medical records of his injuries and the

treatment he received at a U.S. military hospital in West Germany and the immediate and subsequent treatment he received at St. Jude Medical Center¹ in Fullerton, California.

DISCUSSION

Jurisdiction

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

Nationality

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

Award Under the December Referral

To fall within Category D of the claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that claimant has satisfied this element of his Category D claim.

¹ Also known as St. Jude Hospital and Rehabilitation Center.

Dismissal of the Pending Litigation

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

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.

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether "the severity of the injury is a special circumstance warranting additional compensation." In *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D. The Commission further held that in determining which injuries are among the most severe, it would consider the nature and extent of the injury itself, the impact that the injury has had on claimant's ability to perform major life functions and activities—both on a temporary and on a permanent basis—and the degree to which claimant's injury has disfigured his or her outward appearance.

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

In support of his Category D claim for additional compensation, claimant incorporates his prior submission in support of his claim under the December Referral and has submitted additional medical records for consideration. In his prior submission claimant provided a declaration, dated June 22, 2009, detailing the terrorist attack, describing the injuries he suffered, the treatment he received, and his subsequent health condition. Claimant’s prior submission also included medical records from a U.S. military hospital in West Germany where claimant received treatment after he was evacuated from Pakistan, and medical records from St. Jude Medical Center in Fullerton, California for treatment received upon his arriving from Pakistan, and subsequent rehabilitation treatment on an out-patient basis over a period of approximately six months.

According to his declaration, claimant was a passenger on board Flight 73 with his mother, when it was hijacked in Karachi, Pakistan. Claimant states that, after many hours as a hostage, he had fallen asleep as result of exhaustion from “hunger, dehydration, and the stress of the hijacking.” According to claimant, he then woke up to notice the lights off on the plane; following this, his next memory was waking up in a Karachi hospital. Claimant alleges that it was clear from his injuries that he was “hit by

at least one bullet and a great deal of shrapnel.” He states that he was also told that at least one of the terrorist grenades exploded next to his head knocking him unconscious.

Claimant further states that he received medical treatment in a Pakistani hospital and was subsequently transferred to a hospital in West Germany. On September 7, 1986, according to U.S. military medical records, claimant was admitted to a military hospital in Landstuhl, West Germany. He remained at the facility for seventeen days until September 24, 1986. The records note that claimant had multiple traumas to his head, face, chest, and right upper arm, and suffered a “shrapnel injury of the brain.” In addition, the records show that claimant sustained an injury to his right hand, and that his eye was damaged as a result of shrapnel in his cornea. According to the military hospital medical records, a CT scan “showed multiple fragments and bone scattered throughout the brain, including one in the left hemisphere . . . Fragments were primarily in the right frontal and right temporoparietal.”

The military hospital medical records include a report from an ophthalmologist who treated claimant. The ophthalmologist’s report dated September 19, 1986, states that when claimant arrived he had a “gaping corneal wound” that was not treated when he was in Pakistan, and the report states that “[claimant’s] eye was apparently opened for at least one day; maybe one and a half days.” The ophthalmologist highlights the severity of the eye injury by stating, “the patient will probably require corneal transplant and, actually, one would have been done here in Germany if an [e]ye bank was available; unfortunately, there is no tissue for transplantation available to our hospital.”

While at the military hospital, claimant went through immediate surgery and had the following surgical procedures: (1) craniectomy procedures on the right frontal and

left temporoparietal with removal of shrapnel; (2) debridement of shrapnel wounds on the right shoulder, right arm, and right hand, and arthroscopy of the right shoulder; (3) debridement and repair of facial lacerations; and (4) repair of corneal lacerations and debridement of shrapnel fragments. Following surgery, claimant was kept intubated and placed on a ventilator because of the "possibility of swelling of the brain." In addition, claimant suffered a collapsed lung at the hospital and required a chest tube to return his lungs to normal. After seventeen days, claimant was discharged from the military hospital in West Germany and returned to the United States where he received additional medical treatment.

On September 25, 1986, claimant was admitted to St. Jude Medical Center in Fullerton, California, where he underwent surgery for, in the words of the hospital's records, "debridement and intrinsic tendon transfer of index finger, partial thickness skin graft, right hand and shoulder." He was discharged from St. Jude Medical Center on October 1, 1986. Following his discharge, claimant attended physical therapy three times a day for two weeks. A March 31, 1987, letter from St. Jude Medical Center to Dr. Carl Chen notes that at the beginning of his physical therapy, claimant had "decreased strength in all of his extremities." The letter ends by noting that physical therapy stopped because claimant complained of abdominal pain and subsequently required abdominal surgery.

Claimant has also produced a series of x-ray reports summarizing x-rays taken between 1992 and 2000, which show the presence of multiple metallic fragments in his body. In addition, claimant submitted a report of a CT scan of his brain conducted in April of 2009, which evidences the presence of shrapnel in his brain, scalp, and face. In

addition, claimant has submitted an orthopedic consultation report, dated November 23, 2009, from Dr. Jacob Tauber. Dr. Tauber's report states that there was injury to the radial nerve in claimant's right upper arm "where the patient has a sensory deficit," which creates significant pain. Dr. Tauber's report also states that the claimant

lacks dexterity in his right hand and index finger. This is dominant hand, and he has never been able to resume all activities, due to his residuals. In summary, this patient had most significant injuries and has deficits as a result of the hijacking of September 1986. He will never have normal use of his right upper extremity.

A November 23, 2009 report prepared by Safety Works Medical Inc. indicates that claimant underwent a "Functional Capacity Evaluation" and that the "[claimant] demonstrated ratable pain that is adequately encapsulated in the conventional impairment rating system." Under the "Work Restrictions" section of the report it states that claimant is "currently working full duty. . . . we recommend maximum lift and carry of 57 lbs. . . and the patient can frequently perform reaching, handling, and pinching."

Claimant also submitted to the Commission an undated joint letter from Dr. Clyde Kitchen, claimant's ophthalmologist, and Thomas Law, claimant's optician. The letter indicates that claimant was a patient of Dr. Kitchen for follow-up treatment during the years after the hijacking incident. The letter notes that claimant sustained severe damage to his right cornea and that corneal scarring left claimant with an "irregular astigmatism," and that "injuries to his brain created a permanent binocular visual field loss." The letter specifically states

[claimant] has a left inferior quadrantanopsia in both eyes which appears to be due to a parietal lobe injury secondary to the brain damage he suffered from the exploding grenade. This affects his vision significantly

as he is unable to see things below and to the left of fixation without first turning his head downward and to the left so that the image he wants to see comes into his usable field of vision.

In addition, the image clarity in his right eye was reduced due to the shrapnel still in his eye and the scarring from injury to his cornea. On May 22, 2007, according to the letter, claimant had a corneal transplant, but the transplant "failed to improve his visual acuity beyond the previous level even with the help of glasses."

In his declaration, claimant addresses the impact of the hijacking on his life. Claimant states that the injuries from the attacks were "life-altering and permanent." Claimant claims that since the attack he has constant ringing in his right ear and that his hearing is permanently impaired.² He further asserts that a scar on his cornea "dramatically impairs" his vision and that his current vision is "like looking through a cracked windshield." He notes in his declaration that his peripheral vision in both eyes is permanently altered and that he cannot see below his knees without first turning his head downward. Claimant also states that he is heavily scarred from the shrapnel on the right side of his body, and that he experiences extreme pain when the remaining shrapnel periodically moves and his body tries to expel it. He states that the injuries have affected his balance, dexterity, and agility. In addition, claimant states that the severe trauma to his head has intensified his pre-existing epilepsy, and he now requires higher doses of his medication to control his epilepsy. Also, according to his

² In addition to copies of hospital medical records, claimant also submitted notes taken by his prior counsel of medical records that are no longer available. One of the notational summaries states that on March 17, 1986, claimant visited an Otolaryngologist where the exam revealed "high frequency neural hearing loss due to acoustic trauma."

declaration, claimant's seizures went from petit mal before the injuries to grand mal after the injuries.³

In assessing the evidence concerning that portion of the claim for additional compensation based on the physical injury suffered by the claimant, the Commission considers the factors articulated in its decision in ^{5 U.S.C.} §552(b)(6) which include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions.

Considering the totality of the evidence submitted, the Commission finds that claimant's severe injuries have had a sufficiently significant impact on his ability to perform major life functions, and the disfigurement from his injuries is severe so as to qualify him for additional compensation under Category D. Claimant's medical records demonstrate that claimant suffered multiple injuries from the hijacking incident. Claimant had shrapnel wounds to his head, face, chest, right upper arm, and shrapnel in his brain. He also had significant injuries to his right eye as a result of shrapnel around his eye and in his cornea. Claimant also sustained injuries to his right hand and right ear. As a result of the injuries, claimant underwent numerous surgical procedures at the military hospital in West Germany and underwent additional procedures at St. Jude Medical Center upon returning to the United States.

The evidence submitted by claimant also demonstrates the permanent impact of claimant's injuries. Claimant continues to have shrapnel in his body, including shrapnel

³ A petit mal seizure is "a staring spell, most commonly called an 'absence seizure.' It is a brief (usually less than 15 seconds) disturbance of brain function due to abnormal electrical activity in the brain." Petit Mal Seizure, Medline Plus. <http://www.nlm.nih.gov/medlineplus/ency/article/000696.htm> (last updated Feb. 16, 2012). In contrast, a grand mal seizure "features a loss of consciousness and violent muscle contractions." Grand Mal Seizure, Mayo Clinic. <http://www.mayoclinic.com/health/grand-mal-seizure/DS00222> (last updated June 23, 2011).

in his brain, scalp, face, and wrist. In addition, according to claimant's ophthalmologist, the eye injuries claimant suffered have permanently reduced his vision even after a cornea transplant. The medical records provided by claimant demonstrate that claimant has suffered from significant vision issues, including permanent damage to his vision. According to evidence in the record, claimant also has a permanent deformity of his ear and scarring around his ear. Moreover, the injuries to claimant's right arm permanently affected the mobility of his arm. Under these circumstances, the Commission concludes that the severity of claimant's injury in this claim rises to the level of a special circumstance warranting additional compensation under Category D. Accordingly, claimant 5 U.S.C. §552(b)(6) is entitled to compensation as set forth below.

COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. As the Commission has previously stated in this program, assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula.⁴ It is, *a fortiori*, similarly difficult to assess the *relative* value of such claims, as is contemplated under Category D of the January Referral. Moreover, the Commission is unaware of any precedent under international law where fixed sum awards have been enhanced for a subset of claimants who suffered particularly egregious harm, such as severe physical injury, vis-à-vis other claimants.

⁴ *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-002, Decision No. LIB-II-002, at 4-5 (Final Decision) (citing *Claim of* 5 U.S.C. §552(b)(6) , Claim No. LIB-II-002, Decision No. LIB-II-002, at 9-10 (2009) (Proposed Decision)); see also 2 Dan B. Dobbs, *Dobbs' Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); I Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937)).

The negotiating history of the Claims Settlement Agreement offers little guidance as to the expected value of eligible Category D claims. In this respect, the July 28, 2008 letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate, which preceded passage of the LCRA, states only that any additional money obtained during negotiations would be intended for, among other things, “further recoveries for death and physical injury victims . . . where special circumstances warrant, for example, if the injuries are especially severe” For its part, the January Referral itself recommends only that “the Commission award up to but no more than an additional \$7 million per claim (offering the possibility that some injury cases will be compensated at the \$10 million level of the wrongful death claims processed by the Department of State).” January Referral, *supra*, ¶ 6.

For the sake of comparison only, on the domestic level, one federal court has grappled with the question of enhanced pain and suffering awards for physical injuries resulting from acts of international terrorism. A leading case in this regard is *Peterson v. Islamic Republic of Iran (Peterson II)*, 515 F. Supp. 2d 25 (D.D.C. 2007), where the U.S. District Court for the District of Columbia established a framework whereby persons suffering “substantial injuries in terrorist attacks” were entitled to an award of \$5 million as a “baseline assumption.”⁵ *Estate of Bland v. Islamic Republic of Iran*, No. 05-cv-2124 (RCL), 2011 WL 6396527, at *2 (D.D.C. Dec. 21, 2011) (citing *Peterson II*, 515 F. Supp. 2d at 54). Applying this framework, the court, in subsequent cases,

⁵ Injuries entitling the plaintiff to the baseline award of \$5 million included “compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as ‘lasting and severe psychological pain.’” *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 77 (D.D.C. 2010) (citing *Peterson II*, 515 F. Supp. 2d at 54).

departed upward from this assumption in “more severe instances of physical or psychological pain . . .” *id.* (citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 84 (D.D.C. 2010)), and downward in instances where the plaintiff’s injuries were less severe. *Id.* Thus, in one case where the plaintiff had awoken from a bomb blast to discover “his skin hanging from his body; severe hole-like wounds passing through his chest; pieces of metal, concrete, and glass embedded in his body; and his leg split open[,]” and where he suffered burns to 90% of his body, the court departed upward to \$7.5 million. *Valore*, 700 F. Supp. 2d 52. On the other hand, in a case where the plaintiffs suffered from hearing loss, PTSD, and/or minor cuts and bruises, the court departed downward to \$2 million. *See Davis v. Islamic Republic of Iran*, 2012 WL 1059700 (D.D.C. 2012).

In light of the discussion above, the Commission holds that, in determining the appropriate level of compensation for claimants who satisfy the threshold requirements for Category D claims, it will consider, in addition to the recommendation contained in the January Referral for Category D, such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any disability ratings, if available, and the nature and extent of disfigurement to the claimant’s outward appearance.

Starting with the severity of the initial injury, claimant was severely injured by grenade shrapnel. The shrapnel caused multiple shrapnel wounds to his head, face, chest, right upper arm, and shrapnel in his brain. Claimant’s right eye was also damaged

as a result of shrapnel around his eye and in cornea. In addition, shrapnel also damaged cartilage of his right ear and his ear drum. As a result of his injuries, claimant was hospitalized for seventeen continuous days at a U.S. military hospital in West Germany, and then hospitalized for an additional six days at St. Jude Medical Center in Fullerton, California. He underwent numerous surgeries in the military hospital in West Germany including a craniectomy, an arthroscopic procedure on his shoulder, and surgery to remove shrapnel from his body including in and around his cornea. The injury to claimant's eye was so severe that the ophthalmologist at the military hospital noted in his report that claimant would have undergone a corneal transplant if an eye bank had been available to the military hospital. Upon arriving from Pakistan, claimant underwent additional surgery at St. Jude Medical Center, including a debridement and tendon transfer procedure, and a skin graft procedure.

Beyond the numerous surgeries, claimant has also suffered a degree of permanent impairment. Claimant underwent multiple surgeries to remove shrapnel from his right eye and a corneal transplant to address the shrapnel injury to his cornea. Yet, the claimant still suffers from visual field loss and lost vision clarity. In addition, even after the attempts to remove shrapnel, claimant continues to have shrapnel in his body from the attack. X-ray reports demonstrate the claimant experienced pain in his wrist and chest, and the x-rays themselves showed that there was still shrapnel in those locations in his body. Finally, claimant continues to have disfigurement to his outward appearance. For example, the shrapnel injuries to his ear resulted in tissue loss of his right ear cartilage and scarring of the scalp around his right ear. Claimant also has scarring on his right shoulder, arm, and hand.

In light of these facts, and in consideration of the factors listed above, the Commission holds that \$3 million is an appropriate amount of compensation in this claim. The Commission further holds that, as with awards for physical injury made under the December Referral, compensable claims under Category D 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 million and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission therefore enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 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).

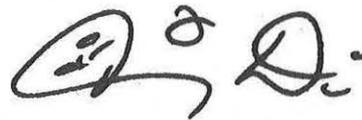
Dated at Washington, DC, June 5, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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

August 28, 2012

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).