

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-136

Decision No. LIB-II-156

Counsel for Claimant:

Neal M. Sher, Esq.

Oral Hearing held on October 25, 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)

at Lod Airport in Tel Aviv, Israel on May 30, 1972. The claim was made under Category E of the *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"). By its Proposed Decision entered May 16, 2012, the Commission denied the claim on the grounds that claimant had not met his burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the Commission held that claimant had failed to provide any evidence, apart from his own statements, substantiating his claim that he injured his knee while trying to escape the violence during the Lod Airport incident. In

addition, with regard to claimant's assertion of post-traumatic stress disorder ("PTSD"), the Commission held that claimant failed to meet the requirement of Category E that the claimant have asserted before the Commission a claim for wrongful death or physical injury. In so holding, the Commission cited its repeated findings in the Libya Claims Program that claims for psychological injury, including claims for PTSD, do not fall within the terms of Category E and are therefore ineligible for compensation under this category of the January Referral.

On July 12, 2012, the claimant filed a notice of objection and requested an oral hearing. The hearing was initially scheduled for September 14, 2012, but was postponed at claimant's request. No objection brief or additional evidence was submitted. The Commission held the oral hearing on October 25, 2012; the hearing consisted solely of argument by claimant's counsel, and counsel presented no witnesses for examination.

During the oral hearing, counsel for the claimant reiterated arguments he had made before the Commission in other similar claims involving the Lod Airport attack in which claimants alleged PTSD. Specifically, he argued that the January Referral "does not mandate the exclusion of PTSD . . . that the medical evidence and research shows that PTSD indeed . . . has physical ramifications, physical indications," and maintained, therefore, that "PTSD should be considered and categorized as a physical injury, at least for the purposes of this program."

As the Commission noted in its Proposed Decision, claims for psychological injury, including PTSD, are not compensable as a physical injury under Category E of the January Referral. *See, e.g., Claim of 5 U.S.C. § 552(b)(6)*, Claim No. LIB-II-128, Decision No. LIB-II-031 (2012) (Final Decision). On this basis alone, claimant's

argument is unavailing, particularly in light of the fact that he has failed to submit any additional evidence to support his objection. Further, even if physical changes in the brain caused by the terrorist incident could be classified as “physical injuries” for purposes of Category E, claimant has not submitted any evidence to establish that he experienced any physical changes to his brain. Under these circumstances, the Commission finds no basis for departing from its Proposed Decision as to claimant’s assertion of PTSD.

Finally, as noted above, counsel for the claimant did not submit any additional evidence to substantiate the claim that “while climbing the stairs in the airport (seeking safety), [claimant] hurt [his] knee, an injury [he] still suffer[s] from today.” Asked during the hearing whether there were any medical records beyond the two doctor’s notes from 2010—notes asserting that claimant suffers from certain medical conditions¹ that the doctor attributes, without explanation, to the Lod Airport attack—counsel responded, “[T]hat’s all we had.” Therefore, as with claimant’s argument concerning PTSD, the Commission finds no basis for departing from its previous finding as to this aspect of the claim.

¹ As noted in the Proposed Decision, the conditions are identified as “HTN” and “OA.” Translator’s notes suggest that these may be abbreviations for hypertension and osteoarthritis, respectively.

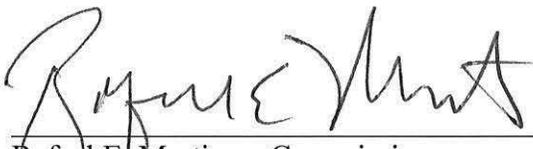
CONCLUSION

For the reasons discussed above, and based on the evidence submitted in this claim, the Commission again concludes that the claimant has not met his burden of proving that he has satisfied the Commission's standard for physical injury.² Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. 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



Anuj C. Desai, Commissioner

² 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).

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Counsel for Claimant:

Neal M. Sher, Esq.

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) at Lod Airport in Tel Aviv, Israel on May 30, 1972.

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 ICOSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On July 1, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under Category E of the January Referral, along with exhibits supporting the elements of his claim, including evidence of claimant's U.S. nationality, his presence at the scene of the terrorist incident, and his alleged injuries for which he now claims compensation.

The claimant states that he was present in the terminal at Lod Airport in Tel Aviv, Israel on May 30, 1972, when terrorists armed with automatic rifles began shooting and throwing hand grenades at passengers gathered in the baggage claim area. Claimant asserts that he dropped to the floor when the attack began, and, at some point amid the chaos, he moved position and took cover behind a small room. He alleges that he subsequently climbed a stairway to escape, injuring his knee in the process. Although claimant avers that he still suffers from the effects of this injury, he does not indicate that he ever sought or received medical treatment for the injury. He does, however, allege that he suffers from post-traumatic stress disorder ("PTSD") as a result of the attack.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under Category E of 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 *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 copies of his Puerto Rico birth certificate, a sworn statement attesting to his continuous U.S. nationality, a 2008 voter registration card, and his current U.S. passport. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and has been so held until the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within Category E of the January Referral, the claimant must 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 “May 30, 1972 attack at Lod Airport in Israel, as alleged in *Franqui v. Syrian Arab Republic, et al.* (D.D.C.) 06-cv-734.” *Id.*, Attachment 2, ¶ 1. In his Statement of Claim and accompanying documentation, the claimant sets forth a claim for physical injury suffered as a result of the May 30, 1972 Lod Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of his claim.

Pending Litigation

Finally, Category E of 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 and includes the *Franqui* case, which, as noted above, is the Pending Litigation related to this claim. Claimant has stated under oath in his Statement of Claim, and the relevant pleadings confirm, that he was not a plaintiff in that litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of his 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)}

, Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and
- (2) must have received medical treatment for the physical injury within a reasonable time; and
- (3) must verify the injury by medical records.

Id. at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to the Statement of Claim and accompanying documents, claimant suffered physical injuries at Lod Airport on May 30, 1972 when, as discussed above, gunmen opened fire and tossed hand grenades at the crowd gathered in the baggage claim area. In a sworn statement, claimant asserts that he was speaking with a traveling companion when the attack began, and that upon hearing the gunfire, he dropped to the ground. He states that, after witnessing a woman being shot by one of the terrorists, and "fearing for [his] safety, [he] hid behind a small room in the baggage hall." Sensing that he was not safe there either, claimant climbed up a staircase, where he was met by an individual who frisked him, checked his passport, and told him "to stay where [he] was." He notes that "while climbing the stairs in the airport (seeking safety), I hurt my knee, an injury I still suffer from today." Claimant alleges that he eventually returned downstairs to search for his wife, "stepping over corpses and wounded people" along the way, and found her in the bathroom.

In support of his claim, claimant has provided, *inter alia*, two sworn statements from 2010 describing the incident and identifying his alleged physical injury; sworn statements from four of claimant's traveling companions (including his wife) attesting to his presence at the scene of the incident; a copy of a Puerto Rican Senate resolution from June 2005 commemorating the Lod Airport massacre; recent notes (one translated, the other untranslated) from claimant's physician in Puerto Rico indicating that he suffers from specified conditions¹ resulting from the Lod Airport massacre, as well as PTSD; and a copy of a newspaper photograph said to depict claimant and other Puerto Rican victims of the terrorist incident meeting with government officials upon their return to Puerto Rico.

As noted above, claimant alleges that he "hurt [his] knee" while climbing the stairs to escape the gunmen during the attack, and that the effects of the injury remain with him today. However, claimant has provided no documentation whatsoever to substantiate this claim.² The only medical records provided are the two doctor's notes from 2010, and the only one which is translated into English makes no reference to a knee injury. In addition, although the physician notes that claimant's present medical conditions—which, as noted above, are not clearly identified—"result[ed] from trauma" sustained during the Lod Airport attack, his reasons for drawing this conclusion are unclear, and no explanation is provided.

¹ The conditions are identified as "HTN" and "OA." Translator's notes suggest that these may be abbreviations for hypertension and osteoarthritis, respectively.

² During development of this claim, claimant's counsel submitted to the Commission a translated copy of a 1974 decision of the Superior Court of Puerto Rico, San Juan Division, involving the distribution of an *ex gratia* payment from the Government of Japan intended to benefit the victims of the Lod Airport Massacre. See *Commonwealth v. Martinez*, Civil No. 73-3218 (P.R. Super. Ct. May 13, 1974). While this is not considered dispositive evidence of injury or otherwise, the Commission notes that, in this decision, claimant is listed among those who were "Unwounded at the Tel Aviv Massacre." *Id.* at 22.

Given the absence of medical records or other evidence to corroborate claimant's assertion that he suffered a knee injury during the incident, the Commission cannot conclude that the claimant suffered "a discernible physical injury, more significant than a superficial injury." In this regard, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2011).

Apart from the alleged knee injury, claimant also argues, as noted above, that he suffered from PTSD as a result of the attack. Claimant contends that this condition "cannot reasonably be considered to be superficial or non-physical[,]" and that, therefore, the Commission should find that PTSD is compensable as a physical injury under this program.

In view of the Commission's repeated findings in this program that claims for psychological injury, including claims for PTSD, do not fall within the terms of Category E, *see, e.g., Claim of* ^{5 U.S.C. §552(b)(6)}, Claim No. LIB-II-128, Decision No. LIB-II-031 (2012) (Final Decision), the Commission concludes that claimant's alleged PTSD does not satisfy the Commission's standard for Category E claims.

In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met his burden of proof in that he has failed to provide evidence sufficient to establish that he "suffered a discernible physical injury, more

significant than a superficial injury,” and that the injury be verified by medical records, as required under the Commission’s physical injury standard.

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

The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

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).