

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-III-012
	}	
	}	Decision No. LIB-III-022
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant: Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

FINAL DECISION

Claimant objects to the Commission's Proposed Decision denying her claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya"). In a previous claims program, the Commission awarded Claimant \$3 million based on physical injuries she suffered during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In this claim, she seeks additional compensation for these same injuries. In the Proposed Decision, the Commission denied the claim because Claimant had not established that the severity of her injuries constituted a "special circumstance" warranting additional compensation, as required by the State Department's referral letter authorizing the Commission to hear claims in this program.¹ On objection, Claimant provides additional evidence and argument in support of her claim. She states that the evidence now

¹ See Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission ("2013 Referral" or "November 2013 Referral").

demonstrates that she suffered permanent impairment and disfigurement, and that she should be awarded at least an additional \$1.5 million. After carefully considering Claimant's new evidence and arguments, we again conclude that Claimant has not established that the severity of her injuries constitutes a special circumstance warranting additional compensation within the meaning of the 2013 Referral. We therefore affirm the denial of this claim.

BACKGROUND

Claimant brought this claim against Libya based on the physical injuries she suffered during the terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. She alleges that she was struck by shrapnel (and possibly gunfire) in her right thigh, right ankle, left arm, and abdomen. Claimant states that this in turn has caused permanent injury to her right leg, ongoing pain in her right leg and right knee, and limitation of her ability to stand and walk. In a previous program, the Commission awarded her \$3 million for her injuries. In this claim, she now seeks compensation above and beyond that \$3 million, based on a claim that the severity of her injuries is a special circumstance warranting additional compensation.

In a Proposed Decision dated June 10, 2015, the Commission concluded that Claimant had satisfied the requirements for jurisdiction, but denied the claim for additional compensation, finding that the severity of Claimant's injuries was not a special circumstance warranting additional compensation.²

On June 15, 2015, Claimant filed a timely notice of objection and requested an oral hearing. On March 28, 2016, Claimant submitted a brief containing further argument and evidence in support of her objection. The evidence consisted of a

² See Claim No. LIB-III-012, Decision No. LIB-III-022 (2015) (Proposed Decision).

declaration of Dr. Mark (Marcel) A. Reischer, dated March 27, 2016, medical notes, and recent (March 2016) photographs of Claimant's right thigh and left upper arm. The Commission held a hearing on April 14, 2016; Claimant and Dr. Reischer testified at the hearing, and Claimant's counsel argued on Claimant's behalf.

DISCUSSION

To prevail on this claim, Claimant has the burden to prove that the severity of her injuries is a "special circumstance" warranting additional compensation beyond the \$3 million already awarded to her.³ Thus, to decide this claim, the Commission must determine whether Claimant's evidence, which now includes Claimant's testimony, the testimony and written declaration of Dr. Reischer, and the newly submitted medical notes and photographs, suffices to meet that burden.

Claimant makes numerous arguments. She asserts that she suffers from severe muscle atrophy of her right thigh, long-standing pain as the result of a neuroma from her injuries, progressively worsening limitation of her ability to stand, progressively worsening limitation of her ability to walk, and serious issues related to her mobility. Claimant further alleges that she has fallen several times, undergone multiple surgeries, undergone physical therapy, and has substantial disfigurement of her right thigh. Claimant states that Dr. Reischer's declaration and testimony as well as the medical notes substantiate the severity of her injuries. She further asserts that the March 2016 photographs document substantial disfigurement of her right thigh and left upper arm.

After carefully considering Claimant's evidence and argument in light of the applicable standard in this claim, we again conclude that, even with this new evidence, Claimant has failed to carry her burden of proving her claim.

³ 2013 Referral, ¶ 6.

I. Proposed Decision

In the Proposed Decision, we denied the claim primarily for two reasons: (1) Claimant had not demonstrated that her purported ongoing injuries were related to the Lod Airport attack, and, more importantly, (2) even if she had, the nature and extent of her injuries were not, and are not, sufficiently severe to warrant additional compensation beyond the \$3 million she has already been awarded.⁴ On the second point, the Commission stated that Claimant

has not demonstrated that the injuries have had a sufficiently significant impact on her ability to perform major life functions and activities to warrant additional compensation. Claimant states that, as a result of her 1972 injuries and the remaining shrapnel in her right leg, she suffers from severe, persistent right leg and knee pain; she now has a hobbling gait; and she has moderate to severe impairment including limitation of her ability to stand and walk. Claimant has not demonstrated that her injuries had a severe life-changing impact on her personal or professional life comparable to that we have previously deemed sufficient to warrant additional compensation.⁵

The Proposed Decision further stated that Claimant's disfigurement was too limited to support the conclusion that the severity of Claimant's injuries is a special circumstance warranting additional compensation.⁶

II. Claimant's New Evidence

On objection, Claimant testified and submitted recent (March 2016) photographs of her right thigh and left arm. She has also provided the testimony and declaration of Dr. Mark (Marcel) A. Reischer, MD, and additional medical progress notes and records from 2014 and 2015, as well as recent notes from a rehabilitation clinic.

⁴ Proposed Decision at 11-13.

⁵ *Id.* at 13.

⁶ *Id.*

In his declaration and testimony, Dr. Reischer drew several conclusions about Claimant's various injuries. With respect to her right leg injuries, he stated that Claimant's injuries have caused her disabling pain and dysfunction in her right lower extremity; that she has significant muscle atrophy in her right leg and many large, deep disfiguring scars in her thigh; that the circumference of Claimant's right thigh is 3 cm smaller than her left thigh at a point 10 cm above her patella, which constitutes severe atrophy of the right thigh/quadriceps; and that, measured further up her legs, near her scarring, the atrophy is even greater, with the right leg 5-7 cm narrower than the left leg at the site of injury. Dr. Reischer opined that this results in a 5% disability rating of the whole person on the basis of Table 37 of the Fourth Edition of the *American Medical Association's Guides to Evaluation of Permanent Impairment* (hereinafter "AMA Guide").

Dr. Reischer also opined that Claimant suffers from a neuroma. He stated that the neuroma is on one of the femoral nerve branches and was likely caused by the trauma and shrapnel from the Lod Airport attack. Accordingly, Dr. Reischer concluded that this results in an additional 5% disability rating to the whole person for pain based on Example 1 (#4) on page 67 of the AMA Guide.

Dr. Reischer also stated that Claimant suffers from osteoarthritis in the right knee. He further noted that Claimant's muscle atrophy exacerbates the osteoarthritis, because the weaker atrophied muscle does not adequately protect the knee joint. To support his claim that Claimant has osteoarthritis, Dr. Reischer relied on October 2014 x-rays that allegedly show that the joint space of Claimant's right knee is far narrower than the joint space of her left. Dr. Reischer did not, however, personally review the x-rays. Rather, a Dr. Jeffrey Gronkowicz purportedly reviewed the x-rays and took the joint-space

measurements at Dr. Reischer's request. A copy of those x-ray reports and Dr. Gronkowicz's correspondence was attached to Dr. Reischer's declaration. Dr. Reischer further stated that the arthritis and associated pain and weakness have resulted in Claimant having a gait abnormality and have caused her to suffer falls. He concluded that, under the AMA Guide, Claimant has an additional 10% permanent disability as to the whole person from the right knee arthritis as measured by the loss of cartilage.

In sum, Dr. Reischer opined in his Declaration that when these combined disability values (muscle atrophy, painful neuroma, and arthritis) are taken together under the AMA Guide's Combined Values Chart, Claimant is 19% disabled as to the whole person.

Claimant testified about the Lod Airport attack and the physical injuries she suffered at the time, her treatment in Israel, her return to Puerto Rico, and her subsequent treatment over the following years. Claimant also provided the medical progress notes of Dr. Dario Cardona, which very briefly reference Claimant having had five surgeries on her right leg because of grenade particles; her needing to lose weight; and her having left knee pain and right hip pain which generally fluctuate between none at all to a 3 or 5 out of a scale of 10. The notes also state that Claimant has no pain or less pain when she takes certain medication; has fallen down a number of times; has a "BMI"⁷ that defines her as obese; and is able to perform physical activity and "ADL."⁸ Claimant has also provided medical records from Lakeland Regional Medical Center, which note that Claimant's right leg and knee pain generally fluctuates from none at all to minor

⁷ Body Mass Index (BMI) is a person's weight in kilograms divided by the square of height in meters. BMI can be used to screen for weight categories that may lead to health problems. See <https://perma.cc/49SB-E3AX>.

⁸ ADL appears to be an abbreviation for "activities of daily life." See <https://perma.cc/5GA5-3QTQ>.

discomfort to moderate; that Claimant sometimes uses a cane; that Claimant had multiple surgeries to remove shrapnel and as a result has decreased muscle mass which causes gait abnormality and knee instability; and that Claimant has fallen a number of times.

III. Analysis

The Commission considers three factors in determining whether the severity of a victim's physical injuries is a "special circumstance warranting additional compensation" under Category D of the 2013 Referral: "(1) the nature and extent of the injury itself, (2) the impact that the injury has had on a claimant's ability to perform major life functions and activities—both on a temporary and on a permanent basis—and (3) the degree to which the claimant's injury has disfigured his or her outward appearance."⁹

On objection, Claimant argues that the totality of the evidence now satisfies her burden of demonstrating that the severity of her injuries constitutes a "special circumstance" warranting additional compensation. The essence of Claimant's argument is that the disabling effects of the injuries Dr. Reischer attributes to the Lod Airport attack—principally, muscle atrophy, painful neuroma, and osteoarthritis—and the disfigurement to her right thigh, as depicted in the new photographs, are severe enough to warrant an additional \$1.5 million in compensation. She argues in particular that her injuries are comparable to those suffered by three other victims who have received awards for additional compensation in these Libyan claims programs.¹⁰ Even with Claimant's new evidence, however, she has failed to establish that the severity of her

⁹ Proposed Decision at 6 (*quoting* Claim No. LIB-III-021, Decision No. LIB-III-016, at 7 (Proposed Decision)) (brackets omitted).

¹⁰ *See* Claim No. LIB-II-168, Decision No. LIB-II-110 (2012); Claim No. LIB-II-154; Decision No. LIB-II-170 (2013); and Claim No. LIB-II-174, Decision No. LIB-II-180 (2013).

injuries constitutes a special circumstance warranting additional compensation beyond the \$3 million she has already been awarded.

Claimant's principal argument, that the Proposed Decision underestimated the long-term impact her injuries had on her ability to perform major life functions and activities, is based on Dr. Reischer's opinion that she is 19% disabled under the AMA Guide. Dr. Reischer's opinion, however, has several problems that undermine its reliability, including those discussed below.

First, Dr. Reischer's total disability rating of 19% appears to be based on double counting. Dr. Reischer assigned separate disability ratings for Claimant's muscle atrophy and her neuroma conditions, and combined these two ratings. Yet, the AMA Guide appears to preclude counting both ailments. The Guide states that when assessing muscle atrophy, "[d]iminished muscle function should be estimated under only one of several parts of this chapter, relating to gait derangement (p. 75), *muscle atrophy* (p. 76), manual muscle testing (p. 76), or *peripheral nerve injury*."¹¹ Since Dr. Reischer counted a 5% disability rating of the whole person based on the muscle atrophy, it appears that he should not have *also* included the 5% disability rating of the whole person based on Claimant's neuroma, which can be considered a "peripheral nerve injury."¹² Dr. Reischer's responses at the objection hearing failed to adequately explain this double counting.

Second, there is insufficient support for Dr. Reischer's testimony about the causal connection between the Lod Airport attack and Claimant's neuroma, which he inferred from the neuroma's location. Dr. Reischer's declaration stated that, "[b]ased on the

¹¹ AMA Guide at 76 (emphases added).

¹² See, e.g., *MR Neurography of Neuromas Related to Nerve Injury and Entrapment with Surgical Correlation*, *AJNR Am J Neuroradiol* 31:1363-68 (A. Chhabra, E.H. Williams, K.C. Wang, A.L. Dellon and J.A. Carrino, Sep. 2010).

location of the neuroma, as described in the medical records, it is likely on one of the femoral nerve branches and injured by the trauma and shrapnel from the Lod attack.” When questioned about this conclusion at the objection hearing, however, Dr. Reischer conceded that there is a non-invasive test that could have determined the location of Claimant’s neuroma (and, thus, whether the neuroma is more likely than not related to the Lod Airport attack). But, when asked, Dr. Reischer failed to explain adequately why this test was not performed.

Third, Dr. Reischer’s conclusion that the neuroma results in a 5% disability rating to the whole person for pain is based on seemingly inapplicable portions of the AMA guide. In particular, Dr. Reischer’s reliance on Example 1 (#4) on page 67 of the AMA guide seems misplaced. Claimant was injured in her leg, and yet, the example on which Dr. Reischer relies involves an *upper extremity*, the index finger: An individual receives a 5% rating for the loss of the use of the index finger, which is then multiplied by the relevant pain evaluation to get the impairment to the upper extremity. The example then refers to several tables related to upper extremity impairments.¹³ At the objection hearing, Dr. Reischer failed to answer adequately several questions about this somewhat unusual claim, including whether it is appropriate to use an example addressing impairments of the upper extremity for a leg neuroma.

Fourth, Dr. Reischer’s evaluation of Claimant’s osteoarthritis condition was based, at least initially, on patently erroneous information. Dr. Reischer based his

¹³ Specifically, the example refers to Table 15 (page 54) and Table 11a (page 48) of the AMA Guide. Table 15 is the table for evaluating Maximum *Upper Extremity* Impairments Due to Unilateral Sensory or Motor Deficits or Combined Deficits of the Major Peripheral Nerves. Table 11a is the table for Determining Impairment of the *Upper Extremity* Due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders. As best we can tell, nothing in the AMA Guide indicates that these tables can be used for nerve damage to other parts of the body, and, despite Dr. Reischer’s claim that one can simply use the rating from an index-finger nerve injury for a lower-body nerve injury, neither he nor Claimant point to anything in the AMA Guide supporting this unusual claim.

assessment of both the cause and extent of Claimant's right knee osteoarthritis on a claim that the joint space in Claimant's right knee was less than in her left knee. This claim was in turn based on measurements made not by Dr. Reischer himself, but by Dr. Jeffrey Gronkiewicz. Dr. Gronkiewicz sent the final diagnostic reports to Dr. Reischer under a cover e-mail stating that the measurements were made on an x-ray of the left knee allegedly taken on June 6, 2014. Claimant has not, however, submitted any x-ray dated June 6, 2014. At the objection hearing, Dr. Reischer testified that he was unaware that the diagnostic report on which he relied was based on an x-ray that was not included in Claimant's file (or that was misdated). Furthermore, Dr. Reischer conceded that while he had relied on Dr. Gronkiewicz in formulating his medical opinion, he had never met Dr. Gronkiewicz or reviewed Dr. Gronkiewicz's qualifications, and that he did not know the training or expertise on which Dr. Gronkiewicz had based his assessment.¹⁴

When questioned by the Commission at the objection hearing about these numerous problems with Dr. Reischer's sworn declaration, Dr. Reischer and Claimant's counsel conceded that Dr. Reischer's calculation was flawed, and that Claimant was not 19% disabled as to the whole person under the AMA Guide, as Dr. Reischer had attested in his written expert opinion. Claimant's counsel asserted at the hearing that instead Claimant was actually either 15% or 13% disabled as to the whole person under the AMA Guide. We remain troubled by the contradiction between the written expert opinion submitted and the expert testimony provided on direct examination, Claimant's

¹⁴ More than a month after the objection hearing, Claimant filed with the Commission the correct x-ray diagnostic reports and x-rays, and a declaration by Dr. Gronkiewicz and a supplemental declaration of Dr. Reischer. However, Dr. Reischer's lack of knowledge about a key diagnostic assessment on which he relied for his declaration to this Commission raises questions as to the overall value of his assessment and opinion; and the fact that these supplemental filings were made after the objection hearing deprived the Commission of an opportunity to seek further direct clarification under sworn examination.

expert's inability to provide clear answers to questions posed by the Commission, and the overall lack of diligence and accuracy these flaws suggest.

Ultimately, however, the shortcomings of Dr. Reischer's opinions are not the sole basis of our conclusion. Even if we accepted Dr. Reischer's opinions, Claimant still would not have shown that her injuries and disabilities had a significant enough impact on her ability to perform major life functions and activities to support compensation beyond the \$3 million she has already been awarded.¹⁵

Claimant's argument that her disfigurement was more significant than the Proposed Decision recognized and serious enough to support her claim for additional compensation is similarly unavailing. That argument is based on recent photographs of her right thigh and left upper arm. First, although the photographs of Claimant's right thigh do demonstrate significant scarring, Claimant has not provided any pictures of this disfigurement from the more than forty years between the terrorist attack and her filing of this claim, and we do not know whether any other factors, such as age, weight, and/or other non-Lod Airport related surgeries (all factors with some support in the record), may have contributed to the disfigurement. Second, the disfigurement is not one that would ordinarily be visible, and Claimant did not provide any evidence that it had a demonstrable impact on her life.¹⁶ As for Claimant's left arm, the photographs do not appear to show substantial disfigurement, nor has Claimant provided any evidence that her left-arm scarring had a significant impact on her life either. Claimant's disfigurement is thus insufficient to support an award of additional compensation.

¹⁵ See Proposed Decision at 11-13 (and claims cited).

¹⁶ Cf. Claim No. LIB-III-021, *supra*, at 17 (finding severe disfigurement to claimant who lost both of her legs and has to wear prostheses); Claim No. LIB-II-116, Decision No. LIB-II-166, at 5 (2012) (denying claim where disfigurement was not a prominent feature of claimant's overall outward appearance).

Similarly deficient is Claimant's contention that additional compensation is warranted by recent medical evidence, submitted for the first time on objection, including medical progress notes and records from 2014 and 2015, and notes from a rehabilitation clinic. According to Claimant, these records, when considered with medical records previously provided, show that her initial injuries "were so severe that she required several surgeries to repair the damage." The new medical evidence does make very brief mention of multiple surgeries that claimant had to her right leg due to her shrapnel injuries. However, we have no evidence that these notations were based on pre-existing, contemporaneous medical records (none of which have been provided to the Commission) as opposed to Claimant's own oral recitation of her medical history at the time of treatment. Additionally, the newly submitted records were created after the 2009 Referral¹⁷ and the 2013 Referral, which limits their reliability.¹⁸ More importantly, these medical records do not indicate how extensive, invasive, or disruptive the surgeries were, or whether they required Claimant to be hospitalized, and if so, for how long.¹⁹

While Claimant's testimony provided some additional details about the surgeries, it does not support a determination that the injury and subsequent surgeries were so severe as to warrant additional compensation when viewed in the context of all the Libyan claims before the Commission.²⁰ Moreover, the newly submitted medical records contain statements suggesting that the nature of Claimant's impairment from the shrapnel

¹⁷ *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.*

¹⁸ *See* Claim No. IRQ-009, Decision No. IRQ-I-004, at 8-9 (2015).

¹⁹ *See* Proposed Decision at 10.

²⁰ *See* Proposed Decision at 10-11; *see also* Claim No. LIB-II-148, Decision No. LIB-II-185 (2012) (denying claim for additional compensation where claimant had bullet wounds to his chest, buttocks and leg; had spent eight days in the hospital after the terrorist attack; had to fly back home while lying on his abdomen and then spent another four weeks in a hospital near his home; and had medical records showing continued pain in his lower leg, thigh and back for the first few years after the attack).

injuries, while real, was not severe enough to support additional compensation beyond the \$3 million Claimant has already been awarded. In particular, the records describe Claimant's right leg pain as usually fluctuating between no pain (when she takes medication) and moderate pain, and note repeatedly that Claimant is independently able to perform physical activity and "ADL," which we presume stands for "Activities of Daily Living."²¹

The crux of Claimant's legal argument, that the totality of her injuries and disfigurement are similar to, or worse than, injuries suffered by three claimants who have received additional compensation in these Libyan claims programs, is based on inapt comparisons. The first of the decisions on which Claimant relies, Claim No. LIB-II-168, Decision No. LIB-II-110, dealt with a unique set of circumstances: that claimant sustained a lifelong impairment starting at the age of 3, and he has lived with the disfigurement, uncontrollable spasms, chronic impediment, and a 40% impairment to his left upper extremity, which corresponded to a 24% impairment of the whole person, ever since, with demonstrable impact on his personal and professional development.²² The second decision, Claim No. LIB-II-174, Decision No. LIB-II-180 (2013), involved a claimant who suffered severe scarring on her left leg and the complete loss of mobility of her left foot due to a deformed, dropped left foot and clawing of the toes. Although the evidence is clear that Claimant here has scarring on her right thigh, there is no indication that the impact, duration, and disfigurement is of the same extent. Likewise, Claimant's injuries are not similar to the injuries the claimant suffered in Claim No. LIB-II-154, Decision No. LIB-II-170, the third of the decisions on which Claimant relies. In that

²¹ See *supra* note 8; see also Proposed Decision at 12-13.

²² See Claim No. LIB-II-168, Decision No. LIB-II-110, *supra*, at 3-5.

claim, the claimant suffered bilateral calcaneal fractures of both feet, crushed bone, damaged heel bone, surgical insertion of plates and screws into both feet, arthritis, continuous pain, casting, wheel chair use, and weekly physical therapy, all of which prevented the claimant from resuming her employment.

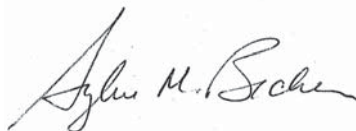
CONCLUSION

In sum, for the reasons discussed above and in the Proposed Decision, and in light of the severity of the injuries suffered by all the claimants who have sought additional compensation in these Libyan claims programs, the severity of Claimant's injuries does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Claimant has endured, she is not entitled to additional compensation beyond the \$3 million the Commission has already awarded her. 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, November 29, 2016
and entered as the Final Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

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Counsel for Claimant:	Joshua M. Ambush, Esq. Joshua M. Ambush, LLC
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PROPOSED DECISION

Claimant brings this claim against the Great Socialist People’s Libyan Arab Jamahiriya (“Libya”) based on physical injuries she suffered during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In that attack, Claimant was struck by shrapnel (and possibly gunfire) in her right thigh, right ankle, left arm, and abdomen. Claimant states this in turn has caused permanent injury to her right leg, ongoing pain in her right leg and right knee, and limitation of her ability to stand and walk. In a previous program, the Commission awarded Claimant \$3 million in compensation for these injuries. Claimant now seeks additional compensation based on a claim that the severity of her injuries is a “special circumstance warranting additional compensation.” Because Claimant has failed to demonstrate that the terrorist attack was the cause of any of her long-term injuries or that her injuries are sufficiently severe to warrant additional

compensation beyond the \$3 million she has already been awarded, she is not entitled to additional compensation in this program. Therefore, the claim is denied.

BACKGROUND AND BASIS OF CLAIM

Claimant was in the terminal at Lod Airport in Tel Aviv, Israel, on May 30, 1972, when three armed terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. She states that in that attack shrapnel tore through her right thigh, right ankle, left arm, and abdomen.¹ Claimant states that, as a result of her injuries in the attack, she had to endure five days of immediate hospitalization, five subsequent surgeries, and physical therapy, and that she now has permanent injury to her right leg and right knee which has caused, and continues to cause, substantial pain and limitation of her ability to stand and walk.

Although Claimant was not among them, a number of the Lod Airport victims sued Libya (and others) in federal court in 2006. *See Franqui v. Syrian Arab Republic*, No. 06-cv-734 (D.D.C.). In August 2008, the United States and Libya concluded an agreement that settled numerous claims of U.S. nationals against Libya, including claims “aris[ing] from personal injury ... caused by ... [a] terrorist attack.” *See Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* Art. I (“Claims Settlement Agreement”), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008; *see also* Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008). Two months later, in October 2008, the President issued an Executive Order, which, among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling

¹ Claimant’s husband died in the Lod Airport attack, and Claimant was one of the beneficiaries of her husband’s estate, which was awarded \$10 million by the Commission in a separate claim for his wrongful death. *See* Claim Nos. LIB-II-080 and LIB-II-103, Decision No. LIB-II-150, at 6 (2012).

within the terms of the Claims Settlement Agreement. *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

The Secretary of State has statutory authority to refer “a category of claims against a foreign government” to this Commission. *See* International Claims Settlement Act of 1949 (“ISCA”), 22 U.S.C. § 1623(a)(1)(C) (2012). The Secretary delegated that authority to the State Department’s Legal Adviser, who, by letters dated December 11, 2008, and January 15, 2009, referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement.

In 2010, Claimant filed a claim under the January 2009 Referral, alleging that she had suffered physical injuries as a result of the Lod Airport attack. By Proposed Decision entered May 10, 2011, the Commission determined that Claimant was eligible for compensation under Category E of that Referral and awarded her a fixed sum of \$3 million for her physical injuries. *See* Claim No. LIB-II-079, Decision No. LIB-II-041 (2011) (“Physical-Injury Decision”). Because Claimant did not file an objection to the Proposed Decision, the Proposed Decision automatically became the Commission’s Final Decision on June 20, 2011. *See* 45 C.F.R. § 509.5 (g) (2014).

The Legal Adviser referred an additional set of claims to the Commission on November 27, 2013. *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”). One category of claims from the 2013 Referral is applicable here. That category, known as Category D, 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 January 15, 2009 referral or by this referral, provided that (1) the claimant has received an award for physical injury pursuant to our January 15, 2009 referral or this 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 claimant did not make a claim or receive any compensation under Category D of our January 15, 2009 referral.

2013 Referral at ¶ 6.

On December 13, 2013, the Commission published notice in the *Federal Register* announcing the commencement of the third Libya Claims Program pursuant to the ICSEA and the 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On May 2, 2014, the Commission received from Claimant a Statement of Claim seeking compensation under Category D of the 2013 Referral. Claimant supplemented her filing with further information and exhibits in a submission dated January 2, 2015. Her submissions also incorporated by reference the evidence she had previously submitted in connection with the physical-injury claim she made under the January 2009 Referral.

DISCUSSION

Jurisdiction

The Commission must first consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the "Category D" paragraph of the 2013 Referral is limited to claims of (1) "U.S. nationals"; who (2) have received an award for physical injury pursuant to the January 15, 2009 referral or this referral and (3) did not make a claim or receive any compensation under Category D of the January 15, 2009 referral. 2013 Referral ¶ 6.

Nationality

With respect to the first jurisdictional element, this claims program is limited to “claims of U.S. nationals.” Here, that means that a claimant must have been a national of the United States continuously from the date the claim arose until the date of the Claims Settlement Agreement. *See* Claim No. LIB-III-001, Decision No. LIB-III-001, at 5-6 (2014).

In its Decision on Claimant’s physical-injury claim under the January 2009 Referral, the Commission found that Claimant was a U.S. national from the time of the attack continuously through the effective date of the Claims Settlement Agreement. Physical-Injury Decision, *supra*, at 4. She therefore satisfies the nationality requirement here.

Prior Award

To fall within the category of claims referred to the Commission, a claimant must have received an award under either the January 2009 or November 2013 Referrals. The Commission awarded Claimant \$3 million based on her physical-injury claim under the January 2009 Referral. Claimant has thus satisfied this element of her Category D claim.

No Claim Under Category D of the January 2009 Referral

With respect to the final jurisdictional requirement, Claimant did not make a claim or receive any compensation under Category D of the January 2009 Referral. Therefore, Claimant meets this element of her claim as well.

In summary, this claim is within the Commission’s jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

Standard for Special Circumstances Claims

The Commission has previously drawn on decisions from the January 2009 Referral to determine what constitutes a “special circumstance” in this program. The 2009 Referral decisions, made pursuant to the same Libyan Claims Settlement Agreement and involving the same terrorist attacks, addressed the exact same question as that presented here, whether the “severity of [a victim’s] injury” constitutes a “special circumstance warranting additional compensation.” The Commission adopted the same standard that it applied under the 2009 Referral and held that in determining whether the severity of a victim’s physical injuries is a “special circumstance warranting additional compensation” under Category D of the 2013 Referral, the Commission would consider three factors: “[(1)] the nature and extent of the injury itself, [(2)] the impact that the injury has had on a claimant’s ability to perform major life functions and activities—both on a temporary and on a permanent basis—and [(3)] the degree to which the claimant’s injury has disfigured his or her outward appearance.” Claim No. LIB-III-021, Decision No. LIB-III-016, at 7 (Proposed Decision).

Importantly, in all of its “additional compensation” decisions under the 2009 Referral (and its 2013 Referral “additional compensation” decisions to date), the Commission addressed these three factors in light of the unique context of the Commission’s Libyan claims programs, under which every successful physical-injury claimant received an initial award of \$3 million. While noting that no amount of money can adequately compensate some victims for their injuries, the Commission recognized that \$3 million is “exceptionally high when compared to other claims programs”

See Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). For that reason, the Commission emphasized that “the eligible claimants in [the Libya claims] program [had], for the most part, been adequately compensated” *Id.* at 6. Starting from that premise, the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D. As discussed in more detail below, Claimant has not shown that her injuries are among the most severe in this program, and she is thus not entitled to additional compensation under the November 2013 Referral beyond the \$3 million the Commission has already awarded her.

Factual Allegations

Claimant states that she was in the terminal at Lod Airport in Tel Aviv, Israel, on May 30, 1972, when three armed terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. She states that, in that attack, she was struck by shrapnel (and possibly gunfire) in her right thigh, right ankle, left arm, and abdomen. Claimant further states that she “required immediate surgery for the shrapnel wounds,” but that, because she was pregnant, “the hospital was unable to perform certain surgeries or x-ray[s] due to the extent of the shrapnel wounds.” According to Claimant, she was discharged from the hospital on June 4, 1972 at her own request and she then returned to Puerto Rico. Claimant states that in the first few years after returning to Puerto Rico she underwent five surgeries to her right leg, and that foreign metallic bodies have been found in her body over the years.

Claimant additionally states that, as “a result of the right thigh injury and the remaining shrapnel in her right leg, [she] . . . suffers from severe, persistent right leg and

knee pain,” and “complications includ[ing]” neuroma that causes pain in her right leg, bone spurs in her right knee, and arthritis of the right knee. Claimant also states that she now has a “hobbling gait consistent with severe knee pain” as well as decreased strength in her knees, decreased lower extremity flexibility and strength, decreased weight-bearing tolerance involving the lower extremities, and a decreased tolerance for dynamic weight-bearing activity.

Supporting Evidence

In support of her claim, Claimant has submitted, among other things, her own declaration; a letter from the Tel Hashomer hospital in Israel to the Israeli National Insurance Institute; a letter from the Puerto Rico Department of Social Services to the Israeli National Insurance Institute; a Tel Hashomer “Discharge Certificate” and “Disease Summation”; progress notes from Claimant’s visits to medical professionals from 1980 through 1994; a radiologist’s evaluations from 1997 and 1998; medical records from Dr. Gonzalez del Rosario from 1996 through 2002; a CT scan in 2002; evaluations by a physical therapist in 2004 and 2006; an MRI in 2004, and 2009; a report by Dr. Luis A. Rodriguez Lopez from 2006; evaluations by physical therapy centers in 2009; files of the Puerto Rico State Insurance Fund Corporation; progress notes from Dr. Dario Cardona from 2013; and evaluations by a physical therapy center from 2013.²

² Claimant has also provided a 1974 decision of the Superior Court of Puerto Rico addressing the distribution of *ex-gratia* funds that Japan provided to the Commonwealth of Puerto Rico for the benefit of Puerto Ricans harmed by the Lod Airport attack. The Special Commissioners appointed by the court established a point system for distributing those funds and awarded Claimant 1,500 points out of a possible total of 2,000. However, Claimant has not provided any evidence as to how the Special Commissioners made that determination. In particular, other Lod Airport victims in these Libyan claims programs have provided the related “Report From Special Commissioners,” a victim-specific document that provides details about how the Special Commissioners determined the point totals in individual cases. In any event, the Special Commissioners’ formula differs from the 2013 Referral’s mandate and the Commission’s

Application of Special Circumstances Factors to Evidence

In making award determinations for additional compensation, we must take into account the severity of the injuries of all the claimants who have sought additional compensation in these Libyan claims programs. See Claim No. LIB-II-110, Decision No. LIB-II-111, *supra*, at 5. Moreover, as noted above, “to the extent that a monetary award can ever adequately compensate for a physical injury,” the Commission views these claims for additional compensation through the lens of the \$3 million previously awarded to Claimant (and all successful claimants in this program) -- an amount that is “exceptionally high when compared to other programs.” *Id.* Seen through that lens, Claimant’s evidence is insufficient to meet her burden to prove that the severity of her physical injuries is a “special circumstance” warranting additional compensation in this claims program.

First, the nature and extent of the initial injuries Claimant suffered in the attack, in and of themselves, were not sufficiently severe to warrant additional compensation beyond the \$3 million already awarded. Although she alleges that she suffered wounds to her right thigh, right ankle, left arm and abdomen, the only injury she alleges to be severe enough to warrant additional compensation is to her right leg; the other injuries were, as the Tel Hashomer Disease Summation puts it, “small” and “superficial.” That

standards for determining whether the severity of a claimant’s injuries warrants additional compensation in this program (as well as the 2009 Referral’s mandate and the Commission’s standard for physical-injury claims under the 2009 Referral). See Claim No. LIB-II-064, Decision No. LIB-II-073, 5-7 (2012) (discussing this same Report in the context of another Lod Airport victim); Claim No. LIB-II-088, Decision No. LIB-II-108, 4-6 (2012) (same). In particular, the Special Commissioners could award considerable points for psychological harm, which is outside the purview of this Commission’s Libya claims programs. *Id.*; see also Claim No. LIB-II-128, Decision No. LIB-II-031 (2012). As Claimant’s husband was killed and Claimant was pregnant at the time of the attack, and the medical records repeatedly discuss her anxiety, many of her 1,500 points may well have been due to psychological harm.

same document refers to the right thigh wound as having “a length of about 8 cm with the lifting of the epidermis of a large area.” It also notes, however, that the wound was “without damage to the muscles.” Thus, the outer layer of the skin (the epidermis) was wounded, but the injury was not so deep as to cause any damage to the muscles underneath. In this program, such an injury is not sufficient to warrant additional compensation because it is not among the most severe in these Libyan claims programs.

Claimant alleges that she underwent five surgeries to her right leg. The evidence she offers, however, makes only brief reference to surgeries, and it provides no further information about them. For example, one medical record that appears to explicitly support her having had five surgeries is dated November 20, 1991, and it states simply, “Operated Rt. Leg 1979 By Dr. Soltero. Harrington (the 5th on [illegible] leg – shrapnel from grenade Israeli airport tragedy).” The only other medical record that appears to support the claim of five surgeries is from Dr. Dario Cardona at Advanced Internal Medical Care, P.A. in Lakeland, Florida, dated October 8, 2013, which states, under the surgical history notes, “RT leg 5 times [due] to [trauma grenade] particles.” Nor does Claimant’s own declaration provide meaningful information about the surgeries. Claimant merely states that, “The next seven years [after the attack], until 1979, were filled with various surgeries to my right leg. In total, I was required to undergo five different surgeries to my right leg following the incident.” This evidence does not demonstrate why Claimant needed the surgeries, what type of surgeries they were (e.g., how invasive they were), when they were performed, or how long—if at all—Claimant was hospitalized. We recognize the difficulty of finding medical records regarding surgeries that are alleged to have taken place during the 1970s, but the Commission’s

regulations place the onus of establishing the severity of her injuries on Claimant.³ Although Claimant has provided extensive medical records from the past four decades, the scant evidence in these records regarding the surgeries on which Claimant bases her claim is insufficient to establish that the severity of her initial injuries warrants additional compensation.

Moreover, even if Claimant had proven her allegations, the nature and extent of her injuries would not be among the most severe when compared with all the other claimants who have sought additional compensation in these Libyan claims programs. The Commission has previously denied additional compensation to other claimants whose physical injuries were similar to or worse than Claimant's. *See, e.g.*, Claim No. LIB-II-148, Decision No. LIB-II-185 (2012) (denying claim for additional compensation where claimant had bullet wounds to his chest, buttocks and leg; had spent eight days in the hospital after the terrorist attack; had to fly back home while lying on his abdomen and then spent another four weeks in a hospital near his home; and had medical records showing continued pain in his lower leg, thigh and back for the first few years after the attack); Claim No. LIB-II-109, Decision No. LIB-II-112 (2011) (denying claim for additional compensation where the claimant suffered bullet wounds to her right foot with entry and exit wounds, requiring ten days in the hospital and immediate surgery); Claim No. LIB-II-110, Decision No. LIB-II-111, *supra* (denying claim for additional compensation where the claimant suffered a through and through gunshot wound to the chest, requiring four days of hospitalization and a course of antibiotics, and which left a 3-inch scar on his chest).

³ Pursuant to 45 C.F.R. § 509.5(b) (2010), 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.

The second factor—the impact of the injury on claimant’s ability to perform major life functions and activities—also supports the denial of the claim for additional compensation. Claimant has not proven that any of the long-term ailments she complains of are related to the 1972 Lod Airport attack; and, as will be discussed in greater detail below, even if she had, she has not demonstrated that the impact those injuries have had on her ability to perform major life functions and activities has been significant enough to support an award of additional compensation.

Claimant states the shrapnel led to permanent injury to her right leg and knee, ongoing pain, and limitation of her ability to stand and walk. However, she has provided no expert medical assessment connecting her long-term ailments to the 1972 Lod Airport attack. In particular, the diagnosis of her injuries includes neuroma,⁴ osteoarthritis,⁵ and bone spurs, all of which are in and around her right *knee*. Yet, none of the evidence connects any of these knee problems to the injuries she suffered during the terrorist attack, injuries to her right *thigh*, which the Tel Hashomer Disease Summation described as “lifting of epidermis . . . without damage to the muscles.”

While it may be medically possible for grenade and gunfire wounds on one’s thigh to cause knee problems of the sort Claimant alleges, none of her evidence suggests such a connection. Claimant’s only hint of such a connection is to note that one medical record from the 1990s refers to the neuroma as being “between scar and knee,” possibly implying a connection with the scar. But, even assuming the “scar” is from the terrorist

⁴ Citing Taber’s Cyclopedic Medical Dictionary, Claimant defines a neuroma as a “tumor of nerve cells’ [that] can be caused by ‘accidental or intentional incision of the nerve.’”

⁵ Again citing Taber’s, Claimant defines “osteoarthritis” as a “type of arthritis marked by progressive cartilage deterioration in synovial joints and vertebrae.”

attack, the mere location of the neuroma “between” the scar and the knee does not show a causal connection between the scar and the neuroma.

Moreover, even if Claimant had proven that her current physical problems are the direct result of her injuries in the 1972 attack, she has not demonstrated that the injuries have had a sufficiently significant impact on her ability to perform major life functions and activities to warrant additional compensation. Claimant states that, as a result of her 1972 injuries and the remaining shrapnel in her right leg, she suffers from severe, persistent right leg and knee pain; she now has a hobbling gait; and she has moderate to severe impairment including limitation of her ability to stand and walk. Claimant has not demonstrated that her injuries had a severe life-changing impact on her personal or professional life comparable to that we have previously deemed sufficient to warrant additional compensation. *See* Claim No. LIB-II-116, Decision No. LIB-II-166 (2012) (denying claim for additional compensation where claimant had nerve damage to his right leg requiring him to wear a foot brace for 18 months to mitigate “foot drop,” had shrapnel remaining in both legs, was assessed as having a partial permanent disability in both legs, and although unable to continue in his prior profession after his injuries, was eventually able to find work in a lower paying job).⁶

The third factor—the degree of disfigurement—also supports our conclusion that the severity of Claimant’s injuries is not a special circumstance warranting additional compensation. This factor has been important to the outcome of the Commission’s decision to award additional compensation only when the disfigurement has been significant. *See, e.g.*, Claim No. LIB-III-021, Decision No. LIB-III-016, *supra*, at 17

⁶ *See also* Claim No. LIB-II-175, Decision No. LIB-II-139 (2012) (denying claim for additional compensation where the claimant had regular hip and knee pain that prevented her from participating in certain family activities, and a separated pelvis during pregnancy)

(finding severe disfigurement to claimant who lost both of her legs and has to wear prostheses); Claim No. LIB-II-116, Decision No. LIB-II-166, *supra*, at 5 (denying claim where disfigurement was not a prominent feature of claimant's overall outward appearance). Claimant does not contend that she has significant disfigurement. While the medical records do make brief reference to scars, Claimant has provided almost no further information about them. As noted earlier, the 1972 Tel Hashomer Disease Summation states that "[t]he major and largest wound is on the outer section of the right thigh with a length of about 8 cm with the lifting of epidermis of a large area. . . . Small wounds from 1 cm 3 cm on the right ankle, left arm and abdomen, all are superficial." We have no information, however, about the size of any enduring scars, the degree of their severity, or whether, and to what degree, if any, they have had an impact on Claimant's life. In sum, the evidence of disfigurement is not sufficient to persuade us that the severity of Claimant's injuries warrants additional compensation under Category D.

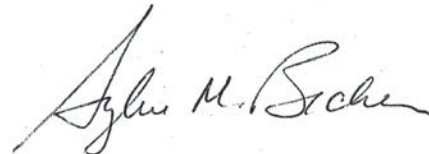
Conclusion

Having considered all of Claimant's evidence in light of the severity of the injuries suffered by all the claimants who have sought additional compensation in these Libyan claims programs, the Commission concludes that the severity of the injuries in this claim does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Claimant has endured, she is not entitled to additional compensation beyond the \$3 million the Commission has already awarded her. Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, June 10, 2015
and entered as the Proposed Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2014).