



On April 3, 2012, the claimant filed a "Notice of Objection" and requested an oral hearing. By letters dated April 11, 2012 and September 17, 2012, the Commission requested that claimant submit any additional evidence that he wished it to consider in support of his objection. In response, under cover of letter dated on October 18, 2012, the claimant submitted an objection brief along with his own declaration and the report of Edward M. Decker, M.D. dated September 25, 2012. The oral hearing was held on November 8, 2012.

## DISCUSSION

Category D of the January Referral consists of:

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

January Referral at ¶ 6. As noted in the Commission's Proposed Decision, claimant satisfies the first and third requirements: he received an award under the December Referral, and his Pending Litigation against Libya had been dismissed prior to his submitting this claim. The only issue on objection, therefore, is whether the severity of claimant's injury is a special circumstance warranting additional compensation.

At the oral hearing, claimant provided additional evidence about his injuries. Claimant testified that he continues to experience pain in his left foot to the present which interferes with his ability to stand, walk and sleep. Specifically, claimant testified that he can only stand or walk for "ten to fifteen minutes" before sitting down and that "every other night...the [pain] intensity level is high and it wakes [him] up." Claimant also

testified that the pain is not confined to his left foot, but rather that it “starts in the foot itself, goes all the way through the leg itself, and goes all the way up to [his] spine” and that he takes over-the-counter medication four to five times a day.

Claimant also testified about the effect his injuries have had on his major life functions. Specifically, claimant testified that he could no longer continue in his profession as a Civil Engineer because he could no longer perform his duties—including performing site visits which had been an essential component of his job prior to the hijacking. He further testified that he acquired a franchise called “Salad Works,” where he could hire people to do the work that he is unable to do because of his injury. Claimant further testified that the injury has affected his family life because he is unable to travel to family functions and is unable physically to play with his grandchildren and, further, that although he continues to play tennis, he plays in a very limited capacity and for only 10 or 15 minutes at a time.

The newly submitted medical evidence consists of the report of an examination conducted by a certain Dr. Decter dated September 25, 2012. In his report, Dr. Decter determined the claimant to have a “7.5% permanent disability of the left foot.” Dr. Decter further states that the fact that claimant’s toes are “not articulated” causes an “extraordinary painful condition, whether he is walking or simply standing.”

#### *Analysis*

Category D of the January Referral requires the Commission to determine whether the “severity of the injury is a special circumstance warranting additional compensation.” January Referral, ¶6. In assessing whether compensation is warranted in this claim, the Commission considers the factors articulated in its decision in *Claim of 5 U.S.C. § 552(b)(6)* Claim No. LIB-II-109, Decision No. LIB-II-112 (2011). These factors, assessed in light of

the totality of the evidence, include the nature and extent of the injury, the extent (if any) of physical disfigurement, and the effect on the claimant's major life functions.

The first factor is the nature and extent of the injury. In its Proposed Decision, the Commission stated that "the injury has not required significant hospitalization of the claimant." Claimant explained in his objection brief that he did not require additional hospitalization because the treatment options for his injury were limited. Claimant's explanation reinforces the Commission's finding in its Proposed Decision that the nature of the injury suffered by claimant did not require recurrent hospitalization or treatment, beyond that initially provided contemporaneous to the hijacking.

The second factor is the extent (if any) of physical disfigurement. The Commission found in its Proposed Decision that "while the claimant has established that he suffered disfigurement of his toes...such disfigurement—consisting of overlapping toes—does not rise to the level of deformity warranting additional compensation... ." The claimant has not provided any additional evidence beyond that described in the materials submitted prior to the Commission's Proposed Decision.

Finally, the claimant asserted that the consequences of his injuries have significantly interfered with his major life functions and in particular his ability to work. In support of this assertion, claimant has submitted the disability rating determination of Dr. Decker and his own testimony. While this evidence supports claimant's contention that he was limited in his ability to continue performing his duties as a Civil Engineer—his career previous to the hijacking—it does not support a finding that claimant was unable to engage in remunerative work or that the injuries substantially limited his major life functions. The reference to "major life functions" in <sup>5 U.S.C. §</sup> 552(b)(6) does not include a specific chosen career where, as here, the claimant has the capability to work in a variety of other

fields. In addition, claimant's testimony at the hearing regarding his familial and athletic limitations is also insufficient to alter the Commission's determination on this point.

Accordingly, the Commission concludes that the evidence is insufficient to make a finding that the severity of claimant's injury is such as would warrant an award of compensation under Category D in addition to the \$3 million that has been awarded to him for this injury in this program.

#### CONCLUSION

For the reasons set forth above, the Commission concludes that 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, December 21, 2012  
and entered as the Final Decision  
of the Commission.

  
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Timothy J. Feighery, Chairman

  
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Rafael E. Martinez, Commissioner

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-146

Decision No. LIB-II-142

Counsel for Claimant:

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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation based on the alleged severity of physical injuries suffered by, and the hostage-taking of, 5 U.S.C. §552(b)(6) during the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

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 Categories A and D. According to the January Referral, Category A consists of

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to [the Secretary of State’s] referral of December 11, 2008.

*Id.* at ¶ 3. Category D of the January Referral consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by our December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to our December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim’s death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 6. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter (“December Referral”) from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People’s Libyan Arab Jamahiriya*

("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

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

By Proposed Decision entered on February 18, 2010, the Commission denied the claimant's physical injury claim submitted pursuant to the December 2008 Referral. The claimant objected to the Commission's decision and requested an oral hearing which was held on July 21, 2011. Considering the evidence proffered in support of his objection, as well as the claimant's testimony during the oral hearing, the Commission concluded that the injury to claimant's foot—a dislocation deformity of three of his toes and a deep wound—met the Commission's standard for physical injury and, consequently, that the claimant was entitled to compensation in the amount of \$3 million. 5 U.S.C. §552(b)(6)

, Claim No. LIB-I-016, Decision No. LIB-I-038 (2011). The Commission issued its Final Decision in the claim to this effect on September 6, 2011.



## BASIS OF THE PRESENT CLAIM

On July 1, 2010, the Commission received from claimant a completed Statement of Claim in which he asserts claims under Categories A and D of the January Referral Letter, along with exhibits supporting the elements of his claim, including evidence of his U.S. nationality, and the extent of his injury. With regard to his claim for additional compensation, claimant asserts that “[t]he severity of [his] injuries, the fact that he has lived with these severe deformities for over two decades, and the potentially irreversible damage caused by his injuries, are...special circumstances warranting additional compensation under Category D... .” The evidence submitted includes claimant’s testimony before the Commission on July 21, 2011, the statements of both claimant and his son, medical records, and photographs of claimant’s left foot.

### DISCUSSION

#### *Category A Claim*

The language of the January Referral quoted above provides that in order for a claim to be included under Category A the claimant must establish that he or she “did not receive an award pursuant to [the Secretary of State’s] referral of December 11, 2008.” Given the Commission’s Final Decision awarding claimant’s claim under the December Referral, noted above, the claimant is unable to meet this critical element of Category A. Accordingly, the Commission finds that this claim for compensation under Category A of the January Referral must be, and hereby is, denied.

#### *Category D Claim*

##### Jurisdiction

Under subsection 4(a) of the ICSA, the Commission’s jurisdiction here is limited, under Category D of the January Referral, to claims of individuals who: (1) are U.S.

nationals; (2) received an award under the December Referral; and (3) have dismissed their respective Pending Litigation cases against Libya. January Referral, *supra*, ¶ 6.

#### *Nationality*

The Commission determined in its decision on claimant's physical injury claim under the December Referral that the claim was owned by a U.S. national from the date of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies equally to satisfy the nationality requirement here.

#### *Award Under the December Referral*

To fall within the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of his Category D claim.

#### *Dismissal of the Pending Litigation*

The January Referral also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 6. The Commission determined in its decision on claimant's physical injury claim under the December Referral that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya, et al.*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination also applies here.

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

Merits

Category D of the January Referral requests, in pertinent part, that the Commission determine whether “the severity of the injury is a special circumstance warranting additional compensation.” In making this determination, the Commission considers the following. First, the Commission is familiar with the nature of all of the injuries that fall under Category D.\* Second, the Commission’s standard for physical injury in this program sets a relatively low threshold for compensable injuries; specifically, a claimant need only establish that he or she suffered an injury that is discernible, and more significant than a superficial injury. *See Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001, at 8-9 (2009). Third, the amount of compensation awarded for compensable injuries in this program—a fixed amount of \$3 million for each compensable injury—is, in the Commission’s experience, exceptionally high when compared to other claims programs, and extraordinarily high for compensable injuries that were not severe, but which nonetheless met the Commission’s standard. Therefore, to the extent that a monetary award can ever adequately compensate for a physical injury, the eligible claimants in this program have, for the most part, been adequately compensated via the Commission’s awards under the December Referral.

Considering the foregoing, the Commission concludes that only the most severe injuries will constitute a special circumstance warranting additional compensation under Category D. In determining which injuries are among the most severe, the Commission considers the nature and extent of the injury itself, the impact that the injury has had on claimant’s ability to perform major life functions and activities—both on a temporary and

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\* As indicated above, in its adjudication of claims under the December Referral, the Commission has already examined all of the eligible Category D claims.

on a permanent basis—and the degree to which claimant’s injury has disfigured his or her outward appearance. These factors are applied to the present claim as set forth below.

In support of claimant’s Category D claim for additional compensation, claimant has incorporated by reference the record of his claim under the December Referral and, further, has submitted, among other documents, the declaration of his son. 5 U.S.C. §552(b)(6)

In his declaration 5 U.S.C. §552(b)(6) asserts that his father “cannot stand for long periods of time without excruciating pain that can only be lessened by sitting down”; “is now unable to participate in activities that require weight bearing or impact, such as walking, hiking, running or racquet sports,” which has affected vacations, social events and his ability to participate in his grandchildren’s lives; “wakes up with a significant amount of pain and swelling in his foot” the morning following an active day; and “has difficulty wearing closed toe shoes” because his “foot is very sensitive to the touch.”

During claimant’s December Referral Oral Hearing, he provided testimonial, physical, and documentary evidence. Claimant’s testimony was largely consistent with the aforementioned statement submitted by his son with the exception of his ability to participate in athletic activities. Specifically, claimant testified that “I have my mobility itself, I play tennis...I play racquetball.” The physical and documentary evidence presented at the oral hearing included both photographs and an actual physical observation by the Commissioners of claimant’s left foot. This evidence revealed a deformity to claimant’s left foot, specifically an overlapping toe—claimant’s second toe over his third toe—and a scar.

In addition, claimant submitted, along with his December Referral Statement of Claim, a report of a medical evaluation conducted by a Dr. DiMenna dated August 4, 2009. In this report Dr. DiMenna states that the claimant’s “vascular status is intact” and that

“[t]here are no neurological deficits.” However, he notes that “his left great toe...appears to be flexion contracture at the IPJ joint” and “[h]is second and third digits...appear to be subluxed and dislocated in a rigid nature with bony prominence noted plantarly.” Dr. DiMenna further states that claimant’s “options would be to live with this the way they are, to offload the area with shoes as it is not likely that orthotics would be helpful or to surgically intervene.”

Considering the totality of the evidence submitted, the Commission is not persuaded that the severity of the injury suffered by the claimant is such that it would qualify for additional compensation under Category D, that is, beyond the \$3 million already awarded. In this regard, the Commission notes that the injury has not required significant hospitalization of the claimant. Furthermore, while the claimant has established that he suffered disfigurement of his toes, the Commission finds that such disfigurement—consisting of overlapping toes—does not rise to the level of deformity warranting additional compensation beyond the \$3 million already awarded. With regard to the physical limitations associated with claimant’s injuries, it appears from the evidence that while claimant experiences pain or requires rest after long periods of activity, he is not substantially limited from engaging in any of his major life activities. Moreover, the Commission notes that Dr. DiMenna indicates that this condition could be improved if the claimant were to “offload the area with shoes.” Accordingly, while the Commission in no way wishes to minimize the fact of claimant’s pain, it finds that such circumstances do not amount to a substantial impairment so as to warrant additional compensation.

Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional

compensation under Category D, beyond its award of \$3 million under the December Referral.

Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, March 15, 2012  
and entered as the Proposed Decision  
of the Commission.



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Timothy J. Feighery, Chairman



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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) (2011).