

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

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-101

Decision No. LIB-II-071

Counsel for Claimant:

Laurel P. Malson, Esq.
Crowell & Moring LLP

Oral Hearing held on November 18, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by 5 U.S.C. §552(b)(6) based upon physical injuries allegedly sustained as a result of a terrorist attack at Schwechat Airport in Vienna, Austria on December 27, 1985. The claim was made under Category E of the *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"). By its Proposed Decision entered July 12, 2011, the Commission denied the claim on the grounds that claimant had not met her burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the Commission cited open questions in the evidence regarding both the fact and the severity of the injury alleged.

On July 28, 2011, the claimant filed a notice of objection and requested an oral hearing, asserting various factual errors in the Commission's Proposed Decision. On October 27, 2011, claimant submitted an objection brief containing further evidence and argument in support of her objection. The hearing on the objection was held on November 18, 2011.

In her objection brief and during the oral hearing, claimant argued that she had in fact suffered a physical injury in the Vienna Airport attack that was severe enough to meet the Commission's standard. In particular, claimant argued that newly-submitted records corroborate the fact and severity of her physical injury and resolve the ambiguity in the contemporaneous documents previously identified by the Commission. The claimant testified in person during the hearing, responded to questions from the Commission, and permitted examination of the scarring to her head that resulted from the injury that she alleges she suffered during the attack.

DISCUSSION

In its Proposed Decision in this claim, the Commission determined that the evidence submitted by claimant was, considered as a whole, ultimately inconclusive on both the fact of injury and the severity of that injury. The Commission noted that while contemporaneous newspaper accounts of the incident identified claimant as having been injured and treated, no information concerning the extent or treatment of the injury was proffered by the claimant. In addition, the Commission made reference to contemporaneous documents from the Austrian Security Directorate and the Federal Archives of Austria, which, although they confirmed that claimant had been taken to the

hospital after the incident, were unclear as to the extent of claimant's injury and the nature of her treatment.

In support of her objection, claimant submitted, *inter alia*, an "Injury Report," dated December 27, 1985 (the day of the incident), translated from German to English, and received at the Federal Police Directorate on January 7, 1986, evidencing claimant's treatment at Kaiser Franz Josef Hospital; revised translations of previously submitted letters from the Austrian Security Directorate (November 25, 2009), the Austrian State Archives (dated January 12, 2010), and the Kaiser Franz Josef Hospital (dated January 19, 2010); the report of a neuropsychiatric examination conducted by James R. Merikangas, M.D., on October 17, 2011, together with a copy of an MRI scan of claimant's brain taken the same day; and the sworn declaration and report of Lynn M. Grattan, Ph.D., detailing the results of a neuropsychological examination of the claimant conducted on October 10, 2011. In addition, during the oral hearing, claimant provided live testimony to supplement her written submissions, in which she described in detail her experience during the incident, including the nature of her physical injury, her treatment at Kaiser Franz Josef Hospital, and her experience in the months and years that followed.

According to the above-referenced Injury Report, claimant was taken to the Surgery unit in the "Outpatient Department" following the attack at the Vienna Airport. The report indicates that claimant suffered a "VLC [*vulnus lacero-contusum* = crush injury / laceration] *permagna [large] fronto parieto [on the forehead and the side of the head]*" In addition, the revised translations of the other contemporaneous documents confirm that claimant was treated at Kaiser Franz Josef Hospital on an

outpatient basis.* Regarding the severity of the injury, the Commission, in its Proposed Decision, made reference to a letter from the Austrian Security Directorate which referred to “local documents” confirming that claimant had been taken to Kaiser Franz Josef Hospital, but noting that “[t]he severity of the injury is not officially known”; however, according to the revised translation, the latter statement should read, “The severity of the injury is not known *at this office.*” (emphasis added.)

During the oral hearing, claimant provided credible testimony that was consistent with the information contained in the newly-submitted documents and with the affidavits and other evidence previously submitted. She testified that, after she was taken to the hospital following the attack, medical personnel “shave[d] the whole side of the head.” She further testified that shrapnel was removed from her head, the wound was sutured, and a “large bandage” was placed on her head. The claimant also permitted a physical examination of her scarring, which revealed not only a scar from the wound itself, but also suture marks evidencing treatment. Considered as a whole, the new evidence provided, as well as the totality of claimant’s testimony, now establishes to the Commission’s satisfaction that the claimant suffered a physical injury that meets the Commission’s standard.

In her objection and during the oral hearing, claimant also asserted a number of other impairments related to alleged brain injuries resulting from the laceration sustained, including concentration and memory problems, difficulty with word recall, and anxiety. Claimant asserts that the results of the neuropsychiatric and neuropsychological

* In her objection brief, counsel for the claimant attributes the differences between the initial and the revised translations to “the differences between Austrian German and more modern dialects of the language.” This is confirmed in an affidavit provided by the legal translator who prepared the revised translations.

examinations submitted with her objection indicate that these impairments were the result of brain injuries sustained in the Vienna Airport attack. The Commission notes, however, that although the attached reports indicate that claimant's symptoms are, variously, "consistent with," "a typical result of," or "most likely related to" traumatic brain injury, there is simply no contemporaneous evidence that the claimant suffered a "brain injury" during the attack, and indeed claimant did not assert as much during her testimony. Moreover, these reports do not establish a causal link between these symptoms and the injuries sustained during the Vienna Airport incident. Although the MRI scan and attached report provided with this claim identifies certain abnormalities in claimant's brain, it is unclear whether these abnormalities are the result of the 1985 incident. In this regard, the Commission notes that the report states that "aphasic symptoms" may result from automobile accidents, and in the neuropsychological evaluation, it is noted that claimant was involved in such an accident when she was 29 or 30 years old (which would have been in 1989 or 1990, approximately five years after the incident). Claimant has provided no documentation pertaining to this incident.

In any event, given the lack of evidence, and the absence of a causal link to the Vienna Airport attack, and notwithstanding the fact that the Commission has determined that the claimant has established a laceration to her head that meets the Commission's standard for physical injury, the Commission cannot conclude that claimant suffered a brain injury, as alleged, during the terrorist incident. With regard to claimant's allegations of non-physical "mental" injuries, as the Commission has recently explained, the plain language of the *Letter dated December 11, 2008, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J.*

Tamargo, Chairman, Foreign Claims Settlement Commission, limits compensation to claims of “physical injury.” *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-I-033, Decision No. LIB-I-046 (2011). The Commission holds that this also applies to claims brought under Category E of the January Referral.

Based on the newly-submitted evidence, and in particular the contemporaneous medical record and the totality of the testimony provided by the claimant during the oral hearing, the Commission finds that the claimant’s head wound injury meets the standard for physical injury set forth in the Proposed Decision. Accordingly, claimant 5 U.S.C. §552(b)(6) is entitled to compensation as set forth below.

COMPENSATION

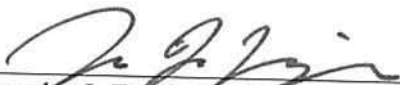
In *Claim of* 5 U.S.C. §552(b)(6), *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission’s standard under Category E, and that compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. Accordingly, the Commission determines that the claimant, 5 U.S.C. §552(b)(6), is entitled herein 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 accordingly withdraws the denial in its Proposed Decision in this claim, and enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-1627 (2006).


AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

Dated at Washington, DC, December 15, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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PROPOSED 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) at Schwechat Airport in Vienna, Austria on December 27, 1985.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ('ICSA'), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009,*

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 Letter’).

The present claim is made under Category E. According to the January Referral Letter, Category E consists of

claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 (‘Covered Incidents’), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Id. at ¶ 7. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

The January Referral Letter, as well as a December 11, 2008 referral letter (‘December Referral Letter’) from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act (LCRA), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* (‘Claims Settlement Agreement’), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the

Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

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

BASIS OF THE PRESENT CLAIM

On June 4, 2010, the Commission received from claimant a completed Statement of Claim in which she asserts a claim under Category E of the January Referral Letter, along with exhibits supporting the elements of her claim. This submission included evidence of claimant's U.S. nationality, her presence at the scene of the terrorist incident, and her alleged physical injuries for which she now claims compensation.

The claimant states that she was present at the Schwechat Airport in Vienna, Austria at the time of the terrorist attack. According to the Statement of Claim and accompanying exhibits, claimant suffered a shrapnel wound to the right side of her head as a result of a grenade explosion. She states that she fell to the floor unconscious after being hit by the shrapnel, but soon regained consciousness, stood up, and, as the attack continued, rushed into a small room behind a convenience store inside the terminal where other people had gathered. Claimant alleges that she encountered an off-duty doctor, Viktor Wratzfeld, among those gathered in the room, and that Dr. Wratzfeld "took [a bottle of alcohol] and poured the potent liquid over [her] head to disinfect the wound." After the attack ended, claimant states that she was placed in an ambulance and taken to

Kaiser Franz Josef Hospital in Vienna, where doctors “shaved the hair from half of [her] head, gave [her] a tetanus shot, removed the shrapnel from [her] head, and cleaned and sutured [the] wound.” According to claimant, the wound “was about 5 inches long and required numerous stitches.”

Claimant states that, after her treatment at the hospital, Dr. Wratzfeld accompanied her back to her apartment in Vienna and stayed with her overnight to monitor her condition. In the morning, he contacted a friend of hers to arrange for her further care. Claimant states that she convalesced for several weeks in the care of a Viennese friend, local relatives, and various doctors. Although her wound eventually closed, claimant alleges that it “did not heal properly” and that she is “left with a long, jagged, and disfiguring scar along the right side of [her] head.”

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction here is limited to the category of claims defined under the January Referral Letter; namely, claims of individuals who: (1) are U.S. nationals; (2) set forth a claim before the Commission for wrongful death or physical injury resulting from one of the Covered Incidents; and (3) were not plaintiffs in a Pending Litigation case against Libya. January Referral Letter, *supra* ¶ 7.

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 birth certificate, indicating that she was born in Newark, New Jersey, a copy of her U.S. passport from the time of the incident (valid from August 1984 to August 1994), and a copy of her 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 has been so held until the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, the claimant must also assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral Letter. January Referral Letter, *supra*, ¶ 7. This list includes the "December 27, 1985 attack at the Schwechat Airport in Vienna, Austria, as alleged in *Knowland v. Great Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 08-cv-1309." *Id.*, Attachment 2, ¶ 7. In her Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the December 27, 1985 Vienna Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of her claim.

Pending Litigation

Finally, the January Referral Letter states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral Letter, *supra*, ¶ 7. Attachment 2 to the January Referral Letter identifies the Pending Litigation cases associated with each

Covered Incident, which in this claim, as noted above, is the *Knowland* case. Claimant has stated under oath in her Statement of Claim, and the pleadings in the *Knowland* case confirm, that she was not a plaintiff in that litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of her claim.

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

Merits

Standard for Physical Injury

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category E must meet "the standard for physical injury or wrongful death, as appropriate, adopted by the Commission" for purposes of this referral. January Referral Letter, *supra*, ¶ 7. The Commission held in *Claim of* ^{5 U.S.C. §552(b)}₍₆₎

Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; 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 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to her Statement of Claim and accompanying exhibits, claimant was sitting inside the terminal at Schwechat Airport when three terrorists opened fire with machine guns and tossed hand grenades at waiting passengers. In her description of the incident, claimant states that, upon hearing “a loud explosion and repeated ear-piercing noises[,]” she “stood up to see what was happening[,]” at which point “grenade shrapnel hit [her] on the top right side of [her] head.” She further states that she “recall[s] feeling a sharp pain in [her] head, and then collapsed to the floor, unconscious.” As described above, claimant states that she eventually regained consciousness, took cover in a small storage room inside the terminal with other passengers, including Dr. Viktor Wratzfeld, and when the attack ended, was taken by ambulance to Kaiser Franz Josef Hospital.

In support of her claim, claimant has provided, *inter alia*, medical records; a “background paper” describing the incident and her alleged physical injuries; an affidavit sworn by claimant; a 2009 letter from Dr. Wratzfeld describing claimant’s head injury and the treatment he provided to her; copies of newspaper articles describing the incident and identifying claimant as one of the Americans injured in the attack; photographs of a scar on claimant’s head; an October 2010 affidavit from Emília Otočková, one of claimant’s relatives, noting that claimant spent two or three weeks recovering in the affiant’s apartment in Bratislava (in then-Czechoslovakia); an October 2010 affidavit from Dr. Lýdia Ondrušková, who treated claimant while she recovered at Ms. Otočková’s apartment; and various communications from the Austrian government and Kaiser Franz Josef Hospital regarding the medical treatment claimant received after the terrorist incident.

The contemporaneous evidence submitted by the claimant is inconsistent on both the fact of injury and the severity of that injury. For instance, the contemporaneous newspaper accounts of the incident produced by claimant identify claimant as one of those injured and treated, but do not give any information on the nature or extent of the injury. Similarly, the official Austrian records provided with this claim reflect contemporaneous information confirming that claimant was injured in the attack and received medical treatment shortly thereafter, but likewise lack information concerning the nature and extent of the injury. For example, a letter from the Austrian Security Directorate, dated November 25, 2009, confirms that, “according to the local documents[,]” claimant was injured in the Vienna Airport terrorist attack and was treated at Kaiser Franz Josef Hospital the same day; however, the letter also notes that “[t]he severity of the injury is not officially known.” In addition, a January 12, 2010 letter addressed to claimant from the Federal Archives of Austria states merely that “after the terrorist attack on the Vienna-Schwechat Airport you were treated in the Kaiser Franz Josef Spital of the City of Vienna . . . where you were admitted to the Surgical Department—Outpatient . . . on December 27, 1985.”* It is noteworthy that while these reports are dated in 2010, they must necessarily refer to records contemporaneous with the incident, but that contemporaneous information has not been provided by the claimant.

Given the equivocal nature of the contemporaneous evidence that has been produced, the affidavits and other statements submitted with this claim are of limited use to the Commission. On this point, it should be noted that in proceedings before the

* According to a 2010 letter from the Kaiser Franz Josef Hospital and a 2009 email from Vienna General Hospital, outpatient records from 1985 were kept by hand and would have been destroyed after ten years as permitted by Austrian law.

Commission, the burden of submitting sufficient evidence lies with the claimant. 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.

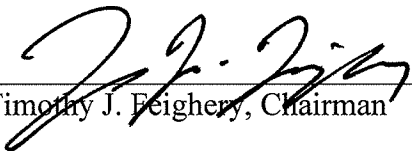
45 C.F.R. § 509.5(b) (2010).

In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met the burden of proof in that she has failed to provide evidence sufficient to establish that she "suffered a discernible physical injury, more significant than a superficial injury"; that she "received medical treatment for the physical injury within a reasonable time"; and that the injury be verified by medical records, as required under the Commission's physical injury standard.


In light of the foregoing, the Commission is constrained to conclude that the claimant, 5 U.S.C. §552(b)(6) does not qualify for compensation under the January Referral Letter. Accordingly, her claim based must be and is hereby denied.

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

Dated at Washington, DC, July 12, 2011
and entered as the Proposed Decision
of the Commission.



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).