

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

In the Matter of the Claim of	}	
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	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-III-003
	}	
	}	Decision No. LIB-III-004
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:	Richard D. Heideman, Esq. Heideman Nudelman & Kalik, P.C.
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PROPOSED DECISION

Claimant brings this claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") for physical injuries said to have been sustained during a terrorist attack at Fiumicino Airport in Rome, Italy on December 27, 1985. For the reasons explained below, we conclude that Claimant has met her burden to establish that (1) she did in fact suffer physical injuries during the attack; (2) those injuries were "discernible [and] more significant than . . . superficial," as required by the Commission's standard for physical-injury claims in this program; and (3) she satisfies all other legal requirements entitling her to an award of compensation from this Commission. She is thus entitled to an award of \$3 million.

BACKGROUND AND BASIS OF THE PRESENT CLAIM

Claimant alleges that she was at the Fiumicino Airport with her parents, brothers, and sister when terrorists attacked with machine guns and hand grenades. She states that during the attack, she suffered grenade shrapnel wounds to her head. She further alleges that she required four days of hospitalization in Rome—where doctors removed some of the shrapnel and sutured her wounds—and that she still has shrapnel fragments in her scalp and skull, and permanent scarring on her head. In addition, Claimant alleges that the attack led to both a displaced pituitary stalk and a pituitary tumor, resulting in a host of other medical ailments.

Along with about 25 others, Claimant sued Libya in federal court in 2006, although her initial complaint at the time did not include any allegations of physical harm. *See Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, No. 06-727, 2013 WL 351610, at *1 (D.D.C. Jan. 29, 2013); Amended Complaint for Compensatory & Punitive Damages, *Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, 2013 WL 351610 (D.D.C. 2013) (No. 1:06-cv-727(JMF)).¹ In August 2008, the United States and Libya concluded an *en bloc* (lump-sum) settlement agreement that settled numerous claims of U.S. nationals against Libya, including all claims for “personal injury” caused by “terrorist act[s].” *See 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; *see also* Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008). In October 2008, the President issued an Executive Order, which,

¹ We refer to this case as the *Buonocore/Simpson* case after the names of the two lead plaintiffs in the two different suits that were eventually consolidated.

among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling within the terms of the Claims Settlement Agreement. *See* Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

The Secretary of State has statutory authority to refer “a category of claims against a foreign government” to this Commission. *See* International Claims Settlement Act of 1949 (“ISCA”), 22 U.S.C. § 1623(a)(1)(C) (2012). The Secretary has delegated that authority to the State Department’s Legal Adviser, who, by letters dated December 11, 2008, January 15, 2009, and November 27, 2013, referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement. The first of these referral letters, the 2008 Referral, authorized the Commission to award compensation for claims of U.S. nationals against Libya for “physical injury,” and in July 2009, Claimant filed a claim under the 2008 Referral for the physical injuries she allegedly sustained in the Rome Airport attack.

When referring this category of claims, the State Department limited the Commission’s jurisdiction in several ways. First, a claimant had to have been a named party in one of the so-called “Pending Litigation” cases, which Claimant was.² Second, a Claimant had to provide evidence that her Pending Litigation case against Libya had been dismissed. Claimant satisfied this requirement too: after the issuance of the Referral, Claimant sought to have Libya dismissed from the *Buonocore/Simpson* case, and the federal district court issued an Order of Dismissal on December 24, 2008.

A third limitation on the Commission’s jurisdiction under the 2008 Referral, however, prevented Claimant from pursuing her claim on the merits. The 2008 Referral

² Attachment 1 to the Referral, included a specific list of cases pending in U.S. courts on the date of enactment of the LCRA and the term “Pending Litigation” referred to this list. The list included the *Buonocore/Simpson* case in which Claimant was a plaintiff.

limited the Commission's jurisdiction to those whose claims had been "set forth as a claim for injury *other than emotional distress alone* by a named party in the Pending Litigation" 2008 Referral at ¶ 3 (emphasis added). In the *Buonocore* and *Simpson* complaints pending at the time of the December 2008 Referral, the only claim made by or on behalf of Claimant was for emotional injury. Thus, in a Proposed Decision dated February 18, 2010, the Commission denied the claim because Claimant had failed to show, as required by the 2008 Referral, that her claim in the *Buonocore/Simpson* case was "set forth as a claim for injury other than emotional distress alone."

The Claimant objected to the Proposed Decision on March 5, 2010, and, a little more than a year later, on April 22, 2011, she requested an oral hearing. On June 6, 2011, she requested that the Commission bifurcate further proceedings on the claim, so as to limit the oral hearing to the question of jurisdiction and issue a separate decision on the merits of her physical-injury claim. The Commission agreed to Claimant's request and held an oral hearing confined to the question of jurisdiction on July 28, 2011.

Although the Commission had not yet issued a Final Decision on the jurisdictional question (and had thus not yet determined whether it had jurisdiction), it also acceded to Claimant's request to issue a separate decision on the merits. It did this in a "Supplemental Proposed Decision" dated May 17, 2012. The Supplemental Proposed Decision held that Claimant had failed to meet her "burden of proof [to] submit[] evidence and information sufficient to establish the elements necessary for a determination of the validity . . . of . . . her claim," as required by the Commission's regulations. 45 C.F.R. § 509.5(b) (2011). In particular, the Commission found her evidence insufficient to establish that she had "suffered a discernible physical injury,

more significant than a superficial injury,” and that the injury be verified by medical records, both of which were required under the Commission’s physical-injury standard. The Claimant objected to this decision on July 10, 2012, and requested an oral hearing, which the Commission held on September 14, 2012. The objection was supported by new evidence that included various medical reports and opinions, an additional affidavit from the Claimant, and the Claimant’s own live testimony before the Commission.

In a Final Decision issued on December 12, 2012, the Commission concluded that it lacked jurisdiction over Claimant’s claim because her claim had not been “set forth as a claim for injury other than emotional distress alone” in the *Buonocore/Simpson* complaints—i.e., her Pending Litigation case—as required by the 2008 Referral. The Commission thus reaffirmed the conclusion it had reached in its original Proposed Decision on jurisdiction and determined that Claimant’s claim was therefore ineligible for adjudication on the merits. As a result of this decision on jurisdiction, the Commission took no further action on the merits of the claim.

In the meantime, Claimant had also brought a separate claim for physical injury under Category E of the second State Department referral, the 2009 Referral. *See* Claim No. LIB-II-165, Decision No. LIB-II-186 (2012). Category E consisted of claims of U.S. nationals for wrongful death or physical injury where, *inter alia*, the claimant was not a plaintiff in any of the Pending Litigation cases. In its Proposed Decision on December 12, 2012, the Commission denied this claim because Claimant was in fact a plaintiff in one of the Pending Litigation cases, the *Buonocore/Simpson* case; she therefore had failed to show that her claim came within the category of claims referred to the Commission. Claimant objected to the Commission’s Proposed Decision on January 10,

2013, and the Commission held an oral hearing on February 15, 2013. In a Final Decision issued February 16, 2013, the Commission affirmed its denial of the claim on jurisdictional grounds because Claimant was a plaintiff in the *Buonocore/Simpson* case.

The Legal Adviser then referred a third set of claims to the Commission on November 27, 2013. *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”). For the present claim, Category A of this Referral is the relevant category. According to the 2013 Referral, Category A consists of

claims of U.S. nationals for physical injury who had claims in the Pending Litigation, but whose claims for physical injury were previously denied by the Commission for failure to plead for injury other than emotional distress alone in the Pending Litigation, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claimant was a named party 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 has not received any compensation under any other distribution under the Claims Settlement Agreement and does not qualify for any other category of compensation in this referral except Category D.

2013 Referral at ¶ 3. Attachment 1 to the 2013 Referral lists the suits comprising the Pending Litigation, and it includes the *Buonocore/Simpson* case.

On December 13, 2013, 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 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On February 4, 2014, the Commission received from claimant a completed Statement of Claim in which she asserted a claim under Category A, along with exhibits supporting the elements of her claim, including evidence of her U.S. nationality, her

presence at the scene of the terrorist attack at Fiumicino Airport, and her alleged physical injuries for which she now claims compensation.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under the 2013 Referral; namely, claims of individuals who (1) are U.S. nationals; (2) are named parties in a Pending Litigation case that has been dismissed; (3) are making claims for physical injury that were previously denied by the Commission for failure to plead for injury other than emotional injury alone in the Pending Litigation; and (4) have not received any compensation under the Claims Settlement Agreement and do not qualify for any other category of compensation under the 2013 Referral except Category D. 2013 Referral, *supra* ¶ 3.

Nationality

This claims program is limited to “claims of U.S. nationals.” In the context of a different category of claims in this same 2013 Referral, we held that “claims of U.S. nationals” means that a claimant must have been a national of the United States continuously from the date the claim arose until the date of the Claims Settlement Agreement. *See* Claim No. LIB-III-001, Decision No. LIB-III-001, at 5-6 (2014) (Proposed Decision). Given that this Category A claim contains the same language and is made under the same 2013 Referral and given that physical-injury claims—indeed, all claims—under both the 2008 and the 2009 Referrals also incorporated the same continuous-nationality requirement, that requirement should apply equally here.

Claimant satisfies this requirement. She has provided copies of her U.S. birth certificate and current U.S. passport. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and was so held until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

Category A further requires that the Claimant have been a named party in one of the Pending Litigation cases listed in Attachment 1 to the 2013 Referral and provide evidence that his or her Pending Litigation case against Libya has been dismissed. 2013 Referral, *supra* ¶ 3. Claimant has provided a copy of the Order of Dismissal in the consolidated *Buonocore/Simpson* case, Cases No. 06-cv-727 and 08-cv-529, filed in the United States District Court for the District of Columbia, which is one of the Pending Litigation cases. That document names the Claimant as a party and indicates that Libya was dismissed from the case on December 24, 2008. Claimant was thus a named party in one of the Pending Litigation cases, and Libya has been properly dismissed from that case. *See also Claim of*⁵ U.S.C. §552(b)(6), Claim No. LIB-I-037, Decision No. LIB-I-031 (2010) (Proposed Decision).

Denial of Previous Claim

Under Category A, Claimant's claim for physical injury must have been previously denied by the Commission for failure to plead for injury other than emotional injury alone in one of the Pending Litigation cases. The Commission's records indicate that under the 2008 Referral, Claimant previously submitted a physical-injury claim arising from the same facts as this claim and that her 2008 Referral claim was denied because Claimant had "not set forth in the Pending Litigation a claim for injury other

than emotional distress alone.” Claim LIB-I-037, Decision No. LIB-I-031 (2010), at 6 (Proposed Decision); *see also* Claim LIB-I-037, Decision No. LIB-I-031 (2012) (Final Decision). The Claimant therefore satisfies this element of her claim under Category A.

Prior Compensation and Eligibility Under the 2013 Referral

The final requirement for jurisdiction under Category A is that the Claimant not have received any other compensation under the Claims Settlement Agreement and “not qualify for any other category of compensation under the 2013 Referral except Category D.”³ Our independent review of Commission records from the two previous Libyan claims programs confirms that she has not received compensation from the Commission under the Libyan Claims Settlement Agreement. As noted above, the Commission denied Claimant’s previous claims under the 2008 Referral and under Category E of the 2009 Referral on jurisdictional grounds. Thus, the Commission has not awarded her any compensation under either of its Libyan claims programs.⁴ Moreover, we have no evidence that the State Department has provided her any compensation under the Claims Settlement Agreement either. She also submitted an affidavit, signed under penalty of perjury, confirming that she had not received any compensation under any other

³ Like Category A, under which Claimant brings this claim, Category D also covers claims of U.S. nationals for compensation for physical injury. The difference is that Category D provides *additional* compensation on top of any amounts already recovered, if the Commission determines, *inter alia*, 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”

⁴ Claimant’s father suffered a physical injury from the same terrorist attack. He died from unrelated causes in 2003, and his estate brought a physical-injury claim under the 2008 Referral. In January 2010, the Commission awarded his estate \$3 million for that claim. *See* Claim No. LIB-I-046, Decision No. LIB-I-036 (2010). The record in that claim indicates that Claimant was among the estate’s residuary beneficiaries via a family trust and may therefore have indirectly received money from her father’s estate’s award. *See id.* at 4. The award did not, however, “compensate” Claimant; rather, it compensated her father, and did so solely for his own injuries. Thus, even though Claimant may have received *money* “under [some] other distribution under the Claims Settlement Agreement,” she “has not received *compensation* under any other distribution under the Claims Settlement Agreement.” 2013 Referral ¶ 3 (emphasis added). *Compare* Claim No. LIB-II-046, Decision No. LIB-II-017 (2011) (Final Decision) (denying a claim, in a case in which the 2009 Referral used similar language barring claimants who had received compensation under the CSA, because claimant had previously received an award for *his own* physical injury).

distribution under the Claim Settlement Agreement. The Commission finds, therefore, that Claimant did not receive any compensation under any other distribution under the Claims Settlement Agreement. In addition, the Commission is satisfied that the only other category of compensation under the 2013 Referral for which Claimant might qualify is Category D.

In summary, therefore, the Commission concludes that this claim is within the Commission's jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

Standard for Physical Injury

The 2013 Referral states that to qualify for compensation under Category A, a claimant must "meet[] the standard for physical injury adopted by the Commission." 2013 Referral ¶ 3. The 2008 Referral included this requirement as well. In its first decision under the 2008 Referral, the Commission held, after careful and thorough analysis, that to receive compensation for physical injury, a claimant (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident related to the Pending Litigation; (2) must have received medical treatment for the physical injury within a reasonable time; and (3) must verify the injury by medical records. Claim No. LIB-I-001, Decision No. LIB-I-001, at 8-9. The Commission adopted this same standard, with a minor modification of no relevance here, for physical-injury claims brought under Category E of the 2009 Referral. *See* Claim No. LIB-II-039, Decision No. LIB-II-015, at 6-7 (2010).

Given that the 2013 Referral derives from the same Claims Settlement Agreement and the physical-injury claims arise out of the exact same incidents as the 2008 and 2009 Referrals, and there being no factors favoring any other approach, the same standard should apply. The standard for compensable physical-injury claims under the 2013 Referral should thus be the same as it was under the 2008 and 2009 Referrals: to receive compensation for physical injury under Category A of the 2013 Referral, a claimant

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident related to one of the Pending Litigation cases;
- (2) must have received medical treatment for the physical injury within a reasonable time; and
- (3) must verify the injury by medical records.

Factual Allegations

In a detailed narrative about the terrorist attack, Claimant (who was six years old at the time) alleges that she was sitting with her family in the food court area near the TWA and El Al Airlines ticket counters when terrorists opened fire with machine guns and tossed hand grenades within 30 feet of where she and her family were seated. Claimant states that, “[w]hen the attack started, [she] was very near to loud hand grenade explosions and gunfire, . . . was thrown to the ground, and hit [her] head on the ground.” She further states that “[m]ultiple pieces of hand grenade shrapnel struck the back left side of [her] head.” Claimant alleges that the shrapnel “cut into [her] head, causing [her] to bleed substantially” One of her brothers (who was eight at the time) states in his affidavit that Claimant “was on the ground, wounded in her head, bleeding from her head

wound, crying and screaming. The bleeding was substantial, and there was blood streaming down her face and neck and onto her shirt.” Her other brother (age twelve at the time) writes much the same thing in his affidavit, noting that Claimant was “cut[] in the back of her head, and bleeding from the back of her head.”

Claimant states that, after the attack, she was taken by ambulance to San Agostino Hospital (now known as G.B. Grassi Hospital) in Rome. Her mother and brothers accompanied her in the ambulance; one of her brothers states in his affidavit that Claimant “had a deep gash in the back of her head, from which most of the blood was flowing, and she had a number of other cuts and bruises on her head in the same area.” Claimant states (and both of her brothers confirm) that she was admitted to the surgery department at San Agostino and remained there for approximately 24 hours. She was then transferred to the CTO (Centro Traumatologico Ortopedico) Alesini Hospital, also in Rome, and was admitted for further treatment. Claimant states that the doctors at CTO Alesini “took x-rays of [her] head, removed some of the shrapnel from [her] head, and treated and sutured [her] wounds.” According to her brothers, Claimant was discharged from the hospital on December 31, 1985, four days after the attack.

Injuries Alleged: Claimant alleges that she suffered physical injuries from the shrapnel and blows to her head at the time, and that she also continues to suffer serious physical repercussions from those injuries. For one, she says she still has “some scarring on her head[,]” although she notes that it is “covered by [her] hair, and the color of the scar has faded” Nonetheless, she claims that “[t]he scar tissue can be felt” and that it is painful to the touch. More importantly, she claims that “at least one piece of the shrapnel lodged in [her] skull bone, and remains there today[,]” a fact she asserts is

verified by various medical reports submitted with her claim. Further, Claimant states that her alleged “physical head trauma” caused her to develop a displaced pituitary stalk, which in turn has triggered a condition called hyperprolactinemia. In addition, she alleges that she developed a pituitary tumor “caused by a combination of the physical trauma to [her] head, the horror [she] experienced as a 6 year old in the Attack, and the post-traumatic stress of the Attack.” Claimant states that these conditions “have caused very painful and humiliating physical symptoms, such as uncontrollable lactation unrelated to pregnancy, painful headaches, dramatic weight fluctuations, obesity and insomnia.”

Supporting Evidence

Claimant has supported her claim with, among other things, her own statement and short affidavit, her two brothers’ affidavits, and numerous medical records. The medical records include both contemporaneous records from Italy, accompanied by certified English translations of these documents, as well as more recent records, including recent radiological images of her head, along with various reports and letters from doctors explaining those images and their import.

The contemporaneous medical records confirm that (1) she spent about a day at San Agostino immediately after the attack and the next three days at CTO Alesini; and (2) she had shrapnel embedded into the back left side of her head. A one-page slip of paper that Claimant says she received from the G.B. Grassi Hospital (San Agostino’s successor)⁵ indicates that Claimant was “[a]dmitted to the Surgery Department,” having suffered “[p]enetrating puncture wounds caused by metallic shrapnel in the parietal

⁵ She has also provided a letter from G.B. Grassi stating that a fire at the hospital destroyed the medical records of her stay at San Agostino.

occipital region (soft parts)[,]” and was given a “5 days prognosis.” A more extensive set of records from CTO Alesini indicates a diagnosis of “[l]acerated and bruised wound Left parietal occipital region caused by metallic shrapnel.” The records describe Claimant’s “General Conditions” as “Good,” and her “Internal organs and apparatuses” as “Unharmmed,” although the puncture wound on her head is described as “lacerated” and “open.” A one-page chart in the records, in a column entitled “Daily Clinical Journal,” indicates that the doctors also conducted a neurological examination on December 30, 1985 (three days after the attack) and found “[n]o neurological damage.” The only treatment described in any of the contemporaneous medical records is a single notation on the chart (in that same “Daily Clinical Journal” column but from a day earlier, December 29, 1985), consisting of the word “Medication.” Neither the chart nor any of the other contemporaneous medical records mention any procedure to remove shrapnel or suture Claimant’s head wound, as alleged by Claimant’s brothers. According to the chart, Claimant was discharged on December 31, 1985, and this was “against the Physician’s advice.”

In addition to these contemporaneous records, Claimant has submitted medical evidence of much more recent vintage, dating from 2007 (22 years after the terrorist attack) to the present. These more recent medical records contain evidence of possible shrapnel injury. The first is a report of a physical examination conducted by Adel Haddad, M.D.,⁶ in April 2010 in Amman, Jordan, which indicated that Claimant had “wounds [which] appear as soft scarring (approximately 2 cm x 2 cm) in the parietal occipital region of her head, all of which is consistent with . . . hand grenade shrapnel wounds.” Dr. Haddad also noted that “[t]he scarring is palpable to touch, and visible to

⁶ In her exhibit list, Claimant refers to Dr. Haddad as a plastic surgeon.

the unaided eye, though partly obscured by hair making it difficult to photograph” The report of a separate examination the same month by M.A. Arnaout, M.D., an endocrinologist also in Amman, similarly observed that Claimant “has permanent scarring . . . consistent with physical injury from hand grenade shrapnel as reported.”

Claimant has submitted radiological images from February 2012, including a skull x-ray and a brain CT-scan, which also appear to confirm the presence of small foreign bodies on the top left side of her head. There is a one-page, bullet-point report by Dr. Mohammed Al-Khatib accompanying the CT-scan, and it states that “[m]ultiple small shrapnels [are] seen in the left parietal region, one partially embedded in the skull bone[,]”⁷ but that “[v]entricular system is normal in size, shape and position,” that “[b]asal cisterns and cerebral sulci appear normal,” that “[n]o mass lesion, infarction, hemorrhage or other pathology is seen in the brain substance,” and that “[n]o evidence of extra-cerebral hematoma is seen.”

Claimant has also submitted letters from three doctors who have reviewed these 2012 radiological images, although none of these three doctors examined Claimant in person. Each doctor describes, with varying degrees of detail and explanation, the significance of the shrapnel seen in the images. The first is a February 2012 letter from Dr. Carl Warren Adams, who stated that the images “demonstrate the presence of multiple deeply embedded shrapnel fragments in the parietal region of [Claimant’s] head.” Dr. Adams, a board-certified cardiovascular and thoracic surgeon, also opined that “due to the location of the embedded multiple shrapnel fragments they cannot be

⁷ As we discuss below, the original version of this report did *not* include the language “one partially embedded in the skull bone.” See *infra* at 19-20.

removed without an additional surgical procedure, risk of anesthesia, neurological injury, medical risk, additional pain and suffering, and additional scarring.”

The second letter was a July 2012 letter from Cornell Overbeeke, M.D., a board-certified radiologist with some experience in neuroradiology, who examined the same images and concluded that the images “clearly show two pieces of metal in the left parietal occipital region, consistent with the reported head injuries sustained by [Claimant]” He added that “[E]ach piece of metal appears to measure approximately one and one-half centimeters in length. Both pieces clearly penetrate through all five layers of the scalp[,] . . . [and o]ne of the pieces is embedded in the diploic space of the skull.” In addition, he noted that “the shrapnel cannot be removed without removing part of the skull itself, and this would not be advisable.”

The third letter is an August 2012 letter from Jordan K. Davis, M.D., a board-certified neurological surgeon, who also reviewed the radiological images, together with Dr. Al-Khatib’s report and Dr. Overbeeke’s letter. Dr. Davis agreed that the scans showed that Claimant had shrapnel in her head. In addition, he noted that “these pieces of shrapnel could not . . . be removed with minor outpatient procedures It seems . . . that at least some of the shrapnel may have entered in a bullet-like fashion creating smaller entry wounds (the ‘punctures’ referred to in the CTO records).” On this basis, Dr. Davis concluded that “it would have been necessary . . . to further open the wounds in order to locate, access and remove the shrapnel.”

Application of Physical-Injury Standard to Evidence

The essence of Claimant’s argument is that she satisfies the physical-injury standard because she suffered serious shrapnel wounds to her head that penetrated

through her scalp to her skull; that she continues to have shrapnel in her head to this day; and that these wounds thus constitute “a discernible physical injury, more significant than a superficial injury.” She also claims that the physical head trauma she suffered from the terrorist attack (most likely, she says, from the force of both the shrapnel and the blows to her head when she was knocked to the ground) led to a displaced pituitary stalk, and that some combination of these physical head injuries and the psychological trauma of her experience in the Rome airport that day also led to her pituitary tumor. She argues that the displaced pituitary stalk and the pituitary tumor are also “discernible physical injur[ies], more significant than . . . superficial.”⁸

In its Supplemental Proposed Decision on Claimant’s physical-injury claim under the December 2008 Referral, the Commission concluded, based on the evidence put forward at that time, that Claimant had not met her burden to show that her injuries were “significant” and “more than . . . superficial.” In particular, the evidence was equivocal as to the “precise nature and severity” of Claimant’s shrapnel injuries: except for a reference to “medication,” the contemporaneous medical records contained (and still contain) no evidence of Claimant having received any medical treatment at the time of the terrorist attack.

Moreover, looking at the February 2012 x-rays and CT-scan, there was no way to tell whether the shrapnel was just on the surface of the skin or deeper, and the only medical explanation Claimant provided was insufficient to show that there was a *significant* injury, as required by the physical-injury standard. The report from Dr. Al-

⁸ Because we conclude that the injuries she suffered from the shrapnel in the immediate aftermath of the terrorist attack suffice to meet the physical-injury standard, we need not address the injuries allegedly caused by the physical head trauma she suffered from the terrorist attack – i.e., the displaced pituitary stalk and pituitary tumor (and their possible consequences).

Khatib that accompanied the CT-scan merely said “[m]ultiple small shrapnels seen in the left parietal region.” It explicitly said that they were “small” and had no indication of how deep they were. Claimant had provided a letter from Dr. Adams who, after viewing the radiological images, concluded that the “multiple shrapnel fragments” were “deeply embedded” and that due to their location, “they cannot be removed without an additional surgical procedure, risk of anesthesia, neurological injury, medical risk, additional pain and suffering, and additional scarring.” The problem, however, was that Dr. Adams, who is a thoracic surgeon⁹ and who provided no curriculum vitae or biographical information, failed to provide any reasons or factors to support his conclusion.

The Commission concluded that, while the evidence supported the existence of shrapnel on the top left side of Claimant’s head, Claimant had failed to provide any medical evidence to establish “that the fragments in [her] head caused any significant injury or required any treatment beyond cleaning and observation.” *See* Supplemental Proposed Decision at 10. In so concluding, the Commission did not make any specific findings about the extent of Claimant’s injuries, but simply explained that the Commission’s regulations place the burden on the Claimant to submit evidence sufficient to establish the elements of a claim, and then determined that the medical records were “inconclusive.” *See* Supplemental Proposed Decision at 12 (quoting 45 C.F.R. § 509.5(b) (2011)).

After the Commission issued its Supplemental Proposed Decision denying Claimant’s physical-injury claim under the December 2008 Referral, Claimant provided additional medical evidence to buttress her claim that the injuries from the shrapnel were

⁹ “A thoracic surgeon performs operations on the heart, lungs, esophagus, and other organs *in the chest*.” *See What is a Thoracic Surgeon?*, Society of Thoracic Surgeons, www.sts.org/patient-information/what-thoracic-surgeon (emphasis added) (last visited Sept. 18, 2014).

“more significant than . . . superficial.” As noted above, we had no occasion to consider her new evidence because we reaffirmed our conclusion that we lacked jurisdiction over her claim. *See supra* at 5. For this claim, however, she has included all of that evidence, and since we now have jurisdiction, we can now consider that evidence.

With this new evidence, Claimant has met her burden to establish that her shrapnel injuries are in fact “more significant than . . . superficial,” as required by the physical-injury standard. The evidence establishes that the shrapnel is not simply lodged at the surface level of her skin (a possibility that the evidence presented to the Commission at the time of the Supplemental Proposed Decision suggested),¹⁰ but has penetrated all five layers of Claimant’s scalp and through to the skull. Claimant’s new evidence also provides further explanation about the meaning of the contemporaneous medical records and helps answer some questions that the Commission had due to the gaps in the record at the time of the Supplemental Proposed Decision.

When the Commission issued its Supplemental Proposed Decision, a number of facts were unclear: (1) the size of the shrapnel and how deeply embedded into Claimant’s scalp it was; (2) why the doctors did not remove the shrapnel at the time; and (3) why there was no evidence of Claimant receiving any treatment in Rome (other than “medication”), despite her having stayed four days at the two hospitals.

First, and most important, Claimant’s new evidence provides sufficient support to establish that her shrapnel injuries were deep enough to constitute a significant injury that was more than superficial. To start, Claimant has submitted an altered version of the report prepared by Dr. Al-Khatib accompanying the CT-scan. The first version of that

¹⁰ *See* Supplemental Proposed Decision at 8-9 (“[T]he radiological images appear to indicate that the foreign objects are very near to the surface of the skin, and as the records suggest, caused no damage to the skull or any significant damage to the surrounding tissue.”).

report, which was all the Commission had when it issued the Supplemental Proposed Decision, merely said “[m]ultiple small shrapnels seen in the left parietal region.” The second version of the report, which Claimant submitted in August 2012 (and referred to as a “Revised” report) in her materials on objection from the Supplemental Proposed Decision and which she included in this claim, is noticeably different. Although it is still dated February 18, 2012 and bears no outward indication that it is an altered version of the earlier document, it includes the phrase “one partially embedded in the skull bone” immediately after the reference to the shrapnel. This is at least one piece of evidence suggesting that one fragment of the shrapnel is deeply embedded in Claimant’s head.

Moreover, Claimant’s two new experts, one a board-certified radiologist with some training in neuroradiology, the other a board-certified neurosurgeon, both reviewed the radiological images and both concluded that the shrapnel had penetrated all five layers of the scalp. Dr. Overbeeke, the radiologist, states that “[b]oth pieces clearly penetrate through all five layers of the scalp to the outer table of the bony calvarium.¹¹ One of the pieces is embedded in the diploic space of the skull.”¹² Dr. Davis, the neurosurgeon, reads the images similarly. In his letter, Dr. Davis first describes the relevant anatomy in a way that explains the importance of the shrapnel’s location; he then writes, “[B]oth pieces of shrapnel have penetrated through and damaged all five layers of [Claimant’s] scalp, including the clinically significant third, fourth, and fifth layers of her scalp, and one of them has reached her skull and is partially embedded in and therefore has damaged her skull.” Both experts agree that the two pieces of shrapnel are more than

¹¹ According to Stedman’s Medical Dictionary, “calvarium” is a form of the word “calvaria,” which refers to the “upper domelike portion of the skull.” *See Stedman’s Medical Dictionary* 292 (28th ed. 2006). The “outer table” means the outer layer of the skull.

¹² The “diploic space” of the skull is the space between the outer and inner layers of the skull. *See id.* at 546.

1 centimeter in length,¹³ which Dr. Davis describes as “without any doubt medically significant in terms of their physical size and location.”

Evidence that Claimant has shrapnel embedded beneath all five layers of her scalp and into her skull suffices to establish that she has “suffered a discernible injury, more significant than a superficial injury” and thus to meet the physical-injury standard in this program.

The new evidence also explains a gap in the contemporaneous medical records that confounded the Commission at the time it issued the Supplemental Proposed Decision on Claimant’s December 2008 Referral claim: why was there no medical evidence that Claimant had shrapnel removed in the hospitals in Rome? The testimonial evidence Claimant had provided from her two brothers (aged twelve and eight at the time) suggested that Claimant had undergone surgery “to remove the metal from her head.” Yet, at the same time, there was no medical evidence to support that claim, although there was (and still is) evidence of shrapnel still lodged in Claimant’s head. These facts together raised further uncertainties about the nature and severity of the injuries Claimant had suffered.

The new evidence, however, clarifies this issue, at least as to the shrapnel that remains in Claimant’s head. Dr. Davis (the neurosurgeon) explains that it is in fact *because* the shrapnel is so deeply lodged that it probably should remain there. As he puts it, although “the shrapnel poses a serious risk of infection and further damage,” the risks of surgery to remove it would be greater: “removing the shrapnel would require significant inpatient surgery under anesthesia. . . . There are grave risks associated with

¹³ Dr. Overbeeke says “approximately one and one-half centimeters in length.” Dr. Davis says “1 centimeter or greater.”

any such surgery, including the risk that it will be necessary to insert a prosthetic into [Claimant's] skull in order to close any resulting gap in the skull bone, the risk of nerve damage, the risk of damage to vessels and tendons, the risk of bone and brain infection[,] . . . the risk of scarring and the usual risk of anesthesia.”

Responding directly to the Commission's puzzlement about the shrapnel not having been removed at the time, Dr. Davis stated that the decision by the Italian doctors to “leave the shrapnel in place . . . is actually a good measure of the severity of the injury. . . . If shrapnel of that size were simply at the level of the surface of the skin and could have been removed easily without a significant surgical procedure or significant medical risk, then it would have been removed.” Although we do not view this statement as conclusive evidence about what doctors 27 years earlier did or did not do, it does sufficiently explain one strong possibility for why the two pieces of shrapnel are still there. While none of this supports Claimant's brothers' statements about possible surgery “to remove the metal from [Claimant's] head,”¹⁴ that does not matter since the shrapnel that remains lodged in her is enough to satisfy the physical-injury standard.

Finally, Claimant has provided sufficient evidence to convince us that she must have undergone some kind of medical procedure or procedures during the four days she spent at San Agostino and the CTO Alesini hospitals, even if she has been unable to provide any medical evidence to establish exactly what those procedures were. In the Supplemental Proposed Decision on Claimant's December 2008 Referral claim, the Commission noted that it was unclear why she had been in the hospital those four days,

¹⁴ We make no factual determinations, one way or the other, about the claims made in Claimants' brothers' affidavits. We simply reiterate what we said in the Supplemental Proposed Decision on Claimant's December 2008 Referral claim: Claimant has failed to meet her burden to establish, with medical evidence, that she had surgery to remove any shrapnel from her head at the time.

whether it was “for treatment for her own physical injuries, for medical observation, or simply because she was six years old and other members of her family had also been hospitalized as a result of the incident.” Supplemental Proposed Decision at 9. Given the lack of clarity in the contemporaneous medical records and the equivocal nature of the evidence about Claimant’s alleged injuries, the Commission was unable to draw any conclusions about the reasons for her hospital stay.

While we still have no contemporaneous medical records evidencing any medical procedures that Claimant may have undergone, Claimant has provided a plausible explanation that convinces us that she most likely required some kind of medical care during that four-day period, care that was likely related to shrapnel in her head. Claimant has submitted a letter from Dr. Giorgio Graziano, an English-speaking Italian doctor based in Turin, Italy (about 450 miles from Rome), who contacted the two doctors whose names were on the documents from the two Italian hospitals, Dr. La Barbera, the on-call physician at San Agostino,¹⁵ and Professor Francesco Manetta, the “head physician” at CTO Alesini. Although neither doctor remembered Claimant or her family, they both said they had clear memories of the day of the attack. Both indicated that the circumstances required strict triage. When Dr. Graziano spoke with Dr. La Barbera, the San Agostino physician allegedly stated that, because of the need to triage, “victims not requiring inpatient treatment were treated on an outpatient basis and released,” and further “stated without any doubt that no victim regardless of age would have been admitted as an inpatient for any length of time, unless that victim had a serious physical injury requiring serious medical attention.” Similarly, Professor Manetta was reportedly

¹⁵ The one-page record from San Agostino seems to indicate that his surname is “Le Barbie,” but the signature trails off at the end and might well be La Barbera.

“equally clear and emphatic that [Claimant] would never have been admitted to the CTO Hospital on an inpatient basis for any purpose other than the required treatment of a serious medical condition.” These are of course hypothetical statements, not specific evidence about Claimant in particular. Moreover, the evidence of these statements comes to us from a second-hand source (Dr. Graziano), and it appears that the text of Dr. Graziano’s letter is based on his own unverified English translations of conversations he had with the two eye-witnesses in Italian. They are thus by no means highly reliable evidence, and we approach them with caution. Nonetheless, they suffice to reduce doubt as to whether Claimant’s four days of hospitalization involved some kind of medical treatment.

Although there is thus no specific medical evidence conclusively demonstrating treatment for the shrapnel itself “within a reasonable time,” as required by the physical-injury standard, the new evidence puts the references in the contemporaneous medical records (e.g., “[p]enetrating puncture wounds caused by metallic shrapnel”) in a new light and sufficiently supports the fact that these wounds were somehow “treat[ed] . . . within a reasonable time.” With this new evidence, therefore, Claimant has met her burden to show that the doctors in Italy were aware of the shrapnel and its medical significance, and either thought it should have been treated (as possibly suggested by the reference to Claimant “being discharged against the Physician’s advice”) or affirmatively chose not to remove it because the risks of doing so outweighed those of leaving it in.

In sum, therefore, Claimant has met her burden to satisfy the physical-injury standard. She (1) suffered a “discernible injury, more significant than superficial”—namely, wounds from shrapnel, at least some of which lodged into her skull; (2) received

medical treatment of some kind related to that shrapnel during her four days in the San Agostino and CTO Alesini hospitals; and (3) has verified the shrapnel injury with contemporaneous medical records as well as recent radiological images and expert reviews of those images, which demonstrate the continued presence of shrapnel embedded in Claimant's skull through all five layers of her scalp. Accordingly, Claimant is entitled to compensation as set forth below.

COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. The 2013 Referral recommends a fixed amount of \$3 million for claims that meet the applicable standards under Category A. 2013 Referral, *supra* ¶ 3. This is the same fixed amount that was recommended for compensable physical-injury claims in both the 2008 Referral and Category E of the 2009 Referral. In its first decision addressing compensation under the 2008 Referral, the Commission noted that it had carefully reviewed its prior claims programs, as well as those of other tribunals and commissions that had adjudicated physical-injury claims. The Commission further noted the intent of Congress in passing the LCRA, the significance of the terrorist incidents covered, the injuries suffered by the victims, and the length of time that those individuals had waited for justice, and determined that \$3 million was an appropriate amount of compensation for physical-injury claims that met the Commission's standard. *See* Claim No. LIB-I-001, Decision No. LIB-I-001. This fixed sum was therefore awarded to all claimants under the 2008 Referral who satisfied the Commission's standard. The Commission adopted the same

amount for physical-injury claims under Category E of the 2009 Referral. *See* Claim No. LIB-II-039, LIB-II-035.

In this instance, it is significant that this claim—indeed the entire 2013 Referral—arises from the same U.S.-Libya Claims Settlement Agreement that resulted in both the 2008 and 2009 Referrals. Moreover, Category A of the 2013 Referral is substantively the same as both the 2008 Referral and Category E of the 2009 Referral: all three involve claims of U.S. nationals for physical injury. Indeed, other victims of the Rome Airport attack (including Claimant's father and siblings) have been awarded compensation from this Commission under those two Referrals, and in those claims, the Commission has awarded the \$3 million recommended by the State Department. The Commission sees no reason to depart from this figure for physical-injury claims under Category A of the 2013 Referral.

The Commission will not award interest in this claim. For physical-injury awards under both the 2008 Referral and Category E of the 2009 Referral, the Commission held that claimants were not entitled to interest as part of their awards. *See* Claim No. LIB-I-001, Decision No. LIB-I-001, at 11-13; Claim No. LIB-II-039, Decision No. LIB-II-035, at 8. It did so after consideration of the applicable principles of international law and its own precedent, and those reasons apply equally to physical-injury claims under the 2013 Referral. Accordingly, the Commission determines that the Claimant is entitled to an award of \$3,000,000.00 and that this amount constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

The Commission hereby enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27 (2012).

AWARD

Claimant is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

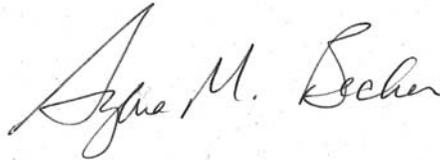
Dated at Washington, DC, September 18, 2014
and entered as the Proposed Decision
of the Commission.

**This decision was entered as the
Commission's Final Decision on**

October 29, 2014



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2013).