

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-159

Decision No. LIB-II-167

Counsel for Claimant on Objection:

Steven R. Perles, Esq.
Perles Law Firm, P.C.

Oral hearing held on December 12, 2012.

FINAL 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. The claim was submitted under Category D 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 June 5, 2012 the Commission denied the present claim on the grounds that claimant failed to establish that the severity of her injuries rose to the level of a special circumstance warranting additional compensation under

Category D; that is, compensation beyond the \$3 million already awarded to her in this program for her injuries.

On July 9, 2012, the claimant objected to the Commission's decision and requested an oral hearing. By letter dated July 23, 2012, the Commission requested that claimant submit any additional evidence that she wished it to consider in support of her objection. In response, under cover of letters dated October 20, 2012 and November 28, 2012, claimant submitted a brief along with two letters from Dr. Michael Lipton, dated October 18, 2012 and November 26, 2012 respectively; Dr. Gary Abrams dated November 19, 2012; Dr. Thomas Lewis dated October 12, 2012 and November 23, 2012; Dr. Brian Greenwald dated November 26, 2012; Dr. Robert Eilers dated November 20, 2012; and Anthony Gamboa Ph.D., MBA dated November 21, 2012. Claimant also submitted medical records that were prepared contemporaneously with the hijacking and affidavits executed by her parents, her sister, a friend, and two friends of friends who were in Pakistan during claimant's treatment there in 1986.

The claimant, who initially appeared before the Commission *pro se*, was scheduled for an oral hearing on her objection on November 8, 2012. Claimant requested a continuance in order to retain counsel. This request was granted by the Commission, and the oral hearing was held on December 12, 2012. Following the oral hearing, claimant submitted letters dated December 17, 2012, December 19, 2012 and January 4, 2013, with additional information that had been requested by the Commission during the oral hearing.

DISCUSSION

Category D of the January Referral 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.

January Referral at ¶ 6. As noted in the Commission's Proposed Decision, claimant satisfies the first and third requirements: she received an award under the December Referral, and her Pending Litigation against Libya had been dismissed prior to her submitting this claim. The only issue on objection, therefore, is whether the severity of claimant's injury is a special circumstance warranting additional compensation.

The Commission determined in its Proposed Decision that claimant, in the course of escaping from the airplane, fell from a height of fifteen feet onto the airport tarmac, and in so doing, suffered a head injury. The newly submitted contemporaneous medical records from Pakistan have shed further light on the severe nature of claimant's injury. According to these records, claimant was taken to the emergency room of Aga Khan University Hospital immediately following her escape from the airplane, at which point she was "conscious, but drowsy." Approximately two hours later she began experiencing sudden twitching of the small muscles in both of her hands, followed by vomiting and then "frank seizures," and difficulty breathing. Claimant was then intubated and immediately experienced a "grand mal seizure," after which she was transferred to the Intensive Care Unit, placed on a ventilator, and given anti-seizure

medication. Later that same evening, claimant was evaluated by a neurologist and neurosurgeon who “felt that she had a left sided hemiparesis,¹ a left extensor plantar response² and had a clinical suspicion of an [] intracranial haematoma.” A computerized tomography (CT) scan of claimant’s head revealed “generalized cerebral oedema without any evidence of any fractures, haematoma, [or] contusion to the brain.”

Claimant was “weaned off the ventilator” 30 hours later, at which point the records indicate that she was breathing well without aid and responding well to verbal commands. The records further indicate that the edema of claimant’s brain was treated with Mannitol, an osmotic diuretic agent, and Dexamethasone, an anti-inflammatory and immunosuppressant drug. About a week after the hijacking, on September 12, 1986, claimant was discharged from the hospital, at which point she was found to be “asymptomatic with no focal deficit and no hemiparesis.” Six days after that, on September 18, 1986, just prior to claimant’s departure from Pakistan, she was evaluated as an outpatient. At that point she was found to be asymptomatic, although follow-up care by a neurologist was recommended when she returned to the United States.

Claimant had previously submitted the records of her follow-up care in the United States. Included in these records were the reports of a neurologist, Dr. Rebecca Hanson, dated December 4, 1986 and October 15, 1987. In her December 1986 report, Dr. Hanson stated that her neurologic examination of claimant in essence was “completely normal.” However, in her report dated October 15, 1987, Dr. Hanson noted that claimant was experiencing headaches, which she stated had not been a major

¹ “Hemiparesis” means weakness affecting one side of the body. Lippincott Williams & Wilkins, *Stedman’s Medical Dictionary* (28th ed. 2006).

² A plantar response is a sign of an abnormality in the central nervous system (CNS), most likely in the part of the CNS known as the pyramidal tract.

issue in the previous examinations and, further, that she was allowing claimant to take an “adaptive type of physical education.”³

Since the Proposed Decision in June 2012, claimant has seen numerous other doctors and has subjected herself to additional medical examinations. On October 2, 2012, an examination of claimant’s brain was conducted using a type of magnetic resonance imaging (MRI) known as diffusion tensor imaging (DTI). In his letter dated October 18, 2012, Dr. Lipton, a neuroradiologist who serves as the Director of Radiology Research at Albert Einstein College of Medicine, determined that the DTI images evidenced features of traumatic brain injury (TBI) pathology, specifically, “prior hemorrhage in the basal ganglia on the right; post-traumatic gliosis in the right frontal lobe; and microstructural traumatic axonal injury (TAI) at multiple locations.”

The DTI images, Dr. Lipton concluded, were consistent both with claimant having fallen from the aircraft and with several of the functional and psychiatric problems diagnosed by claimant's treating clinicians. In particular, the DTI images showed that claimant’s brain abnormalities were “clustered along an axis” that “corresponds to the expect[ed] distribution of forces resulting from impact to the right eye region,” precisely where claimant hit the tarmac. Among the injuries that the DTI images showed were abnormalities “in the right frontal lobe,” abnormalities that match claimant’s clinical symptoms. As Dr. Lipton put it, “[e]xecutive dysfunction, ... mood disorders including depression as well as personality changes, [and] memory and attention problems” are all associated with “frontal lobe injury.” Just as importantly, Dr. Lipton concluded that “the asymmetric distribution of the areas of brain injury pathology” was consistent with the fact that certain aspects of claimant’s brain

³ Dr. Hanson’s report did not detail the specific restrictions recommended for claimant.

functioning—“such as verbal and overall intellectual capacity”—“may remain unaffected.” Furthermore, he concluded that “the brain pathology resulting from this injury is permanent.” With regard to claimant’s ongoing issues assertedly caused by the TBI, Dr. Lipton noted in that same report that “[f]unctional deficits related to TBI become gradually apparent over time; the detection of these deficits is dependent upon prior cognitive capacity (reserve) and on the degree to which the patient’s activities challenge areas of functioning affected by the TBI.”

At the oral hearing, Dr. Lipton testified that the claimant suffered a severe traumatic brain injury evidenced by the aforementioned medical records from the Aga Khan University Hospital. Specifically, he stated that the injury was severe based on the following factors: claimant remained in a coma for 30 hours, the contemporaneous CT scan revealed diffuse cerebral edema even after the administration of multiple drugs to reduce the swelling, claimant experienced paralysis on one side of her body opposite the location of the injury, and claimant experienced early onset of seizures that were difficult to control. In his follow-up letter dated November 26, 2012, Dr. Lipton stated that “based on the records, it is remarkable that [claimant] survived to be discharged from the hospital.” Dr. Lipton’s testimony during the oral hearing was authoritative and credible on the issue of the fact of the injury—specifically, the interpretation of the contemporaneous medical records and the physical manifestations of that injury evidenced from the results of the DTI scan—and he answered all of the many questions posed by the Commission during the oral hearing directly and thoroughly.

In his report dated November 19, 2012, Dr. Abrams stated that the new DTI information confirms his initial assessments contained in his reports dated June 9, 2011

and August 5, 2011, previously considered by the Commission in the Proposed Decision. Dr. Abrams concludes that the injury has been the source of the “cognitive behavioral complaints, chronic insomnia, major depression, and behavioral abnormalities that will undoubtedly interfere with [claimant’s] ability to be competitively employed as an attorney, or to be employed in any job that requires unimpaired executive function.”

In his opinion dated October 12, 2012, Dr. Lewis stated that from a psychological standpoint, people with what he refers to as “persistent post concussive syndrome” following TBI typically have complaints in four clusters: hormonal abnormalities; insomnia; trouble with emotion regulation; and difficulty with cognitive speed, agility, stamina, and advanced cognitive function. This clustering of symptoms matches those of claimant, who has had difficulties with three out of the four categories since the TBI.

In his opinion dated November 26, 2012, Dr. Greenwald stated that claimant’s impairments are permanent and while “therapies may offer marginal compensation of current deficits, they will not be curative of underlying traumatic brain injury.” Further, Dr. Greenwald noted that the deficits associated with the type of injury suffered by claimant may remain masked until one’s executive functions are challenged and that in claimant’s case, the challenge began when she attempted to obtain and maintain employment. Specifically, he stated that “the need for organization, deadlines, pressure, stressors, and challenging personalities, brought the underlying deficits and disabilities that resulted from her traumatic brain injury to light.” At the oral hearing, Dr. Greenwald asserted that the cognitive issues assertedly suffered by claimant are a result

of the traumatic brain injury and not post-traumatic stress disorder (PTSD), as all of claimant's former physicians believed. In support of his assertion, Dr. Greenwald noted that there are many symptoms that overlap between a diagnosis of PTSD and TBI, but that claimant does not suffer from recurrent flashbacks and dreams, which are the "essence" of PTSD.

The remaining newly submitted reports, from Dr. Eilers and from Anthony Gamboa, Ph.D., MBA, relate to claimant's potential future employment opportunities and medical costs. Dr. Eilers created a "Rehabilitation and Medical Patient Management Plan" based upon his review of claimant's medical records. In his plan, Dr. Eilers estimates the cost, in his opinion, of claimant's future medical treatment requirements, including not only direct medical services but also childcare expenses—if claimant has children in the future—plus housing, transportation, and so forth. In his report dated November 21, 2012, Dr. Gamboa stated his opinion regarding claimant's potential future lost earnings using as a basis the US Census Bureau's American Community Survey. In forming his opinion, Dr. Gamboa considered as his control workers with a professional degree and no disability, which in his opinion reasonably represented claimant's lifetime power to earn money.

At the oral hearing, the claimant testified that following the incident she was taken to the hospital and upon discharge from the hospital she went to a hotel because she was not yet medically approved for travel. Claimant testified that during this time she heard that it was a miracle that she had lived. Since that time, claimant testified, she has had difficulties with depression and her school work became more challenging. For example, she testified that in law school she had difficulty taking examinations and,

therefore, requested and received accommodations consisting of extra time and a private room. Further, upon completing law school, claimant testified that she requested and was approved for similar accommodations when she sat for the California Bar examination. Since passing the California Bar examination in 2007, claimant testified that she has been on the Board of Directors for the American Civil Liberties Union of Northern California, and worked as an attorney for one year, a job that she stated she left voluntarily. Although she has held other positions, she testified that due to the issues she faces with interpersonal relationships, she has been unable to maintain any of these other positions. Claimant testified that the interpersonal challenges she faces are compounded by the fact that her ability to plan and do things is limited by the unpredictable nature of her physical energy levels due to the insomnia from which she suffers. During her testimony, claimant stated that her condition has changed over time, noting for example that when she first met her husband she “was not like this,” and adding that at that time she was very outgoing and had her first real job, and so forth. At the present time, claimant stated that she is seeking treatment for her TBI, since she is now aware that it may be the cause of her symptoms.

Claimant’s husband, ^{5 U.S.C. §}
_{552(b)(6)}, testified that claimant struggles with interpersonal relationships and, as a consequence, has had difficulty working in an office environment. Furthermore, ^{5 U.S.C. §}
_{552(b)(6)} testified that he has observed that claimant has difficulty initiating tasks, becomes overwhelmed and is unable to complete certain simple tasks such as sorting the mail, and that she suffers from insomnia. He also testified that shortly after their marriage, claimant fell into a deep depression that lasted nearly a year and required extensive treatment.

The evidence relating to the testing accommodation determinations submitted by claimant included both the final determinations of her law school and the California State Bar and the supporting evidence upon which those determinations were based. Included among this evidence were the medical reports and records of Allen Darbonne, Ph.D., and Thomas Adam Cotsen, M.D. These records indicate that due to the post-traumatic stress disorder and depression from which claimant suffered, she was unable to perform up to her potential in timed testing situations. These records make no reference to TBI. Based upon these records and the statements of claimant, both entities afforded her accommodations, including extra time within which to take examinations and a private examination room.

Analysis

Category D of the January Referral requires the Commission to determine whether the “severity of the injury is a special circumstance warranting additional compensation.” January Referral, ¶6. In assessing whether compensation is warranted in this claim, the Commission considers the factors articulated in its decision in *Claim of*⁵ U.S.C. § 552(b) ; Claim No. LIB-II-109, Decision No. LIB-II-112 (2011). These factors, assessed in light of the totality of the evidence, 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.

Assessing these factors, the Commission finds that, in this Category D claim, the most significant factor is the nature and extent of the injury. In particular, claimant’s injury is to her brain, a vital organ. The Proposed Decision noted that claimant had failed to explain what constitutes a “traumatic brain injury,” to describe how and why

the injury she sustained may be categorized as such, and to explain the relative severity of the kind of injury she suffered especially in light of the fact that the medical reports that were roughly contemporaneous with the physical injury mention no lasting effects.

On objection, claimant remedied those defects in her claim. In particular, Dr. Lipton's reports and testimony helped clarify these issues. In his report dated November 25, 2012, Dr. Lipton stated that TBI severity is defined by the patient's clinical state at or close to the time of injury and that the most widely used measure of the severity of TBI is the duration of "the alteration or loss of consciousness."⁴ Further, Dr. Lipton stated that "[w]hen alteration or loss of consciousness exceeds 24 hours, the injury is characterized as severe." During the oral hearing, Dr. Lipton testified to several other factors present in the medical record which supported the conclusion that the TBI suffered by claimant was severe, e.g., diffuse cerebral edema, one-sided paralysis opposite the location of the injury, and early onset of seizures that were difficult to control. While the mere fact that the medical terminology in this case uses the word "severe" to describe claimant's injuries is not, by itself, dispositive as to the legal issue of severity under Category D, the Commission finds her injuries, in light of the circumstances, to be severe.

As noted above, the Commission considers other factors in determining whether a claim meets the standard for an award under Category D, including the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions. In this case, there is no claim of physical disfigurement. Claimant does, however, assert that

⁴ Dr. Lipton noted that "[a]lteration of consciousness includes confusion, disorientation, drowsiness, etc. Loss of consciousness, which is synonymous with coma, means the patient does not respond appropriately to verbal (e.g., calling the patient's name, asking the patient to perform a simple task) or physical (e.g., pinching the finger or toe) stimuli."

her major life functions have been severely impacted by her injury. Specifically, claimant asserts, with support from expert and other witnesses, that as a result of her injury she has suffered “significant impairment in attention, working memory and executive function (‘cognitive agility’).” These assertions are much more difficult for the Commission to assess with any degree of certainty, and are especially difficult given the seeming contradictions in the record between the conclusion that claimant suffers from these impairments and claimant’s actual achievements since the injury. These issues are discussed further in the “Compensation” section, which follows.

Considering all of the evidence and the testimony during the oral hearing (in particular the testimony of Dr. Lipton), the Commission interprets the contemporaneous medical records from the Aga Khan University Hospital, which indicate claimant remained in a coma for approximately 30 hours and remained at the hospital for six more days after that, as establishing that claimant suffered a severe TBI. The Commission also finds that the severity of claimant’s initial injury is further supported by the DTI images obtained in 2012. Considering these factors, the Commission concludes that the severity of the injury suffered by claimant during the 1986 hijacking is indeed among the most severe in this program and warrants an award of additional compensation under Category D.

COMPENSATION

In *Claim of 5* U.S.C. § 552(b)(6) , Claim No. LIB-II-118, Decision No. LIB-II-152 (2012), the Commission held 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.

As set forth above, the Commission has concluded that claimant's injury was among the most severe in the program, considering the nature of the injury, the amount of time she remained in a coma after the injury, and the amount of time she was hospitalized immediately after suffering the injury. With regard to the other relevant factors, there is no evidence of disfigurement to claimant's outward appearance. Claimant did, however, present a significant amount of evidence to support her contention that her life functions have been fundamentally impaired by the injury, mostly in the form of opinion testimony.

Moreover, claimant presented evidence of her potential future health-care costs and losses in earnings, costs and losses that she may suffer in the future as a result of her injuries and limitations. This evidence, however, is of limited value: the Commission has not considered the individual economic damages of claimants in this program. Under Category D in particular, the Commission awards compensation largely based on the relative severity of the injuries.

The evidence concerning the continuing effects of the injury and their impact on claimant's major life functions is, as the Commission noted above, extremely difficult to parse given the totality of the medical and other relevant evidence. Two issues in

particular complicate the situation. First, none of the medical evidence prior to the filing of this claim makes reference to the traumatic brain injury, and much of that evidence indicates that doctors prior to the filing of this claim all viewed claimant's problems as connected to her PTSD and depression.⁵ Second, claimant has been for much of her post-hijacking life an extraordinarily successful, high-functioning individual who has already accomplished a great deal.

Claimant's answer to the first complication is in essence that scientific progress has unearthed what her earlier doctors were unable to see, that claimant suffered a TBI when her head collided with the airport tarmac on September 5, 1986. In effect, claimant argues that for nearly a quarter-century, from the time the injury was initially treated in 1986 until the filing of this claim in 2010, all of her doctors continuously misdiagnosed her symptoms as the product of PTSD and depression, and not one of them even suspected she had TBI. More importantly, claimant argues that with advances in both medical understanding of TBI and brain-imaging technology, the evidence now shows not only that she suffered a TBI, but also that it is the TBI—and not the PTSD and depression—that has impaired her memory, attention and executive functioning.

There may be some truth to these contentions, but the evidence still does not conclusively establish that claimant's problems are due solely to the TBI. The evidence does show that claimant suffers from bouts of depression, forgetfulness and difficulty in

⁵ As the Proposed Decision made clear, adjudication of this claim requires separating that portion of claimant's condition that can be attributed to her physical injury—the TBI—from that portion attributable to the psychological injury, her PTSD. *See* PD at 8-9. To medical professionals, for whom the brain's physical and psychological processes are no doubt deeply intertwined, this might seem odd. It is, however, what the State Department Referrals' limitation of this Commission's jurisdiction to physical injuries requires the Commission to do.

concentration, but, as noted above, even claimant's own expert, Dr. Greenwald, acknowledges that these are symptomatic of PTSD as well as TBI.

In response to the second issue, claimant asserted in her brief that her graduation from law school and her entry into the workforce "made concrete the abstract distinction between 'book smarts' and the ability to succeed in the 'real world'." As noted above Dr. Lipton stated that the functional deficits related to TBI become gradually apparent over time and may not be apparent until a patient is challenged. Dr. Greenwald stated that in claimant's case the challenge began when she attempted to obtain and maintain employment.

The record of claimant's actions and achievements indicates that claimant has the ability to perform in her chosen profession. For example, claimant courageously and persuasively provided extensive testimony to a federal court during the sentencing of the lead hijacker of Pan Am Flight 73; she successfully completed law school and passed the California Bar examination (albeit with accommodations granted on the grounds of anxiety); she was employed for one year as an attorney, a job from which she left voluntarily; she served recently as Secretary on the Board of Directors for the American Civil Liberties Union of Northern California; and she ably represented herself (after dismissing former counsel) up to the oral hearing before this Commission, when she retained new counsel. The evidence that claimant has been unsuccessful in her efforts to obtain and maintain employment consists only of testimony (hers and her husband's) and the short-term nature of her employment. Claimant has not provided, however, any evidence that her employers were unsatisfied with her as an employee. Finally, claimant's hearing testimony about limitations on other activities of daily

living—e.g. sorting the mail, cooking, shopping, etc.—is also insufficient to alter the Commission's determination on this point.

For all of these reasons, the evidence of ongoing impairment of claimant's major life functions as a result of the TBI does not add substantially to the Commission's consideration of the proper amount of compensation to be awarded to the claimant for the severity of the injury she suffered as a result of the hijacking of Pan Am Flight 73 in 1986.

Considering (i) the Commission's other awards under Category D, (ii) the evidence presented in this case, and (iii) the Commission's conclusions concerning the severity of the initial injury, the Commission determines that \$1,500,000 is an appropriate amount of further compensation in light of the nature and extent of claimant's initial injury. With regard to interest, the Commission held in ^{5 U.S.C. §} 552(b)(6) *supra*, that, as with awards for physical injury made under the December Referral, compensable claims under Category D are not entitled to interest. Accordingly, the Commission determines that the claimant, ^{5 U.S.C. § 552(b)} (6), is entitled to an award of \$1,500,000 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

In conclusion, the Commission withdraws its denial of the claimant's claim as set forth in the Proposed Decision and issues an award as set forth below, 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). This constitutes the Commission's final determination in this claim.

AWARD

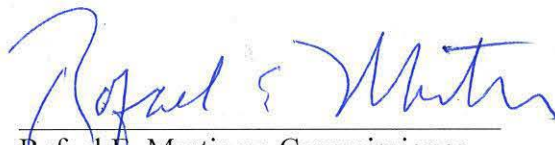
Claimant ^{5 U.S.C. § 552(b)}₍₆₎ is entitled to an award in the amount of One Million

Five Hundred Thousand Dollars (\$1,500,000.00).

Dated at Washington, DC, February 15, 2013
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
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UNITED STATES DEPARTMENT OF JUSTICE
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5 U.S.C. §552(b)(6)

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Libyan Arab Jamahiriya

Claim No. LIB-II-159

Decision No. LIB-II-167

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 [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 I to the January Referral Letter lists the lawsuits 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 April 7, 2011, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission concluded that the injury claimant suffered to her head during the hijacking met the Commission's standard for physical injury in this program, and 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-022, Decision No. LIB-I-004 (2009).

BASIS OF THE PRESENT CLAIM

On July 6, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts a claim under Category D of the January Referral. Claimant also submitted evidence supporting the elements of her claim, including evidence of her U.S. nationality and the extent of her injury. In support of her claim for additional compensation, claimant asserts that "[her] injury, and its continuing detrimental effects, qualifies for special circumstances because it has had a tremendously negative impact on [her] functioning, and [she] continues to have severe

effects from the injury to this day... ." The evidence submitted includes the claimant's own statement, medical records, and medical reports.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited, under Category D of the January Referral, 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 date 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 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 determines 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*, ¶ 6. The Commission determined in its decision on claimant's physical injury claim under the December Referral that the Pending Litigation in question, *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, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination 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 *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 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 her Category D claim for additional compensation, claimant submitted, among other documents, her own declaration and medical records and opinions from several medical providers. In her declaration, the claimant states that “[a]fter the approximately three-day coma, [she] had regularly recurring severe headaches for many years...[and she] took medications to control and prevent seizures for approximately five to seven years.” Further she asserts that “[t]he effects of the brain trauma continue to this day - with continued anxiety, depression, and chronic insomnia, and problems with concentration, attention, and cognitive functioning.” In addition, she asserts that she has “suffered from debilitating major depression...[and] was diagnosed with Post Traumatic Stress Disorder” as a result of the hijacking.

The medical records submitted in support of this claim include reports by Gary Abrams, M.D., Beth Cook, Ph.D., Allen Darbonne, Ph.D., Thomas Brod, M.D., Thomas Adam Cotsen, M.D., and Jan Aura, Ph.D. Dr. Abrams—a neurologist—notes, in his report dated June 9, 2011, that “[t]he claimant reports multiple symptoms consistent with postconcussive syndrome” and, further, that claimant “developed major depression, with recognition and diagnosis of PTSD as an adult” concluding that “[h]er current problems are likely a combination of residual traumatic brain injury and behavioral abnormalities with multiple causes.” Dr. Cook—a clinical neuropsychologist—in her opinion dated June 9, 2011, notes that claimant’s

“significantly less than expected performances across multiple domains...are typical of individuals who have sustained a traumatic brain injury” and, further, that a

recent MRI of the brain suggests basal ganglia abnormalities...[which] may represent frontostriatal circuitry damage from a traumatic brain injury, and provide a parsimonious neurobiological explanation for the executive dysfunction and attentional deficits identified in [claimant’s] testing.

Dr. Cook diagnosed claimant with a “Cognitive Disorder secondary to Traumatic Brain Injury (TBI), Mild/Mod...Depressive Mood Disorder, secondary to TBI, Moderate...Posttraumatic Stress, chronic...[and] S/p Closed Head Injury and Traumatic Brain Injury, Severe.” Dr. Cook states that claimant, in her everyday life, would experience “difficulties initiating and completing complex and multi-step activities consistently and fluently...occupational problem[s]...[and] relationship difficulties.” For his part, Dr. Darbonne—claimant’s clinical psychologist—in his report dated June 11, 2011, notes that he has “known [claimant] to have great difficulty with treatment resistant insomnia and severe headaches and debilitating depression...[which] are all very typical patterns associated with traumatic brain injury, particularly when compounded with early life emotional trauma.”

Dr. Brod—claimant’s former psychiatrist—notes, in his report dated May 23, 2011, that claimant “presented with problems with focus and concentration, anxiety, insomnia, carpal tunnel syndrome, and depression” and concludes that “all these symptoms she had were connected and were likely a result of the traumatic brain injury she suffered as a child.” Dr. Cotsen—claimant’s psychiatrist—treated claimant for “post-traumatic stress disorder (PTSD), depression, and anxiety.” In his report, dated June 30, 2010, Dr. Cotsen states that “these conditions were caused by a

hijacking and brain trauma that she suffered during her formative years.” Finally, Dr. Aura—claimant’s former psychotherapist—states that “[w]hile the symptoms of Traumatic Brain Injury and Post Traumatic Stress Disorder parallel each other very closely, [she] felt that treating the brain regulation and injury was important given the history of concussion and unconsciousness.”

In analyzing this claim the Commission notes that at the time of the hijacking, claimant suffered direct harm of two different types: psychological and physical. She was a ten-year old girl who was on a plane when terrorists stormed the plane and hijacked it. The entire ordeal, including the violent end to the hijacking, undoubtedly was psychologically traumatizing to the claimant. At the same time, in the course of escaping from the plane, claimant fell from a height of fifteen feet onto the airport tarmac, and in so doing, she suffered a head injury as a direct result of her physical collision with the ground. This required her to spend seventeen days in a hospital in Pakistan.

For purposes of Category D claims, the Commission’s “physical injury” jurisprudence requires it to distinguish between the effects from these two different types of harm, and to focus solely on whether the claimant’s *physical* injury and the effects from that injury warrant additional compensation. In ^{5 U.S.C.} §552(b)(6) *supra*, the Commission held “that ‘the injury’ referred to under this Category is the injury for which an award was issued by the Commission under the December Referral.” Further, under the December Referral, compensation 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); *Claim of* ^{5 U.S.C. §552(b)(6)}

, Claim No. LIB-I-041, Decision No. LIB-I-030 (2010). Consistent with this principle, the Commission determined that claimant's compensable injury under the December Referral was the physical injury to claimant's head, not the psychological injury resulting from the hijacking for which claimant had also claimed compensation. Thus, to the extent that claimant is basing her claim for additional compensation under Category D on the effects of the psychological trauma she suffered because of the experience of being a hijack victim, her claim must be rejected.

The question here, then, is whether the claimant's physical injury, caused by the fifteen-foot fall to the concrete tarmac, and the effects from that physical injury, are severe enough to constitute a "special circumstance" for awarding the claimant additional compensation beyond the \$3 million she has already received from her December Referral claim.¹ Notwithstanding its sympathy with the claimant's pain and suffering, the Commission concludes, for two reasons, that they are not.

First, the evidence submitted by the claimant fails to establish a clear connection between the physical injury suffered and the lasting impacts claimant describes. It is clear that the effects claimant describes are themselves psychological; she does not, for example, claim any physical disfigurement, nor any impact on life functions other than those that depend on normal psychological functions. In order to establish a compensable claim, claimant must demonstrate a connection between the physical injury from the fall and the psychological effects that she describes. In this regard, claimant has submitted articles from medical journals that tie some of the

¹ It is the claimant's burden to provide evidence to establish the validity of its claim. See 45 C.F.R. 509.5(b) (2011) ("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.").

psychological problems she has to brain trauma caused by head injuries of the kind she suffered. But, a number of the doctors and psychologists who treated claimant—specifically, Drs. Darbonne, Cotsen and Aura—noted that claimant’s problems were the result of both the physical injury and the experience of being on a hijacked plane. The only evidence that might suggest that the cause was solely the physical injury was a one-page letter from Dr. Brod, a clinical psychiatrist who treated the claimant for about a year in 2002 and 2003. As noted above, Dr. Brod noted that the claimant “presented with problems with focus and concentration, anxiety, insomnia, carpal tunnel syndrome, and depression,” and concluded, without any support or explanation, that these conditions were “likely a result of the traumatic brain injury she suffered as a child.” Moreover, while Dr. Cook suggests that there is evidence that physical changes to claimant’s brain may represent damage from a “traumatic brain injury,” this diagnosis is similarly unsupported by any evidence. There is no explanation of what constitutes a “traumatic brain injury,” no description of how and why the injury sustained by the claimant in escaping from the plane may be categorized as such, and no explanation of the relative severity of the kind of injury suffered by the claimant. These conclusory statements are illustrative of the fact that the various medical reports, most of which had been prepared since the filing of claimant’s initial December Referral claim (i.e., in the last few years), do not assist the Commission in discerning precisely how it is that the *physical* injury that the claimant suffered has impacted her life functions. This is particularly important because the medical reports

that were roughly contemporaneous with the physical injury mention no lasting effects.²

Second, even if the Commission were to assume that Dr. Brod is correct, that the sum total of claimant's problems—problems with “focus and concentration, anxiety, insomnia, carpal tunnel syndrome, and depression”—were all caused solely by the brain trauma resulting from the fall to the tarmac, the Commission would find that they are not severe enough to warrant additional compensation beyond the \$3 million the Commission has already awarded the claimant. While noting that claimant spent 17 days in a hospital due to the fall from the wing of the airplane—a factor that suggests a relatively severe injury—and even accepting, *arguendo*, that claimant's life functions have been impacted as a result of this attack, the Commission is not persuaded that such facts are sufficient on their own to support an award. Further, the Commission notes that the claimant did not suffer any permanent physical disfigurement as a result of the attack. The Commission, therefore, concludes that, in aggregate, claimant's physical injury is not severe enough to warrant additional compensation.

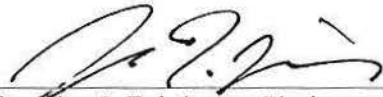
In summary, considering the totality of the evidence submitted, the Commission is not persuaded that (a) the impact of the incident in question on the claimant's major life functions can be sufficiently attributed to her physical injury alone; or that (b) the severity of the injury suffered by the claimant is sufficiently severe to qualify for additional compensation under Category D beyond the \$3 million already awarded in her December Referral claim.

² For example, a December 4, 1986 medical and neurological examination reflects that the claimant's “school performance this year after the head injury is as good [as] or better than the past.”

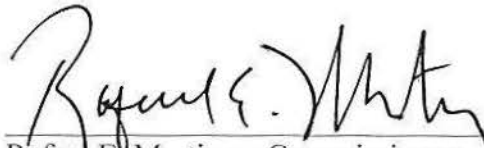
Consequently, the Commission concludes, based on the evidence submitted, that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D, beyond its award of \$3 million under the December Referral.

Accordingly, this claim must be and is hereby denied.

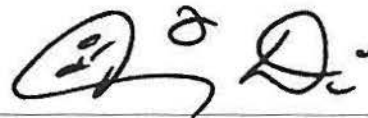
Dated at Washington, DC, June 5, 2012
and entered as the Proposed Decision
of the Commission.



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).