

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-181

Decision No. LIB-II-173

Counsel for Claimant:

K. Lee Boyd, Esq.
Schwarcz, Rimberg, Boyd
& Rader, LLP

Oral hearing held on November 8, 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 20, 2012, the Commission denied the present claim on the grounds that the claimant failed to establish that the severity of her physical 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 the program.

On July 31, 2012, the claimant filed a "Notice of Objection" and requested an oral hearing. On October 18, 2012, the claimant submitted a "Supplemental Brief in Support of Category D Claim" ("objection memorandum"), which included an October 3, 2012 report by Dr. Daniel R. Crogan, M.D., and an October 17, 2012 report by Dr. Laura Hatch, M.D. The oral hearing on the objection was held on November 8, 2012. As requested by the Commission during the oral hearing, claimant submitted additional evidence on November 23, 2012, which included a supplemental report of Dr. Hatch.

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, ¶ 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 submitting this claim. The only issue on objection, therefore, is whether the severity of claimant's injury is a special circumstance warranting additional compensation.

Claimant, in her objection memorandum, argued that she meets the Commission's standard for a severe injury constituting a special circumstance. Employing the three factors the Commission enumerated in *Claim of*⁵ U.S.C. § 552(b)(6) Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), claimant argued that (1) her impairment rating, diagnosed by Dr. Hatch in her October 17, 2012 report, demonstrates the severity of her injury; (2)

the October 3, 2012 office visit report from Dr. Crogan documents claimant's chronic eczema, which claimant suggests demonstrates the presence of a disfigurement; and (3) her impairment rating, when considered under federal workers' compensation standards, demonstrates that claimant is sufficiently limited in her major life functions to warrant additional compensation.

Claimant submitted with her objection memorandum the medical reports by Doctors Hatch and Crogan, both of which were prepared after the Proposed Decision in this claim. In Dr. Hatch's October 17, 2012 report, she asserts that claimant has (1) a seven percent whole person impairment derived from her right foot condition, (2) a 12% whole person impairment derived from her lumbar spine condition, and (3) an overall whole person impairment of 18%. Dr. Crogan's report documents his October 3, 2012 treatment of the eczema and bacterial infection on claimant's right foot. Claimant asserts that the foot injury from the 1986 hijacking altered her gait, which then led to a persistent chafing of her foot against her shoe, which in turn causes her allegedly chronic eczema.

Claimant also submitted legal and medical sources on workers' compensation.¹ Relying on these sources, claimant devoted much of her objection memorandum to describing federal standards for impairment ratings and disability determinations, and the application of those standards to her medical evidence. Claimant argued that because her impairment rating and resulting disability would be worthy of compensation under federal workers' compensation standards, the Commission should find that that she is sufficiently

¹ The workers' compensation materials claimant submitted with her objection memorandum include excerpts from (1) Parts 2 and 3 of the Federal Employees Compensation Act Procedure Manual; (2) the Federal Employees Compensation Act Practice Guide; (3) the Colorado Department of Labor & Employment, Division of Workers' Compensation, Level I Accreditation Curriculum; (4) the second edition of American Jurisprudence's Workers' Compensation treatise; and (5) a 2009 article in the Journal of Korean Medical Science by Alan Colledge et al. entitled, "Impairment Rating Ambiguity in the United States: The Utah Impairment Guides for Calculating Workers' Compensation Impairments."

limited in her major life functions and that her injury is sufficiently severe to grant her claim for additional compensation.

At the hearing, claimant recounted the horrific ordeal she endured with her sister on board Pan Am Flight 73 and the lasting effects the ordeal has had on her life. Claimant testified that she broke the navicular bone in her foot in her escape from the aircraft and that since the injury, she has experienced pain and tenderness in her foot and ankle, “dull aches” in the midsole, and numbness in the heel. Claimant explained that, because of this pain, she has difficulty standing for long periods and has developed an abnormal gait that favors the uninjured left foot. To manage her pain, claimant testified that she has tried numerous treatments—physical therapy, ultrasound, transcutaneous electrical nerve stimulation (TENS) units, steroid shots, over-the-counter and prescription pain medications, and acupuncture—all with minimal or no effect. However, claimant also acknowledged that doctors failed to uncover any permanent abnormalities after conducting an electromyogram (EMG) on her foot and ankle.

Claimant further testified that the pain from her injury has adversely impacted her life, personally and professionally. In the years after the hijacking, claimant states she was unable to participate in sports or high-impact activities in school, and she continues to avoid these activities. According to the claimant, the constant pain affected her ability to focus and study in school and limited her social activities. Claimant asserted that her injury affected her selection of a medical specialty—radiation oncology—because she perceived it as requiring fewer hours and “not as much overnight training and time with patients” as other specialties.

Claimant then described several limitations on her major life functions that have occurred since 2006, when she suffered an L5-S1 disc injury that she asserts placed her on

disability for a year. Claimant testified that after the 2006 disc injury, her doctors recommended that she reduce her work to part-time, a recommendation with which she complied. According to claimant, working part-time has decreased her salary and prevents her from “working the full scope of [her] specialty, participating in clinical research,” and “being able to take on leadership positions.” Claimant also stated she no longer performs certain treatments that require standing for long periods because of her pain. Cumulatively, claimant asserts, these limitations adversely impact her reputation among colleagues and superiors, which affects decisions about promotions and raises, and thus also affects her professional advancement. According to claimant, her pain restricts her from travelling long distances by car, which results in her choosing to video conference rather than travel by air to professional conferences when they are only a few hours away by car, such as the ones in the San Francisco Bay area.

During the oral hearing, claimant suggested that her 2006 disability may have resulted, at least in part, from her foot injury. Crucially, however, claimant had submitted no evidence to support this connection. At the hearing, the Commission requested that claimant submit any evidence linking her foot injury to her 2006 disability. Specifically, the Commission requested that claimant provide any federal or state Social Security Administration Disability Insurance records related to her foot injury.

In her November 23, 2012 post-hearing submission, claimant did not submit Social Security Disability records but did submit a November 14, 2012 supplemental report from Dr. Hatch, who sought to clarify the impairment rating determination contained in her October 17, 2012 report. Claimant also included several additional medical records, all of which focused primarily, if not exclusively, on her back injury.

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, 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.

The first factor is the nature and extent of the injury. The relevant injury for purposes of a Category D analysis, however, is the injury for which a claimant received an award under the December Referral. The award under the December Referral in this claim was based on claimant’s foot injury and specifically excluded her back injury.² Consequently, in determining claimant’s Category D claim, the Commission limits its analysis to the severity of the injury to her right foot and will not consider claims based on alleged injuries to her back.

In its Proposed Decision, the Commission found that “[t]he nature of the physical injury suffered by the claimant—a fracture of her foot—is not among the most severe injuries in this program.” In her objection memorandum, claimant argued that her 18% whole body impairment rating, which Dr. Hatch prepared after claimant’s 2006 back injury, demonstrates that her injury is sufficiently severe to qualify her for additional compensation because such a rating would “certainly qualify under federal guidelines for a scheduled award” as well as be “worthy of . . . compensation of loss of wage-earning

² On this point, during the oral hearing, claimant’s counsel acknowledged that her arguments were “confined to [claimant’s] foot” injury, which the Commission had found met its standard for physical injury in this program and for which the Commission had made an award. Counsel further stated that she would not reargue whether the Commission should consider claimant’s back injury because the Commission had explicitly excluded that injury in its Final Decision in claimant’s December Referral claim, *Claim of*⁵ U.S.C. § 552(b)(6), Claim No. LIB-I-031, Decision No. LIB-I-040 (2011).

capacity.” Dr. Hatch’s 18% impairment rating, however, is an “overall whole person impairment” rating attained from combining the ratings derived from both claimant’s back condition and her foot condition. Since the Commission must limit its analysis to claimant’s 1986 foot injury, it will only consider the impairment rating derived from her foot condition, which Dr. Hatch stated was seven percent. A seven percent impairment rating by itself is insufficient to persuade the Commission that claimant’s injury—a fracture of her foot—is among the most severe injuries in this program.³

The second factor is the extent (if any) of physical disfigurement. The Commission determined in its Proposed Decision that claimant had not alleged any disfigurement. Claimant submitted with her objection memorandum a medical report from Dr. Crogan documenting an October 3, 2012 office visit. The report noted that claimant’s “chronic eczema had flared” over the two weeks prior to the visit, which had caused claimant discomfort wearing a shoe “on that foot due to rubbing on the rash.” It is unclear whether claimant argues that the eczema is evidence of a disfigurement, *i.e.*, the “altered position” in which claimant must hold her foot, or that the eczema is a limitation on a major life function. To the extent claimant now argues that the eczema is evidence of disfigurement, the Commission rejects that argument. The Commissioners visually examined claimant’s

³ Assuming *arguendo* that claimant’s seven percent impairment were dispositive here, the rating still would not alter the Commission’s conclusion. Dr. Hatch’s opinion is based on factors that fail to meet the criteria required by the relevant medical authority—Table 17-5 in the fifth edition of the American Medical Association’s Disability Guide, on which Dr. Hatch explicitly relied in her report. Table 17-5 requires two elements for an impairment rating of seven percent: (1) an “antalgic limp with shortened stance phase *and* [2] documented *moderate to advanced* arthritic changes of the hip, knee, or ankle.” (*Emphasis added*). Dr. Hatch acknowledged in her October 17, 2012 report that claimant “does not have documented moderate to advanced arthritic changes of the hip, knee, or ankle as described in this table.” Dr. Hatch reasoned that claimant’s x-rays demonstrating “heterotrophic ossification adjacent to the navicular bone” were sufficient to “substantiate her gait derangement” in place of arthritis. However, Dr. Hatch provides no authority for such a substitution. Moreover, her November 14, 2012 supplemental clarification does not correct the discrepancy. As Dr. Hatch notes in this later report, claimant’s most recent x-rays demonstrate claimant has “early arthritic changes,” but still does not exhibit the “moderate to advanced” arthritis required in Table 17-5. Thus, claimant fails to meet one of the two necessary elements for a seven percent impairment rating. Since the medical evidence in this claim does not support the seven percent impairment rating, the Commission cannot rely on Dr. Hatch’s opinion about the rating in its determination.

foot at the hearing and were unable to discern any disfigurement. Moreover, the Commission does not find the alleged disfigurement to be a prominent feature of claimant's overall outward appearance such that it would warrant additional compensation.

The final factor is the effect of the injury on the claimant's major life functions. The Commission found in its Proposed Decision that the limitations attributed by the evidence to claimant's foot were "not of such a degree to put claimant in the category of those claimants with the 'most severe' injuries." In her testimony, claimant described several limitations on major life functions, including her reduced earnings and injury to her professional reputation. She alleged that the impact on her reputation led to restrictions on her professional advancement, her ability to engage in clinical research, and "working the full scope" of her specialty. These limitations, however, appear to have arisen after claimant's 2006 back injury, which, as noted above, are not considered in the Commission's determination. The only limitations directly attributable to claimant's foot injury are her inability to travel long distances by car, stand for long periods of time, and participate in high-impact sports.⁴ Neither claimant's testimony about these alleged limitations nor her medical records provide adequate evidence that the severity of the limitations on claimant's major life activities is sufficient to alter the Commission's determination on this point.⁵

After reviewing claimant's testimony and the recently submitted evidence, the Commission affirms its earlier conclusion that the nature and extent of claimant's injury is not among the most severe in this program. Claimant exhibits no discernible physical

⁴ To the extent claimant argues that her eczema also constitutes a limitation on a major life function, the Commission does not find that the discomfort and related inconveniences associated with skin rashes such as eczema rise to a level of substantial limitation from a severe injury.

⁵ The evidence claimant submitted after the oral hearing does not link the foot injury to her 2006 disability. The epidural records concern the back injury only and contain no reference to the foot. Though the physical therapy records and acupuncture records contain sporadic mention of claimant's foot pain, these records clearly indicate that the primary focus for treatment is claimant's back injury and related pain.

disfigurement and has submitted no persuasive evidence of having been disfigured. Finally, the limitations on claimant's major life functions attributable to her foot injury are not sufficient to categorize her injury as among the most severe.

Accordingly, the Commission concludes that the evidence is insufficient to make a finding that the severity of claimant's injury is such as would warrant an award of compensation under Category D in addition to the \$3 million that has been awarded to her for her injury in this program.

CONCLUSION

For the reasons set forth above, the Commission concludes that 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.

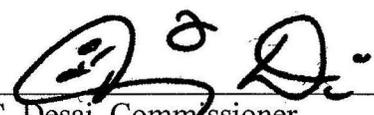
Dated at Washington, DC, January 22, 2013
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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Counsel for Claimant:

K. Lee Boyd, Esq.
Schwarcz, Rimberg, Boyd
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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)} 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 Categories A and D. According to the January Referral, Category A consists of

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to [the Secretary of State's] referral of December 11, 2008.

Id. at ¶ 3. 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.

Id. at ¶ 6. Attachment 1 to the January Referral Letter 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 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 determined that the claimant injured her right foot as a result of jumping from the wing of the airplane. However, it was not persuaded that the claimant's alleged back injury was causally linked to the hijacking incident. The Commission concluded that the injury to claimant's foot 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-031, Decision No. LIB-I-040 (2011).

BASIS OF THE PRESENT CLAIM

On July 9, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts a claim under Categories A and D of the January Referral,

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 claim warrants additional compensation for four reasons: “[t]he traumatic injury...negatively affected the development process of [her] immature musculoskeletal system; the long term detrimental effects of the physical injury on [her] physical, emotional and professional life; the devastating impact of the injury on [her] ability to safely carry a pregnancy; [and] [t]he fact that [she] was traveling alone and likely exacerbated [her] own condition as a result of being responsible for both [her]self and [her] even younger sister.” The evidence submitted includes claimant’s own statement, medical records, and medical reports.

DISCUSSION

Category A Claim

As noted above, the Commission made an award to the claimant in the amount of \$3 million for her December Referral claim of physical injury. The language of the January Referral provides that in order for a claim to be included under Category A the claimant must establish that he or she “did not receive an award pursuant to [the Secretary of State’s] referral of December 11, 2008.” By the Commission’s Decision dated April 7, 2011, the claimant has in fact received an award under the December Referral. Thus, the claimant is unable to meet this critical element of Category A. Accordingly, the Commission concludes that this claim for compensation under Category A of the January Referral must be, and hereby is, denied.¹

¹ Claimant filed her Category A claim in July 2010 in order to comply with the Commission’s deadline for filing such claims. This was prior to the Commission’s April 2011 determination of her December Referral claim. Thus, at the time she filed her Category A claim, she did not yet know whether the clear language of the January Referral would have rendered her ineligible for a Category A claim.

Category D Claim

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 hijacking 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 the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million under the December Referral based on its finding that she suffered a physical injury sufficient to meet the Commission's standard. Accordingly, the Commission finds that the claimant has satisfied this element of her Category D claim.

Dismissal of the Pending Litigation

The January Referral also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 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 also 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 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 support of her Category D claim for additional compensation, claimant has incorporated by reference the record of her claim under the December Referral and also submitted, among other documents, her own declaration as well as the medical report of a Laura Wertheimer Hatch, M.D.

In her declaration, the claimant gives four reasons why she believes her claim warrants additional compensation:

[t]he traumatic injury from jumping off a plane as a child, negatively affected the development process of [her] immature musculoskeletal system; [t]he long term detrimental effects of the physical injury on [her] physical, emotional and professional life; [t]he devastating impact of the injury on [her] ability to safely carry a pregnancy; [t]he fact that [she] was traveling alone and likely exacerbated [her] own condition as a result of being responsible for both [her]self and [her] even younger sister.

In regard to the physical effects of claimant's injuries, she states that after the attack she experienced "intermittent pelvic and low back pain [which along with]...the pain in [her] feet...was worse when [she] was active." Further, she states that while she had "several episodes of pelvic, back pain and lower leg pain that were temporarily debilitating...[,] in 2006 [she] had a severe episode with a ruptured spinal disk that left [her] totally disabled for one year." In addition, she states that she has been advised by her physicians that "while [she] would be able to become pregnant, doing so would be a tremendous risk to [her] life." Regarding the impact on her professional life, claimant states that she "was unable to earn income as a physician" during the aforementioned periods of disability, and "because of being medically restricted to part-time work, [her] income has been correspondingly reduced." As to the emotional consequences of her injuries, claimant states that "their continuing effects[] have been unimaginable and have left [her] uncertain, guilty, and invaded."

In support of her assertions, the claimant has provided medical reports from Doctors Pradhan, Rao and Hatch.² In a “Medical Update” dated August 22, 2008, Dr. Pradhan—claimant’s orthopedist—states that claimant “has improved since her initial injury in 8/06 of a broad based annular tear.” Further, Dr. Pradhan describes the progression of the injury noting that

[f]rom August to November of 2006 she was bed bound, unable to perform her ADLs and required a wheelchair to mobilize. In December, she was primarily bed bound but was able to mobilize to and from PT...[she suffered] a clinical herniation in May 2007 that left her bed bound again for two months...[h]owever, she improved and was able to mobilize at the end of July [2007].

He also noted that, at the time of the update, claimant continued “to have gait and postural problems...has considerable difficulty with...repetitive or continuous bending forward and prolonged sitting...[and] is working part time with difficulty: with a brace, office equipment accommodations and rest brakes on a yoga mat during work.” In a report dated April 17, 2009, Dr. Pradhan states that “while continuing her physical therapy and conservative non-surgical care, [claimant] is also working, but with some ergonomic adjustments in her environment, and not yet at a full time basis.” Dr. Pradhan notes in this report that claimant’s “symptoms include pain in the low back and right foot/calf, increased with activity [and] [r]ight foot numbness increased with prolonged sitting and standing.” In his letter dated August 14, 2009, Dr. Pradhan states that claimant has an “L5/S1 lumbar spine disc disruption with associated lower extremity radiculopathy and disability [which] is associated with chronic postural and musculoskeletal imbalances.” In his declaration dated December 1, 2009, Dr. Pradhan writes as follows:

² The reports from Doctors Pradhan and Rao were previously submitted in support of claimant’s December Referral claim and referred to by claimant in her Category D submission.

I can state with reasonable medical certainty that in cases of lower extremity injury such as the injury experienced by ^{5 U.S.C.} §552(b)(6) in the hijacking of Pan Am Flight 73, the sequelae of a lower extremity injury, including musculoskeletal and postural changes, can manifest in the spine as it did with ^{5 U.S.C.} §552(b)(6)

Claimant has also submitted a “Reasonable Accommodation Request Medical Certification” dated January 22, 2007, completed by Dr. Pradhan, requesting that she be excused from work for 4 months due to the “condition in her lumbar spine.”

In Dr. Rao’s report dated November 23, 2009, she notes that, at the time of claimant’s injury, she “was near the peak of physical development...[which] was negatively affected by blunt force trauma to her immature musculoskeletal system and further by impact from a high vertical free fall...[causing] visible trauma immediately and occult trauma that manifested with time.” Regarding claimant’s current condition, she further notes that claimant

has multiple disabilities including lower extremity sensory and motor deficits from her impairments. She has chronic pain in her ankle and heel, pelvis and low back. Additionally, sitting and standing is limited in duration with frequent breaks and frequent postural changes...needed. She is restricted from repetitive bending and heavy lifting. As a result of the above, she works part-time in her occupation with equipment accommodations. Her driving is limited to short distances. She avoids participation in high impact sports and activities. Additionally, there is a risk of substantial deterioration of her condition with pregnancy and therefore she has not had children.

Dr. Rao states that “[t]here is reasonable medical probability that [claimant’s] injuries from the hijacking are causally linked to her current spine, pelvic and extremity impairments and injuries.”

In her report dated July 27, 2011, Dr. Hatch—an orthopedist—comments specifically on claimant’s foot injury, noting that she “continues with pain in her foot and ankle and difficulty bearing weight through her foot due to this old injury.” Dr. Hatch further describes certain limitations due to the foot injury, including “difficulty standing

for longer than an hour” and, further, that claimant “avoids jumping activities[] and avoids hiking.” Regarding the pain which the claimant asserts she experiences in her back and pelvis, Dr. Hatch notes that “[i]n 2006, [claimant] had a severe episode of low back pain that radiated into her right leg... [and] now has constant right leg and foot pain.” Dr. Hatch “advised that [claimant] not become pregnant due to her lower back condition, which is a consequence of her right foot condition.” Further she states that claimant

continues to walk with a limp...is significantly limited in her squatting ability due to her right foot pain...is limited in her low back range of motion...has significant tenderness over her lumbar spine...has signs that are consistent with sciatica/radiculopathy...has decreased sensation in a lower extremity nerve root...continues with weakness in her right lower extremity...[and] [b]ecause of her low back condition, she is limited to part-time work with significant accommodations that primarily affect her sitting and standing.

Dr. Hatch concludes by stating that “the right foot condition has caused an antalgic gait (limp) that has led to muscular imbalances and transfers the force inappropriately through the lumbar spine causing the present lumbar spine condition, which has been severely debilitating on a permanent basis.”

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.” In this case, the Commission determined that the compensable injury under the December Referral was only the injury to claimant’s foot, not the back injury or the emotional effects relating to the hijacking for which she also claimed compensation. The Commission’s decision specifically stated that “the Commission is not persuaded that the claimant’s alleged back injury is causally linked to the hijacking incident.” *See Claim of* ^{5 U.S.C.} §552(b)(6) Claim No. LIB-I-031, Decision No. LIB-I-040 (2011). Moreover, regarding the claim based on the emotional consequences of the

hijacking, the Commission has previously determined that compensation under the December Referral 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). For these reasons, to the extent that claimant requests additional compensation based on injuries to her back and/or psychological trauma, her claim is rejected.

The relevant question here, then, is whether claimant is entitled to additional compensation based solely on the physical injury to her foot. In assessing the evidence concerning that portion of the claim, the Commission considers the factors discussed in its decision in ^{5 U.S.C. §552(b)(6)} including the nature of the injury; the extent (if any) of physical disfigurement; and the effect on the claimant's major life functions.

The nature of the physical injury suffered by the claimant—a fracture of her foot—is not among the most severe injuries in this program. Further, claimant alleges no physical disfigurement of any kind. Regarding the impairment of claimant's major life activities, the Commission first notes that the majority of the limitations noted both by claimant and her physicians relate to the injury to her back, which, as noted above, are not compensable as part of the present claim. The only reference in the evidence to limitations relating directly to claimant's foot injury comes from Dr. Hatch's report, which notes that the injury has affected claimant's ability to walk and squat. However, the severity of these limitations as described by Dr. Hatch is not of such a degree to put claimant in the category of those claimants with the "most severe" physical injuries.

Consequently, the Commission concludes, based on the evidence submitted, that the severity of the physical 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 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).