

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

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| In the Matter of the Claim of | } | |
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| ESTATE OF DAVID W. GAISER, DECEASED; GILLIAN GAISER, ADMINISTRIX | } | Claim No. LIB-II-081 |
| | } | |
| | } | Decision No. LIB-II-169 |
| | } | |
| Against the Great Socialist People's Libyan Arab Jamahiriya | } | |
| | } | |

Counsel for Claimant:

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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by ESTATE OF DAVID W. GAISER, DECEASED; GILLIAN GAISER, ADMINISTRIX and is based on the alleged severity of physical injuries suffered by its decedent, David W. Gaiser, as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986. Mr. Gaiser died in 2002 of causes unrelated to the hijacking.

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 brought under Category D. According to the January Referral, 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 lawsuits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter ("December Referral") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14,

2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICOSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On January 12, 2010, the Commission adjudicated Mr. Gaiser's physical injury claim under the December Referral. In its decision, the Commission determined that Mr. Gaiser suffered a bullet wound to his right leg requiring surgery. The Commission concluded that the injury met the Commission's standard for physical injury and that the claimant estate was entitled to compensation in the amount of \$3 million. *Claim of ESTATE OF DAVID GAISER, DECEASED; GILLIAN GAISER, ADMINISTRATOR*, Claim No. LIB-I-013, Decision No. LIB-I-032 (2010).

BASIS OF THE PRESENT CLAIM

On April 19, 2010, the Commission received from the claimant estate a completed Statement of Claim in which it asserts a claim under Category D of the January Referral. The submission included evidence of the U.S. nationality of the late David Gaiser and that of the beneficiary of the claimant estate, and evidence of the extent of Mr. Gaiser's

injury in the form of statements of Mr. Gaiser's widow, Gillian Gaiser, and Mr. Gaiser's treating physician in 1986, Dr. Alexander Greer, as well as medical records. In support of its claim for additional compensation, the claimant estate asserts that, as a result of the bullet wound to Mr. Gaiser's right knee, he "was never able to walk normally again."

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICOSA, 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 the claimant estate's 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 Category D of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant estate \$3 million under the December Referral based on its finding that Mr. Gaiser suffered a physical injury sufficient to meet the Commission's standard for compensation. Accordingly, the Commission determines that the claimant estate has satisfied this element of its 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 the claimant estate's 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 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 its Category D claim for additional compensation, the claimant estate has incorporated by reference the record of its claim under the December Referral and has submitted one additional piece of evidence, the Declaration of Mr. Gaiser’s widow, Gillian Gaiser. In her statement, Gillian Gaiser states that Mr. Gaiser, as a result of his injury,

walked with a severe limp and was forced to walk with a cane for the rest of his life...[and walking] became very slow, tedious and painful....[He] could no longer walk up hills, and could not walk down hills without his knee giving out. ...[He] could not walk for more than 10 minutes at a time,...could no longer bend over unless he was sitting down... [and could not] crouch down...[or] run.

She further states that Mr. Gaiser, who had worked as an “agricultural consultant in developing countries,” “could not work at all for approximately one year...[and when] [h]e did eventually return to work...he could no longer effectively perform his job because of his leg injury.” In addition to the physical effects of the hijacking, Gillian Gaiser further states that Mr. Gaiser also suffered mental trauma as a result of this attack.

The claimant estate also references the medical evidence submitted in its claim under the December Referral. This consisted of a November 9, 2009 sworn declaration of Dr. Alexander Greer—claimant’s treating physician in the United States in 1986—along with two accompanying attachments to that declaration: an October 26, 1987 letter from Dr. Greer to Vernon Judkins, Esq., one of the lawyers representing Mr. Gaiser in

legal proceedings against Pan Am; and the record of Mr. Gaiser's initial visit with Dr. Arnold Peterson (an orthopedist to whom Dr. Greer referred Mr. Gaiser) dated October 16, 1987.

According to Dr. Greer's declaration, he first saw Mr. Gaiser in October 1986, about a month after the hijacking. At that time, Dr. Greer observed a "fresh surgery scar," a scar that was, according to Dr. Greer, consistent with the type of surgery Mr. Gaiser is said to have undergone in Pakistan. Dr. Greer also states in his declaration that Mr. Gaiser told him, during that initial visit in October 1986, that his right leg injury led him to put more weight on his left leg, thereby aggravating a pre-existing joint problem from an earlier left knee injury. According to his declaration, Dr. Greer treated Mr. Gaiser a second time, approximately a year later (October 1987) and, at that time, Mr. Gaiser was experiencing chronic pain and soreness in his left knee.

Dr. Greer's October 1987 letter to the lawyer also appears to refer to an October 1986 appointment and an October 1987 appointment: it notes that Dr. Greer had "attended Mr. Gaiser since October of 1986" and also refers to "followup a year later.", Referring to Mr. Gaiser's condition in October 1986, the letter notes the swelling and "fresh scar" on Mr. Gaiser's right calf. At the same time, the letter indicates that although "[h]is left knee had some crepitus in joint motion ... , he had a good range of motion," and "[t]here was no definite knee joint effusion." Moreover, further referring to October 1986, Dr. Greer states that "[Mr. Gaiser] was in the process of planning a trip to Indonesia and was given antimalarial prophylaxis to use for that trip." By the time of the 1987 "followup" visit (the same month as the letter), it was Mr. Gaiser's left knee that was "the more symptomatic. The right leg is not giving him a lot of trouble at this time."

In short, the evidence from Dr. Greer establishes that Mr. Gaiser visited him twice (perhaps more, though there is no indication of any other visits), once in October 1986 and once in October 1987 as “followup.” It also indicates that in October 1986, somewhere between one and two months after the hijacking, Mr. Gaiser was “planning a trip to Indonesia.”

Dr. Peterson’s report, dated October 16, 1987, consists of a two-page description of Mr. Gaiser’s “initial visit” with him. Like Dr. Greer, Dr. Peterson noted that, as a result of the injury suffered during the hijacking, Mr. Gaiser was forced to bear much more weight on his left side causing an increase of pain in the medial compartment of his left knee. Further, Dr. Peterson noted in his October 1987 report that in order to determine the best treatment option for Mr. Gaiser’s knee pain—in particular, to determine whether to perform an osteotomy—it was necessary “to obtain a limited bone scan...as part of [the] preoperative evaluation.” At the same time, however, Dr. Peterson specifically noted the difficulty in scheduling the bone scan because of Mr. Gaiser’s travel schedule, which included a trip “to Jordan for three months and then...a one year stint in Indonesia.” The record does not indicate whether the procedure was in fact ever completed, or whether Mr. Gaiser ever had any other appointments with Dr. Peterson.¹

With regard to the psychological trauma suffered because of the hijacking which Gillian Gaiser describes in her statement, the Commission notes its finding in 5 U.S.C. §552(b)(6) *supra*, “that ‘the injury’ referred to under this Category is the injury for which an award was issued by the Commission under the December Referral.” Here, as noted above, the

¹ According to the declaration of Gillian Gaiser submitted with claimant’s December Referral claim, Mr. Gaiser had knee surgery upon his return to the United States. However, Dr. Peterson’s notes are the only reference in the medical records to potential knee surgery.

Commission determined that the compensable injury under the December Referral was the injury to Mr. Gaiser's leg, not the emotional injury resulting from the hijacking for which compensation was also claimed. Moreover, 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, claimant's claim for additional compensation based on psychological trauma is rejected.

In assessing the evidence concerning that portion of the claim for additional compensation based on the physical injury suffered by the claimant's decedent, 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 injured person's major life functions.² While the physical injury suffered by Mr. Gaiser—a bullet wound to his right leg—is in and of itself a serious injury, it is not among the most severe injuries in this program for which compensation has been awarded. With regard to disfigurement, Dr. Greer, in his 1987 letter, notes that Mr. Gaiser had a scar on his right calf when he returned to the United States after the hijacking. However, no further evidence has been submitted establishing the nature or duration of such disfigurement, nor has any evidence been submitted establishing that he suffered any other type of disfigurement.

² It is the claimant's burden to provide evidence to establish the validity of its claim. *See* 45 C.F.R. 509.5(b) (2011) ("The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.").

Turning to the effect that Mr. Gaiser's injury had on his life activities, he appears to have experienced some difficulty walking. His widow, Gillian Gaiser states that he "walked with a severe limp and was forced to walk with a cane for the rest of his life." However, the claimant estate has not submitted any medical records or other contemporaneous documentation—for example, a determination of disability—quantifying in any way, or indeed even corroborating, those statements.

Gillian Gaiser also asserts that her husband was unable to work for approximately one year after the incident and had difficulties performing his duties after that. However, other than Gillian Gaiser's declaration, the claimant estate likewise has not submitted any evidence to support these assertions. The evidence indicates that Mr. Gaiser continued to travel extensively after the injury: Dr. Greer notes that Mr. Gaiser was planning a trip to Indonesia less than two months after the hijacking, and Dr. Peterson's October 1987 notes from his appointment with Mr. Gaiser indicate difficulties he had with scheduling medical tests due to Mr. Gaiser's travel schedule. It is unclear from the record whether Mr. Gaiser was traveling for work, but the evidence certainly suggests that he was physically able to travel to developing countries and thus might have been able to work in his job as an agricultural consultant in developing countries.

In summary, based on the record before it, the Commission concludes that the claimant estate has failed to establish that the severity of the physical injuries suffered by Mr. Gaiser is such that it would qualify for compensation under Category D in addition to the \$3 million already received under the First Referral.

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.

Accordingly, this claim must be and is hereby denied.

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



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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

August 28, 2012

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).