

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

Oral hearing held on February 24, 2012.

Claim No. LIB-I-051

Decision No. LIB-I-043

Counsel for Claimant:

Mark N. Bravin, Esq.
Winston & Strawn LLP

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) during her alleged detention in Libya beginning on or about February 10, 1987.

By Proposed Decision entered April 7, 2011, the Commission denied the claimant's physical injury claim on the ground that the claimant had failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for compensable physical injury.

By letter dated April 28, 2011, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. On August 3, 2011, the claimant provided additional evidence in support of her claim, including an additional medical

record dated July 11, 2011. On July 22, 2011, the claimant, through her former counsel, filed "Objections to Proposed Decision in the Claim of ^{5 U.S.C. §552(b)(6)} setting forth claimant's arguments and objections to the Proposed Decision. By letter dated July 25, 2011, claimant informed the Commission that she was no longer represented by her former counsel, Eric Sorenson, Esq. At claimant's request, an oral hearing was held on September 8, 2011 (September oral hearing) at which ^{5 U.S.C. §552(b)(6)} appeared pro se. By letter dated October 14, 2011, prior to the issuance of the Commission's Final Decision, claimant notified the Commission that she had obtained new counsel to represent her in the present claim. By letter dated November 29, 2011, claimant's new counsel requested an opportunity to submit further evidence and to make a further oral presentation in the present claim. By letter dated December 2, 2011, claimant's request was granted, based on the particular circumstances of her claim. On February 3, 2012, claimant submitted further documentary evidence in support of the present claim and on February 24, 2012, the requested oral hearing was held (February oral hearing). Finally, on May 24, 2012, additional evidence was submitted in response to questions raised by the Commission during the February oral hearing.

DISCUSSION

The physical injury standard adopted by the Commission in *Claim of* ^{5 U.S.C. §552(b)(6)}

Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), requires that a claimant establish that he or she suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation; establish that he or she received medical treatment for the physical injury within a

reasonable time; and verify his or her injury by medical records, in order to establish a compensable claim.

Claimant asserts that while she was held captive in Derna, Libya, she was exposed to cold temperatures, in an unheated apartment without appropriate clothing or blankets for warmth and, as a result, she suffered frostbite to a toe on her left foot and post-traumatic stress disorder (PTSD). Claimant further contends that the frostbite injury she suffered caused the Raynaud's disease from which she suffers today. In support of these assertions, claimant provided, during the February oral hearing, a list of "the documents most relevant to the Objections." Included in this list were the following: Affidavit of ^{5 U.S.C. §552(b)(6)} dated July 23, 2009; Affidavit of ^{5 U.S.C. §552(b)(6)}

dated November 28, 2004; Example of Snow and Freezing Weather in Eastern Libya—Derna—in February—undated but including pictures from 2005; ^{5 U.S.C. §552(b)(6)}

Libya Diary Kept While in Captivity in Libya Covering February-April 1987; ^{5 U.S.C. §552(b)(6)} TFR-635 Census of Claims Against Libya in 1987—Application and Correspondence dated September 12, 1989; Letter from Dr. Adel Taher dated April 19, 2010; Dr. Connie Anderson Patient Visit Note dated October 29, 2009 and Letter dated March 1, 2010; Letters of Dr. Adel Taher dated October 20, 2009, March 20, 2010, and July 11, 2011; Letter from Dr. Le Thu faxed on August 11, 2010; Objections to the Proposed Decision in the Claim of ^{5 U.S.C. §552(b)(6)} (LIB-I-051) filed July 2011; Supplemental Statement of Sandra Simpson and Attachment A—Photographs of Wadha Hospital in Dema, Libya—dated February 3, 2012; Supplemental Statement of Dr. Adel Taher filed on February 7, 2012; Expert Report of Dr. Eric Johnson dated February 5, 2012, and Attachment A—Wilderness Medical Society Practice Guidelines for the

Prevention and Treatment of Frostbite; Letter of Mirella Bongaerts dated September 15, 2011; Letter of Ahmed Tawfik, Esq., dated February 2, 2012; Valley News Dispatch, "A-K native freed in Libya" dated May 21, 1987; and Supplemental Legal Submission filed on February 14, 2012.

As an initial matter, while the claimant has not pursued her objection to the Commission's Proposed Decision regarding her claim of PTSD beyond her Objections to the Proposed Decision filed July 2011, she has not withdrawn it and, therefore, the Commission must address it in rendering this Final Decision on her claim.

The claimant asserted in her objection that the Commission, "without medical proof," determined that "PTSD is just 'mental' and therefore can't be considered." In support of her claim based on PTSD, she has submitted the evaluation of one Jerrold M. Post, M.D., wherein he states that the claimant "suffered...not merely emotional distress, but shattering emotional trauma." Dr. Post notes further that "[i]t has now been well demonstrated that psychological trauma affects the brain," and that studies "show reduced volume of the right hippocampus, increased activity of the amygdala, and increased blood flow to the medial pre-frontal cortex when stressful stimuli are presented." However, there is no indication in the entire record of this claim that Dr. Post or any other medical practitioner actually examined the claimant and detected in her "changes in brain structure" of any kind, let alone changes that could be said to have resulted from her alleged confinement by the Libyan government. Therefore, even if the Commission were to accept Dr. Post's opinion as valid in principle—which, as explained below, it does not—the record before it in this case lacks any evidence that

would enable it to determine that the claimant actually suffered an injury meeting its physical injury standard. On this basis alone, the claim must be denied.

In any event, the Commission noted in its Proposed Decision in this claim that under the December Referral¹ it may only provide compensation for claims for “physical injury,” based on the Department of State’s specific reference in the December Referral to compensation for “physical injury” claims, rather than personal injury claims in general. As such, the Department made clear that it drew a specific distinction between physical and mental injuries, and opted to provide compensation only for the former under that referral. Moreover, the term “physical injury” appears in the Libyan Claims Resolution Act (LCRA)², which required certification of sufficient funds in any Libya settlement to compensate for “wrongful death or physical injury,” as well as the *Letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate* (July 28, 2008) (“Negroponte Letter”), which repeatedly referenced the State Department’s intent to provide compensation for “wrongful death or physical injury” claims.³ Accordingly, for the Commission to award compensation for mental or psychiatric injuries would effectively erase the distinction between physical and mental injuries, contrary to the intent of the Department of State, Congress, and the President as expressed in the LCRA, the Negroponte Letter, and the December Referral. For that reason, the Commission

¹ December 11, 2008 *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission.*

² Pub. L. No. 110-301, 122 Stat. 2999,

³ The Negroponte Letter states, in part, the following: “The other pending terrorism cases against Libya by U.S. nationals for wrongful death or *physical injury* are listed in . . . this letter. . . . In determining whether the funds are adequate . . . we intend to require amounts sufficient so that these claimants are guaranteed compensation comparable to what we understand was provided for *physical injuries* in the LaBelle Discotheque settlement . . . without requiring U.S. claimants for wrongful death or *physical injury* to prove liability by Libya or individual economic damages.” (emphasis added).

concludes that claimant's argument on objection that the Commission should consider psychiatric injuries to be compensable as "physical injuries" under the December Referral is without merit. Therefore, the denial of her claim for compensation for PTSD set forth in the Proposed Decision is affirmed

Turning to claimant's frostbite injury claim, the Commission again notes that claimant has submitted a diary that she maintained during her time in Libya, her own affidavit, and oral testimony along with statements of Dr. Taher—the physician who, it has been asserted, treated claimant following this incident—together with certain recent medical opinions.

Claimant noted in her diary that on March 1 they arrived at the Derna hotel; on March 3 "a doctor was called [and] then sent...nose drops for me"; on March 7 "one toe frostbitten one slightly"; on March 8 "a doctor was requested for...my toe"; on March 11 "got a heater"; on the next day March 12 "frostbite has a blister"; on March 17 "no doctors for 2 weeks"; on March 20 "[d]o not get doctors anymore"; on March 22 "the wild man...got us slippers"; on April 2 "got good sinus pills" on April 5 "went to the hospital for my circulation"; on April 6 "had some x-rays...only my backbone is a little funny." Further, claimant notes that on several days in early March she, as well as the other persons with whom she was held, were cold. In particular, on March 7 she noted that "it was raining [and] unbelievably cold. We saw hail."

Claimant testified at the September oral hearing that "just being in the room, we had two or three blankets on, and I realized that my foot was cold." Further, she noted that "we had ice and cold...it was just really cold, really cold on your feet...the walls are cold, the stone is cold ... I got the blister and frostbite." Claimant stated that she

determined her toe had been frostbitten by the appearance of the blister, describing her toe as “red [with a] white blister.”

During the February oral hearing claimant testified that she identified the frostbite on her toe based upon her recollection of pictures and symptoms described in her Girl Scout first aid book. She further testified that while she did have “some warm socks” she was unable to keep her toes covered all of the time. In addition, claimant described the progression of the injury, noting that in the beginning her toe was “cold and red with whitish patches” that when the “blister” formed it was initially “white...[and] waxy hard...then started to get dark...it was a solid mass...flat...not raised too much...discolored and lumpy.” Claimant further described her treatment--first, in Libya--as consisting of wrapping her toe in gauze or cotton--and later, in Egypt--as consisting of “several debridement sessions...[administered by] Dr. Adel Taher and Dr. Hammam.”

Although no contemporaneous medical records relating to the diagnosis and treatment of this injury have been submitted, Dr. Taher—an Egyptian doctor who is said to have treated the claimant in Cairo for this condition in June 1987—has submitted a statement bearing a date of transmission of February 7, 2012, which provides a detailed narrative of his recollection of the extent of the injury suffered by the claimant.⁴ Specifically, he stated that

...the smallest toe of her left foot looked quite pale, almost grayish and felt waxy. The sides of the toe were yellowish. The toe was numb to light

⁴ With regard to the statement by Dr. Taher, the Commission notes that prior to its Proposed Decision, Dr. Taher, in his several letters, made no mention of examining or treating the claimant after the incident or that he had even seen her since 1983. However, after the Commission’s decision denying this claim, his statement was amended—on July 9, 2011—to include a short description of the treatment received by claimant. Finally, claimant’s new counsel requested that Dr. Taher make a further statement regarding what he “know[s] and recall[s] about [his] diagnosis of [claimant’s] frostbite injury in 1987.” The final undated statement is his response to this request.

touch with a piece of cloth and also to the light prick with a sharp point of a hair pin ornament. There were darker areas that proved, on closer examination to be collections of dead skin, probably from blisters she told me had formed in Libya.

Dr. Taher also noted in his statement, however, that he had never seen a case of frostbite before, and that his determination that claimant had suffered “second degree frostbite” was based on medical literature and his consultation with other doctors, including one Dr. Ahmed Sameh Hammam, a vascular surgeon. Dr. Taher further stated that Dr. Hammam “recommended a course of treatment that permitted [claimant] to regenerate healthy tissue...consist[ing] of a series of debridements of the affected toe, spaced three to four days apart.” Dr. Taher explained that “[d]ebridement is careful removal of dead skin, tissue and any debris from the affected area until you reach the edge of the viable and vital tissue ... until it bleeds!”

Claimant has also submitted recent opinions from Connie Anderson, D.O., Le Thu, M.D. and Eric Johnson, M.D, in further support of the contention that she suffered serious frostbite and continues to suffer from the consequences thereof. Each doctor stated that claimant suffered frostbite and now, as a result, suffers from Raynaud’s disease as well as an increased sensitivity to cold.

In her report dated October 29, 2009, Dr. Anderson noted under “Assessment” “Frostbite of the left foot”; however, in her letter dated March 1, 2010, Dr. Anderson noted that “there is no current manifestation of frostbite.” Dr. Anderson also stated in her March 2010 letter that she “had made the diagnosis of Raynaud's by [claimant’s] clinical symptoms and the test ruled out another autoimmune disease,” and noted that [Raynaud’s] is more common in women causing cyanosis of hands and feet...[and] can be caused by a cold injury.”

Dr. Thu, in her undated statement bearing a date of transmission of August 11, 2010, stated that, based on a review of claimant's health records dating from before and after the 1987 incident and a personal interview, claimant "was in an unheated apartment in the winter of the Green Mountains of Eastern Libya with inadequate clothing where temperature hovered near freezing to freezing [and] [a]s a result...suffered second-degree frostbite of her left toes and intermittent hypothermia." Dr. Thu also expressed the opinion that claimant's "ordeal in Libya with two months of cold exposure and not being treated early and properly increased her susceptibility even more to future cold injuries."

For his part, Dr. Johnson, in his report dated February 5, 2012, expressed the opinion that "from [his] review of the case record, [claimant] likely suffered from frostbite in the second or third degree." Specifically, Dr. Johnson stated

[t]he severity of frostbite injury is categorized as follows:

First-degree frostbite presents with numbness and erythema. A white or yellow firm, slightly raised plaque develops in the area of injury. No gross tissue infarction occurs; there may be slight epidermal sloughing. Mild edema is common.

Second-degree frostbite injury results in superficial skin vesiculation [blistering]; a clear or milky fluid is present in the blisters, surrounded by erythema [skin redness and discoloration] and edema [tissue swelling].

Third-degree frostbite creates deeper hemorrhagic blisters, indicating that the injury has extended into the reticular dermis [lower layer of the skin] and beneath the dermal vascular plexus [the network of blood vessels and nerves below the top layer of skin]

In support of his conclusion, Dr. Johnson further stated that "[claimant's] diary and other available evidence are sufficient to show that the 'right' conditions existed during her captivity to cause her frostbite injury"; that "[i]t is a misconception that direct,

prolonged exposure to freezing or sub-freezing cold temperatures is necessary for the injury to occur”; and that

[i]n view of the low temperatures...[claimant’s] body type and arachnodactyly, history of low blood pressure, and given her underlying physiological and psychological risk factors it is [his] opinion that...[the] diagnosis of frostbite. . .[is] accurate.

The claimant has also submitted deposition testimony of Dr. Johnson taken in the course of a lawsuit in his capacity as both an expert witness and treating physician.⁵ Dr. Johnson relies upon this lawsuit as support for his view that freezing or sub-freezing temperatures are not required for frostbite to occur. It is noteworthy, however, that in his deposition, at page 166, Dr. Johnson conceded that although “there are cold injuries that don’t require freezing” the definition of frostbite is freezing, *i.e.*, the tissue must be less than 32 degrees Fahrenheit.

With regard to the ongoing effects of claimant’s injury, Dr. Johnson noted that claimant “stopped diving as of 1990 or 1991” and, further, that “[i]t is medically significant that [claimant], an otherwise able 36-37 year old woman, had to curtail activities in which she regularly engaged prior to her captivity, including diving, due to increased cold sensitivity after her frostbite injury.”

The claimant has also submitted several photos as well as historical weather data dated March 1987 for Derna, Libya, from the National Climatic Data Center of the United States. According to the claimant, the climatic data was submitted as evidence of the temperature in Derna during the time claimant asserts she suffered frostbite,

⁵ *Schwarz-kopf v. Kristensen*, Case No. CV-PI-08-23121 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. Dr. Johnson notes that this case concluded with a jury award for the plaintiff; however, the Commission’s research indicates that this case was dismissed without a jury trial.

while the photos were submitted as evidence both that it can be cold and that it can snow in Derna.

The climatic data indicates that during March of 1987 the temperature varied between 45°F and 66°F. Claimant asserts that these figures do not accurately reflect the temperatures she experienced because the weather station reporting the temperatures just cited was located at an elevation 103 meters lower and 8 kilometers from the hotel where she was held, and that “[t]he distance and higher elevation of [her] location, as compared to that of the weather station, and wind chill help explain why [she] experienced cooler temperatures than those indicated in the...data.” However, she has provided no calculation or analysis to quantify the difference that those factors would have made on the temperatures actually experienced in Derna. Further, claimant has not explained how wind chill would have affected her experience of low temperature while held captive indoors; *i.e.*, how she could have been exposed to the wind. Moreover, the Commission notes that the photographs of snowfall in Libya appear to be from 2005, and that the text associated with the photographs indicates that snowfall in Libya is rare.

In the categorization of frostbite relied upon by Dr. Johnson, second degree frostbite is associated with blistering with “a clear or milky fluid present in the blisters.” However, during claimant’s testimony she described the blister on her toe as initially “white...[and] waxy hard...then started to get dark...it was a solid mass...flat...not raised too much...discolored and lumpy.” Dr. Taher noted that “the smallest toe of her left foot looked quite pale, almost grayish and felt waxy...[t]he sides of the toe were yellowish.” The descriptions provided both by claimant and Dr. Taher appear at best, to

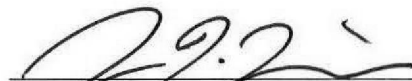
fit more accurately within the categorization for first degree frostbite, “white or yellow firm, slightly raised plaque.” While first degree frostbite does not include cases where “gross tissue [death] occurs,” the description of the dead tissue by Dr. Taher does not appear to the Commission to rise to the level of gross tissue death. The description provided by Dr. Taher indicates, consistent with claimant’s testimony, that she merely had a small amount of dead skin on her small toe, the treatment of which included the removal of that dead skin to allow for new skin to grow in its place. Moreover, even if the Commission were to accept a diagnosis of second degree frostbite, the severity of claimant’s frostbite, as noted in Dr. Johnson’s report, is by the very definition proposed by Dr. Johnson, “superficial.”

Finally, as noted above, claimant also contends that the injury she suffered led to her current condition of Raynaud’s disease, as well as a heightened sensitivity to cold. To support this contention, she refers to Dr. Thu’s opinion that the cold exposure and lack of treatment “increased her susceptibility even more to future cold injuries.” Dr. Johnson has assessed the degree of claimant’s increased susceptibility to cold based on the fact that three to four years after her confinement the claimant curtailed activities in which she had previously engaged, such as diving. However, neither expert acknowledges claimant’s pre-existing cold sensitivity – dramatically illustrated by her testimony concerning an injury she suffered in a swimming pool prior to 1986. Furthermore, claimant has failed to provide evidence establishing that the condition she asserts she suffers from now is not the result of the natural consequence of what Dr. Thu described as claimant’s “genetically cold sensitive makeup.”

CONCLUSION

In summary, considering the evidence in its entirety, the Commission finds that although claimant may have suffered from a cold environment, she has failed to establish that she suffered a degree of frostbite or other physical injury that meets its standard for a compensable physical injury under the December Referral. Accordingly, while the Commission sympathizes with the claimant for the ordeal that she endured during her captivity, the denial of her claim for compensation under the December Referral set forth in its Proposed Decision of April 7, 2011, must be and it is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, June 29, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya’s agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, 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 Secretary of State certified, pursuant to the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), which, among other things, 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 March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On July 31, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits, postmarked July 23, 2009, supporting the claimant's claim, including evidence of claimant's: United States nationality; inclusion as a named party in the complaint filed in ^{5 U.S.C.} §552(b)(6) *et al. v. Socialist People's Libyan Arab Jamahiriya*, 00-cv-1722 (D.D.C.), part of the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; dismissal of the ^{5 U.S.C.} §552(b)(6) case; and alleged physical injuries.

The claimant, ^{5 U.S.C. §552(b)(6)} states that in early February 1987 she was traveling on a yacht from Italy to Egypt. She alleges that a severe storm required the yacht to take refuge in the port of Benghazi in Libya, where the crew and passengers were confined for several days prior to being taken hostage by the Libyan authorities on February 15, 1987 and held until May 13, 1987. According to her Statement of Claim, the claimant suffered two separate injuries as a result of the incident, cold injuries including second degree frostbite and Raynaud's Disease, and Post-Traumatic Stress

Disorder. In support of her claim the claimant has provided medical records, medical opinions, a journal that she kept during her time in Libya, and her own sworn statement.¹

With regard to the allegation of cold injuries, the claimant states that during her confinement in the winter months, the room in which she was confined was “just slightly above freezing”, which, she alleges, caused her to suffer frostbite on her toes that eventually blistered.² According to her diary, she was not treated for frostbite during her time in captivity although medical care was provided to her for “circulatory problems.”³ In support of this portion of her claim, claimant has provided a recent letter from Dr. Adel Taher who had examined the claimant in 1983 (prior to the incident), a medical report dated October 29, 2010 from Connie S. Anderson, D.O., and a recent medical opinion from Dr. Le Thu.

In his letter dated March 20, 2010, Dr. Taher states his observations of the claimant prior to the incident; specifically that she “exhibited, on several occasions, a reaction to cold that indicated she is much more sensitive to cold than the average person.” He further states that “[he] did at the time examine her *specifically* for the possible diagnosis of ‘Raynaud’s Disease’ as it was one of the obvious differential diagnosis at hand.” However, he notes that in 1983 “[s]he was referred to a professor of vascular surgery at Cairo University and he ruled it out.” Additionally, Dr. Taher concluded that the claimant had suffered second degree frostbite on her toe during this

¹ The Commission notes that additional documentary evidence was received on April 7, 2011 and reviewed by the Commission prior to the issuance of this decision.

² Claimant’s entry in her diary on March 12 indicates that a blister formed where she had been experiencing frostbite.

³ Claimant states, in her April 5 and 6 entries in her diary that she was brought to the hospital for circulatory problems. Claimant does not indicate that any treatment was received for frostbite.

incident based on “excerpts from her diary, and ... [his] personal knowledge of the [claimant].”

Dr. Anderson, in her letter dated March 1, 2010, states that as a result of her October 29, 2009 examination of the claimant she “made the diagnosis of Raynaud’s by [claimant’s] clinical symptoms and the test ruled out another autoimmune disease.” Dr. Anderson explains that Raynaud’s Disease “can be caused by a cold injury” and, therefore, although “there is no current manifestation of frostbite ... [she] cannot say that it was not a contributing cause ... [because claimant’s] past experience in Libya was the only instance in her entire life that she reported experiencing frostbite.”

Dr. Thu, in her opinion, concludes that “the 1987 event has caused [claimant’s] genetically cold sensitive makeup to be even more prone for all forms of cold injuries.”

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction is limited to the category of claims defined in the December Referral Letter; namely the claims of individuals who: (1) are United States nationals, (2) have been named as parties in a Pending Litigation which has been dismissed, and (3) set forth a claim, in the Pending Litigation, for injury other than emotional distress alone. December Referral Letter, *supra*, ¶¶ 2-3.

Nationality

In the *Claim of*^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order to meet the nationality requirement,

the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement the claimant has provided a copy of her current U.S. passport. Based on this and other evidence in the record, the Commission finds that this claim was held by a U.S. national at the time of the injury upon which the claim is based and that it has been so held until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the complaint in Case No. 00-cv-1722, filed in the United States District Court for the District of Columbia, which names her as a party. Additionally, the claimant has provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated November 19, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

Claimant has provided, with her Statement of Claim, a copy of the Second Amended Complaint in the Pending Litigation. The Commission takes note that there was a Third Amended Complaint filed prior to the dismissal of this case. In the Third Amended Complaint, under Count II, claimant states a cause of action for, *inter alia*,

battery. The Commission therefore finds that the claimant set forth a claim for injury other than emotional distress alone in the Pending Litigation.

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

Merits

Standard for Physical Injury

As stated in the December Referral Letter, to qualify for compensation, a claimant asserting a claim for physical injury must meet the standard for physical injury adopted by the Commission for purposes of this Referral. In order to develop the appropriate standard for compensability, the Commission considered both its own jurisprudence and pertinent sources in international and domestic law. The Commission concluded in the *Claim of*^{5 U.S.C. §552(b)(6)} *supra*, that in order for a claim for physical injury to be considered compensable, a claimant:

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

Id. at 8-9.

Physical Injury

The Commission notes that the claimant does not allege that she ever sought or received medical care for the physical injury she is now asserting: frostbite. Thus, there is no contemporaneous record of claimant having received medical treatment for this condition. Instead, claimant has submitted a number of medical evaluations which appear to have been undertaken in 2009 and 2010 and one undertaken some 4 years prior to the incident. None of the opinions submitted differentiate the claimant's condition prior to the incident from that of her current condition, except the opinion from Dr. Thu, who suggests that the degree of claimant's cold sensitivity may have increased after the incident. Further, none of the doctors have referenced any injuries where the claimant received or would be required to receive medical treatment as a result of her confinement. These evaluations provide little support to the claim before the Commission.

The Commission next turns to the claim based on the assertion that claimant suffers from post-traumatic stress disorder (PTSD). As stated above, under subsection 4(a) of the ICSA, the Commission's jurisdiction is limited to the category of claims defined in the December Referral Letter. Under the December Referral Letter, the Commission may only provide compensation for claims for physical injury. This specific reference to compensation for "physical injury" claims, and not "personal injury" claims more broadly, makes clear that the Secretary of State drew a clear distinction between physical and mental injuries, and opted to provide compensation only for the former under this referral. Thus, regardless of claimant's submissions, the December Referral Letter contemplates a distinction between the two types of injuries and precludes the Commission from compensating for anything other than physical injuries. For the

Commission to do otherwise would render the term “physical injury” (as opposed to “personal injury”) effectively meaningless.⁴

Moreover, insofar as the Commission is directed to apply “applicable principles of international law” in deciding the claims before it, *see* 22 U.S.C. § 1623(a)(2) (2006), the Commission notes that the distinction between physical and mental injuries is well-established in both international conventions⁵ and decisions of international tribunals⁶.

Section 509.5(b) of the Commission's regulations provides:

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.

45 C.F.R. 509.5(b) (2010).

Based on the evidence and information submitted in support of claimant's asserted injuries, and for the reasons set forth above, the Commission finds that the claimant has not met her burden of proof in this claim in that she has not satisfied the Commission's standard for physical injury. In light of the foregoing, the Commission concludes that the claimant,^{5 U.S.C. §552(b)(6)} does not qualify for compensation under the December Referral Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that she must have endured during the confinement

⁴ That the term “physical injury” was intended to have a specific meaning is clear from the fact that the Referral Letter suggests that passage of the LCRA was predicated on assurances made to Congress that *physical injury* claimants would receive compensation comparable to the amount provided for *physical injuries* in the private settlement made by the Libyan government with victims of the 1986 Labelle Discotheque terrorist attack in Berlin, Germany.

⁵ *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, at 3-5, 19, 1465 U.N.T.S. 85; Rome Statute of the International Criminal Court, arts. 6, 7, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, *entry into force* Jan. 12, 1951, Sen. Exec. Doc. 81-O, 78 U.N.T.S. 277.


⁶ *See, e.g.*, Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 492-494 & n.454, ¶¶ 501-501 (citing, *inter alia*, Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 291); Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶ 746 (citing Prosecutor v. Delalic (“The Čelebići case”), Case No. IT-96-21-A, Judgment, ¶¶ 424, 426); Prosecutor v. Bagosora, ICTR-98-41-T, Decision on Motions for Judgment of Acquittal, ¶ 34 & n.77; South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 253 (July 18).

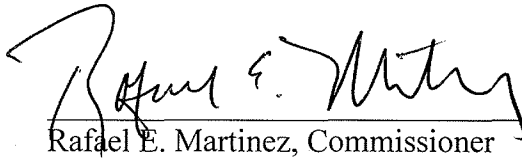
incident in question, her claims under the December Referral Letter must be and are hereby denied.

The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

APR 07 2011


Timothy J. Feighery, Chairman


Rafael E. Martinez, 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) (2010).