

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-092

Decision No. LIB-II-143

Oral hearing held on June 20, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. § 552(b)(6) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986. This claim was submitted under Category E of the January 15, 2009 *Letter 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 Proposed Decision entered February 23, 2012, the Commission denied the claimant's physical injury claim on the ground that the claimant failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for physical injury. The claimant, by letter dated March 18, 2012, objected to the Commission's decision and requested an oral hearing. The Commission, by letter dated April 12, 2012, requested that

claimant submit any additional evidence that she wished it to consider in support of her objection. However, no further evidence was submitted in response.

The hearing on the objection was held on June 20, 2012. During the hearing, the claimant requested additional time to submit further evidence to the Commission, which request was granted. The claimant submitted additional material on July 2, 2012, consisting of a letter from Letty Moss-Salentijn, D.D.S., Ph.D., dated July 2, 2012.

DISCUSSION

As noted in the Commission's Proposed Decision, Category E of the January Referral 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.

January Referral at ¶ 7.

Claimant's Physical Injury

The evidence submitted in support of the claim (including evidence submitted in support of the objections to the Commission's Proposed Decision) includes claimant's sworn statement describing the events; the deposition testimony of claimant's father, 5 U.S.C. §552(b)(6) taken on March 27, 1989; the sworn statement of former FBI Agent Lewis Subelsky; documentation regarding the reasons for the unavailability of contemporaneous medical records; a handwritten list of medical insurance claims noting the date of service and identity of the medical provider; the live testimony of the claimant herself and that of her mother and father during the oral hearing; and, finally, the aforementioned letter from Dr. Moss-Salentijn.

During the hearing, the claimant described the ordeal that she and the other passengers endured, and testified that she suffered “a shrapnel injury to [her] foot that was infected for some time after the hijacking,” and which required treatment with a course of antibiotic and a tetanus shot. Claimant testified that this treatment was administered by her pediatrician upon her return to the United States. She also testified that she remembered “walking around on the streets of Karachi with [an] open wound on [her]...foot” because she was forced to leave her shoes on the airplane before exiting onto the escape chute. She further stated that she could “remember limping and having problems with [her] foot, but after all this time there is no visible scar.” Claimant’s father,⁵ U.S.C. §552(b)(6) testified that after they escaped from the airplane, he carried claimant to the terminal because she was unable to run. He stated that he cleaned claimant’s wound himself at the hotel, and that claimant did not receive any treatment while she was in Pakistan. He further asserted that claimant received medical treatment in Wiesbaden, Germany, and upon her return to the United States. Finally, he stated that claimant’s pediatrician, Dr. Jacobs, at that time “had written a letter excusing her from swimming until her wounds were healed.”

Analysis

As noted in the Proposed Decision in this claim, the Commission’s standard for physical injury in this program requires that claimant establish that she suffered a discernible physical injury, more significant than a superficial injury. The Commission has carefully and thoroughly reviewed the entire record in this claim, including claimant’s compelling and credible testimony at the oral hearing, and the supplemental documentation submitted after the hearing. After examination of this evidence, however, fundamental questions remain as to the nature and extent of the injuries asserted.

Claimant testified that the wound left no permanent scarring and the record is unclear whether shrapnel actually was imbedded in claimant's foot. Further, although the testamentary evidence indicates that treatment was provided when she returned to the United States—consisting of a course of antibiotic and a tetanus shot—the Commission finds that such treatment, in and of itself, is not sufficient to establish that the injury was more significant than superficial.

Where, as here, the testamentary evidence provides evidence of an injury but lacks sufficient detail concerning the nature and extent of that injury, the requirement that the claim be verified by medical records—contemporaneous or otherwise—takes on particular importance. However, there are no such records here that would substantiate that claimant's injury was more significant than superficial. The Commission must conclude, therefore, that the claimant has not met her burden of proof in establishing that the injury on which her claim is based meets the threshold standard for compensability.*

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 its statement from the Proposed Decision that, in this program, a number of victims of the hijacking of Pan Am

* The Commission's regulations provide:

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).

Flight 73 made claims for physical injury 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. 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 its conclusion, 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 any assertion that she was held hostage. 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 would 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, December 12, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
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5 U.S.C. §552(b)(6)

Against the Great Socialist People's
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Claim No. LIB-II-092

Decision No. LIB-II-143

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by ^{5 U.S.C. §552(b)(6)} during the hijacking of Pan Am Flight 73 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 E. According to the January Referral, 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 May 12, 2010, the Commission received from the claimant a Statement of Claim, in which the claimant asserts a claim under Category E of the January Referral, along with accompanying exhibits supporting the elements of her claim. The submission included evidence of claimant's U.S. nationality, her presence on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986, and the injuries for which she now claims compensation.

The claimant states that she, along with her parents and younger sister, was a passenger on Pan Am Flight 73 when it was hijacked by terrorists on September 5, 1986, in Karachi, Pakistan. According to the Statement of Claim and accompanying exhibits, claimant's foot was injured by grenade shrapnel during the final moments of the hijacking. In support of her claim, the claimant has provided her sworn statement describing the events; the deposition testimony of her father,⁵ U.S.C. §552(b)(6), taken on March 27, 1989; the sworn statement of former FBI Agent Lewis Subelsky; and correspondence produced during her search for medical records.

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) set forth a claim before the Commission for wrongful death or physical injury resulting from one of the Covered Incidents; and (3) were not plaintiffs in a Pending Litigation against Libya. January Referral, *supra*, ¶ 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 U.S. passport, valid from October 2000 through October 2010, showing her place and date of birth in New York in 1976. Based on this and other evidence in the record, 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.

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, 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 injury suffered as a result of that terrorist attack. Accordingly, the Commission finds that the claimant has satisfied this element of her claim.

Pending Litigation

Finally, the January Referral states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral, *supra*, ¶ 7. Attachment 2 to the January Referral identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, is the *Patel* case. Claimant has averred under oath in the Statement of Claim, and the pleadings in the *Patel* case confirm, that she was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has also satisfied this element of her claim.

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

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 (2010), 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

As noted above, the claimant alleges that she suffered an injury to her foot, caused by grenade shrapnel. She states that “[her] understanding, based on the information available to [her] at this time, is that, while [she] was on the plane, a terrorist exploded a grenade near [her], and [her] foot was injured by shrapnel.”

Claimant asserts in her Statement of Claim that “[she] received treatment for [her] injuries at Wiesbaden air force base and from [her] pediatrician in New York.” Claimant acknowledges, however, that although she has searched for the relevant medical records she has “been unable to locate copies of the medical records [she has] been seeking from the U.S. Air Force Base in Wiesbaden and from Columbia Presbyterian Hospital.”

As noted above, claimant has submitted the 1989 deposition testimony of her father,⁵ U.S.C. § 552(b)(6), wherein he states that “⁵ U.S.C. . . . had quite a bad cut on her § 552(b)(6) foot which became pusy [sic] and they cleaned that up with medication.” The claimant has also submitted the sworn statement of former FBI Agent Lewis Subelsky. Mr.

Subelsky states that he remembers interviewing the claimant's family at the military facility in Wiesbaden, Germany, but does "not remember the actual injuries sustained by any member of the ^{5 U.S.C.} §552(b)(6) family."

In summary, aside from the personal statements proffered by the claimant, there is simply no evidence to establish the nature and extent of any injuries suffered by the claimant as a result of the hijacking. Based on the record before it, the Commission must therefore conclude that claimant has failed to satisfy any of the prongs of the standard for physical injury in this program; in particular, claimant has failed to establish that the severity of the injury was more than superficial, as that term is used in the Commission's formulation of its physical injury standard.* Consequently, the Commission determines that the claimant, ^{5 U.S.C. §552(b)(6)}, does not qualify for compensation under Category E of the January Referral, and 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 for physical injury 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. 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 its conclusion, 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 any assertion that she was held hostage.

* 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).

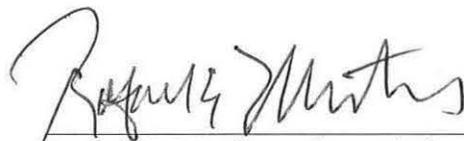
Indeed, it would appear that claimant was held by the hijackers under precisely the same circumstances as those who later became parties to the Pending Litigation. All other requirements for hostage claims would appear to have been met in this particular claim. However, the Commission is constrained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

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).