

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

In the Matter of the Claim of

ESTATE OF LUZ BELEN MATOS GARCIA,
DECEASED;
CARMEN LUZ SANCHEZ MATOS,
ADMINISTRATOR

Against the Great Socialist People’s
Libyan Arab Jamahiriya

Claim No. LIB-II-122

Decision No. LIB-II-153

Counsel for Claimant:

Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

ORDER

This claim against the Great Socialist People’s Libyan Arab Jamahiriya (“Libya”) is brought by the ESTATE OF LUZ BELEN MATOS GARCIA (“claimant”), based upon physical injuries said to have been sustained by Ms. Matos at Lod Airport in Tel Aviv, Israel on May 30, 1972.¹ 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 May 16, 2012, the Commission denied the claim on the grounds that claimant had not met its burden of proving an injury sufficient to meet the Commission’s standard for physical injury. The claimant objected and requested an oral

¹ Ms. Matos died in 1983 of causes unrelated to the attack.

hearing, which was held on September 13, 2012. In its Final Decision dated October 26, 2012, the Commission affirmed its denial of the claim, again concluding that claimant had not satisfied the Commission's physical injury standard.

On January 2, 2013, claimant submitted a Petition to Reopen Claim No. LIB-II-122 and Reverse Decision No. LIB-II-153 on the basis that newly discovered evidence warranted reconsideration of the claim. Accompanying the petition were three, original color photographs of Ms. Matos; color copies of said photographs marked by claimant to indicate alleged scarring on Ms. Matos' body; an authenticating affidavit from Ms. Ana Mercedes Kampe; and the original discharge summary from Tel Hashomer Hospital in Israel. Claimant argues that the photographs "clearly depict[]" "extensive scarring on Ms. Matos Garcia's face and chest[,]" as well as "multiple shrapnel pieces still embedded on [her] chest." In light of this new evidence, claimant contends that it "has conclusively established that Ms. Matos Garcia suffered discernible physical injury, more significant than superficial injury as a result of shrapnel wounds at the Lod Airport Massacre."

Subsection 509.5(l) of the Commission's regulations provides:

At any time after a final Decision has been issued on a claim . . . but not later than 60 days before the completion date of the Commission's affairs in connection with the program under which such claim is filed, a petition to reopen on the ground of newly discovered evidence may be filed. No such petition will be entertained unless it appears therein that the newly discovered evidence came to the knowledge of the party filing the petition subsequent to the date of issuance of the Final Decision or the date on which the Proposed Decision was entered as the Final Decision; that it was not for want of due diligence that the evidence did not come sooner to the claimant's knowledge; and that the evidence is material, and not merely cumulative, and that reconsideration of the matter on the basis of that evidence would produce a different decision. The petition must include a statement of the facts which the petitioner expects to prove, the name and address of each witness, the identity of documents, and the reasons for failure to make earlier submission of the evidence.

45 C.F.R. § 509.5(l) (2012).

As a threshold matter, the Commission finds that claimant has satisfied the formal requirements for a petition to reopen under the final sentence of § 509.5(l): the petition

recites the facts that the submitted evidence purports to prove, all documentation is clearly identified, the name and address of the sole witness in the submission is provided, and the reasons for failure to make earlier submission of the photographs are set forth. Therefore, the primary question for consideration is whether the newly submitted evidence is material, and not merely cumulative, and whether consideration of the evidence would produce a different decision.

The Commission has carefully examined the photographs submitted with the petition and reviewed Ms. Kampe's affidavit, and is not persuaded that consideration of the photographs, together with the other evidence submitted with the claim, would produce a different decision. Although claimant has attempted to identify what is described as "extensive disfiguring scarring" by marking the copies of the photographs, the Commission is unable to conclude either that the photographs confirm the alleged scarring, or that, to the extent such scarring is present, it confirms that claimant suffered discernible, non-superficial injuries that are the result of the Lod Airport attack. Consequently, the Commission concludes that claimant's petition to reopen its claim fails to satisfy the Commission's regulations, specifically, the requirement that consideration of the newly submitted evidence would produce a different decision.²

² As noted above, § 509.5(*l*) also requires claimant to demonstrate it was not for want of due diligence that the evidence did not come sooner to the claimant's knowledge. On this issue, claimant has explained that in "late December of 2012 . . . Ana Kampe discovered three photographs in her family's attic." Moreover, Ms. Kampe explains in her affidavit that she found the photographs "when [she] was looking for papers related to another matter[.]" and that "although [she] had previously searched [the attic] . . . these photos were not found in [her] prior searches." In light of the Commission's decision denying the petition on the ground that claimant has failed to show that the newly submitted evidence would produce a different decision, the Commission need not decide whether it was not for want of due diligence that the photographs were not previously submitted.

Accordingly, it is ORDERED that the petition to reopen this claim for further consideration be and it is hereby denied and, therefore, the denial set forth in the Final Decision in this claim must be and is hereby affirmed.

Dated at Washington, DC, January 25, 2013
and entered as the Order of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

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Counsel for Claimant:

Joshua M. Ambush, Esq.
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Oral Hearing held on September 13, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by the Estate of Luz Belen Matos Garcia ("claimant"), based upon physical injuries said to have been sustained by Ms. Matos at Lod Airport in Tel Aviv, Israel on May 30, 1972.¹ 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 May 16, 2012, the Commission denied the claim on the grounds that claimant had not

¹ Ms. Matos died in 1983 of causes unrelated to the attack.

met its burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the Commission cited the equivocal description of claimant's injuries in the contemporaneous medical record—which consisted of a single one-page hospital discharge summary—and the absence of any other medical records to support the claim. In addition, the Commission cited the lack of any photographic or other evidence to support claimant's assertions of scarring resulting from the decedent's alleged injuries.

On July 11, 2012, the claimant filed a notice of objection and requested an oral hearing. On August 23, 2012, claimant submitted an objection brief containing further evidence and argument in support of its objection, including, *inter alia*: the supplemental affidavit of Raphael Walden, M.D., the lead surgeon at Tel Hashomer Hospital in the aftermath of the Lod Airport attack, discussing the nature and severity of Ms. Matos's physical injuries; the affidavit of Anne K. Hayles, Pharm.D, a pharmacist at a national drug store chain, discussing the medications Synthomycetin and tetanus toxoid and what their administration reveals about Ms. Matos's alleged injuries; and the supplemental affidavit of Carmen Luz Sanchez de Bartolomei, M.D.,² Ms. Matos's daughter and the estate administrator, attesting to her mother's injuries and treatment following her return to Puerto Rico after the incident. The Commission held an oral hearing on September 13, 2012; the hearing consisted solely of argument by claimant's counsel, and the claimant presented no witnesses for examination.

² Claimant submitted an affidavit from Dr. Sanchez explaining the variations of her name that appear in certain documents in the file. In the affidavit, Dr. Sanchez explains that her "full maiden name is Carmen Luz Sanchez Matos." However, because she was previously married to the late Jack Bartolomei, she occasionally uses his surname in place of her second surname, "Matos," which was her mother's surname. (Dr. Sanchez indicates that the "de" in "de Bartolomei" indicates a married surname.) In any event, the Commission is satisfied that these are names used by one and the same person—the administrator of the claimant estate.

In his objection brief and during the oral hearing, counsel for the claimant argued that, contrary to the Commission's conclusion, Ms. Matos "suffered discernible more than superficial injury from multiple shrapnel wounds to her face, chest, and buttocks[.]" In particular, counsel focused on two aspects of the hospital discharge summary: the fact that Ms. Matos had received a tetanus shot in the hospital and the fact that she had been prescribed the antibiotic Synthomycetin for the six days following her discharge. Counsel argued that this evidence establishes that Ms. Matos suffered non-superficial physical injuries, because the antibiotic is prescribed only when there is a "danger of life-threatening infection" and a tetanus shot "is not administered for superficial injuries." In addition, counsel noted that claimant provided affidavits indicating that Ms. Matos had permanent scarring on her chest, neck, and face as a result of her alleged injuries, as well as pieces of shrapnel visibly embedded in "her face, thorax, and gluteus." According to counsel, the testimonial evidence also indicates that, upon Ms. Matos's return to Puerto Rico, she was treated by her daughter (the claimant estate administrator) and her daughter's husband—both of them doctors—who cleaned and dressed Ms. Matos's wounds and prescribed additional antibiotics for ten days. Counsel argued that this written testimony, together with the other evidence described above, proves that Ms. Matos's injuries were serious and non-superficial.

DISCUSSION

I. Ms. Matos's Medical Treatment in Israel

Claimant's objection focuses largely on a one-page discharge summary from Tel Hashomer Medical Center—the only contemporaneous medical document

submitted in support of the claim. As the Commission noted in its Proposed Decision, the discharge summary contains little evidence of significant physical injury; it mentions that Ms. Matos suffered “numerous shrapnel fragments in her face,” but also states explicitly that there were “[n]o deep wounds or injury.” It indicates that she “[r]eceived toxoid³ 0.5 c.c.” and was prescribed “1 gram Synthomycetin for 6 days[.]” The discharge summary notes that Ms. Matos was discharged on May 31, 1972, the day after the incident.

In its Proposed Decision, the Commission determined that the information regarding claimant’s treatment in Israel, as reflected in the discharge summary, was insufficient to establish a discernible, non-superficial physical injury, particularly in light of the lack of detailed information in the summary and the absence of any other medical records. Counsel argued, however, that the evidence regarding the prescription of Synthomycetin and the administration of a tetanus shot, independent of other information in the discharge summary, establishes that Ms. Matos’s injuries were more than superficial, thereby satisfying the Commission’s standard for physical injury.

In support of its argument, claimant pointed to the recently-sworn affidavits from Dr. Walden and Ms. Hayles. The affidavits describe and explain the meaning of Synthomycetin and the tetanus shot in the context of Ms. Matos’s discharge summary. With respect to the prescription of Synthomycetin, Dr. Walden and Ms. Hayles conclude that the commission erred in its understanding of the drug, and both assert that the Synthomycetin prescription indicates the possibility of a “serious infection.” Dr. Walden, who is now a Deputy Director of the Tel Hashomer Medical Center, notes that,

³ As noted in the Proposed Decision, a toxoid is an “inactivated bacterial *toxin*[.]” which may be used “to immunize against specific diseases, such as *diphtheria* or *tetanus*.” Am. Med. Ass’n, *Encyclopedia of Medicine* 1000 (Charles B. Clayman ed., 1989).

while he did not personally treat Ms. Matos at the time of the incident, he has “personal knowledge of this hospital’s policies and medical protocol at the time of the Lod Airport Massacre.” He then goes on to state that the Commission incorrectly suggested that the antibiotic “Synthomycetin,” the term appearing in the discharge summary, actually referred to “Synthomycin,” a topical cream. According to Dr. Walden, “Synthomycetin is taken orally in capsule form[,]” and “Ms. Matos Garcia’s prescription was for 1 gram of Synthomycetin per day to be taken orally ‘250 mg x 4/day for 6 days.’” He states that “‘due to serious side effects . . . , it is usually reserved for the treatment of serious and life-threatening infections’” and adds that its use “is most assuredly systemic and not local and indicates a threat for a serious infection.” Citing these conclusions, counsel argued in his brief that the administration of Synthomycetin in capsule form was “an indication of the strength of the infection[,]” an assertion repeated during the oral hearing.

Ms. Hayles, in her affidavit, provides conclusions that largely mirror those of Dr. Walden. Based on her own research, Ms. Hayles indicates that the dosage for the antibiotic indicated on Ms. Matos’s discharge summary indicates “a standard dose for chloramphenicol in capsule form. By contrast, something in cream form would generally have a percentage indicating the strength of dilution.” She concurs with Dr. Walden that chloramphenicol—the active ingredient in Synthomycetin—is “a very powerful antibiotic used for serious infections” For this reason, she concludes that “the six day course of antibiotic treatment with chloramphenicol suggests to me, to a reasonable degree of pharmaceutical certainty, that the multiple wounds on Ms.

Matos's face and glutei were significant enough to warrant systemic treatment requiring the administration of a powerful antibiotic."

Ms. Hayles and Dr. Walden make similar conclusions about the import of the tetanus shot that Ms. Matos received. According to Ms. Hayles, "[t]etanus shots are not prescribed for superficial wounds (i.e. wounds that are only on the surface of the skin)." For his part, Dr. Walden states that Ms. Matos was "at heightened risk for serious infection and further aggravation of injury. To treat or prevent serious and life threatening infections, a course of medical treatment with a strong antibiotic such as synthomycin and administration of a tetanus shot are absolutely medically necessary." In light of these conclusions, claimant argued that "if the wounds were superficial, Ms. Matos Garcia would not have needed a tetanus shot or been put on the strong course of antibiotic treatment"

In his brief and during the oral hearing, counsel also discussed the meaning of the phrase "[n]o deep wounds or injury" in the discharge summary, a point raised by the Commission in its Proposed Decision. Counsel pointed to Dr. Walden's statement, in his supplemental affidavit, that "this does not mean that Ms. Matos Garcia did not suffer significant physical injury[,]" and that "'deep' does not necessarily indicate superficial."⁴ In this respect, counsel argued, during the oral hearing, that the injuries "could be somewhere between more than superficial and yet not so deep to be commented on in a discharge summary"

Given the evidence presented, claimant is apparently arguing that its burden to provide medical evidence about the nature and severity of Ms. Matos's alleged physical injuries can be met by inferences to be drawn from the particular medications—a

⁴ The Commission assumes that Dr. Walden meant "'deep' does not necessarily indicate not superficial."

tetanus shot and prescription for an antibiotic—that she received. While the conclusions in the affidavits regarding the dosage and form of Synthomycetin prescribed appear plausible, these affidavits, together with the discharge summary, nevertheless raise as many questions as they answer.

With regard to the prescription of the antibiotic Synthomycetin, the affidavits and the discharge summary are unclear as to the precise reason why this drug was prescribed. Much of the evidence suggests that it was prescribed to *prevent*, not to treat, an infection. For example, as noted above, Dr. Walden states that its use “indicates a threat for a serious infection.” Similarly, he states that, “with multiple shrapnel wounds in her face and glutei, and considering her diabetic condition, she was at heightened risk for serious infection” In another sentence, he states that the antibiotic was administered “to treat *or prevent* serious and life-threatening infections” (emphasis added).

Similarly, the affidavit testimony of Alberto Folch, M.D., submitted with the initial claim, indicates that the Synthomycetin was administered prophylactically: “With many shrapnel wounds in her face and glutei, and considering her age and gender she was at serious risk for infection Additionally, because she was a diabetic, she was at heightened risk for infection and needed antibiotics to prevent infection from occurring.”

The affidavit testimony of Ms. Hayles, however, is unclear as to the reason for the prescription, and indeed suggests the possibility that the drug was prescribed to treat an actual infection. Ms. Hayles states that in her opinion, Ms. Matos’s wounds “were significant enough to warrant systemic treatment requiring the administration of a

powerful antibiotic.” However, she does not specify whether “treatment” encompasses prophylactic measures or refers only to treatment of an infection that has already developed. On this point, the Commission notes that there is no evidence in the record—and particularly no record in the discharge summary—to indicate that Ms. Matos was in fact suffering from an infection.

To support her conclusions, Ms. Hayles relies on a printout from an information database named Clinical Pharmacology, which she identifies as “a drug information database Rite-Aid uses that is generally accepted in the pharmaceutical profession”⁵ The database states that “[s]ystemic chloramphenicol is contraindicated . . . as *prophylaxis* because of the potential for toxicity[,]” and more specifically that “the drug must not be used . . . in the prophylaxis of bacterial infections.” However, Ms. Hayles did not appear before the Commission, and so the Commission did not have the opportunity to question her to determine, for example, whether this 2012 contraindication for this particular drug was the same as in 1972 in Israel.⁶

With regard to Ms. Matos’s treatment with tetanus toxoid, Dr. Walden stated that a tetanus shot was “absolutely medically necessary” to “treat or prevent” serious infection. For her part, Ms. Hayles states that a tetanus shot was administered due to the “risk of tetanus,” adding that it is generally administered “to patients who have wounds that would be vulnerable to contamination.” Supporting this view, the Clinical Pharmacology database states that tetanus toxoid is used for prophylaxis against tetanus

⁵ Ms. Hayles attached the pages referenced in this online database with her affidavit. However, because the database appears to be available only by subscription, the Commission was only able to review the pages submitted.

⁶ Indeed, during the oral hearing, counsel for the claimant was asked whether Synthomycetin could have been used differently in 1972 in Israel than it would be used today. Counsel pointed out that Dr. Walden’s opinion as to this matter was entitled to deference, insofar as he was the chief surgeon at Tel Hashomer Hospital at the time of the incident, and is competent to testify as to how the drug was used in Israel in 1972.

“for patients with large, contaminated wounds[]”; at the same time, however, it also states that “[a]vulsions, wounds from missiles, a crushing injury, punctures, burns, frostbite, and wounds with dirt, feces, soil or saliva are considered to be large or contaminated.” This suggests that any wound, regardless of severity, that results from shrapnel, causes punctures or burns, or contains dirt, would warrant treatment with a tetanus shot, especially in an environment, such as Lod Airport at the time of the attack, where there were many seriously-wounded victims who sustained significant blood and fluid loss. Clearly this could encompass superficial injuries. For this reason, and in light of the other evidence outlined above, the administration of a tetanus shot fails to provide sufficient medical evidence to meet claimant’s burden to demonstrate that Ms. Matos’s physical injuries were more than superficial.

In sum, the affidavits submitted on objection do little to clarify the uncertainty as to why these medications were administered. This is especially problematic in light of the fact that the discharge summary clearly states that Ms. Matos suffered “[n]o deep wounds or injury.” Although both Dr. Walden and Ms. Hayles dismiss this statement, explaining that this does not necessarily mean that Ms. Matos’s wounds were superficial, their only support for this assertion is that the two medications were administered. If the wounds had been significant, one might expect some indication of that fact on the discharge summary, especially when that same discharge summary even includes the results of Ms. Matos’s urine examination (“no pathological findings”). In any event, the Commission is unable to draw inferences about the nature and severity of Ms. Matos’s physical injuries based on the evidence of the medications administered, where the reasons for those medications is unclear from the evidence presented. Thus,

the administration of Synthomycecin and tetanus toxoid, without more, is insufficient to meet claimant's burden to satisfy the Commission's physical injury standard.

Finally, the claimant argues that the Commission has issued awards to other claimants in this program based solely on shrapnel wounds and a tetanus shot and that it should thus do the same here. In particular, claimant points to Claim No. LIB-II-100, Decision No. LIB-II-070 (2011). That decision, however, is distinguishable: the claimant in Claim No. LIB-II-100 provided more extensive and detailed evidence than was presented here. For instance, the contemporaneous record in that claim described an "open wound" on the claimant's left arm, which a recent medical exam confirmed left a 2.5 cm scar. In addition, recent medical reports confirmed that a shrapnel fragment remained lodged under claimant's right eye. The evidence included radiological images from 2004—prior to this claims program and the filing of the claim—along with an accompanying report and a second opinion confirming the presence of the embedded shrapnel. Further, the surgery report indicated a fifteen-day prognosis. The reference to the tetanus shot administered in that claim was at most corroborative of other information in the record. In short, the medical evidence in claim No. LIB-II-100 concretely and explicitly demonstrated the fact that the physical injuries were more than superficial. In contrast, claimant's evidence here requires the Commission to make inferences about the severity of Ms. Matos's injuries, inferences based on the medications that were administered. For these reasons, the Commission's decision in Claim No. LIB-II-100 provides no support for an award in this claim.

In sum, given the claimant's burden to "verify the injury by medical records," *Claim of 5 U.S.C. § 552(b)(6)* , Claim No. LIB-II-039, Dec. No. LIB-II-015

(2010), the evidence from Ms. Matos's discharge summary from Tel Hashomer Hospital, evidence that she received a tetanus shot and was prescribed Synthomycin, is insufficient to establish that she suffered a discernible, non-superficial physical injury as a result of the Lod Airport incident.

II. Testimonial Evidence Regarding Treatment in Puerto Rico and Permanent Injuries

Claimant also argues that the affidavits provided by Ms. Matos's daughters—Carmen Luz Sanchez de Bartolomei, M.D. and Ana Mercedes Kampe—establish the nature and severity of Ms. Matos's injuries by providing detailed information about her medical treatment upon returning to Puerto Rico. Claimant contends that these affidavits constitute “reliable testimonial evidence” that support an award by establishing the non-superficial nature of Ms. Matos's injuries.

Dr. Sanchez and Ms. Kampe each provided an affidavit with the initial submission describing Ms. Matos's injuries and the effect on her life; however, the supplemental affidavit of Dr. Sanchez submitted on objection contains the most detailed description of Ms. Matos's alleged physical injuries and treatment. Dr. Sanchez states that she flew to Israel immediately after the incident to be with her mother^{5 U.S.C. § 7}_{552(b)(6)}. She explains that when she arrived, she learned that her mother had suffered shrapnel wounds on her face, chest, and lower body. Dr. Sanchez further states that she “saw the many shrapnel wounds underneath [her mother's] skin. It was like black pieces of metal were buried beneath the skin in those areas” She adds that her mother “was weak, in pain, and could only walk leaning forward at a shuffle. She was also in traumatic shock. I had to help bathe and dress her. I also tended to her

⁷ 5 U.S.C. § 552(b)(6)
Decision No. LIB-II-076 (2011).

See Claim No. LIB-II-114,

wounds on her face, thorax, and glutei.” Dr. Sanchez notes that the wounds “displayed signs of infection.”

Dr. Sanchez further states that, upon returning to Puerto Rico approximately one week after the incident, she and her late husband, who was also a physician, provided additional medical treatment to her mother. Although she does not recall the details of this treatment, she recalls that her “husband prescribed my mother antibiotics for ten days. My mother also required regular wound care (cleaning and re-bandaging of the wounds).” Dr. Sanchez states that, because she and her husband provided her mother’s follow-up care in Puerto Rico, “no medical records exist.”

According to Dr. Sanchez, Ms. Matos was left with “black pieces of metal deeply buried in her face, thorax, and gluteus so that it looked like she had holes punched in her skin with black metal in the middle, similar to the appearance of pockmarks.” She avers that, as a result, her mother “had permanent scars on her chest, neck, and face.” Ms. Kampe offers similar testimony, stating that her “mother had permanent scars on her chest, neck, and face caused by metal shrapnel pieces deeply embedded in the front of her chest above her breasts, her cheek, and neck” Dr. Sanchez also states that Ms. Matos would also “feel phantom pains in her chest and neck long after the attack.”

During the oral hearing, counsel for the claimant was asked whether there were any photographs available showing Ms. Matos’s alleged scarring; he responded that he had been unable to obtain any photographs and that Ms. Matos had been “reluctant to take pictures.” On this point, Ms. Kampe states in her affidavit that her “mother would use make-up to cover the shrapnel wounds; she was extremely self-conscious about

people being able to see her wounds and did her best to hide the physical wounds. That is why there are no pictures of her scars.” Similarly, Dr. Sanchez states that her “mother was very embarrassed and ashamed of her scars and would cover them up in pictures. For this reason, no pictures of her wounds exist.”

Despite the detailed information contained in the affidavits, there is no other evidence corroborating either Ms. Matos’s alleged medical treatment upon her return to Puerto Rico or the permanent scarring she is alleged to have suffered. Claimant argues that such affidavit evidence has been relied on in other claims in this program and that the Commission should do so here. In particular, claimant cites Claim No. LIB-II-114, Decision No. LIB-II-076 (2011), and Claim No. LIB-II-091, Decision No. LIB-II-054 (2011). In contrast to this claim, however, the affidavits in those claims served simply as corroborating evidence for actual medical records. In Claim No. LIB-II-114, the claimant produced, in addition to an affidavit, contemporaneous evidence that included a detailed discharge summary describing the claimant’s injuries, which included open fractures, and treatment that included wound excision. An x-ray examination referenced in the discharge summary confirmed that the claimant had, in fact, suffered fractures to fingers on her left hand. Likewise, in Claim No. LIB-II-091, the claimant submitted, in addition to affidavits, both contemporaneous and more recent medical records—including radiological images—confirming the presence of embedded shrapnel in the claimant’s body. In both claims, the affidavits were not the only evidence used to establish the nature and severity of the alleged physical injury; rather the affidavits merely corroborated information contained elsewhere in the record, particularly the contemporaneous and non-contemporaneous medical records.

As noted in the Proposed Decision in this claim, physical injury claims in the Libya Claims Program require that the claimant verify the alleged injury with medical records. *See also* 5 U.S.C. § 552(b)(6) ; *supra*. Here, the affidavits of Ms. Matos's daughters do describe a detailed and plausible narrative concerning Ms. Matos's medical treatment upon her return to Puerto Rico, as well as a detailed description of the permanent scarring she is alleged to have suffered. However, there are no medical records confirming any of that treatment or scarring. In such circumstances, the affidavits alone are insufficient evidence to meet the claimant's burden to show that Ms. Matos suffered a "discernible physical injury, more significant than a superficial injury." *Id.*

CONCLUSION

Claimant has provided insufficient evidence to satisfy the Commission's physical injury standard in this claim. The administration of an antibiotic and a tetanus shot are indicative of some physical condition, but they do not, in and of themselves and in the context of a discharge summary that also clearly states that Ms. Matos had "[n]o deep wounds or injury," demonstrate "a discernible physical injury, more significant than superficial." Further, while Dr. Sanchez's detailed affidavit describing her mother's scars and follow-up treatment in Puerto Rico provides helpful information, it is insufficient to establish the medical facts it describes: without medical documentation, the Commission cannot rely on this affidavit as sufficient evidence of a non-superficial physical injury.

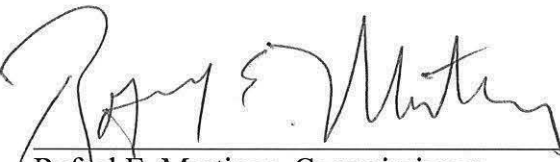
Therefore, for the reasons discussed above, and based on the evidence and information submitted in this claim, the Commission again concludes that the claimant

has not met its burden of proving that it has satisfied the Commission's standard for physical injury.⁸ Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, October 26, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

⁸ 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) (2011).

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Counsel for Claimant:

Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by the Estate of Luz Belen Matos Garcia ("claimant"), based upon physical injuries said to have been sustained by Ms. Matos at Lod Airport in Tel Aviv, Israel on May 30, 1972. Ms. Matos died in 1983 of causes unrelated to the attack.

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral").

The present claim is made under Category E. According to the January Referral, 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 lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

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 ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On June 30, 2010, the Commission received a completed Statement of Claim in which the claimant asserts a claim under Category E of the January Referral, along with exhibits supporting the elements of its claim. This submission included evidence of: the U.S. nationality of the claimant's decedent, the late Luz Belen Matos Garcia; Ms. Matos' presence at the scene of the terrorist incident; and her alleged physical injuries for which the claimant now claims compensation.

The claimant states that Ms. Matos was present in the terminal at Lod Airport in Tel Aviv, Israel on May 30, 1972, when three terrorists armed with automatic rifles began shooting and throwing hand grenades at passengers gathered in the baggage claim area. Claimant asserts that Ms. Matos suffered injuries from "multiple shards of grenade shrapnel that lacerated her face and glutei." Claimant states that, immediately following the incident, Ms. Matos was taken to a local hospital, where she was given a tetanus shot

and an antibiotic. According to the claimant, Ms. Matos was hospitalized overnight and was prescribed a six-day course of antibiotics. The claimant further states that “[s]hrapnel remained permanently embedded in Ms. Matos’ body.”

According to Ana Mercedes Kampe, one of the decedent’s daughters, Ms. Matos “was in pain for a long time and was on pain medicine for her wounds when she returned home from Israel.” She further states that her mother “had permanent scars on her chest, neck, and face[]” resulting from “metal shrapnel pieces, deeply embedded in the front of her chest . . . her cheek, and neck, so it looked like my mother had many black pockmarks in those areas.” Ms. Kampe also alleges that her mother “suffered from emotional trauma” and “would feel phantom pains in her chest and neck long after the attack.”

DISCUSSION

As an initial matter, the Commission has reviewed the Decision issued by the Superior Court of Puerto Rico, Division of Humacao, on June 22, 1990, indicating that Ms. Matos died intestate and widowed, and identifying the heirs to her estate. Specifically, the court “declare[d] the sole and universal heirs of Luz Belén Matos García to be her daughters Carmen Luz and Ana Mercedes Sánchez Matos.” The claimant estate has also provided a copy of a Decision issued on August 19, 2011 by the Puerto Rico General Court of Justice, Court of First Instance, Superior Division of San Juan, appointing Carmen Luz Sanchez Matos as administrator of the estate. Documentation submitted by the claimant reflects that the decedent was a U.S. national at the time of the incident¹ through her death in 1983, and that both of the estate beneficiaries are U.S.

¹ Citizens of Puerto Rico were initially granted U.S. citizenship by the Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917), amended by Act of June 27, 1934, Pub. L. No. 73-477, 48 Stat. 1245 (codified as amended at

nationals by birth. Based on this review, the Commission finds that the ESTATE OF LUZ BELEN MATOS GARCIA, DECEASED; CARMEN LUZ SANCHEZ MATOS, ADMINISTRATOR, is the proper claimant in this claim.

Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission's jurisdiction here is limited to the category of claims defined under Category E of the January Referral; 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, *supra* ¶ 7.

Nationality

In *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. In the case of claims brought by estates on behalf of beneficiaries, it is a well-established principle of the law of international claims, which has been applied by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that, for purposes of determining the nationality of a claim, the nationality of the injured person as well as the beneficiaries

48 U.S.C. § 733b (2006)), *repealed by* the Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 403, 66 Stat. 163, 279 (1952). Currently, under the INA, "[a]ll persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth." 8 U.S.C. § 1402 (2006).

of his or her estate must be evaluated in order to establish that the claim has been held continuously by U.S. nationals from the date of injury through the date of the Settlement Agreement.²

To meet this requirement, the claimant has provided the birth certificate of the claimant's decedent, Luz Belen Matos Garcia, indicating her place of birth in Naguabo, Puerto Rico, and copies of current U.S. passports for Carmen Luz Sanchez de Bartolomei and Ana Mercedes Kampe, also evidencing their birth in Puerto Rico. Based on this and other evidence in the record, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within Category E of the January Referral, the claimant must assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral. January Referral, *supra*, ¶ 7. This list includes the "May 30, 1972 attack at Lod Airport in Israel, as alleged in *Franqui v. Syrian Arab Republic, et al.* (D.D.C.) 06-cv-734." *Id.*, Attachment 2, ¶ 1. In its Statement of Claim, the claimant sets forth a claim for physical injury suffered by the late Luz Belen Matos Garcia as a result of the May 30, 1972 Lod Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of its claim.

² See, e.g., *Claim of THE ESTATE OF JOSEPH KREN, DECEASED against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of PETER KERNAST*, Claim No. W-9801, Decision No. W-2107 (1965); *Claim of RALPH F. GASSMAN and URSULA ZANDMER against the German Democratic Republic*, Claim No. G-2154, Decision No. G-1955 (1981); *Claim of ELISAVETA BELLO, et. al. against Albania*, Claim No. ALB-338, Decision No. ALB-321 (2008).

Pending Litigation

Finally, Category E of the January Referral states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral, *supra*, ¶ 7. Attachment 2 to the January Referral identifies the Pending Litigation cases associated with each Covered Incident and includes the *Franqui* case, which, as noted above, is the Pending Litigation related to this claim. Claimant has provided a copy of the First Amended Complaint in *Franqui*, which demonstrates that neither the claimant estate, nor any of the beneficiaries, were plaintiffs in the Pending Litigation. In addition, claimant, through its duly appointed administrator Carmen Luz Sanchez Matos, has stated under oath in its Statement of Claim that it was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has satisfied this element of its claim.

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

Standard for Physical Injury

As stated in the January Referral, 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, *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 the Statement of Claim and accompanying documents, the decedent suffered physical injuries at Lod Airport on May 30, 1972 when, as discussed above, three gunmen opened fire and tossed hand grenades at the crowd gathered in the baggage claim area. Specifically, claimant avers that the late Ms. Matos suffered “severe lacerations to her face and glutei from multiple shards of grenade shrapnel.” Claimant further avers that Ms. Matos “was immediately admitted to the Tel Hashomer/Haim Sheba Medical Center and administered a tetanitis [sic] shot and synthomycetin.” Further, “[s]he required an overnight stay at the hospital and six days of antibiotic treatment.” Claimant states that “[a]dditional treatment followed upon her return to Puerto Rico[,]” and that “[s]hrapnel remained permanently embedded in Ms. Matos’ body, causing her disfigurement and humiliation.”

In support of its claim, claimant has provided, *inter alia*, a contemporaneous medical record; copies of newspaper articles, published in the days following the incident, identifying Ms. Matos as one of those wounded in the attack; a copy of Ms. Matos’ Air France passenger ticket, noting her travel to Tel Aviv on the date of the

incident; an informational letter addressed to Ms. Matos, dated May 12, 1972, from the Puerto Rican tour director, noting the group's date of travel to Israel; an affidavit from Ana Mercedes Kampe describing her mother's alleged injuries and their permanent effects; an affidavit from Raphael Walden, M.D., who was the lead surgeon at Tel Hashomer Medical Center on the date of the incident; an affidavit from Alberto L. Folch, M.D., expressing his awareness of Ms. Matos' injuries and involvement in the Lod Airport incident shortly thereafter, and commenting on her medical treatment; and a copy of a program from a June 1972 memorial service held in Puerto Rico in memory of the Lod Airport attack, which lists Ms. Matos as among those wounded.

The contemporaneous medical record provided with this claim provides little evidence of significant physical injury. Although this record—a discharge summary from Tel Hashomer Medical Center—notes that Ms. Matos was injured in the Lod Airport attack by “numerous shrapnel fragments in her face[,]” it also notes that she suffered “[n]o deep wounds or injury.” Moreover, the “Treatment Instructions” indicate only that she “[r]eceived toxoid^{3]} 0.5 c.c.[,]” and that “[s]he is being discharged.” Under the heading “Recommendation for Sick Leave,” a notation indicates that Ms. Matos “should receive 1 gram Synthomycetin⁴ for 6 days”; however, no instructions for follow-up or further treatment are included. In addition, as the discharge summary is dated May 31, 1972, it appears that Ms. Matos was released only one day after the incident.

³ A toxoid is an “inactivated bacterial *toxin* (poisonous protein). . . . Certain toxoids are used to immunize against specific diseases, such as *diphtheria* or *tetanus*.” Am. Med. Ass’n, *Encyclopedia of Medicine* 1000 (Charles B. Clayman ed., 1989).

⁴ Synthomycetin is “a broad-spectrum antibiotic . . . now produced synthetically.” *Synthomycetin Generic*, Generic Drugs, [http:// www.igenericdrugs.com/?s=Synthomycetin](http://www.igenericdrugs.com/?s=Synthomycetin) (last visited May 16, 2012); *see also* Nat’l Insts. of Health, *Chloramphenicol Injection*, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a608008.html> (last visited May 16, 2012). In Israel (the site of the Lod Airport attack), it is known as “synthomycin” and “is indicated for the topical treatment of infections” *See Synthomycin Generic*, Generic Drugs, <http://www.igenericdrugs.com/?s=Synthomycin> (last visited May 16, 2012); *Synthomycetin Generic*, *supra*.

As noted above, claimant asserts that Ms. Matos had shrapnel fragments embedded in her upper body, and that her injuries left permanent scars in that area; however, no evidence has been provided which substantiates either of these assertions. On this point, it should be noted that claimant has provided no photographs of Ms. Matos' injuries, nor has it provided any medical documentation apart from the discharge summary from Tel Hashomer Hospital. In addition, although claimant alleges that Ms. Matos required additional treatment after returning to Puerto Rico, again, no evidence, apart from the statements of decedent's daughter, has been provided in support of this assertion. Finally, it should be noted that, although the various lists of persons wounded in the Lod Airport attack include Ms. Matos' name, they provide no information detailing the nature and severity of her alleged injuries.

Given the information available in the discharge summary and the absence of any other medical records submitted in support of this claim, the Commission cannot conclude that the claimant's decedent suffered "a discernible physical injury, more significant than a superficial injury." On this point, it should be noted that in proceedings before the 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) (2011).

In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met its burden of proof in that it has failed to provide evidence sufficient to establish that its decedent "suffered a discernible physical injury,

more significant than a superficial injury,” 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, ESTATE OF LUZ BELEN MATOS GARCIA, DECEASED; CARMEN LUZ SANCHEZ MATOS, ADMINISTRATOR, does not qualify for compensation under the January Referral. Accordingly, its claim 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, May 16, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner



Anuj C. Desai, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2011).