

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-118

Decision No. LIB-II-152

Counsel for Claimant:

Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

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 passenger on Egypt Air Flight No. 648 from Athens, Greece, to Cairo, Egypt, which was hijacked on November 23, 1985 and forced to land at Luqa Aiport in Malta.

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 September 23, 2009, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission determined that claimant had suffered a gunshot wound to the head as a result of being shot at close range by one of the hijackers and thrown out of the airplane onto the airport tarmac. Further, the Commission concluded that this injury, which resulted in, among other things, permanent damage and disfigurement to the right side of claimant's head, damage to her brain, and impairment of her vision and other faculties, 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-039,* Decision No. LIB-I-016 (2009) (entered as Final on October 28, 2009).

BASIS OF THE PRESENT CLAIM

On June 29, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts a claim for additional compensation under Category D of the January Referral, along with exhibits supporting the elements of her claim, including evidence of her U.S. nationality, her receipt of an award under the December Referral, and the extent of her injuries. Specifically, claimant asserts that her “severe permanent injury” and attendant “permanent life altering problems,” including “visual field deficits,” epileptic seizures, memory and learning impairments, and a “partially caved-in head (which a subsequent surgical procedure successfully partially corrected by inserting a metal plate in her head),” constitute a special circumstance warranting additional compensation under Category D. The evidence submitted includes a detailed, narrative description of claimant’s physical injury and its alleged permanent effects, extensive medical records spanning from 1985 to 2010, and an affidavit from claimant’s husband, attesting to the permanent impairments said to be the result of the physical injury claimant sustained in the terrorist incident.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction under Category D 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*, ¶ 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 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 her physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of her 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 physical injury claim under the December Referral, that the Pending Litigation in question, *Baker v. Socialist People's Libyan Arab Jamahiriya*, Case No. 03-cv-749, and *Pflug v. Socialist People's Libyan Arab Jamahiriya*, Case No. 08-cv-505, filed in the United States District Court for the District of Columbia, had been dismissed through an Order of Dismissal issued on December 24, 2008. That determination also 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

At the outset, the Commission stresses that the facts of this claim clearly establish that the ordeal suffered by claimant was uniquely harrowing and grotesque; words cannot convey the fear and apprehension that must have been experienced by claimant, and her bravery and will to live in the face of this trauma is nothing short of remarkable. In this proceeding, the Commission is required to focus solely on the physical injuries suffered by claimant, and to make a determination as to whether further compensation is warranted under Category D for those injuries.

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 the *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.” These factors—

permanent disfigurement and/or limitation of major life functions—are applied to the present claim as set forth below.

As to the injury itself, claimant has provided a detailed description of the terrorist incident, the gunshot wound to her head, and her subsequent medical treatment. According to claimant, the hijackers “ordered [her] to the front of the plane” after having already shot four other passengers. They then “shot her in the head and threw her to the tarmac.” The gunshot “resulted in an entry wound to the right side of her head, about one-quarter inch in diameter; the impact blew a hole in her skull five inches wide.” Claimant further states that “[t]he bullet lodged into [her] skull and pushed skull fragments into her brain[,]” and that, “[d]uring the surgery which followed, the doctors had to clean out her wound, remove the bullet, along with skull fragments and brain matter.”

The contemporaneous medical records submitted with this claim confirm that, following the incident, claimant was immediately taken to St Luke’s Hospital in Malta, where she was observed to have “an obvious entry wound to the right posterior parietal area” X-rays revealed the presence of a bullet in claimant’s skull with portions of the skull pushed into her brain. This was confirmed by a CT scan, which also revealed a “large hematoma” in the right side of claimant’s head. The records indicate that “under general anesthesia a right parietal craniectomy was performed[]” in which claimant’s wound was debrided, the hematoma and bone fragments were removed, and “the entry wound was closed.” In addition, claimant was diagnosed with a “left homonymous

hemianopia”¹ resulting from the hematoma, which, following her surgery, “was still present”

Following her treatment in Malta, and five days after her initial injury, claimant was evacuated by air to a U.S. military medical facility in Landstuhl, Germany, where she was admitted for further treatment and evaluation on November 30, 1985. Contemporaneous records indicate that claimant’s “visual fields showed a dense left homonymous hemianopia as expected[,]” which she described as the “loss of peripheral vision” in her left eye. Numerous notations in the records appear to confirm this, indicating that claimant was only able to see to her right. References are also made to alterations in claimant’s “sensory depth perception.” A summary of the records indicates that she was evacuated by air back to the United States on December 6, 1985—having been hospitalized for nearly two weeks—and was admitted to the University of Minnesota Hospital for further treatment.²

Medical records from claimant’s treatment in Minnesota confirm the nature of her injuries and presage the permanent conditions associated with these injuries. According to a discharge summary dated December 13, 1985, from the Neurosurgery Department, claimant suffered from a “left visual field cut and some sensory apparitions involving the left face and body” The summary also notes a “craniectomy site” with attendant “surgical incisions.” Records from the months that follow make repeated reference to claimant’s “left visual field deficit,” which is said to be consistent with her left

¹ Hemianopia—also known as “hemianopsia”—is characterized by the “[l]oss of one half of the field of vision in each eye [I]t is caused by damage to the nerve tracts or brain.” Am. Med. Ass’n, *Encyclopedia of Medicine* 527 (Charles B. Claymen ed., 1989); *Medical Dictionary*, MedlinePlus, <http://www.merriam-webster.com/medlineplus/hemianopia> (last visited May 16, 2012).

² A “Consultation Sheet” from Landstuhl, prepared by a behavioral science specialist, foreshadowed the permanent effects of claimant’s injuries, noting that claimant “[n]eeds to explore the ramifications this injury will have on future work, etc.”

hemianopia, and also identify problems with "spatial orientation" and "decreased depth perception." A report from eight months after the incident notes that claimant "has significant neglect in the entire left visual field with the ability only to detect some movement and thus minimal useful vision." In addition, the report of a neuropsychological exam noted that, although claimant's "intellectual and cognitive functioning appear quite good," she did exhibit difficulty with "[v]isual/perceptual tasks." Claimant also exhibited "word-finding difficulties and possible dysnomia," which the examiner indicated "represents a highly isolated and unexpected suggestion of left hemisphere involvement[.]"

Other notations from this period of treatment indicate that, although claimant's craniectomy site was "well-healed," a depression remained in her skull where the bone had been removed, which doctors suggested could be treated with an elective "cranioplasty." The medical records indicate that claimant did, in fact, undergo such a surgery on July 29, 1987, which she describes as having "had a plate placed in her right head . . ."; the neurosurgery discharge sheet notes that this would provide "good protection of the brain at the site where [claimant] had the skull defect . . ."

Of particular significance in the medical records is the evidence that claimant began to suffer seizures in December 1985 or January 1986 (one to two months after the incident), with continuing episodes in the years that followed. The seizures were initially determined to be non-epileptic and post-traumatic in nature, and attributable to claimant having suffered a gunshot wound to the head. Doctors later determined, however, that claimant suffered from both epileptic and non-epileptic seizures. As to their cause, one notation from a 1989 medical progress report states that claimant "has epilepsy secondary

to head trauma suffered in a hijacking when she was shot in the back of the head” The same conclusion was reached two years later in 1991, when doctors stated that “[t]he epilepsy is the result of a gunshot wound to the right occipital region.” Nonetheless, the medical records indicate that, as of February 1987, “[claimant’s] seizures [were] well controlled” and she was taking appropriate anticonvulsant medication.

Medical records from the 1990s through the present day confirm that claimant has continued to suffer from epilepsy related to her head injury, but has been able to control the condition with anti-epileptic medication. A medical progress report from 1999 indicates that claimant “has been seizure free for almost 11 years.”³ More recent medical records confirm this, noting, in 2009 for example, that claimant has maintained “very good control” over her seizures while continuing to take anti-seizure medication.⁴ In 2010, one of claimant’s physicians summed up her condition as follows: “even though she remains seizure free, she is requiring medication for epilepsy, with continued need for this lifelong.”

In addition to her post-traumatic epilepsy, claimant has continued to suffer from the left visual field deficits discussed above, a fact noted in numerous medical reports from the years following the incident and up through the present day. She has also suffered from “minor difficulties with balance[,]” also attributed to her head injury, although in 2008, this condition was listed on a medical report under “Perceived medication side effects.” The latter report, however, characterizes claimant’s balance

³ An earlier progress report from 1993 noted that claimant was “exercising and is quite healthy[,]” and “is traveling around the country doing motivational speaking.”

⁴ According to the medical records submitted, however, claimant did suffer a seizure in October 2002, which reportedly “persisted for about 45 minutes.” She described these as “similar to what she had in the past”

problems as “increasing.”⁵ The Commission notes that balance problems appear in numerous medical reports through the 2000s. In his affidavit, claimant’s husband attests to the impact of these impairments on claimant’s daily life. He states that claimant “constantly walks into things around the home, and even when we are outside, she sometimes falls off the sidewalk because she has no peripheral vision.”

Finally, a 2010 letter to claimant’s counsel from Ilo Leppik, M.D., a physician who has cared for claimant since shortly after the terrorist incident, confirms that she has suffered from both a “partial visual field deficit” resulting from her head injury as well as permanent seizure activity. Citing the U.S. Department of Veterans Affairs Benefits Administration Web Automated Reference Material System (WARMS), Dr. Leppik assigned claimant a total disability rating of 10 per cent based on her permanent epilepsy, and a permanent disability rating of 5 per cent for her visual field deficit. He therefore concluded that claimant “has a permanent partial disability of 15%”

Considering the totality of the evidence submitted, the Commission finds that claimant’s injury has had a sufficiently significant impact on her ability to perform major life functions so as to qualify her for additional compensation. The detailed and extensive medical records provided with this claim demonstrate that for the last twenty-

⁵ The report of a neuropsychological evaluation conducted in 2009 further concluded that claimant suffered from impaired memory function and a variety of other intellectual difficulties; however, it is not clear that these are directly attributable to claimant’s physical injury. The report states: “Current test results do not provide compelling evidence of generalized cerebral dysfunction despite suggestions of intellectual compromise and a variety of diffuse findings. These non-specific cognitive difficulties are likely to be more related to [claimant’s] present emotional state and psychiatric condition than reflective of organically-determined central nervous system dysfunction.” The report does state, however, that claimant suffers from “visual deficits and perceptual processing problems that directly relate to right occipital involvement and indirectly exist as a function of visual field defect[,]” and were described as “obviously ultimately of organic origin.” Notably, the 2009 examination was conducted by the same doctor who conducted claimant’s first neuropsychological evaluation in 1986, who indicated that claimant had performed far better during the 1980s exam. He stated that “[claimant’s] current decline cannot be explained on the basis of ongoing and poorly controlled seizure activity, medication regimen, or any other obvious neurologic event.”

five years, claimant has suffered from significant vision loss on her left side, adversely affecting her peripheral vision, depth perception, and ability to complete visual/perceptual tasks. In addition, she has suffered from trauma-induced epilepsy, causing seizures that began shortly after the incident and have continued to the present day. Although medication appears to have brought claimant's seizure activity under control, the epilepsy, according to her medical records, is permanent. 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.⁶ 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.

⁶ *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 *Letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate 2* (July 28, 2008), 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.”⁷ *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, departed upward from this assumption in “more severe instances of physical or psychological pain . . .” *Id.*

⁷ 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).

(citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 84 (D.D.C. 2010)). The court departed 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.

Assessing these factors, the Commission first notes the unique and severe circumstances surrounding claimant's initial injury. The terror and fear of death claimant must have experienced after having been tossed onto the airport tarmac and left for dead can scarcely be imagined. With regard to the injury itself, as detailed above, claimant was hospitalized for a total of nineteen days between the date of the incident and August

1987, including a continuous two-week period of hospitalization immediately following her injury. She underwent procedures including a craniectomy in Malta, which left her with a depression in her skull for nearly two years, and a later cranioplasty to correct the depression. Claimant also suffers from epilepsy as a result of her injuries, causing seizures that were the basis for the majority of her hospital visits in the years since the incident, and which were not well-controlled until 1987. In addition, claimant still has a left visual field deficit, depth perception difficulties, and word-finding difficulties as a result of her neurological impairment. Claimant's total disability rating, as noted above, has been determined to be 15%, based on her visual field deficit and her permanent epilepsy.

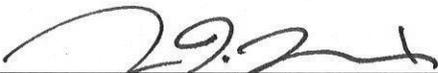
In light of these facts, and in consideration of the factors listed above, the Commission holds that \$4,000,000.00 is an appropriate amount of compensation in this claim. The Commission further holds that, as with awards for physical injury made under the December Referral, compensable claims under 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 \$4,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission therefore enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006).

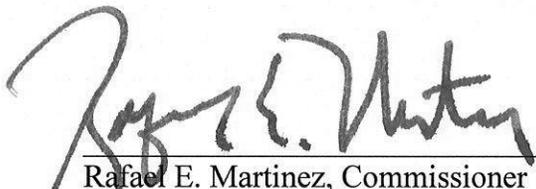
AWARD

Claimant JACKIE NINK PFLUG is entitled to an award in the amount of Four Million Dollars (\$4,000,000.00).

Dated at Washington, DC, May 16, 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**

July 12, 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).