

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-010

Decision No. LIB-II-140

Counsel for Claimant:

K. Lee Boyd, Esq.
Schwarcz, Rimberg, Boyd
& Rader, LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation 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 [the Department of State’s] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State’s] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 6. Attachment 1 to the January Referral 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 ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On July 28, 2009, the Commission adjudicated claimant's physical injury claim under the December Referral. The Commission determined that the claimant was injured as a result of being struck by shrapnel on his left side. Further, the Commission concluded that the shrapnel injury—requiring claimant to undergo a surgical procedure for its removal—met the Commission's standard for physical injury and, consequently, that the claimant was entitled to compensation in the amount of \$3 million. *Claim of 5 U.S.C. §552(b)(6)*, Claim No. LIB-I-009, Decision No. LIB-I-003 (2009) (entered as Final on September 4, 2009).

BASIS OF THE PRESENT CLAIM

On September 3, 2009, the Commission received from claimant a completed Statement of Claim in which he asserts a claim for additional compensation under Category D of the January Referral, along with exhibits supporting the elements of his claim, including evidence of his U.S. nationality, his receipt of an award under the December Referral, and the extent of his injuries. Specifically, claimant asserts that he

“received serious, untreatable injuries which will affect [him] for the rest of [his] life.”

The evidence submitted includes claimant’s statements and medical records indicating the treatment he received for his injuries.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction here is limited to the category of claims defined under the January Referral; namely, 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*, ¶ 3.

Nationality

The Commission determined in its decision on claimant’s 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 the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of his Category D claim.

Dismissal of the Pending Litigation

The January Referral also requires that the claimant provide evidence that the

Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 3. The Commission determined, in its decision on claimant's injury claim under the December Referral, that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination also applies here.

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

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether "the severity of the injury is a special circumstance warranting additional compensation." In making this determination, the Commission considers the following. First, the Commission is familiar with the nature of all of the injuries that fall under Category D; as indicated above, in its adjudication of claims under the December Referral, the Commission has already examined and awarded compensation to all of the eligible Category D claimants. Second, the Commission's standard for physical injury in this program sets a relatively low threshold for compensable injuries: in order to meet the Commission's standard in this program, a claimant need only establish that he or she suffered an injury that is discernible, and more significant than a superficial injury. *See Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-001, Decision No. LIB-I-001, at 8-9 (2009). Third, the amount of compensation awarded for compensable injuries in this program—a fixed amount of \$3 million for each

compensable injury—is, in the Commission’s experience, exceptionally high when compared to other claims programs, and extraordinarily high for compensable injuries that were not severe, but which nonetheless met the Commission’s standard. Therefore, to the extent that a monetary award can ever adequately compensate for a physical injury, the eligible claimants in this program have, for the most part, been adequately compensated via the Commission’s awards under the December Referral.

Considering the foregoing, the Commission concludes that only the most severe injuries will constitute a special circumstance warranting additional compensation under Category D. In determining which injuries are among the most severe, the Commission considers 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. These factors are applied to the present claim as set forth below.

In support of his Category D claim for additional compensation, claimant has submitted, among other documents, a supplemental declaration. In his declaration, claimant asserts that he “sustained physical injuries from metallic fragments that became lodged in [his] torso, on [his] left side, on [his] waist, near [his] back” and that “[t]here are multiple fragments and pieces of shrapnel still in [his] body.” He further asserts that “[a]fter undergoing a surgical procedure to remove the shrapnel, [his] doctors in Philadelphia told [him] that the shrapnel were too close to [his] kidney to be removed and that it would be safer to leave it in [his] body.” This, he asserts, causes him to be “constantly worried that it could move within [his] body and cause serious damage to one

of [his] organs.” In addition he asserts that he has “extensive scarring on the left side of [his] body from the shrapnel.” Claimant separately asserts, as a special circumstance, the emotional trauma he suffered because of the attack. In essence, claimant asserts here a loss of income, stating that his “professional career was affected irreversibly,” and that this “in turn has had a very serious long term adverse impact financially on [him] and [his] family.” Claimant explains that because of this trauma, which a treating psychologist attributed to post traumatic stress disorder (“PTSD”), he became “very anxious about flying,” and scaled back his work travel, to the detriment of his career. He posits that “if [he] had been willing and able to travel more, [he] would not have lost [his] job.”

With regard to the claim of loss of income due to the psychological trauma he suffered because of the hijacking, the Commission notes its finding in *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-II-109, Decision No. LIB-II-112 “that ‘the injury’ referred to under this Category is the injury for which an award was issued by the Commission under the December Referral.” In this case, as noted above, the Commission determined that the compensable injury under the December Referral was the shrapnel wound to the claimant’s left side, not the “other emotional...effects relating to the hijacking” for which he also claimed compensation. Moreover, the Commission notes that it has previously determined that compensation under the December Referral is limited to claims for physical, not psychological, injury. *See, e.g., Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-033, Decision No. LIB-I-046 (2011) (Proposed Decision); *Claim of* 5 U.S.C. §552(b)(6) ; Claim No. LIB-I-041, Decision No. LIB-I-030 (2010).

For these reasons, claimant's request for additional compensation for psychological trauma is rejected.

Concerning that portion of the claim for additional compensation based on the physical injury suffered by the claimant, considering the totality of the evidence submitted, the Commission is not persuaded that the severity of the injury suffered by the claimant is such that it would qualify for additional compensation under Category D, that is, beyond the \$3 million already awarded. In this regard, the Commission notes that the injury has not required significant hospitalization of the claimant. Moreover, while the claimant asserts that he suffered from extensive scarring, he has not submitted any evidence of that scarring. Indeed, the only medical records submitted by the claimant indicate that the procedure used to remove a piece of shrapnel from claimant's abdominal wall required a use of a "band aid" over the wound. The record, therefore, does not establish that claimant suffered a sufficiently significant disfigurement to his outward appearance. Neither has claimant established that any of his major life activities have been limited as a result of the injury in a sufficiently significant way. While claimant asserts that a piece of shrapnel remains embedded in his abdominal area, there is no indication from the medical records that would support the claimant's further assertion that this piece of shrapnel is dangerously close to his kidney, or that there is any danger of it entering his kidney or any other organ. The medical records submitted reveal simply that a metallic fragment was imbedded deeper than the fragment that was removed, and could not be removed via the probe used and was left behind; there is no evidence of any medical concern associated with permitting this fragment to remain.

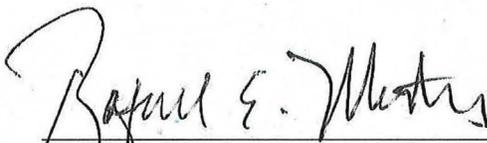
Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D, beyond its award of \$3 million under the December Referral.

Accordingly, this claim must be and is hereby denied.

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



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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

April 10, 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).