

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579

In the Matter of the Claim of

5 U.S.C. § 552(b)(6)

Against the Great Socialist People's
Libya Arab Jamahiriya

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} Claim No. LIB-II-174

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} Decision No. LIB-II-180

Counsel for Claimant:

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

FINAL 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) at Fiumicino Airport¹ in Rome, Italy on December 27, 1985. 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").

On June 20, 2012, the Commission entered a Proposed Decision denying this claim on the ground that claimant failed to establish that the severity of her injuries rose to the level of a special circumstance warranting compensation beyond the \$3 million already awarded in this program for those injuries.

¹ Also known as Rome Leonardo da Vinci Airport or Leonardo da Vinci-Fiumicino Airport.

On August 7, 2012, claimant filed an objection to the Commission's Proposed Decision and requested an oral hearing. On October 26, 2012, claimant submitted an objection brief along with new evidence in support of her claim. This new evidence consists of the medical records from claimant's stay at Rush Presbyterian-St. Luke's Hospital ("St. Luke's Hospital") in Chicago, Illinois from December 31, 1985 to January 30, 1986, claimant's March 6, 2009 records request to St. Luke's Hospital, a document by PubMed Health on "compartment syndrome," a copy of a Wikipedia.org entry for "fasciotomy," a Medical Opinion and Report by Dr. Dalton Carpenter, CDs containing CT scan images, x-ray images, video footage of claimant, and a PowerPoint presentation by Dr. Carpenter, a printed copy of the PowerPoint presentation, and the affidavit of claimant's brother,^{5 U.S.C. § 552(b)(6)}. On November 8, 2012, prior to the hearing, claimant submitted an "Addendum to Medical Opinion Concerning ^{5 U.S.C. § 552(b)(6)} dated October 25, 2012." Additionally, claimant argued that the Commission should award claimant "the \$7 million to which she is entitled as compensation for her 'most severe' physical injuries."

The hearing on the objection was held on November 8, 2012.

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 our 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, ¶ 6. The Proposed Decision concluded that claimant had satisfied the first and third of these requirements. Therefore, on objection, the only question is whether “the severity of [claimant’s] injury is a special circumstance warranting additional compensation.”

At the oral hearing, claimant appeared before the Commission and provided additional evidence about her injuries. She testified that her legs and feet were severely injured as a result of being hit by shrapnel from hand grenades and machine gun bullets, and that immediately after the attack, she was hospitalized in Rome and then hospitalized for a month upon her return to the United States. Claimant further testified that after these initial hospitalizations, she received further medical treatment in hospitals on multiple occasions. These were necessary, claimant stated, to address the permanent effect of her injuries, which she describes in her objection brief as “a dropped left foot, curling of the left toes, painful scarring, arthritis of the left toes and foot, atrophy of the left foot and leg muscles, weakening of the left foot bones, . . . left knee pain, left hip pain and lower back pain.”

Claimant’s testimony and contemporaneous records establish that immediately after the attack she was taken to the Centro Traumatologico Ortopedico (CTO) Hospital in Rome where she was admitted for four days and underwent treatment for firearm wounds to both of her legs. After her discharge from the hospital in Rome, claimant returned to the United States. On her flight back to the United States, she was carried into the plane on a stretcher and was confined to the stretcher for the duration of the flight. Upon her arrival in the United States, she was transported by ambulance to St. Luke’s Hospital in Chicago, Illinois. She was admitted to St. Luke’s for 30 days where

she underwent numerous surgical procedures including a fasciotomy, multiple debridement procedures, and skin graft procedures. For almost a year and a half, she wore a brace on her left leg to help her with a dropped foot. On June 9, 1987, claimant was again admitted to St. Luke's for four days where she underwent a tibial tendon transfer procedure to address her left foot drop. About four years later, on May 6, 1991, she was admitted to Loyola University Medical Center² in Chicago, Illinois for a same-day surgical procedure that attempted to correct the "clawing of her left toes with valgus deformity of the IP joint of the great toe." Finally, in 2001, claimant was admitted overnight to Amman Hospital in Amman, Jordan for what she described as a scar revision procedure to address various scars on her leg.

The injuries she sustained as a result of the attack resulted in severe scarring on her left leg, and a deformity and lack of mobility of her left foot that manifested itself as both a dropped left foot and clawing of the toes on her left foot. The scarring resulted from four primary wounds to her left leg: two directly due to the ballistic trauma from the bullet, and two others resulting from large incisions due to the fasciotomy procedures.³ During the hearing, claimant showed members of the Commission the scars from these wounds, and the disfigurement on her feet as a result of the tendon-transfer procedure and the fusing procedures on the toes of her left foot. Claimant also showed the Commission the indentions on her leg that she claimed were caused by the leg brace she wore to address her dropped foot in 1986-87.

Claimant also described the chronic pain that she experiences as a constant "dull aching pain" that "is everywhere from her ankles to her toes." She testified that she

² Also known as Foster G. McGaw Hospital.

³ Claimant also testified that during her initial hospitalization at St. Luke's Hospital, she underwent skin grafts to address three of the wounds.

experiences pain every time she is walking or standing for more than 20 minutes. Claimant further stated that because of the fusion of her toes, the skin under her toes is very thin and sensitive, and that she is therefore unable to walk barefoot.

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)(6), Claim No. LIB-II-109, Decision No. LIB-II-112 (2011). These factors, which the Commission assesses in light of the totality of the evidence, include “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 permanent basis - and the degree to which claimant’s injury has disfigured his or her outward appearance.” *Id.* at 6.

Looking first at “the nature and extent of the injury itself,” the Commission finds, based on the substantial evidence introduced on objection, that the injuries to both of claimant’s legs were significant, and that the injuries to her left leg were severe. The Commission further finds that these injuries had a permanent impact on claimant insofar as the dropped foot and the clawing of her toes have permanently affected her mobility. Even after claimant’s 1987 tendon-transfer surgery for her dropped foot, she continued to have only limited mobility of the left foot. This continues to be true to this day, a fact that was further supported when members of the Commission visually examined her lower leg and foot during the oral hearing. It is also clear that claimant cannot move the

toes on her left foot as a result of a 1991 surgery that fused the joints in her toes together to address the curling of the toes. Again, claimant supported the medical evidence and testimony by permitting a visual examination of her foot during the hearing.

Claimant has also suffered a significant disfigurement of her outward appearance. As the Commission was able to see during the hearing, claimant's legs contain multiple, deep scars, some of which cover the length of her legs. She also has visible deformities on her left foot and toes due to both her initial injuries and the subsequent surgeries.

Considering all of this evidence in light of the factors identified above, the Commission concludes that the severity of claimant's injury 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 it will consider several factors to determine the appropriate level of compensation for claimants who satisfy the threshold requirements for Category D claims. In addition to the recommendation contained in the January Referral for Category D, the factors include 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 available disability ratings, and the nature and extent of disfigurement to the claimant's outward appearance.

Based on all these factors, and considering other awards in this program based on the Commission's assessment of "special circumstances" under Category D, the

Commission concludes that \$1.5 million is an appropriate amount of further compensation for claimant. 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. *See, e.g., Claim of 5 U.S.C. § 552(b)(6)* , Claim No. LIB-II-118, Decision No. LIB-II-152 (2012). Accordingly, the Commission determines that the claimant, 5 U.S.C. § 552(b)(6), is entitled to an award of \$1.5 million and that this amount constitutes the entirety of the compensation that claimant is entitled to in the present claim.

In conclusion, the Commission withdraws its denial of 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 ICOSA. 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 and One-Half Million Dollars (\$1,500,000.00).

Dated at Washington, DC, January 22, 2013
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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Claim No. LIB-II-174

Decision No. LIB-II-180

Counsel for Claimant:

Richard D. Heideman, Esq.
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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) at Fiumicino Airport¹ in Rome, Italy on December 27, 1985.

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,*

¹ Also known as Rome Leonardo da Vinci Airport or Leonardo da Vinci-Fiumicino Airport.

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 our 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 October 16, 2009, the Commission adjudicated claimant's physical injury claim under the December Referral. In that claim, claimant alleged that her lower left leg was injured as a result of being hit by grenade shrapnel, causing permanent disfigurement and damage, and that the tibia and fibula of her right leg were shattered by a bullet, requiring her to wear a cast for six months. In light of the evidence submitted, the Commission concluded that the injury met the Commission's standard for physical injury and, consequently, that claimant was entitled to compensation in the amount of \$3 million. *Claim of*, 5 U.S.C. §552(b)(6), Claim No. LIB-I-047, Decision No. LIB-I-027 (2009).

BASIS OF THE PRESENT CLAIM

On July 7, 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. The Statement of Claim also includes 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 "permanent physical injuries, deformities, disabilities, immobility, scarring and

pain' constitute a special circumstance warranting additional compensation under Category D.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission's jurisdiction under Category D of the January Referral, is limited 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 time of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies equally to satisfy the nationality requirement here.

Award Under the December Referral

To fall within Category D of the claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded claimant \$3 million for her physical injury claim under the December Referral. Accordingly, the Commission finds that 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, *Estate of John Buonocore III v. Great Socialist Libyan Arab Jamahiriya*, case no. 06-cv-727 and *Simpson v. Great Socialist Libyan Arab Jamahiriya*, case no. 08-cv-529, 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 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

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 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?"

In her Statement of Claim, claimant states that her lower left leg was injured as a result of being hit by shrapnel from several grenades that exploded near her, causing permanent disfigurement and damage, and that the tibia and fibula of her right leg were shattered by a "Kalashnikov machine gun" bullet. Claimant further states that she was hospitalized after the terrorist incident and was also hospitalized on subsequent occasions for reconstructive surgery on her left leg that was only partially successful.

The contemporaneous medical records submitted with this claim confirm that, following the attack, claimant was taken to the emergency room at Centro Traumatologico Ortopedico (CTO) Hospital in Rome where she was treated. The record of the actual treatment she received, translated by the claimant into English, states as follows:

- injury to the left leg caused by fire arm with fracture of the tibia and fibula.
suture - cleansing - drainage-dressing
- injury to the right left [sic] with various tibia fractures
suture - cleansing - drainage-dressing

These records also note that claimant experienced paralysis-specifically, that she "report[ed] that she realized she could not wiggle her toes immediately after being hit by the bullets or shards in the leg." Claimant states that she was discharged from the CTO Hospital on January 3, 1986 "so that she could travel back to the United States with her family."

The Statement of Claim states that claimant was immediately transferred from the airport by ambulance to Presbyterian-St. Luke's Hospital in Chicago, Illinois, where, according to claimant, she was hospitalized for 40 days. Claimant has not submitted any

records from that hospitalization. However, records dated June 1987 from a later procedure at this hospital note that it was the second time claimant was admitted to this hospital since the December 1985 terrorist attack and reflect that the previous admission date was December 31, 1985. There is no indication of a discharge date from that treatment, but the 1987 records indicate that claimant received "secondary skin grafting in 1986:"

The records of claimant's 1987 treatment reflect that she was admitted to Presbyterian-St. Luke's Hospital on June 9, 1987 for a "posterior tibial tendon transfer." The discharge summary states that "since the time of the injury patient has been noted to have a left drop foot and is walking with a limp at the time" and that she has "early fatigue due to hip and knee pain." The summary goes on to explain that claimant had an "extensive area of soft tissue loss on [the] lateral side of the mid-tibia, another smaller area on the medial aspect of the proximal fibula," and that she "walks with a hip-like gait on the right in order to clear the left foot from the ground . . . [and] has no dorsiflexion, eversion, [or] inversion of the left foot." Claimant was discharged on June 13, 1987 with a post-operative cast on her leg. The Statement of Claim states that this surgery "provided some relief, but was not completely successful," and that claimant "still suffers from a dropped left foot, and walks with pain and a limp."

Evidence in the record indicates that on May 6, 1991 claimant was admitted to Loyola University Medical Center for surgery to correct the "progressive clawing of her left toes with valgus deformity of the IP joint of the great toe." The records state that claimant underwent a "flexor tendon transfer of the 2nd and 3rd toes with IP fusion of the 2nd toe and corrective osteotomy and IP fusion of the left great toe" and that she was

required to wear a cast and use crutches after the surgery. The Report of Operation states that “the claw toe deformity was then passively corrected to neutral without any difficulty” and that the surgery achieved “excellent alignment” of the other toes. Notwithstanding this evidence, the Statement of Claim asserts that the surgery “provided some relief, but was not completely successful [because claimant’s] toes are still somewhat curled.” In addition, in 2001, claimant spent one night at Amman Hospital in Jordan for cosmetic surgery to repair the scars on the back of her knee.

The Statement of Claim states that ever since the attack in Rome claimant “experiences pain even walking short distances, and cannot walk long distances . . . she walks with a limp and feels pain in her left foot.” Claimant claims to only have 70% mobility in her left leg, and that her restricted mobility causes her to fall frequently, and as a result she has broken her left foot three times and has fractured her toes “on many occasions.” However, claimant has not provided evidence of a disability rating or determination, or evidence of subsequent injuries. Claimant describes “dramatic, unsightly scarring on her legs,” and that “the scars are still painful and sensitive to touch and temperature.” Claimant did not submit any photos of the scars or alleged deformities.

In assessing the evidence concerning that portion of the claim for additional compensation based on the physical injury suffered by the claimant, the Commission considers the factors articulated in its decision in ^{5 U.S.C.} §552(b)(6) which include the nature of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant’s major life functions.

In the present claim, the medical records demonstrate the nature and extent of claimant’s injuries. The claimant was struck by bullets that resulted in fractures to her

right tibia and fractures of her left tibia and fibula. The injuries to her left leg also caused nerve damage to her left foot. After the attack, claimant was immediately hospitalized in Rome for eight days where she underwent procedures to treat the fractures and then returned to the United States where she underwent additional treatment. Claimant claims to have spent forty days in the hospital when she returned to the United States, but claimant fails to provide any evidence to support the length of her initial stay at Presbyterian St. Luke Hospital. The initial injuries to her left leg—specifically, the nerve damage inflicted—resulted in debilitating and disfiguring “drop foot” and “claw toe” of her left foot. In her Statement of Claim, claimant states that even after the corrective surgeries more than twenty years ago, she still suffers from a dropped foot and that her toes are “still somewhat curled.” Yet, claimant has not provided any records of medical exams, treatment, or other evidence to support her claim of the continued drop foot or curled toes.

Moreover, claimant has not provided sufficient evidence to support her assertions as to the impact of her injuries on major life functions. Claimant describes pain when walking, that she walks with a limp, and that her “restricted mobility frequently causes her to fall.” Yet, claimant has not provided a disability determination to support her claim of a walking disability or any medical records since her procedures to substantiate any subsequent treatment claimant received to address her alleged pain and disabilities. Further, claimant alleges that “[t]he scars are still painful and sensitive to touch and temperature”, but claimant has not provided any medical records, pictures, or other evidence to support her claim regarding the impact of her remaining scars.

Therefore, while the Commission in no way wishes to minimize the fact of claimant's injuries, it finds that claimant has not met her burden of proof to establish that the severity of her injuries in this claim rises 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 20, 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).