

**DEPARTMENT OF JUSTICE****Office of Justice Programs****28 CFR Part 32**

[Docket No.: OJP (OJP)-1333]

RIN 1121-AA56

**Public Safety Officers' Benefits Program****AGENCY:** Office of Justice Programs, Justice.**ACTION:** Final rule

**SUMMARY:** The Bureau of Justice Assistance ("BJA"), Office of Justice Programs, Department of Justice, published the proposed rule for the Public Safety Officers Benefits ("PSOB") Program on July 26, 2005, 70 FR 43,078. During the comment period, BJA received comments on its proposed rule from numerous parties. After further review of the proposed rule and very recent amendments to the underlying statute, and careful consideration and analysis of all comments, BJA made amendments that are incorporated into this final rule.

**DATES:** Effective September 11, 2006.

**FOR FURTHER INFORMATION CONTACT:** Hope Janke, Counsel to the Director, Bureau of Justice Assistance, at (202) 514-6278, or toll-free at 1 (888) 744-6513.

**SUPPLEMENTARY INFORMATION:** BJA published the proposed rule for the PSOB Program on July 26, 2005. During the comment period, BJA received comments on its proposed rule from a number of interested parties: National police and fire associations; municipal police, fire, and rescue departments; PSOB hearing officers; survivors of fallen public safety officers; and individual concerned citizens. Additionally, Members of Congress commented on the proposal. Many of the comments related to the provisions implementing the Hometown Heroes Survivors Benefits Act of 2003 ("Hometown Heroes Act"), Pub. L. 108-182. Many other comments related to various definitions contained in the proposed rule. One commentator expressed approval of the proposed rule for implementing the PSOB Act instead of merely restating or rephrasing the statutory language; BJA has continued this approach in the final rule. After careful consideration and analysis of all comments received, BJA made amendments that are incorporated into this final rule. In addition, the final rule contains some clarifying changes to provisions in the proposed rule where

there were some previously unnoticed ambiguities, or where the language was more complex than necessary; also, the final rule in places changes proposed language that was unintentionally more restrictive than the statute (e.g., the definitions of "parent-child relationship," "adopted child," "intentional misconduct," and several education-benefits provisions). A discussion of the comments and changes follows.

The first part of the discussion generally describes the structure and background of the PSOB Program and aspects of the history of its administration by BJA. The second part of the discussion covers the recent changes to the PSOB Act contained in Public Law 109-162 ("DOJ Reauthorization Act"). Two days after the closing of the comment period for the proposed rule, certain amendments to the PSOB Act were passed by the House of Representatives. Because enactment of these amendments into law appeared to be likely before the end of 2005, BJA deemed it prudent to wait before publishing the final rule. In fact, the amendments (with other changes to the PSOB statute), contained in the bill that became the DOJ Reauthorization Act, were passed by the Senate on December 17th and by the House of Representatives on the following day, and were signed into law by the President on January 5, 2006. Accordingly, the final rule contains several clarifying and conforming changes occasioned by these statutory amendments. The third part of the discussion addresses the comments received by BJA that relate to the proposed provisions implementing the Hometown Heroes Act, and explains the changes being made in the final rule in response to those comments. The fourth part is a specific discussion of the terms "line of duty" and "authorized commuting," in response to a number of comments requesting clarification on these definitions. The last part of the discussion addresses the remainder of the comments in a section-by-section analysis, indicating where changes to provisions were made, or (as the case may be) where BJA determined no changes to be necessary.

As a preliminary matter, BJA wishes to correct two citations made on the same page, 70 FR at 43,080, of the preamble to the proposed rule: (1) In the discussion of the authority of the publication, *Legal Interpretations of the Public Safety Officers' Benefits Act*, and the reliance of courts thereon, one decision mistakenly was included in the list of citations, which should have read: "E.g., *Chacon v. United States*, 48

F.3d 508 (Fed. Cir. 1995), *aff'd* 32 Fed. Cl. at 687-688; *Durco*, 14 Cl. Ct. at 427; *Tafoya v. United States*, 8 Cl. Ct. 256, 262-265 (Cl. Ct. 1985); *North*, 555 F.Supp. at 386; *Morrow*, 647 F.2d at 1101-1102."; and (2) in the discussion of jurisdictional cases that had nullified the rule of the jurisdictional holding of *Russell*, 637 F.2d at 1256-1260, the list of citations, from which two decisions inadvertently were omitted, should have read: "*Davis v. United States*, 169 F.3d 1196 (9th Cir. 1999); *Wydra v. United States*, 722 F.2d 834 (D.C. Cir. 1983); *Tafoya v. Dep't of Justice*, 748 F.2d 1389 (10th Cir. 1984); *see also*, *Durco v. LEAA*, No. 86-3660, order (3d Cir., Dec. 24, 1986); *Russell v. Law Enforcement Assistance Administration*, 637 F.2d 354 (5th Cir. Unit A 1981); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35 (4th Cir. 1980); *LaBare v. United States*, No. C04-4974 MHP, slip op. at 3-5 (N.D. Ca. Mar. 10, 2005); *Ramos-Vélez v. United States*, 826 F.Supp. 615 (D. P.R. 1993); *Thomas v. United States*, No. 80-6511-Civ-ALH, order (S.D. Fl., Mar. 16, 1981)."

**I. General Background**

An individual serving a public agency does not have an automatic or freestanding statutory right to a PSOB Act death or disability benefit. In order to qualify for the PSOB Act death or disability benefit, rather, a claimant must demonstrate (and BJA must "determine[]") under "regulations issued pursuant to" the Act, "that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty," 42 U.S.C. 3796(a), or "that a public safety officer has become permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty," *id.* 3796(b). Thus, in death and disability cases, the Act requires BJA to determine two distinct issues: First, the status of the individual—whether he was a public safety officer; and second, the circumstances of his death or disability—whether it was directly and proximately caused by a line of duty injury.

The PSOB Act is an effort to "balance[] 'compensating for inadequate state and local benefits [with] budgetary considerations and \* \* \* fears that federal assumption of full responsibility for compensating the families of deceased officers would weaken the federal system and allow states and municipalities to evade their responsibility.'" *Chacon v. United States*, 32 Fed. Cl. 684, 687 (1995) (citing *Russell v. Law Enforcement Assistance Admin.* 637 F.2d 1255, 1261 (9th Cir. 1980)), *aff'd*, 48 F.3d 508 (Fed.

Cir.); see *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (per curiam); *Holstine v. Dep't of Justice*, No. 80-7477, slip op. at 2 (9th Cir., Aug. 4, 1982), 688 F.2d 845, 846 (table). To this end (and sharply unlike the case with PSOB Act education benefits, which the law provides that the Attorney General "shall provide," 42 U.S.C. 3796d-1(a)(1), or "shall approve," *id.* 3796d-2(b)), the Act expressly entrusts vast administrative and interpretive authority to BJA in defining the very right to a death or disability benefit—the benefit shall be paid only when "the Bureau of Justice Assistance \* \* \* determines, under [its own] regulations that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty," *id.* 3796(a), or "that a public safety officer has become permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty," *id.* 3796(b). The Act—in at least four places—expressly authorizes BJA to issue regulations, *id.* 3796(a) & (b), 3796c(a), and 3796d-3(a), and goes on to provide that the regulations issued by BJA "will be determinative of conflict of laws issues arising under" the Act, and that, although BJA "may utilize such administrative and investigative assistance as may be available from State and local agencies[, r]esponsibility for making final determinations shall rest with the Bureau." *Id.* 3796c(a) & (b). Clearly, the legislative intention is for BJA to exercise its discretion and expertise to administer the Act and to define and "determine[.]" consistent with the Act as a whole, the circumstances under which death and disability benefits should be extended. See, e.g., *Porter v. United States*, 64 Fed. Cl. 143 (2005), *aff'd*, No. 05-5105, order (Fed. Cir., Apr. 6, 2006).

Carrying out this legislative intention has been challenging; since the PSOB Act's enactment into law, Public Law 94-430, 90 Stat. 1346, 1346-1348 (1976), the Act has been amended no fewer than eighteen times, sometimes creating overlapping statutory structures.<sup>1</sup> These myriad amendments

<sup>1</sup> E.g., Pub. L. 96-157, sec. 2, 93 Stat. 1167, 1219 (1979); Pub. L. 98-411, sec. 204, 98 Stat. 1545, 1561 (1984); Pub. L. 98-473, secs. 609F, 609Z, 98 Stat. 1837, 2098, 2107 (1984); Pub. L. 99-500, sec. 101(b) (sec. 207), 100 Stat. 1783, 1783-56 (1986); Pub. L. 99-591, sec. 101(b) (sec. 207), 100 Stat. 3341, 3341-56 (1986); Pub. L. 100-690, secs. 6105, 6106, 102 Stat. 4181, 4341 (1988); Pub. L. 101-647, secs. 1301-1303, 104 Stat. 4789, 4834 (1990); Pub. L. 102-520, 106 Stat. 3402 (1992); Pub. L. 103-322, sec. 330001(e), 108 Stat. 1796, 2138 (1994); Pub. L. 104-238, 110 Stat. 3114 (1996); Pub. L. 105-180, 112 Stat. 511 (1998); Pub. L. 105-390, 112 Stat. 3495 (1998); Pub. L. 106-276, 114 Stat. 812 (2000);

(or, rather, some of them) have allowed some ambiguities and imprecision in the Act that BJA has had to work through in the thousands of individual PSOB Act benefit claims it has processed in the thirty years since the program began. For example:

(1) As originally enacted, the PSOB Act provided only for death benefits to the statutorily-designated survivors (including any "child") of a fallen public safety officer. See 42 U.S.C. 3796(a). For this reason, it is unremarkable that the Act should define "child" to mean "any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is \* \* \* 18 years of age or under." See *id.* 3796b(3)(i). Analytically speaking, this definition was undisturbed when the Act subsequently was amended to provide benefits to disabled public safety officers. See *id.* 3796(b). But when—still later—the Act was further amended to provide education benefits to any "dependent \* \* \* child" of a deceased or disabled public safety officer, see *id.* 3796d-1(a)(1), a patent conflict manifested itself: Under the literal terms of the Act, by definition no one could be a "child" at all, unless his public safety officer parent were dead, but the Act also clearly commanded that a "child of any eligible public safety officer"—which includes any living disabled officer—was entitled to the Act's education benefits. Exercising the considerable interpretative authority given to it by statute, BJA has understood the education-benefits provision to be in the nature of a *pro tanto* amendment to the PSOB Act's definition of "child" and thus consistently has construed that definition to apply only to the factual situation it obviously contemplates. See, e.g., 70 FR at 43084 (proposed definition of "Child," for codification at 28 CFR 32.3).

(2) The PSOB Act contains several "disentitling" provisions, relating to the actions or status of the officer himself, that prevent payment of benefits under various circumstances, such as the suicide, intentional misconduct, voluntary intoxication, or gross negligence of the officer. See 42 U.S.C. 3796a(1)–(3). Another "disentitling" provision, relating to the actions or status of a potential beneficiary (as

Pub. L. 106-390, sec. 305, 114 Stat. 1552, 1573 (2000); Pub. L. 107-56, sec. 613, 115 Stat. 272, 369 (2001); Pub. L. 107-196, 116 Stat. 719 (2002); Pub. L. 108-182, 117 Stat. 2649 (2003); Pub. L. 109-162, sec. 1164, 119 Stat. 2960, 3120 (2006); see also Pub. L. 107-37, 115 Stat. 219 (2001); Pub. L. 107-56, secs. 611, 612, 115 Stat. at 369.

opposed to the actions or status of the officer himself), operates, for example, to prevent payment of benefits to an officer's murderer. See *id.* 3796a(4) (2006). Yet another "disentitling" provision, added to the Act in 1984, forbade BJA from paying a benefit "to any individual employed in a capacity other than a civilian capacity." See *id.* 3796a(5) as in effect on Jan. 4, 2006. At first glance, this appears to be an unremarkable provision against double-payment of benefits: When military death or disability benefits are payable, civilian benefits are not. The literal text of the provision, however, accomplishes this result only in the case of a disabled officer whose employment was other than in a civilian capacity (e.g., a disabled military police officer); but if the officer is dead, payments, if any, must go "to" his statutory survivors—thus putting *their* actions or status (not the officer's) at issue. Following the literal text of the provision, therefore, would have meant that if a police officer were to die in the line of duty survived by a husband who is a Captain on active duty in the Reserves, the husband could not be paid a PSOB Act death benefit. Mindful of the canon that a statute may be construed so as to avoid plainly-absurd results entailed in a literal reading,<sup>2</sup> BJA has understood this provision within the whole context of the Act to prohibit payment only when the public safety officer himself was employed in a capacity other than a civilian capacity. See, e.g., 70 FR at 43087 (for codification at 28 CFR 32.6(a)) ("No payment shall be made with respect to any public safety officer who is an individual employed as described in the Act, at 42 U.S.C. 3796a(5)."). The reasonability of BJA's interpretation was entirely vindicated on January 5, 2006, when the President signed into law the DOJ Reauthorization Act, amending 42 U.S.C. 3796a(5), which (now) forbids BJA from paying a benefit "with respect to any individual employed in a capacity other than a

<sup>2</sup> It is well established that—"[w]here the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope. \* \* \* [e]ven though, as Judge Learned Hand said, 'the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing'. \* \* \* " *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) (Brennan, J.) (quoting first *Green v. Bock Laundry Machine*, 490 U.S. 504, 509 (1989) and second *Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir. 1945), *aff'd*, 326 U.S. 404 (1945)); 491 U.S. at 469-474 (Kennedy, J., concurring); *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

civilian capacity.” Pub. L. 109–162, sec. 1164, 119 Stat. at 3120.

(3) The PSOB Act’s definition of “law enforcement officer” has occasioned considerable difficulty. Prior to 1984, a “law enforcement officer” was defined as “a person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws. This includes, but is not limited to, police, corrections, probation, parole, and judicial officers.” That “control or reduction” applied to “crime” and to “juvenile delinquency” was clear enough on the face of the statute, but there was considerable debate in the field as to whether “enforcement of the criminal laws” included enforcement of the juvenile delinquency laws, which debate eventually led to an amendment that struck the word “criminal” so as to enable the “enforcement” unquestionably to apply also to “juvenile delinquency.” See 42 U.S.C. 3796b(5) as in effect on Jan. 4, 2006 (“an individual involved in crime and juvenile delinquency control or reduction, or enforcement of the laws, including, but not limited to, police, corrections, probation, parole, and judicial officers”). Consistent, however, with the ordinary sense of the term “law enforcement officer”<sup>3</sup> and applying the traditional interpretive canon *noscitur a sociis*<sup>4</sup> to the statutory definition of the term, BJA has understood “law enforcement officer” not to encompass those who have no criminal law-enforcement authority or enforce only civil laws. See, e.g., 70 FR at 43084 (proposed definition of “enforcement of the laws,” to be codified at 28 CFR 32.3 (“Enforcement of the laws means enforcement of the criminal law.”; the proposed definition of “Criminal law” clarifying that juvenile delinquency is covered)). Notwithstanding the interpretive authority granted to BJA by the Act, the absence of the word

“criminal” from the statutory phrase “enforcement of the laws” unfortunately provided the predicate for some, including at least two judges, incorrectly to conclude that the PSOB Act death benefit may be paid with respect to individuals who had no criminal law-enforcement authority, but enforced only civil laws. See *Hawkins v. United States*, 68 Fed. Cl. 74 (2005), appeal filed, No. 06–5013 (Fed. Cir., Oct. 31, 2005); *Cassella v. United States*, 68 Fed. Cl. 189 (2005), appeal filed, No. 06–5035 (Fed. Cir., Dec. 19, 2005). Confirming the correctness of BJA’s understanding of the statute, however (and directly contrary to these erroneous judicial rulings), the January 5, 2006, clarifying amendments to the PSOB Act changed 42 U.S.C. 3796a(5) to define “law enforcement officer” as “an individual involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws (including juvenile delinquency), including, but not limited to, police, corrections, probation, parole, and judicial officers.”

(4) More than once, the text of the PSOB Act has generated confusion by elaborating upon a specific term in one provision, only to use a short-hand version of the same term in another. Compare, e.g., 42 U.S.C. 3796(b) (“permanently and totally disabled”) and *id.* 3796d–1(a)(1)(B) (“totally and permanently disabling injury” (emphasis added)) with *id.* 3796d(2) (referring only to “total disability”). Prior to January 5, 2006, the Act referred in one place to an “officially recognized or designated \* \* \* public employee member of a rescue squad or ambulance crew,” *id.* 3796b(4) (emphasis added), and in another place merely to “a member of a rescue squad or ambulance crew,” *id.* 3796b(8)(A).<sup>5</sup> Following the traditional rules that the starting point of statutory interpretation must be the language of the statute itself and that every word of a statute should be given effect, if possible, and none rendered superfluous,<sup>6</sup> in the exercise of the

discretion granted to it by the PSOB Act, BJA resolved the ambiguity created by these different textual formulations contained in the Act by interpreting the briefer term as a short-hand expression of the longer one; *i.e.*, by construing the statute to require that “rescue squad or ambulance crew member[s]” be “officially recognized or designated \* \* \* public employee member[s].” See, e.g., 70 FR 43,086 (proposed definition of “Rescue squad or ambulance crew member,” for codification at 28 CFR 32.3). Unfortunately, and despite the considerable interpretive authority granted to BJA by the Act (to say nothing of the deference owed to BJA under the rule in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), at least one judge has ignored BJA’s longstanding construction and erroneously concluded that the PSOB Act death benefit may be paid with respect to an individual (emergency medical technician trainee) who was neither “officially recognized or designated” nor a “public employee member” of a rescue squad or ambulance crew. *Hillensbeck v. United States*, 68 Fed. Cl. 62 (2005); *Hillensbeck v. United States*, 69 Fed. Cl. 369 (2006). Notwithstanding this judicial ruling, the reasonability of BJA’s construction of the statute (and the error of the court’s conclusion) was strongly underscored by the January 5, 2006, clarifying amendments to the PSOB Act, now codified at 42 U.S.C. 3796a(7), which explicitly endorse BJA’s position by adding an express definition of “member of a rescue squad or ambulance crew” that requires that they be “officially recognized or designated public employee member[s].”

Given the foregoing history of careful construction of the statute in the context of repeated statutory amendment and the handling of thousands of claims, it is not surprising that Representative Lamar Smith made the following observation on the floor of the House of Representatives in reference to DOJ Reauthorization Act section 1162 (entitled “Clarification of Persons Eligible for Benefits under the Public Safety Officers’ Death Benefit Programs”), which made these most-recent amendments to the PSOB Act:

J.) (“For we must never forget that it is a statute we are expounding, and it is the intention of the drafters, as expressed in the words they used, that we must heed. \* \* \* [E]ffect must be given, if possible, to every word, clause and sentence of a statute \* \* \* so that no part will be inoperative or superfluous, void or insignificant.” (quoting *National Ass’n of Recycling Indus. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981)).

<sup>3</sup> In several places, the Act uses key terms in their ordinary sense, with the statutory “definition” providing only points of clarification as to detail. See, e.g., 42 U.S.C. 3796b(2) (2006) (“‘chaplain’ includes any individual serving as an officially recognized or designated member of a legally organized volunteer fire department . . .”). To read this “definition” literally would be tantamount to a suggestion that the provision makes the fire chief a “chaplain.” To avoid this ridiculous and counter-intuitive suggestion, BJA understands that the legislative intention is to apply the ordinary meaning of the word, supplemented by the terms of the statutory “definition.” See, e.g., 70 FR at 43084 (proposed definition of “Chaplain,” for codification at 28 CFR 32.3) (“Chaplain means a clergyman, or other individual trained in pastoral counseling, who meets the definition provided in the Act, at 42 U.S.C. 3796b(2).”).

<sup>4</sup> See, e.g., *Hibbs v. Winn*, 542 U.S. 88 (2004); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (“Words and people are known by their companions.”).

<sup>5</sup> For approximately fourteen years the literal text of the statute required that the public safety officer serve a public agency “as a \* \* \* rescue squad or ambulance crew”; this patent error was remedied in 2000 when the Act was amended to permit an individual member of a squad or crew to be covered. See *supra* footnote 3. It may go without saying that, during those fourteen years, BJA (relying in significant part on its statutory interpretive authority and on the canon against absurd results) did not apply these provisions of the Act literally—as forbidding any but one-man squads or crews to be eligible for PSOB benefits.

<sup>6</sup> See, e.g., *Lewis v. United States*, 445 U.S. 55, 60 (1980); *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring in the judgment); see generally *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 578–79 (D.C. Cir. 1990) (per Ginsburg,

The Bureau of Justice Assistance has acquired considerable expertise in the administration of the Public Safety Officers' Benefits Act since its enactment in 1976, and courts have properly accorded the Bureau's interpretations of the Act great deference.

Among other things, H.R. 3402 clarifies statutory provisions relating to the requirements that "rescue squad or ambulance crew" members be public employees, and that "enforcement of the laws" refers to the criminal laws, by making the text conform more clearly to the legislative intention, which has been correctly reflected in the Bureau's longstanding interpretation of the Act.

These clarifying changes should not be understood to effect any substantive change in the Act, as interpreted by the Bureau.

163 Cong. Rec. H12,125 (daily ed., Dec. 17, 2005). These remarks—from a member of the House Judiciary Committee (which reported the bill)—bear strong witness to the reasonability and soundness of BJA's construction of the PSOB Act.

## II. Recent Amendments to the PSOB Act

As discussed above, the DOJ Reauthorization Act made several clarifying and other changes to the PSOB Act. The term "member of a rescue squad or ambulance crew" is now defined as "an officially recognized or designated public employee member of a rescue squad or ambulance crew." 42 U.S.C. 3796b(7). In the definition of "law enforcement officer," the term "enforcement of the laws" has been replaced with "enforcement of the criminal laws (including juvenile delinquency)." *Id.* 3796b(6). As described above, these two clarifying statutory amendments are consistent with the well-settled understanding of the underlying terms by BJA since their original enactment into law. Because of these statutory changes, the rules enunciated in the holdings of the following cases have been nullified or rendered moot: *Hillensbeck v. United States*, 68 Fed. Cl. 62 (2005); *Hawkins v. United States*, 68 Fed. Cl. 74 (2005); *Cassella v. United States*, 68 Fed. Cl. 189 (2005); and *Hillensbeck v. United States*, 69 Fed. Cl. 369 (2006).

Also as a result of these statutory changes, the final rule now contains definitions of several terms (*e.g.*, "officially recognized or designated public employee member of a squad or crew"), and omits the proposed definition of "enforcement of the laws," as the meaning specified in the proposed rule now is clear on the face of the Act itself. The DOJ Reauthorization Act also amended the PSOB Act to ensure that the pre-existing statutory limitation on payments to non-civilians refers to the individual who

was injured or killed, and not to any potential beneficiaries. 42 U.S.C. 3796a(5). For this reason, the final rule omits the language in the proposed rule that was designed to achieve this same result. Finally, the DOJ Reauthorization Act amended certain provisions of the PSOB Act regarding designation of beneficiaries when the officer dies without a spouse or eligible children. *Id.* 3796(a)(4). This amendment removes the need for a one-year waiting period to ensure payment to the beneficiary of the officer's "most recently executed life insurance policy," and accordingly, BJA has amended the definition of this term and added other terms to conform to the statutory amendments.

## III. Hometown Heroes Provisions

The implementation of the Hometown Heroes Act presented a difficult task because the statutory presumption created by that Act contains a number of undefined terms. Some commentators approved of the approach in the proposed rule, but others were dissatisfied with the proposed provisions, finding them too restrictive or difficult to apply, and expressing concerns about BJA's implementation of the statutory presumption. After reviewing the comments, BJA is persuaded that the provisions in the proposed rule relating to the Hometown Heroes Act should be amended in order to avoid their being more restrictive than the statute. In making these amendments, BJA has adopted a much more conceptual approach than it did in the proposed rule; specifically, BJA has replaced its prior per-se rule approach involving enumerated risk factors, with a rule tied to the concept of causation. A discussion of amendments of particular note follows.

*Competent medical evidence to the contrary.* One commentator opined that this term referred to "medical evidence [that] indicated that there was an intervening, non-duty-related factor or event which would have independently caused" the public safety officer's heart attack or stroke. BJA essentially agrees with this comment, and had attempted to capture the basic thrust of this same notion in the definition of this term in the proposed rule. Accordingly, in the final rule, BJA adopts a revised definition:

*Competent medical evidence to contrary—* The presumption raised by the [Hometown Heroes Act provision] is overcome by competent medical evidence to the contrary, when evidence indicates to a degree of medical probability that circumstances other than any engagement or participation described in the [Hometown Heroes Act provision], considered in combination (as

one circumstance) or alone, were a substantial factor in bringing the heart attack or stroke about.

Complementing this definition is the term "circumstances other than engagement or participation," which, in turn, is defined and does not include line of duty actions or activity; other definitions have been added to effect this new conceptual approach.

*Nonroutine stressful or strenuous physical activity.* The term, as written in the Hometown Heroes Act, contains an ambiguity, which BJA resolved in the proposed rule after closely considering the floor statements of the Congressional sponsors of the bill that became the Act. Nonetheless, one commentator criticized BJA's proposed definition of this term ("nonroutine stressful physical activity" or "non-routine strenuous physical activity"), opining that the term should be interpreted to mean, instead, "'nonroutine stressful activity' or 'strenuous physical activity.'" The commentator asserted that the legislative history had made it clear that the term should be so read, and quoted selectively from the floor statements of both sponsors of the bill (Rep. James Sensenbrenner and Sen. Patrick Leahy) to that effect. Despite the commentator's assertion, the selections quoted do not actually resolve the ambiguity, and, in any event, the commentator appears to have overlooked the sentences (by the same speakers) immediately preceding the floor statements quoted, which do apparently resolve it, by summarily referring to the term "nonroutine stressful or strenuous physical activity" as "physical activity." 149 Cong. Rec. H12,299 (daily ed., Nov. 21, 2003) (describing the concern of some Members of Congress had that the bill as originally drafted would "cover officers who did not engage in any physical activity, but merely happened to suffer a heart attack while at work" (emphasis added)); *id.* at S16,053 (Nov. 25, 2003) (same). In their (nearly-identical) floor statements, both Congressional sponsors refer to "physical activity" alone—without qualification—as the target concept in the substitute amendment that inserted the term "nonroutine stressful or strenuous physical activity" into the bill specifically to allay the concerns of those Members of Congress:

The substitute amendment would create a presumption that an officer who died as a direct and proximate result of a heart attack or stroke died as a direct and proximate result of a personal injury sustained in the line of duty if: (1) That officer participated in a training exercise that involved nonroutine stressful or strenuous physical

activity or responded to a situation and such participation or response involved nonroutine stressful or strenuous physical law enforcement, hazardous material response, emergency medical services, prison security, fire suppression, rescue, disaster relief or other emergency response activity; (2) that officer suffered a heart attack or stroke while engaging or within 24 hours of engaging in that physical activity; and (3) such presumption cannot be overcome by competent medical evidence.

149 Cong. Rec. at H12,299 to H12,300 (emphasis added); *id.* at S16,053 (same). Given the foregoing, BJA has made no change to the definition of this term.

**Retroactivity.** A few commentators opined that the Hometown Heroes Act should apply retroactively. Despite BJA's great sympathy for those who have lost loved ones to duty-related heart attacks or strokes, BJA has no authority to give retroactive effect to that Act by rule or regulation. *See, e.g., Bice v. United States*, 61 Fed. Cl. 420 (2004).

**Training exercise.** One commentator requested that the criteria for "training exercise" be amended to clarify that not all training exercises include simulations of actual emergencies or provoke a high level of alarm, fear, or anxiety; the commentator urged BJA to include training exercises that merely "include physical training and exercise." BJA believes that the commentator misunderstood the proposed rule. Under the proposed rule, training exercises that "[e]ntail an unusually-high level of physical exertion" (without reference to simulation of actual emergencies or provocation of high levels of alarm, fear, or anxiety) also are covered, if the other criteria in the rule are satisfied. For this reason, BJA has made no change here.

**24-hour window.** One commentator expressed concern that it will be difficult to pinpoint the time when the 24-hour window for engagement or participation in non-routine stressful or strenuous physical line-of-duty activity begins, and that the time-frame proposed in the rule was too restrictive. BJA agrees that the pinpointing the time well may be difficult in particular cases, but, as this time period is specified in the statute, it cannot be changed by rule.

#### IV. Line of Duty Activity or Action and Line of Duty Injury

Generally speaking, the first thing that BJA must "determine[]" in any PSOB death or disability claim is "Was the individual on whom the claim is based a public safety officer within the meaning of the PSOB Act and its implementing regulations?" or, put somewhat differently, "Did the individual possess the legal authority to

act as a public safety officer such as to confer that status upon him?" Under the Act, 42 U.S.C. 3796(a) & (b), once BJA "determines" that the individual did possess that status, the next thing BJA must "determine[]" is whether that officer died (or was permanently and totally disabled) in the "line of duty." And just as a claim necessarily must fail if the individual did not possess the legal status of public safety officer, so it must fail if the death or injury did not occur in the "line of duty." Given the signal importance of the "line of duty" concept to understanding the PSOB Program, it is unsurprising that the term generated several comments.

One commentator opined that the bifurcated definitions of "line of duty activity or action" and "line of duty injury" in the proposed rule narrows the meaning of the single term "line of duty" in the current rule, and that the proposed rule appeared to fall short of the interpretation of "line of duty" given in *Davis v. United States*, 50 Fed. Cl. 192 (2001). BJA believes that the commentator has misunderstood the reasoning behind the bifurcation of the concept of "line of duty" into the two defined terms. Conceptually, the term "line of duty" remains unchanged from the current rule to the final rule.

At present, and under the final rule, the key issue in determining whether an individual (whom BJA has "determine[d]" to be "a public safety officer") acted in the "line of duty" is whether he was performing activities or actions that he was authorized or obligated to perform as a public safety officer. For a public safety officer whose primary function is the relevant area of public safety activities defined by the PSOB Act (*e.g.*, law enforcement, fire protection, emergency medical response), the definitions of "line of duty action or activity" and "line of duty injury" in the rule do not require that a public safety officer be engaged in any particular line of duty action in order to be considered as acting in the line of duty: What it does require, rather, is that the officer be performing an action or activity that he is "authorized or obligated to perform by law, rule, regulation or condition of employment" as a public safety officer at the time of his injury, or that it be shown that his injury resulted from his status as a public safety officer (*e.g.*, where a police officer (on or off-duty) is killed precisely because of his status as a police officer). For such "primary function" officers, it is presumed that, while they are "on the clock," all of their authorized activities and actions are done in their capacity as public safety officers, and thus are "line of

duty" actions or activities. In sharp contrast, for those who are not "primary function" officers (*i.e.*, those whose primary functions are not public safety activities and actions covered by the PSOB Act), the rule does require that they actually be performing a public safety action or activity (*e.g.*, law enforcement, fire protection, emergency medical response), at the time of the injury in order for it to be considered in the "line of duty."

Logically, it follows that the concept of "line of duty" is not limited only to activities and actions the public safety officer performs while "on the clock." When an off-duty public safety officer responds to a situation with an action that he is authorized or obligated to perform as a public safety officer, he effectively goes "on duty." The definitions of "line of duty action or activity" and "line of duty injury" articulate this well-settled notion of "line of duty" and are consistent with the current rule and with the rulings of the courts. This understanding of "line of duty" has been consistently applied by BJA throughout the 30-year life of the PSOB program. In any event, in order to make it as clear as possible that line of duty injuries include those that result from the individual's status as a public safety officer, BJA has included specific language to that effect in the definition of "line of duty injury" in the final rule.

**Authorized commuting.** Two commentators questioned whether the new definition of "authorized commuting" was unduly narrow. One commentator posited that, although the PSOB Act does not cover all conceivable commuting injuries, neither does it or the term "line of duty" exclude all commuting injuries. BJA agrees, and the definition of "authorized commuting" in the proposed regulation is consistent with this understanding. The definition is based on the concept of "line of duty" under both the current and final rules: When a public safety officer is engaged in activities or actions that he is obligated or authorized to perform as a public safety officer, he is acting in the line of duty, or is, in effect, "on duty." In general, under workers' compensation law, injuries incurred while commuting to and from work are not necessarily regarded as occurring within the scope of employment, except under certain circumstances where it can be shown that there is a "sufficient nexus between the employment and the injury to conclude that it was a circumstance of employment." *Russell*, 637 F.2d at 1265 (quoting *Hicks v. General Motors*, 238 N.W.2d 194, 196 (Mich. Ct. App. 1975)). Analogously, in the case of a public safety officer's

commuting to and from work, a “sufficient nexus” between the circumstances and his duty as a public safety officer must be shown to establish that he was, in effect, “on duty,” and thus engaged in a “line of duty activity or action.” The definition of “authorized commuting” sets out three particular circumstances that long have been recognized by BJA and the courts, where it can be shown that a “sufficient nexus” exists between his employment as a public safety officer and the injury: (1) The officer is responding to a particular fire, police or rescue emergency; (2) the officer is commuting to or from work in an agency vehicle; or (3) the officer is commuting to or from work in a personal vehicle that he is required to use for his work. One commentator questioned why the mode of transportation was the focus of this provision and whether “authorized commuting” would cover officers who walked to work or who used public transportation. The mode of transportation articulated in the exceptions is what gives rise to the “nexus” between employment (*i.e.*, duty) and the circumstances. Clearly, as discussed in the preceding discussion of the “line of duty” definition, whenever a public safety officer responds to an emergency with authorized action, he is “on duty.” A public safety officer who is using an agency vehicle (or alternatively, using the vehicle that he is required to use in his work) is presumed rebuttably to be “on duty” while using the vehicle. In the case of officers who are commuting to or from work with other modes of transportation, the ordinary line of duty analysis would apply: Where it can be shown that they were injured while engaging in line of duty activities or actions, or that they sustained the injury as a result of their status as public safety officers, they would be considered as acting in the line of duty.

## V. Section-by-Section Analysis

### Section 32.2 Computation of Time

One commentator expressed concern about the way in which “filing” is effected under this provision, and in particular, opined that the term “actually received” was somewhat vague and could cause an unfair result for claimants if it were understood to refer strictly to the intended recipient (rather than his office). In response to this observation, BJA has amended this provision by specifying that a filing is deemed filed “on the day that is actually received at the office” of the receiving party.

### Section 32.3 Definitions

**Convincing evidence.** One commentator opined that using the same word within a definition was inappropriate. BJA disagrees. The term “clear and convincing evidence” is a legal term of art that articulates a specific and well-settled legal standard of proof that is higher than a “preponderance of the evidence” standard but lower than a “beyond a reasonable doubt” standard. *Black’s Law Dictionary* 251 (6th ed. 1990) (“That proof which results in reasonable certainty of the truth of the ultimate fact in controversy.”).

**Crime.** As two commentators aptly pointed out, although the term “crime” implicitly includes juvenile delinquency laws, clarifying language is needed to remove any ambiguity as to the point. BJA agrees. Accordingly, the definition of “crime” now includes the phrase “an act or omission punishable as a criminal misdemeanor or felony.”

**Firefighter.** A number of firefighter associations questioned whether this definition, read together with the terms “fire suppression,” “rescue squad or ambulance crew member,” and “line of duty activity or action,” would exclude some of the duties and tasks performed by firefighters. In this vein, one commentator proposed use of the term “fire protection” in order to ensure inclusion of all such duties and tasks. Similarly, another commentator suggested that BJA consider the definition of “firefighter” contained in the Fair Labor Standards Act and reevaluate the definitions of “firefighter” and “rescue squad crew member” as drafted in the proposed rule. BJA agrees substantially with these helpful comments and has adopted the term “fire protection,” defined to include suppression of fire, hazardous-material emergency response, and emergency medical service or rescue activity, and has made conforming changes in defining the terms “hazardous-material response” and “and emergency medical services,” as well as corresponding changes as necessary in other definitions.

The president of a municipal fire marshals association also commented on this definition and requested that the term “fire marshal” be included to ensure coverage, pointing out that many fire marshals perform both law enforcement and firefighting duties, are certified peace officers, and also engage in hazardous materials mitigation. In considering this comment, BJA found that, according to the National Association of State Fire Marshals, fire marshal responsibilities vary

considerably among jurisdictions, and range from regulatory responsibilities (some of which involve criminal law enforcement), to actual firefighting and hazardous material emergency response. Some fire marshals have a more regulatory role, for example, issuing rules and conducting inspections; others have the authority to issue criminal citations and enforce fire safety laws and regulations; while still others may not necessarily have the same authority as police officers. In light of this wide variation, BJA determined that the term “fire marshal” does not lend itself to a clear definition. BJA also finds that it is unnecessary to define the term specifically in order for fire marshals to be covered under the PSOB Act in appropriate circumstances. A PSOB claim involving a fire marshal will be analyzed as it always has been by the PSOB program: Where it can be shown that a fire marshal had the authority to engage in “fire protection” (as defined in the final rule and discussed above) or law enforcement activities, he would be considered a “public safety officer” under the Act; where it cannot be shown, he would not be. As with all PSOB claims, once the threshold determination of the individual’s status as a public safety officer is made, the second inquiry (relating to line of duty) would follow, as to whether his fire protection or law enforcement duties were primary or secondary duties. In any event, as a result of the foregoing regulatory changes, the rule enunciated in the holding of *Messick ex rel. Kangas v. United States*, 70 Fed. Cl. 319 (2006), *appeal filed*, No. 06–5087 (Fed. Cir. May 26, 2006) has been nullified or rendered moot.

**Gross negligence.** One commentator questioned whether the gross negligence provision would exclude first responders who did not wear protective clothing while participating in the breakdown of clandestine drug labs, because their employers either did not provide the clothing, or did not mandate that it be worn, and as a result, were exposed to chemicals that lead to terminal illness. The analysis of cases under the “gross negligence” provision necessarily would entail consideration of many different evidentiary matters, and as such, the question does not lend itself productively to being answered hypothetically. As a general matter, it is important to point out that “occupational diseases” have always been excluded as injuries under the PSOB Act. See, *e.g.*, *Smykowski v. United States*, 647 F.2d 1103, 1105 & n.6 (Ct. Cl. 1981). This is because the PSOB Act requires that in order to be

eligible, the claimant must show that the public safety officer died or was disabled as “direct and proximate” or “direct” result of an injury. Evidence of generalized exposure to chemicals, without more, is not sufficient to show direct causation. The PSOB program has paid claims, however, where claimants have shown with preponderant evidence (*i.e.*, evidence showing that it is more likely than not) the required causal connection between the public safety officer’s illness or death and the exposure to chemicals while on duty.

**Intentional action or activity.** One commentator expressed concern that the definitions of “intention,” “intentional action or activity,” and “intentional misconduct,” which implement 42 U.S.C. 3796a, could result in disqualifying a public safety officer whose intentional line of duty acts were a substantial factor in causing his death or catastrophic injury. In response to this concern, BJA has amended the definition of “intentional action or activity” specifically to exclude line of duty actions or activities.

**Instrumentality.** A private corporate provider of fire and rescue services expressed concerns about the requirement in the definition of “instrumentality” of a public agency that an entity share sovereign immunity with a public agency, or that the relevant agency have tort liability for the acts and omissions of the entity. In contrast to these concerns, another commentator expressed approval of the thrust of this definition. The PSOB Act dictates that a “public safety officer” must be “an individual serving a public agency in an official capacity,” which means that the individual must be cloaked with the public agency’s authority (*i.e.*, must be authorized, recognized or designated as a functional part of a public agency), and his acts and omissions must be legally recognized as those of the public agency. It follows, then, that in order for an entity to be considered an “instrumentality” of a public agency, its acts and omissions must be similarly legally recognized by a public agency by cloaking the entity’s acts and omissions with its sovereign immunity or assuming tort liability for them. This is consistent with the Act.

**Official capacity.** One commentator pointed out that it was somewhat unclear in the definition of “official capacity” who was supposed to authorize, recognize, or designate the individual as functionally within or part of an agency. In response, BJA has included language to indicate that these actions are to be taken by the public agency itself. The definition of this term

incorporates a concept that has been consistently applied by BJA throughout the 30-year life of the PSOB program, and was expressly upheld by the Federal Circuit in *Chacon v. United States*, 48 F.3d 508, 512–513 (Fed. Cir. 1995). The proposed rule was (and the final rule is) expressly intended to codify this holding in *Chacon*. Related to this definition are the definitions of “department or agency,” “employee,” “functionally within or part of,” “instrumentality,” and “official duties,” which are consonant with the rule enunciated in the holding of *LaBare v. United States*, \_\_\_\_\_ Fed. Cl. \_\_\_\_\_ (2006), and which, all told (and in combination with other changes made here), nullify or render moot the rule enunciated in the holding of *Groff v. United States*, \_\_\_\_\_ Fed. Cl. \_\_\_\_\_ (2006).

**Parent-child relationship.** In reviewing the proposed rule, BJA observed that this term as written was more restrictive than the statute in that it could appear that the relationship could be demonstrated only by the evidence prescribed in the definition. To avoid this result, BJA has greatly simplified the rule by providing only that the relationship be shown through convincing evidence, without specifying the particular evidence required. As a result of this change, BJA will consider any proper evidence, which may consist of such things as a written acknowledgment of parenthood; a judicial decree ordering child support; a public or religious record naming the public safety officer as parent (with the officer’s consent); affidavits (from persons without direct or indirect financial interest in a PSOB claim) attesting that the child was accepted by the officer as his child; records of a public agency or a school (with the officer’s consent); the claiming of the child as a dependent on the officer’s tax return; or other credible evidence indicating acceptance of the individual as a child by the public safety officer. An analogous change was made in the definition of “child-parent relationship.”

**Rescue activity and rescue squad or ambulance crew.** In response to the point made by one commentator that the proposed regulation, unlike the current regulation, did not contain a definition of “rescue,” BJA has included within the final rule (“rescue activity”) the substance of that definition in the current rule, and made the corresponding changes to the definition of “rescue squad or ambulance crew.”

**Terrorist attack.** There were several comments relating to the definition of “terrorist attack.” First, the comments

expressed concern about the requirement that the BJA Director make a determination that a terrorist attack was one of an “extraordinary or cataclysmic character so as to make particularized factual finding impossible, impractical, or unduly burdensome,” and opined that the Director’s determination could “trump” the determination by the Attorney General that such an event was a terrorist act. Simply put, the comments appear to spring from the mistaken belief that the term “terrorist attack” is synonymous with “terrorist act.” Additionally, the comments expressed concern about coverage of public safety officers who prevent or investigate aspects of terrorism and suggest that the regulations be expanded to ensure such coverage. There is no applicable statutory definition of the term “terrorist attack,” which was enacted into law here as section 611 of the USA PATRIOT Act (not an amendment to the PSOB Act, but codified at 42 U.S.C. 3796c–1). But on its face, the term fairly may be understood to mean an “act of terrorism” (which is a term defined in the USA PATRIOT Act) that is in the nature of an “attack.” For this reason, the proposed rule is written in terms of an event that is “extraordinary” or “cataclysmic”—in short, an event that approximates those that gave rise to the enactment of section 611. The notion informing the certification process described at section 611 is avoidance of potentially enormous administrative burdens for claimants that could lead to unnecessary delays of benefit payments; the provision, in principle, is not intended to add another dimension of coverage for public safety officers. Nonetheless, BJA agrees with the commentator that determination of what constitutes a “terrorist attack” should be left to the Attorney General and those to whom he may delegate his authority. For this reason, BJA has amended the definition of “terrorist attack,” omitting the language requiring the BJA Director’s determination. With regard to coverage of prevention and investigation of terrorist acts, section 611 itself requires such coverage, and nothing in the proposed rule was intended to prevent it (or lawfully could have done so). Insofar as a public safety officer acts in the line of duty, whether preventing, responding to, or investigating a terrorist attack, he would be covered under section 611. Nonetheless, in order that there be no question on the point, BJA has added clarifying language to this effect in the final rule.

**Voluntary intoxication.** One commentator questioned whether the

regime set out in the definition of "voluntary intoxication" might preclude valid claims involving alcohol consumption. The PSOB Act clearly sets out the legal limits with respect to alcohol and the rule cannot reach beyond what is required by statute. Nonetheless, further to this commentator's question, BJA has made some clarifying changes, relating to intoxication, in the final rule.

### Section 32.5 Evidence

One commentator expressed concerns about the evidence provisions. First, the commentator objected to the use of the term "preponderance of the evidence" proposed in sec. 32.5(a), arguing that the evidentiary standard of "preponderance of the evidence" required for claimants to make successful claims places a greater burden of proof on them than in the current rule. In the commentator's view, BJA is replacing the "reasonable doubt" provision in the current regulations with a "new and higher evidentiary standard." The commentator clearly misunderstands this provision in the current rule, as well as the application of the "preponderance of the evidence" standard with regard to PSOB claims. First, the current "reasonable doubt" provision does not apply to the claimant's burden of proof; *i.e.*, it does not require the claimant to provide evidence rising to the level of "reasonable doubt." The provision in the current rule, rather, is merely an evidentiary mechanism that assists the decision-maker in weighing factual evidence arising from the circumstances of a public safety officer's death or total and permanent disability. Unfortunately, this provision has generated no end of misunderstanding, confusion, and misapplication among claimants, and as well as disagreement in the courts. *See, e.g., Tafoya v. United States*, 8 Cl. Ct. 256 (1985); *Demutiis v. United States*, 49 Fed. Cl. 81 (2000), *aff'd in part*, 291 F.3d 1373 (Fed. Cir. 2002); *Bice v. United States*, 61 Fed. Cl. 420 (2004). For this reason, BJA proposed the removal of this provision and the articulation of the standard of proof as preponderant evidence (also known as "more likely than not," *cf. Black's Law Dictionary* 1182 (6th ed. 1990)). This commonly applied standard is the same standard BJA has used as a default matter in its application of the evidentiary provisions in the current rule. Nonetheless, the commentator's comment has persuaded BJA that the term "preponderance of the evidence" may be daunting to some members of the public, so it has rephrased the

standard as "more likely than not" in the final rule. Second, the commentator objects to the language of § 32.5(e), which provides that certifications under 42 U.S.C. 3796c-1 "shall constitute *prima facie* evidence \* \* \* of the public agency's acknowledgment that public safety officer, as of the event date was \* \* \* serving the agency in an official capacity," alleging that this could exclude public safety officers who heroically respond to events outside of their jurisdiction, or without express authorization of their agency. The proposed rule requires nothing more than what is required by 42 U.S.C. 3796c-1, which dictates what must be certified, and BJA has no authority to change those requirements.

### Section 32.7 Fees for Representative Services

One commentator made the excellent suggestion that the rate of payment for representative services in PSOB claims should be linked to the Equal Access to Justice Act ("EAJA"). BJA has consistently used the EAJA as its guide in determining attorneys fees, and agrees that specifying this in the rule itself will better inform claimants and their representatives with regard to these payments.

### Section 32.12 Time for Filing a Claim

One commentator asked how the thirty-three (33) day time frame proposed for certain filings (but not for the initial filing of claims themselves) was arrived upon by BJA. BJA started from the premise of a standard thirty-day period and then added three more days (the time period customarily given to parties in civil litigation, under the so-called "Mailbox Rule.") *See, e.g., Fed. R. Civ. P. 6(e).*

### Section 32.13 Definitions

*Beneficiary of a life insurance policy of a public safety officer.* One commentator remarked about the moral difficulty occasioned by cases where it is determined that only one of the officer's parents is the "the individual designated by such officer as beneficiary under such officer's most recently executed life insurance policy," *see* 42 U.S.C. 3796(a)(4), and only that parent receives payment because of that designation. The commentator requested that BJA consider a way to allow each parent to receive 50% of the benefit in these cases. The PSOB Act itself dictates that designated beneficiaries are to receive benefits according to the terms of the designation, and dictates that those beneficiaries are to receive priority over parents; this statutorily compelled result

cannot be changed by rule. Additionally, the commentator requested that the one-year waiting period currently required of claimants who are life-insurance beneficiaries be omitted. Prior to the enactment of the DOJ Reauthorization Act, it was not immediately possible to determine the universe of insurance policies in a claim, and, in order to avoid the risk of erroneous and/or double payment, BJA required a one-year period to pass in order to ensure that no other life insurance policy existed that was more "recently executed." The DOJ Reauthorization Act amended 42 U.S.C. 3796(a)(4) to require that the qualifying life insurance policy be "on file at the time of death with [the officer's] public safety agency," thereby obviating the need for a one-year waiting period. Accordingly, BJA has made appropriate conforming changes that are contained in the final rule.

### Section 32.15 Prerequisite Certification

One commentator questions the reasoning behind this requirement, as status as a public safety officer and line of duty determinations by the decedent's employing agency are legal determinations. The commentator appears to misunderstand the provision, which is aimed at establishing various things as factual, not legal, matters; *i.e.*, to establish how the employing agency regarded the public safety officer at the time of fatal injury. Certain facts, key to entitlement to benefits under the statute, are particularly within the ken of the employing public agencies, and benefits are not payable under the PSOB Act when the employing public agency itself has refused to pay analogous benefits on the ground that the individual was not a public safety officer, or was not serving the public agency in an official capacity at the time of the fatal injury, or was not injured in the line of duty, as the case may be. For this reason, BJA has not adopted any change here (or in sec. 32.25, an analogous provision) in response to this comment.

### Section 32.28 Reconsideration

One commentator opined that the three-year period for the staying of a reconsideration of a disability claim was an insufficient amount of time for the effects of a catastrophic injury to fully develop. The commentator has misunderstood the regulation. The time-frame is actually nine years because, upon conclusion of the stay, the claimant has six additional years to file evidence with the PSOB Office in support of his claimed disability. In the final rule, BJA has amended this provision to clarify this point.



### Section 32.33 Definitions

After further review of the definitions proposed in this section, BJA has concluded that several changes are warranted—first, to clarify analytical distinctions that are commonly applied in the program but were not apparent (or not easily apparent) on the face of the proposed rule (e.g., there are two different kinds of education benefit “claims”: “threshold claims” and “financial claims”; definitions of “eligible dependent,” “grading period”), thus making the final rule easier for claimants to use; and second, to correct proposed language that would or might have had the unintentional effect of making the rule more restrictive or limiting than the statute (e.g., the definitions of “child of eligible public safety officer,” “dependent,” “educational expenses,” “eligible dependent,” “spouse of an eligible public safety officer at the time of death or on the date of a totally and permanently disabling injury,” “tax year”).

### Section 32.36 Payment and Repayment

Additional internal review of the proposed rule leads BJA to change the proposed provisions relating to financial need so as to clarify their operation in much greater detail and thus to ensure their conformity to the “sliding scale” requirements of the statute. Additionally, a provision in this section is being changed to clarify that the circumstances under which repayment to the United States may be warranted are more limited than was apparent on the face of the proposed rule.

### Section 32.45 Hearings

In response to one commentator’s recommendation that witnesses be sworn and sequestered, BJA has amended the final rule here and in section 32.5(c) to adopt certain provisions of the Federal Rules of Evidence (over and above those already prescribed in the proposed rule) and to include an express provision requiring the hearing officer to exclude witnesses from hearings while others are giving testimony (except for the claimant or any person whose presence is shown by the claimant to be essential to presentation of his claim). Another commentator questioned whether this section permits a record review of a claim (i.e., a review without a hearing). BJA responds that (in the event a claimant does not request a hearing) a record review, supplemented with any evidence the hearing officer may require, is precisely the means by which

a hearing officer ordinarily would determine a claim. In furtherance of this point, BJA has made amendments, contained in the final rule, that make express the determining official’s authority to require evidence.

## II. Regulatory Certifications

### Regulatory Flexibility Act

The Office of Justice Programs, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: This final rule addresses Federal agency procedures; furthermore, this final rule makes amendments to clarify existing regulations and agency practice concerning death, disability, and education payments and assistance to eligible public safety officers and their survivors and does nothing to increase the financial burden on any small entities.

### Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order No. 12866 (Regulatory Planning and Review), sec. 1(b), Principles of Regulation. The costs of implementing this final rule are minimal. Claimants must complete and submit no more than four forms; a “Claim for Death Benefits,” OMB Form No. 1121–0024; a “Report of Public Safety Officers’ Death,” OMB Form No. 1121–0025; a “Report of Public Safety Officers’ Permanent and Total Disability,” OMB Form No. 1121–0166; an “Application for Public Safety Officers’ Educational Assistance (42 U.S.C. 3796d),” OMB Form No. 1121–0220; and a “Consent to Release Information” pursuant to 5 U.S.C. 552a(b); and supply adequate documentation concerning the public safety officer’s injury. The only costs to OJP consist of appropriated funds. The benefits of the final rule far exceed the costs. The amendments clarify the preexisting regulations and provide coverage for chaplains, life insurance and death beneficiaries, and the survivors of certain heart attack and stroke victims.

The Office of Justice Programs has determined that this final rule is a “significant regulatory action” under Executive Order No. 12866 (Regulatory Planning and Review), sec. 3(f), and accordingly this final rule has been reviewed by the Office of Management and Budget.

### Executive Order 13132

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB Act provides benefits to individuals and does not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

### Executive Order 12988—Civil Justice Reform

This final rule meets the applicable standards set forth in sections 3(a) & (b)(2) of Executive Order No. 12988.

### Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The PSOB Act is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### Paperwork Reduction Act

The collection of information requirements contained in this final rule have been submitted to and approved by OMB, in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Claimants seeking benefits under the PSOB Act variously must complete and return up to three of four OMB-approved forms: a “Claim for Death Benefits,” OMB Form No. 1121–0024; a “Report of Public Safety Officers’ Death,” OMB Form No. 1121–0025; a “Report of Public Safety

Officers' Permanent and Total Disability," OMB Form No. 1121-0166; and an "Application for Public Safety Officers' Educational Assistance (42 U.S.C. 3796d)," OMB Form No. 1121-0220.

#### List of Subjects in 28 CFR Part 32

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

■ Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is revised to read as follows:

#### PART 32—PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFIT CLAIMS

Sec.

32.0 Scope of part.

##### Subpart A—General Provisions

- 32.1 Scope of subpart.
- 32.2 Computation of time; filing.
- 32.3 Definitions.
- 32.4 Terms; construction, severability.
- 32.5 Evidence.
- 32.6 Payment and repayment.
- 32.7 Fees for representative services.
- 32.8 Exhaustion of administrative remedies.

##### Subpart B—Death Benefit Claims

- 32.11 Scope of subpart.
- 32.12 Time for filing claim.
- 32.13 Definitions.
- 32.14 PSOB Office determination.
- 32.15 Prerequisite certification.
- 32.16 Payment.
- 32.17 Request for Hearing Officer determination.

##### Subpart C—Disability Benefit Claims

- 32.21 Scope of subpart.
- 32.22 Time for filing claim.
- 32.23 Definitions.
- 32.24 PSOB Office determination.
- 32.25 Prerequisite certification.
- 32.26 Payment.
- 32.27 Motion for reconsideration of negative disability finding.
- 32.28 Reconsideration of negative disability finding.
- 32.29 Request for Hearing Officer determination.

##### Subpart D—Educational Assistance Benefit Claims

- 32.31 Scope of subpart.
- 32.32 Time for filing claim.
- 32.33 Definitions.
- 32.34 PSOB Office determination.
- 32.35 Disqualification.
- 32.36 Payment and repayment.
- 32.37 Request for Hearing Officer determination.

##### Subpart E—Hearing Officer Determinations

- 32.41 Scope of subpart.

- 32.42 Time for filing request for determination.
- 32.43 Appointment and assignment of Hearing Officers.
- 32.44 Hearing Officer determination.
- 32.45 Hearings.
- 32.46 Director appeal.

#### Subpart F—Director Appeals & Reviews

- 32.51 Scope of subpart.
- 32.52 Time for filing Director appeal.
- 32.53 Review.
- 32.54 Director determination.
- 32.55 Judicial appeal.

**Authority:** Public Safety Officers' Benefits Act of 1976 (42 U.S.C. ch. 46, subch. 12); Public Law 107-37; USA PATRIOT Act, sec. 611 (42 U.S.C. 3796c-1).

#### § 32.0 Scope of part.

This part implements the Act.

#### Subpart A—General Provisions

##### § 32.1 Scope of subpart.

This subpart contains provisions generally applicable to this part.

##### § 32.2 Computation of time; filing.

(a) In computing any period of time prescribed or allowed, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a federal legal holiday, or, when the act to be done is a filing with the PSOB Office, a day on which weather or other conditions have caused that Office to be closed or inaccessible, in which event the period runs until the end of the next day that is not one of the aforesaid days.

(b) A filing is deemed filed with the PSOB Office, a Hearing Officer, the Director, or any other OJP office, -officer, -employee, or -agent, only on the day that it actually is received at the office of the same. When a filing is prescribed to be filed with more than one of the foregoing, it shall be deemed filed as of the day the last such one so receives it.

(c) Notice is served by the PSOB Office upon an individual on the day that it is—

(1) Mailed, by U.S. mail, addressed to the individual (or to his representative) at his (or his representative's) last address known to such Office;

(2) Delivered to a courier or other delivery service, addressed to the individual (or to his representative) at his (or his representative's) last address known to such Office; or

(3) Sent by electronic means such as telefacsimile or electronic mail, addressed to the individual (or to his representative) at his (or his representative's) last telefacsimile

number or electronic-mail address, or other electronic address, known to such Office.

(d) In the event of withdrawal or abandonment of a filing, the time periods prescribed for the filing thereof shall not be tolled, unless, for good cause shown, the Director grants a waiver.

(e) No claim may be filed (or approved) under the Act, at 42 U.S.C. 3796(a) or (b), with respect to an injury, if a claim under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, has been approved, with respect to the same injury.

(f) No claim may be filed (or approved) under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, with respect to an injury, if a claim under the Act, at 42 U.S.C. 3796(a) or (b), has been approved, with respect to the same injury.

#### § 32.3 Definitions.

*Act* means the Public Safety Officers' Benefits Act of 1976 (generally codified at 42 U.S.C. 3796, *et seq.*; part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968) (including (uncodified) section 5 thereof (rule of construction and severability)), as applicable according to its effective date and those of its various amendments (*e.g.*, Sept. 29, 1976 (deaths of State and local law enforcement officers and firefighters); Jan. 1, 1978 (educational assistance); Oct. 1, 1984 (deaths of federal law enforcement officers and firefighters); Oct. 18, 1986 (deaths of rescue squad and ambulance crew members); Nov. 29, 1990 (disabilities); Oct. 30, 2000 (disaster relief workers); Sept. 11, 2001 (chaplains and insurance beneficiaries); Dec. 15, 2003 (certain heart attacks and strokes); and Apr. 5, 2006 (designated beneficiaries)); and also includes Public Law 107-37 and sections 611 and 612 of the USA PATRIOT Act (all three of which relate to payment of benefits, described under subpart 1 of such part L, in connection with terrorist attacks).

*Adopted child*—An individual is an adopted child of a public safety officer only if—

(1) The individual is legally adopted by the officer; or

(2) As of the injury date, and not being a stepchild, the individual was—

(i) Known by the officer not to be his biological first-generation offspring; and

(ii) After the officer obtained such knowledge, in a parent-child relationship with him.

*Authorized commuting* means travel by a public safety officer—

(1) In the course of actually responding to a fire, rescue, or police emergency; or

(2) Between home and work (at a situs authorized or required by the public agency he serves)—

(i) Using a vehicle provided by such agency, pursuant to a requirement or authorization by such agency that he use the same for commuting; or

(ii) Using a vehicle not provided by such agency, pursuant to a requirement by such agency that he use the same for work.

*BJA* means the Bureau of Justice Assistance, OJP.

*Cause*—A death, injury, or disability is caused by intentional misconduct if—

(1) The misconduct is a substantial factor in bringing it about; and

(2) It is a reasonably foreseeable result of the misconduct.

*Chaplain* means a clergyman, or other individual trained in pastoral counseling, who meets the definition provided in the Act, at 42 U.S.C. 3796b(2).

*Child of a public safety officer* means an individual—

(1) Who—

(i) Meets the definition provided in the Act, at 42 U.S.C. 3796b(3), in any claim—

(A) Arising from the public safety officer's death, in which the death was simultaneous (or practically simultaneous) with the injury; or

(B) Filed after the public safety officer's death, in which the claimant is the officer's—

(1) Biological child, born after the injury date;

(2) Adopted child, adopted by him after the injury date; or

(3) Stepchild, pursuant to a marriage entered into by him after the injury date; or

(ii) In any claim not described in paragraph (1)(i) of this definition—

(A) Meets (as of the injury date) the definition provided in the Act, at 42 U.S.C. 3796b(3), *mutatis mutandis* (i.e., with "deceased" and "death" being substituted, respectively, by "deceased or disabled" and "injury"); or

(B) Having been born after the injury date, is described in paragraph (1)(i)(B)(1), (2), or (3) of this definition; and

(2) With respect to whom the public safety officer's parental rights have not been terminated, as of the injury date.

*Convincing evidence* means clear and convincing evidence.

*Crime* means an act or omission punishable as a criminal misdemeanor or felony.

*Criminal laws* means that body of law that declares what acts or omissions are

crimes and prescribes the punishment that may be imposed for the same.

*Department or agency*—An entity is a department or agency within the meaning of the Act, at 42 U.S.C. 3796b(8), and this part, only if the entity is—

(1) A court;

(2) An agency described in the Act, at 42 U.S.C. 3796b(9)(B) or (C); or

(3) Otherwise a public entity—

(i) That is legally an express part of the internal organizational structure of the relevant government;

(ii) That has no legal existence independent of such government; and

(iii) Whose obligations, acts, omissions, officers, and employees are legally those of such government.

*Determination* means the approval or denial of a claim (including an affirmance or reversal pursuant to a motion for reconsideration under § 32.27), or the determination described in the Act, at 42 U.S.C. 3796(c).

*Director* means the Director of BJA.

*Direct and proximate result of an injury*—Except as may be provided in the Act, at 42 U.S.C. 3796(k), a death or disability results directly and proximately from an injury if the injury is a substantial factor in bringing it about.

*Disaster relief activity* means activity or an action encompassed within the duties described in the Act, at 42 U.S.C. 3796b(9)(B) or (C).

*Disaster relief worker* means any individual who meets the definition provided in the Act, at 42 U.S.C. 3796b(9)(B) or (C).

*Disturbance* includes any significant and negative alteration, any significant negative deviation from the objectively normal, or any significant deterioration.

*Divorce* means a legally-valid divorce from the bond of wedlock (i.e., the bond of marriage), except that,

notwithstanding any other provision of law, a spouse (or purported spouse) of a living individual shall be considered to be divorced from that individual within the meaning of this definition if, subsequent to his marriage (or purported marriage) to that individual, the spouse (or purported spouse)—

(1) Holds himself out as being divorced from, or not being married to, the individual;

(2) Holds himself out as being married to another individual; or

(3) Was a party to a ceremony purported by the parties thereto to be a marriage between the spouse (or purported spouse) and another individual.

*Drugs or other substances* means controlled substances within the meaning of the drug control and enforcement laws, at 21 U.S.C. 802(6).

*Educational/academic institution* means an institution whose primary purpose is educational or academic learning.

*Eligible payee* means—

(1) A beneficiary described in the Act, at 42 U.S.C. 3796(a), with respect to a claim under subpart B of this part; or

(2) A beneficiary described in the Act, at 42 U.S.C. 3796(b), with respect to a claim under subpart C of this part.

*Emergency medical services* means—

(1) Provision of first-response emergency medical care (other than in a permanent medical-care facility); or

(2) Transportation of persons in medical distress (or under emergency conditions) to medical-care facilities.

*Employed by a public agency*—A public safety officer is employed, within the meaning of the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, by a public agency, when he—

(1) Is employed by the agency in a civilian capacity; and

(2) Is—

(i) Serving the agency in an official capacity (with respect to officers of any kind but disaster relief workers); or

(ii) Performing official duties as described in the Act, at 42 U.S.C. 3796b(9)(B) or (C) (with respect to disaster relief workers).

*Employee* does not include—

(1) Any independent contractor; or

(2) Any individual who is not eligible to receive death or disability benefits from the purported employer on the same basis as a regular employee of such employer would.

*Filing* means any claim, request, motion, election, petition, or appeal, and any item or matter (e.g., evidence, certifications, authorizations, waivers, legal arguments, or lists) that is, or may be, filed with the PSOB Office.

*Fire protection* means—

(1) Suppression of fire;

(2) Hazardous-materials emergency response; or

(3) Emergency medical services or rescue activity of the kind performed by firefighters.

*Fire, rescue, or police emergency* includes disaster-relief emergency.

*Firefighter* means an individual who—

(1) Is trained in—

(i) Suppression of fire; or

(ii) Hazardous-materials emergency response; and

(2) Has the legal authority and responsibility to engage in the suppression of fire, as—

(i) An employee of the public agency he serves, which legally recognizes him to have such (or, at a minimum, does not deny (or has not denied) him to have such); or

(ii) An individual otherwise included within the definition provided in the Act, at 42 U.S.C. 3796b(4).

*Functionally within or -part of*—No individual shall be understood to be functionally within or -part of a public agency solely by virtue of an independent contractor relationship.

*Gross negligence* means great, heedless, wanton, indifferent, or reckless departure from ordinary care, prudence, diligence, or safe practice—

- (1) In the presence of serious risks that are known or obvious;
- (2) Under circumstances where it is highly likely that serious harm will follow; or
- (3) In situations where a high degree of danger is apparent.

*Hazardous-materials emergency response* means emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk.

*Heart attack* means myocardial infarction or sudden cardiac arrest.

*Illegitimate child*—An individual is an illegitimate child of a public safety officer only if he is a natural child of the officer, and the officer is not married to the other biological parent at (or at any time after) the time of his conception.

*Incapable of self-support because of physical or mental disability*—An individual is incapable of self-support because of physical or mental disability if he is under a disability within the meaning of the Social Security Act, at 42 U.S.C. 423(d)(1)(A), applicable *mutatis mutandis*.

*Independent contractor* includes any volunteer, servant, employee, contractor, or agent, of an independent contractor.

*Injury* means a traumatic physical wound (or a traumatized physical condition of the body) caused by external force (such as bullets, explosives, sharp instruments, blunt objects, or physical blows), chemicals, electricity, climatic conditions, infectious disease, radiation, virii, or bacteria, but does not include any occupational disease, or any condition of the body caused or occasioned by stress or strain.

*Injury date* means the time of the line of duty injury that—

(1) Directly and proximately results in the public safety officer's death, with respect to a claim under—

- (i) Subpart B of this part; or
- (ii) Subpart D of this part, by virtue of his death; or

(2) Directly (or directly and proximately) results in the public safety officer's total and permanent disability, with respect to a claim under—

- (i) Subpart C of this part; or
- (ii) Subpart D of this part, by virtue of his disability.

*Instrumentality* means entity, and does not include any individual, except that no entity shall be considered an instrumentality within the meaning of the Act, at 42 U.S.C. 3796b(8), or this part, unless, as of the injury date,

- (1) The entity—
  - (i) Is legally established, -recognized, or -organized, such that it has legal existence; and
  - (ii) Is so organized and controlled, and its affairs so conducted, that it operates and acts solely and exclusively as a functional part of the relevant government, which legally recognizes it as such (or, at a minimum, does not deny (or has not denied) it to be such); and

(2) The entity's—
 

- (i) Functions and duties are solely and exclusively of a public character;
- (ii) Services are provided generally to the public as such government would provide if acting directly through its public employees (*i.e.*, they are provided without regard to any particular relationship (such as a subscription) a member of the public may have with such entity); and

(iii) Acts and omissions are, and are recognized by such government as (or, at a minimum, not denied by such government to be), legally—

(A) Those of such government, for purposes of sovereign immunity; or

(B) The responsibility of such government, for purposes of tort liability.

*Intention*—A death, injury, or disability is brought about by a public safety officer's intention if—

(1) An intentional action or activity of his is a substantial factor in bringing it about; and

(2) It is a reasonably foreseeable result of the intentional action or activity.

*Intentional action or activity* means activity or action (other than line of duty activity or action), including behavior, that is—

(1) A result of conscious volition, or otherwise voluntary;

(2) Not a result of legal insanity or of impulse that is legally and objectively uncontrollable; and

(3) Not performed under legal duress or legal coercion of the will.

*Intentional misconduct*—Except with respect to voluntary intoxication at the time of death or catastrophic injury, a public safety officer's action or activity is intentional misconduct if—

(1) As of the date it is performed,

(i) Such action or activity—

(A) Is in violation of, or otherwise prohibited by, any statute, rule,

regulation, condition of employment or service, official mutual-aid agreement, or other law; or

(B) Is contrary to the ordinary, usual, or customary practice of similarly-situated officers within the public agency in which he serves; and

(ii) He knows, or reasonably should know, that it is so in violation,

prohibited, or contrary; and

(2) Such action or activity—

(i) Is intentional; and

(ii) Is—

(A) Performed without reasonable excuse; and

(B) Objectively unjustified.

*Involvement*—An individual is involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws (including juvenile delinquency), only if he is an officer of a public agency and, in that capacity, has legal authority and -responsibility to arrest, apprehend, prosecute, adjudicate, correct or detain (in a prison or other detention or confinement facility), or supervise (as a parole or probation officer), persons who are alleged or found to have violated the criminal laws, and is recognized by such agency, or the relevant government (or, at a minimum, not denied by such agency, or the relevant government), to have such authority and responsibility.

*Itemized description of representative services provided*—A description of representative services provided is itemized only when it includes—

(1) The beginning and end dates of the provision of the services;

(2) An itemization of the services provided and the amount of time spent in providing them; and

(3) An itemization of the expenses incurred in connection with the services provided for which reimbursement is sought.

*Kinds of public safety officers*—The following are the different kinds of public safety officers:

(1) Law enforcement officers;

(2) Firefighters;

(3) Chaplains;

(4) Members of rescue squads or ambulance crews; and

(5) Disaster relief workers.

*Law enforcement* means enforcement of the criminal laws, including—

(1) Control or reduction of crime or of juvenile delinquency;

(2) Prosecution or adjudication of individuals who are alleged or found to have violated such laws;

(3) Corrections or detention (in a prison or other detention or confinement facility) of individuals who are alleged or found to have violated such laws; and

(4) Supervision of individuals on parole or probation for having violated such laws.

*Line of duty activity or action*—Activity or an action is performed in the line of duty, in the case of a public safety officer who is—

(1) A law enforcement officer, a firefighter, or a member of a rescue squad or ambulance crew—

(i) Whose primary function (as applicable) is law enforcement, fire protection, rescue activity, or the provision of emergency medical services, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform (including any social, ceremonial, or athletic functions (or any training programs) to which he is assigned, or for which he is compensated), under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to be so obligated or authorized (or, at a minimum, does not deny (or has not denied) it to be such); or

(ii) Whose primary function is not law enforcement, fire protection, rescue activity, or the provision of emergency medical services, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(A) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to be so obligated or authorized (or, at a minimum, does not deny (or has not denied) it to be such); and

(B) It is performed (as applicable) in the course of law enforcement, providing fire protection, engaging in rescue activity, providing emergency medical services, or training for one of the foregoing, and such agency (or the relevant government) legally recognizes it as such (or, at a minimum, does not deny (or has not denied) it to be such);

(2) A disaster relief worker, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is disaster relief activity, and the agency he serves (or the relevant government), being described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), legally recognizes it as such (or, at a minimum,

does not deny (or has not denied) it to be such); or

(3) A chaplain, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(i) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes it as such (or, at a minimum, does not deny (or has not denied) it to be such); and

(ii) It is performed in the course of responding to a fire, rescue, or police emergency, and such agency (or the relevant government) legally recognizes it as such (or, at a minimum, does not deny (or has not denied) it to be such).

*Line of duty injury*—An injury is sustained in the line of duty only if—

(1) It is sustained in the course of—

(i) Performance of line of duty activity or a line of duty action; or

(ii) Authorized commuting; or

(2) Convincing evidence demonstrates that such injury resulted from the injured party's status as a public safety officer.

*Mental faculties* means brain function.

*Natural child*—An individual is a natural child of a public safety officer only if he is a biological child of the officer, and the officer is alive at the time of his birth.

*Occupational disease* means a disease that routinely constitutes a special hazard in, or is commonly regarded as a concomitant of, an individual's occupation.

*Official capacity*—An individual serves a public agency in an official capacity only if—

(1) He is officially authorized, -recognized, or -designated (by such agency) as functionally within or -part of it; and

(2) His acts and omissions, while so serving, are legally those of such agency, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such).

*Official duties* means duties that are officially authorized, -recognized, or -designated by an employing entity, such that the performance of those duties is legally the action of such entity, which legally recognizes it as such (or, at a minimum, does not deny (or has not denied) it to be such).

*Officially recognized or designated member of a department or agency* means a member of a department or agency, or of an instrumentality, of a government described in the Act, at 42

U.S.C. 3796b(8), who is officially recognized (or officially designated) as such a member by the same.

*Officially recognized or designated public employee of a department or agency* means a public employee of a department or agency who is officially recognized (or officially designated) as a public safety officer, by the same.

*Officially recognized or designated public employee member of a squad or crew* means a public employee member of a squad or crew who is officially recognized (or officially designated) as such a public employee member, by the public agency under whose auspices the squad or crew operates.

*OJP* means the Office of Justice Programs, U.S. Department of Justice.

*Parent* means a father or a mother.

*Parent-child relationship* means a relationship between a public safety officer and another individual, in which the officer has the role of parent (other than biological or legally-adoptive), as shown by convincing evidence.

*Performance of duties in a grossly negligent manner at the time of death or catastrophic injury* means gross negligence, as of or near the injury date, in the course of authorized commuting or performance of line of duty activity or a line of duty action, where such negligence is a substantial contributing factor in bringing such death or injury about.

*Posthumous child*—An individual is a posthumous child of a public safety officer only if he is a biological child of the officer, and the officer is—

(1) Alive at the time of his conception; and

(2) Not alive at the time of his birth.

*PSOB determining official* means, as applicable, any of the following:

(1) The PSOB Office;

(2) The Hearing Officer; or

(3) The Director.

*PSOB Office* means the unit of BJA that directly administers the Public Safety Officers' Benefits program, except that, with respect to the making of any finding, determination, affirmance, reversal, assignment, authorization, decision, judgment, waiver, or other ruling, it means such unit, acting with the concurrence of OJP's General Counsel.

*Public employee* means—

(1) An employee of a government described in the Act, at 42 U.S.C. 3796b(8), (or of a department or agency thereof) and whose acts and omissions while so employed are legally those of such government, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such); or

(2) An employee of an instrumentality of a government described in the Act, at

42 U.S.C. 3796b(8), who is eligible to receive death or disability benefits from such government on the same basis as an employee of that government (within the meaning of paragraph (1) of this definition) would.

*Public employee member of a squad or crew* means a member of a squad or crew who is a public employee under the auspices of whose public agency employer the squad or crew operates.

*Public employee of a department or agency* means a public employee whose public agency employer is the department or agency.

*Qualified beneficiary*—An individual is a qualified beneficiary under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, only if he is an eligible payee—

(1) Who qualifies as a beneficiary pursuant to a determination that—

(i) The requirements of the Act, at 42 U.S.C. 3796(a) or (b) (excluding the limitations relating to appropriations), as applicable, have been met; and

(ii) The provisions of this part, as applicable, relating to payees otherwise have been met; and

(2) Whose actions were not a substantial contributing factor to the death of the public safety officer (with respect to a claim under subpart B of this part).

*Representative services* include expenses incurred in connection with such services.

*Rescue activity* means search or rescue assistance in locating or extracting from danger persons lost, missing, or in imminent danger of serious bodily harm.

*Rescue squad or ambulance crew* means a squad or crew whose members are rescue workers, ambulance drivers, paramedics, health-care responders, emergency medical technicians, or other similar workers, who—

(1) Are trained in rescue activity or the provision of emergency medical services; and

(2) As such members, have the legal authority and -responsibility to—

(i) Engage in rescue activity; or

(ii) Provide emergency medical services.

*Spouse* means an individual's lawful husband, -wife, -widower, or -widow (*i.e.*, with whom the individual lawfully entered into marriage), and includes a spouse living apart from the individual, other than pursuant to divorce, except that, notwithstanding any other provision of law—

(1) For an individual purporting to be a spouse on the basis of a common-law marriage (or a putative marriage) to be considered a spouse within the meaning of this definition, it is necessary (but not sufficient) for the jurisdiction of

domicile of the parties to recognize such individual as the lawful spouse of the other; and

(2) In deciding who may be the spouse of a public safety officer—

(i) The relevant jurisdiction of domicile is the officer's (as of the injury date); and

(ii) With respect to a claim under subpart B of this part, the relevant date is that of the officer's death.

*Stepchild*—An individual is a stepchild of a public safety officer only if the individual is the legally-adoptive or biological first-generation offspring of a public safety officer's current, deceased, or former spouse, which offspring (not having been legally adopted by the officer)—

(1) Was conceived before the marriage of the officer and the spouse; and

(2) As of the injury date—

(i) Was known by the officer not to be his biological first-generation offspring; and

(ii) After the officer obtained such knowledge—

(A) Received over half of his support from the officer;

(B) Had as his principal place of abode the home of the officer and was a member of the officer's household; or

(C) Was in a parent-child relationship with the officer.

*Stress or strain* includes physical stress or strain, mental stress or strain, post-traumatic stress disorder, and depression.

*Stroke* means cerebral vascular accident.

*Student* means an individual who meets the definition provided in the Act, at 42 U.S.C. 3796b(3)(ii), with respect to an educational/academic institution.

*Substantial contributing factor*—A factor substantially contributes to a death, injury, or disability, if the factor—

(1) Contributed to the death, injury, or disability to a significant degree; or

(2) Is a substantial factor in bringing the death, injury, or disability about.

*Substantial factor*—A factor substantially brings about a death, injury, disability, heart attack, or stroke if—

(1) The factor alone was sufficient to have caused the death, injury, disability, heart attack, or stroke; or

(2) No other factor (or combination of factors) contributed to the death, injury, disability, heart attack, or stroke to so great a degree as it did.

*Suppression of fire* means extinguishment, physical prevention, or containment of fire, including on-site hazard evaluation.

*Terrorist attack*—An event or act is a terrorist attack within the meaning of

the Act, at 42 U.S.C. 3796c-1(a), only if the Attorney General determines that—

(1) There is a reasonable indication that the event or act was (or would be or would have been, with respect to *a priori* prevention or investigation efforts) an act of domestic or international terrorism within the meaning of the criminal terrorism laws, at 18 U.S.C. 2331; and

(2) The event or act (or the circumstances of death or injury) was of such extraordinary or cataclysmic character as to make particularized factual findings impossible, impractical, unnecessary, or unduly burdensome.

*Voluntary intoxication at the time of death or catastrophic injury* means the following:

(1) With respect to alcohol,

(i) In any claim arising from a public safety officer's death in which the death was simultaneous (or practically simultaneous) with the injury, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally; and

(ii) In any claim not described in paragraph (1)(i) of this definition, unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally, it means intoxication—

(A) As defined in the Act, at 42 U.S.C. 3796b(5), *mutatis mutandis* (*i.e.*, with "post-mortem" (each place it occurs) and "death" being substituted, respectively, by "post-injury" and "injury"); and

(B) As of the injury date; and

(2) With respect to drugs or other substances, it means a disturbance of mental or physical faculties resulting from their introduction into the body of a public safety officer, as evidenced by the presence therein, as of the injury date—

(i) Of any controlled substance included on Schedule I of the drug control and enforcement laws (see 21 U.S.C. 812(a)), or any controlled substance included on Schedule II, III, IV, or V of such laws (see 21 U.S.C. 812(a)) and with respect to which there is no therapeutic range or maximum recommended dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(ii) Of any controlled substance included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)) and with respect to which there is a therapeutic range or maximum recommended dosage—

(A) At levels above or in excess of such range or dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(B) At levels at, below, or within such range or dosage, unless convincing evidence demonstrates that—

(1) Such introduction was not a culpable act of the officer's under the criminal laws; or

(2) The officer was not acting in an intoxicated manner immediately prior to the injury date.

#### § 32.4 Terms; construction, severability.

(a) The first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.

(b) If benefits are denied to any individual pursuant to the Act, at 42 U.S.C. 3796a(4), or otherwise because his actions were a substantial contributing factor to the death of the public safety officer, such individual shall be presumed irrebuttably, for all purposes, not to have survived the officer.

(c) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

#### § 32.5 Evidence.

(a) Except as otherwise may be expressly provided in the Act or this part, a claimant has the burden of persuasion as to all material issues of fact, and by the standard of proof of "more likely than not."

(b) Except as otherwise may be expressly provided in this part, the PSOB determining official may, at his discretion, consider (but shall not be bound by) the factual findings of a public agency.

(c) Rules 401 (relevant evidence), 402 (admissibility), 602 to 604 (witnesses), 701 to 704 (testimony), 901 to 903 (authentication), and 1001 to 1008 (contents of writings, records, and photographs) of the Federal Rules of Evidence shall apply to all filings, hearings, and other proceedings or matters.

(d) In determining a claim, the PSOB determining official may, at his discretion, draw an adverse inference if, without reasonable justification or excuse—

(1) A claimant fails or refuses to file with the PSOB Office—

(i) Such material- or relevant evidence or -information within his possession, control, or ken as may reasonably be requested from time to time by such official; or

(ii) Such authorizations or waivers as may reasonably be requested from time to time by such official to enable him (or to assist in enabling him) to obtain access to material- or relevant evidence or -information of a medical, personnel, financial, or other confidential nature; or

(2) A claimant under subpart C of this part fails or refuses to appear in person—

(i) At his hearing under subpart E of this part (if there be such a hearing); or

(ii) Before such official (or otherwise permit such official personally to observe his condition), at a time and location reasonably convenient to both, as may reasonably be requested by such official.

(e) In determining a claim, the PSOB determining official may, at his discretion, draw an inference of voluntary intoxication at the time of death or catastrophic injury if, without reasonable justification or excuse, appropriate toxicologic analysis (including autopsy, in the event of death) is not performed, and/or the results thereof are not filed with the PSOB Office, where there is credible evidence suggesting that intoxication may have been a factor in the death or injury, or that the public safety officer—

(1) As of or near the injury date, was—

(i) A consumer of alcohol—

(A) In amounts likely to produce a blood-alcohol level of .10 per centum or greater in individuals similar to the officer in weight and sex; or

(B) In any amount, after ever having been treated at an inpatient facility for alcoholism;

(ii) A consumer of controlled substances included on Schedule I of the drug control and enforcement laws (see 21 U.S.C. 812(a)); or

(iii) An abuser of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)); or

(2) Immediately prior to the injury date, was under the influence of alcohol or drugs or other substances or otherwise acting in an intoxicated manner.

(f) In determining a claim under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, the certification described therein shall constitute *prima facie* evidence—

(1) Of the public agency's acknowledgment that the public safety officer, as of the injury date, was (as applicable)—

(i) A public safety officer of the kind described in the certification;

(ii) Employed by the agency;

(iii) One of the following:

(A) With respect to a law enforcement officer, an officer of the agency;

(B) With respect to a firefighter,

(1) An officially recognized or designated member of the agency (if it is a legally organized volunteer fire department); or

(2) An employee of the agency;

(C) With respect to a chaplain,

(1) An officially recognized or designated member of the agency (if it is a legally organized police or volunteer fire department); or

(2) An officially recognized or designated public employee of the agency (if it is a legally organized police or fire department);

(D) With respect to a member of a rescue squad or ambulance crew, an officially recognized or designated public employee member of one of the agency's rescue squads or ambulance crews; or

(E) With respect to a disaster relief worker, an employee of the agency (if it is described in the Act, at 42 U.S.C. 3796b(9)(B) or (C)); and

(iv) Killed (with respect to a claim under subpart B of this part), or totally and permanently disabled (with respect to a claim under subpart C of this part), as a direct and proximate result of a line of duty injury; and

(2) That there are no eligible payees other than those identified in the certification.

#### § 32.6 Payment and repayment.

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a particular public safety officer's spouse.

(b) No payment shall be made, save—

(1) To (or on behalf of) a living payee; and

(2) Pursuant to—

(i) A claim filed by (or on behalf of) such payee; and

(ii) Except as provided in the Act, at 42 U.S.C. 3796(c), approval of such claim.

(c) Any amounts that would be paid but for the provisions of paragraph (b) of this section shall be retained by the United States and not paid.

(d) With respect to the amount paid to a payee (or on his behalf) pursuant to a claim, the payee shall repay the following, unless, for good cause shown, the Director grants a full or partial waiver pursuant to the Act, at 42 U.S.C. 3796(m):

(1) The entire amount, if approval of the claim was based, in whole or in material part, on the payee's (or any other person's or entity's) fraud, concealment or withholding of evidence or information, false or inaccurate statements, mistake, wrongdoing, or deception; or

(2) The entire amount subject to divestment, if the payee's entitlement to such payment is divested, in whole or in part, such as by the subsequent discovery of individuals entitled to make equal or superior claims.

(e) At the discretion of the Director, repayment of amounts owing or collectable under the Act or this part may, as applicable, be executed through setoffs against future payments on financial claims under subpart D of this part.

### § 32.7 Fees for representative services.

(a) A person seeking to receive any amount from (or with respect to) a claimant for representative services provided in connection with any claim may petition the PSOB Office for authorization under this section. Such petition shall include—

(1) An itemized description of the services;

(2) The total amount sought to be received, from any source, as consideration for the services;

(3) An itemized description of any representative or other services provided to (or on behalf of) the claimant in connection with other claims or causes of action, unrelated to the Act, before any public agency or non-public entity (including any insurer), arising from the public safety officer's death, disability, or injury;

(4) The total amount requested, charged, received, or sought to be received, from any source, as consideration for the services described in paragraph (a)(3) of this section;

(5) A statement of whether the petitioner has legal training or is licensed to practice law, and a description of any special qualifications possessed by the petitioner (other than legal training or a license to practice law) that increased the value of his services to (or on behalf of) the claimant;

(6) A certification that the claimant was provided, simultaneously with the filing of the petition, with—

(i) A copy of the petition; and

(ii) A letter advising the claimant that he could file his comments on the petition, if any, with the PSOB Office, within thirty-three days of the date of that letter; and

(7) A copy of the letter described in paragraph (a)(6)(ii) of this section.

(b) Unless, for good cause shown, the Director extends the time for filing, no petition under paragraph (a) of this section shall be considered if the petition is filed with the PSOB Office later than one year after the date of the final agency determination of the claim.

(c) Subject to paragraph (d) of this section, an authorization under paragraph (a) of this section shall be based on consideration of the following factors:

(1) The nature of the services provided by the petitioner;

(2) The complexity of the claim;

(3) The level of skill and competence required to provide the petitioner's services;

(4) The amount of time spent on the claim by the petitioner;

(5) The results achieved as a function of the petitioner's services;

(6) The level of administrative or judicial review to which the claim was pursued and the point at which the petitioner entered the proceedings;

(7) The ordinary, usual, or customary fee charged by other persons (and by the petitioner) for services of a similar nature; and

(8) The amount authorized by the PSOB Office in similar cases.

(d) No amount shall be authorized under paragraph (a) of this section for—

(1) Any stipulated-, percentage-, or contingency fee;

(2) Services at a rate in excess of that specified in 5 U.S.C. 504(b)(1)(A)(ii) (Equal Access to Justice Act); or

(3) Services provided in connection with—

(i) Obtaining or providing evidence or information previously obtained by the PSOB determining official;

(ii) Preparing the petition; or

(iii) Explaining or delivering an approved claim to the claimant.

(e) Upon a petitioner's failure (without reasonable justification or excuse) to pursue in timely fashion his filed petition under paragraph (a) of this section, the Director may, at his discretion, deem the same to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the petitioner and the claimant with notice of the Director's intention to exercise such discretion.

(f) Upon its authorizing or not authorizing the payment of any amount under paragraph (a) of this section, the PSOB Office shall serve notice of the same upon the claimant and the petitioner. Such notice shall specify the amount, if any, the petitioner is authorized to charge the claimant and the basis of the authorization.

(g) No agreement for representative services in connection with a claim

shall be valid if the agreement provides for any consideration other than under this section. A person's receipt of consideration for such services other than under this section may, among other things, be the subject of referral by BJA to appropriate professional, administrative, disciplinary, or other legal authorities.

### § 32.8 Exhaustion of administrative remedies.

No determination or negative disability finding that, at the time made, may be subject to a request for a Hearing Officer determination, a motion for reconsideration, or a Director appeal, shall be considered a final agency determination for purposes of judicial review, unless all administrative remedies have been exhausted.

### Subpart B—Death Benefit Claims

#### § 32.11 Scope of subpart.

Consistent with § 32.1, this subpart contains provisions applicable to claims made under the Act—

(a) At 42 U.S.C. 3796(a); or

(b) At 42 U.S.C. 3796c-1 or Public Law 107-37, with respect to a public safety officer's death.

#### § 32.12 Time for filing claim.

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

(1) Three years after the public safety officer's death; or

(2) One year after the receipt or denial of any benefits described in § 32.15(a)(1)(i) (or the receipt of the certification described in § 32.15(a)(1)(ii)).

(b) A claimant may file with his claim such supporting evidence and legal arguments as he may wish to provide.

#### § 32.13 Definitions.

*Adoptive parent of a public safety officer* means any individual who (not being a step-parent), as of the injury date, was the legally-adoptive parent of the public safety officer, or otherwise was in a child-parent relationship with him.

*Beneficiary of a life insurance policy of a public safety officer*—An individual (living or deceased on the date of death of the public safety officer) is designated as beneficiary of a life insurance policy of such officer as of such date, only if the designation is, as of such date, legal and valid (as a designation of beneficiary of a life insurance policy) and unrevoked (by such officer or by operation of law), except that—

(1) Any designation of an individual (including any designation of the



biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage)—not having taken place as of such date of death—did not take place when scheduled, unless preponderant evidence demonstrates that—

(i) The alteration in schedule was for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such individual) shall be considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer after the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

*Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)*—An individual (living or deceased on the date of death of the public safety officer) is designated, by such officer (and as of such date), as beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), only if the designation is, as of such date, legal and valid and unrevoked (by such officer or by operation of law), except that—

(1) Any designation of an individual (including any designation of the biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage)—not having taken place as of such date of death—did not take place when scheduled, unless preponderant evidence demonstrates that—

(i) The alteration in schedule was for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such spouse (or purported spouse) shall be

considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer subsequent to the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

*Cardiovascular disease* includes heart attack and stroke.

*Child-parent relationship* means a relationship between a public safety officer and another individual, in which the individual (other than the officer's biological or legally-adoptive parent) has the role of parent, as shown by convincing evidence.

*Circumstances other than engagement or participation* means—

(1) An event or events; or

(2) An intentional risky behavior or intentional risky behaviors.

*Commonly accepted* means generally agreed upon within the medical profession.

*Competent medical evidence to the contrary*—The presumption raised by the Act, at 42 U.S.C. 3796(k), is overcome by competent medical evidence to the contrary, when evidence indicates to a degree of medical probability that circumstances other than any engagement or participation described in the Act, at 42 U.S.C. 3796(k)(1), considered in combination (as one circumstance) or alone, were a substantial factor in bringing the heart attack or stroke about.

*Direct and proximate result of a heart attack or stroke*—A death results directly and proximately from a heart attack or stroke if the heart attack or stroke is a substantial factor in bringing it about.

*Engagement in a situation*—A public safety officer is engaged in a situation only when, within his line of duty—

(1) He is in the course of actually—

(i) Engaging in law enforcement;

(ii) Suppressing fire;

(iii) Responding to a hazardous-materials emergency;

(iv) Performing rescue activity;

(v) Providing emergency medical services; or

(vi) Performing disaster relief activity; or

(vii) Otherwise responding to a fire, rescue, or police emergency; and

(2) The public agency he serves (or the relevant government) legally recognizes him to be in such course (or, at a minimum, does not deny (or has not denied) him so to be).

*Event* includes occurrence, but does not include any engagement or participation described in the Act, at 42 U.S.C. 3796(k)(1).

*Excessive consumption of alcohol*—An individual is an excessive consumer

of alcohol if he consumes alcohol in amounts commonly accepted to be associated with substantially-increased risk of cardiovascular disease.

*Execution of a designation of beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)* means the legal and valid execution, by the public safety officer, of a writing that, designating a beneficiary, expressly, specifically, or unmistakably refers to—

(1) The Act (or the program it creates); or

(2) All the death benefits with respect to which such officer lawfully could designate a beneficiary (if there be no writing that satisfies paragraph (1) of this definition).

*Execution of a life insurance policy* means, with respect to a life insurance policy, the legal and valid execution, by the individual whose life is insured thereunder, of—

(1) The approved application for coverage;

(2) A designation of beneficiary; or

(3) A designation of the mode of benefit.

*Medical probability*—A fact is indicated to a degree of medical probability, when, pursuant to a medical assessment, the fact is indicated by a preponderance of such evidence as may be available.

*Most recently executed designation of beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)* means the most recently executed such designation that, as of the date of death of the public safety officer, designates a beneficiary.

*Most recently executed life insurance policy of a public safety officer* means the most recently executed policy insuring the life of a public safety officer that, being legal and valid (as a life insurance policy) upon its execution, as of the date of death of such officer—

(1) Designates a beneficiary; and

(2) Remains legally in effect.

*Nonroutine strenuous physical activity*—Except as excluded by the Act, at 42 U.S.C. 3796(l), nonroutine strenuous physical activity means line of duty activity that—

(1) Is not performed as a matter of routine; and

(2) Entails an unusually-high level of physical exertion.

*Nonroutine stressful or strenuous physical activity* means nonroutine stressful physical activity or nonroutine strenuous physical activity.

*Nonroutine stressful physical activity*—Except as excluded by the Act, at 42 U.S.C. 3796(l), nonroutine stressful physical activity means line of duty activity that—

(1) Is not performed as a matter of routine;

(2) Entails non-negligible physical exertion; and

(3) Occurs—

(i) With respect to a situation in which a public safety officer is engaged, under circumstances that objectively and reasonably—

(A) Pose (or appear to pose) significant dangers, threats, or hazards (or reasonably-foreseeable risks thereof), not faced by similarly-situated members of the public in the ordinary course; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety; or

(ii) With respect to a training exercise in which a public safety officer participates, under circumstances that objectively and reasonably—

(A) Simulate in realistic fashion situations that pose significant dangers, threats, or hazards; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety.

*Parent of a public safety officer* means a public safety officer's surviving—

(1) Biological or adoptive parent whose parental rights have not been terminated, as of the injury date; or

(2) Step-parent.

*Participation in a training exercise*—A public safety officer participates (as a trainer or trainee) in a training exercise only if it is a formal part of an official training program whose purpose is to train public safety officers in, prepare them for, or improve their skills in, particular activity or actions encompassed within their respective lines of duty.

*Public safety agency, organization, or unit* means a department or agency (or component thereof)—

(1) In which a public safety officer serves in an official capacity, with or without compensation, as such an officer (of any kind but disaster relief worker); or

(2) Of which a public safety officer is an employee, performing official duties as described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), as a disaster relief worker.

*Risky behavior* means—

(1) Failure (without reasonable justification or excuse) to undertake treatment—

(i) Of any commonly-accepted cardiovascular-disease risk factor associated with clinical values, where such risk factor is—

(A) Known (or should be known) to be present; and

(B) Present to a degree that substantially exceeds the minimum value commonly accepted as indicating high risk;

(ii) Of any disease or condition commonly accepted to be associated

with substantially-increased risk of cardiovascular disease, where such associated disease or condition is known (or should be known) to be present; or

(iii) Where a biological parent, -sibling, or -child, is known to have (or have a history of) cardiovascular disease;

(2) Smoking an average of more than one-half of a pack of cigarettes (or its equivalent) per day;

(3) Excessive consumption of alcohol;

(4) Consumption of controlled substances included on Schedule I of the drug control and enforcement laws (see 21 U.S.C. 812(a)), where such consumption is commonly accepted to be associated with increased risk of cardiovascular disease; or

(5) Abuse of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)), where such abuse is commonly accepted to be associated with increased risk of cardiovascular disease.

*Step-parent of a public safety officer* means a current or former spouse of the legally-adoptive or biological parent (living or deceased) of a public safety officer conceived (or legally adopted) by that parent before the marriage of the spouse and the parent, which spouse (not being a legally-adoptive parent of the officer), as of the injury date,

(1) Received over half of his support from the officer;

(2) Had as his principal place of abode the home of the officer and was a member of the officer's household; or

(3) Was in a child-parent relationship with the officer.

*Undertaking of treatment*—An individual undertakes treatment, when he consults with a physician licensed to practice medicine in any jurisdiction described in the Act, at 42 U.S.C. 3796b(8), and complies substantially with his recommendations.

#### § 32.14 PSOB Office determination.

(a) Upon its approving or denying a claim, the PSOB Office shall serve notice of the same upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer). In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to requesting a Hearing Officer determination.

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination, by the PSOB Office, of his filed claim, the Director may, at his

discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

#### § 32.15 Prerequisite certification.

(a) Except as provided in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and unless, for good cause shown, the Director grants a waiver, no claim shall be approved unless the following (which shall be necessary, but not sufficient, for such approval) are filed with the PSOB Office:

(1) Subject to paragraph (b) of this section, a certification from the public agency in which the public safety officer served (as of the injury date) that he died as a direct and proximate result of a line of duty injury, and either—

(i) That his survivors (listed by name, address, relationship to him, and amount received) have received (or legally are entitled to receive) the maximum death benefits legally payable by the agency with respect to deaths of public safety officers of his kind, rank, and tenure; or

(ii) Subject to paragraph (c) of this section, that the agency is not legally authorized to pay—

(A) Any benefits described in paragraph (a)(1)(i) of this section, to any person; or

(B) Any benefits described in paragraph (a)(1)(i) of this section, to public safety officers of the kind, rank, and tenure described in such paragraph;

(2) A copy of any rulings made by any public agency that relate to the officer's death; and

(3) A certification from the claimant listing every individual known to him who is or might be the officer's child, spouse, or parent.

(b) The provisions of paragraph (a)(1) of this section shall also apply with respect to every public agency that legally is authorized to pay death benefits with respect to the agency described in that paragraph.

(c) No certification described in paragraph (a)(1)(ii) of this section shall be deemed complete unless it—

(1) Lists every public agency (other than BJA) that legally is authorized to pay death benefits with respect to the certifying agency; or

(2) States that no public agency (other than BJA) legally is authorized to pay death benefits with respect to the certifying agency.

#### § 32.16 Payment.

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a public safety

officer's parent as his mother, or on that basis as his father. If more than one parent qualifies as the officer's mother, or as his father, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that any biological or legally-adoptive parent whose parental rights have not been terminated as of the injury date shall be presumed rebuttably to be such one.

(b) Any amount payable with respect to a minor or incompetent shall be paid to his legal guardian, to be expended solely for the benefit of such minor or incompetent.

#### **§ 32.17 Request for Hearing Officer determination.**

In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall request a Hearing Officer determination under subpart E of this part. Consistent with § 32.8, any denial that is not the subject of such a request shall constitute the final agency determination.

### **Subpart C—Disability Benefit Claims**

#### **§ 32.21 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to claims made under the Act—

- (a) At 42 U.S.C. 3796(b); or
- (b) At 42 U.S.C. 3796c-1 or Public Law 107-37, with respect to a public safety officer's disability.

#### **§ 32.22 Time for filing claim.**

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

- (1) Three years after the injury date; or
- (2) One year after the receipt or denial of any benefits described in § 32.25(a)(1)(i) (or receipt of the certification described in § 32.25(a)(1)(ii)).

(b) A claimant may file with his claim such supporting evidence and legal arguments as he may wish to provide.

#### **§ 32.23 Definitions.**

*Direct result of an injury*—A disability results directly from an injury if the injury is a substantial factor in bringing the disability about.

*Gainful work* means full- or part-time activity that actually is compensated or commonly is compensated.

*Medical certainty*—A fact exists to a degree of medical certainty, when, pursuant to a medical assessment, the fact is demonstrated by convincing evidence.

*Permanently disabled*—An individual is permanently disabled only if there is a degree of medical certainty (given the current state of medicine in the United States) that his disabled condition—

- (1) Will progressively deteriorate or remain constant, over his expected lifetime; or
- (2) Otherwise has reached maximum medical improvement.

*Product of an injury*—Permanent and total disability is produced by a catastrophic injury suffered as a direct and proximate result of a personal injury if the disability is a direct result of the personal injury.

*Residual functional capacity* means that which an individual still is capable of doing, as shown by medical (and, as appropriate, vocational) assessment, despite a disability.

*Totally disabled*—An individual is totally disabled only if there is a degree of medical certainty (given the current state of medicine in the United States) that his residual functional capacity is such that he cannot perform any gainful work.

#### **§ 32.24 PSOB Office determination.**

(a) Upon its approving or denying a claim, the PSOB Office shall serve notice of the same upon the claimant. In the event of a denial, such notice shall—

- (1) Specify the factual findings and legal conclusions that support it; and
- (2) Provide information as to—

- (i) Requesting a Hearing Officer determination; or
  - (ii) As applicable, moving to reconsider a negative disability finding.
- (b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his filed claim, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

#### **§ 32.25 Prerequisite certification.**

(a) Except as provided in the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37, and unless, for good cause shown, the Director grants a waiver, no claim shall be approved unless the following (which shall be necessary, but not sufficient, for such approval) are filed with the PSOB Office:

- (1) Subject to paragraph (b) of this section, a certification from the public agency in which the public safety officer served (as of the injury date) that he was permanently and totally disabled as a direct result of a line of duty injury, and either—

- (i) That he has received (or legally is entitled to receive) the maximum

disability benefits (including workers' compensation) legally payable by the agency with respect to disabled public safety officers of his kind, rank, and tenure; or

(ii) Subject to paragraph (c) of this section, that the agency is not legally authorized to pay—

(A) Any benefits described in paragraph (a)(1)(i) of this section, to any person; or

(B) Any benefits described in paragraph (a)(1)(i) of this section, to public safety officers of the kind, rank, and tenure described in such paragraph; and

(2) A copy of—

(i) Each State, local, and federal income tax return filed by or on behalf of the public safety officer from the year before the injury date to the date of determination by the PSOB determining official; and

(ii) Any rulings made by any public agency that relate to the claimed disability.

(b) The provisions of paragraph (a)(1) of this section shall also apply with respect to every public agency that legally is authorized to pay disability benefits with respect to the agency described in that paragraph.

(c) No certification described in paragraph (a)(1)(ii) of this section shall be deemed complete unless it—

- (1) Lists every public agency (other than BJA) that legally is authorized to pay disability benefits with respect to the certifying agency; or
- (2) States that no public agency (other than BJA) legally is authorized to pay disability benefits with respect to the certifying agency.

#### **§ 32.26 Payment.**

The amount payable on a claim shall be the amount payable, as of the injury date, pursuant to the Act, at 42 U.S.C. 3796(b).

#### **§ 32.27 Motion for reconsideration of negative disability finding.**

A claimant whose claim is denied in whole or in part on the ground that he has not shown that his claimed disability is total and permanent may move for reconsideration, under § 32.28, of the specific finding as to the total and permanent character of the claimed disability (in lieu of his requesting a Hearing Officer determination with respect to the same).

#### **§ 32.28 Reconsideration of negative disability finding.**

(a) Unless, for good cause shown, the Director extends the time for filing, no negative disability finding described in § 32.27 shall be reconsidered if the

motion under that section is filed with the PSOB Office later than thirty-three days after the service of notice of the denial.

(b) Notwithstanding any other provision of this section, no negative disability finding described in § 32.27 shall be reconsidered—

(1) If or after such reconsideration is rendered moot (e.g., by the final denial of the claim on other grounds, without possibility of further administrative or judicial recourse); or

(2) If a request for a Hearing Officer determination has been filed in timely fashion with respect to such finding.

(c) Unless, for good cause shown, the Director grants a waiver, upon the making of a motion under § 32.27, reconsideration of the negative disability finding described in that section shall be stayed for three years. Upon the conclusion of the stay, the claimant shall have not more than six years to file evidence with the PSOB Office in support of his claimed disability.

(d) Upon a claimant's failure (without reasonable justification or excuse) to file in timely fashion evidence pursuant to paragraph (c) of this section, the Director may, at his discretion, deem the motion for reconsideration to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

(e) No negative disability finding described in § 32.27 shall be reversed unless a copy (which shall be necessary, but not sufficient, for such reversal) of each federal, State, and local income tax return filed by or on behalf of the claimant from the year before the date of the motion for reconsideration under that section to the date of reversal is filed with the PSOB Office.

(f) Upon its affirming or reversing a negative disability finding described in § 32.27, the PSOB Office shall serve notice of the same upon the claimant. In the event of an affirmance, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to requesting a Hearing Officer determination of the disability finding.

#### **§ 32.29 Request for Hearing Officer determination.**

(a) In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall request a Hearing Officer determination under subpart E of this part—

(1) Of—

(i) His entire claim, if he has not moved for reconsideration of a negative disability finding under § 32.27; or

(ii) The grounds (if any) of the denial that are not the subject of such motion, if he has moved for reconsideration of a negative disability finding under § 32.27; and

(2) Of a negative disability finding that is affirmed pursuant to his motion for reconsideration under § 32.27.

(b) Consistent with § 32.8, the following shall constitute the final agency determination:

(1) Any denial not described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(i) of this section;

(2) Any denial described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(ii) of this section, unless the negative disability finding is the subject of a motion for reconsideration; and

(3) Any affirmance that is not the subject of a request for a Hearing Officer determination under paragraph (a)(2) of this section.

#### **Subpart D—Educational Assistance Benefit Claims**

##### **§ 32.31 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to claims (i.e., threshold claims and financial claims) made under the Act, at 42 U.S.C. 3796d–1.

##### **§ 32.32 Time for filing claim.**

(a) Subject to the Act, at 42 U.S.C. 3796d–1(c), and to paragraph (b) of this section, a claim may be filed with the PSOB Office at any time after the injury date.

(b) Unless, for good cause shown, the Director grants a waiver, no financial claim may be filed with the PSOB Office, with respect to a grading period that commences more than six months after the date of filing.

(c) A claimant may file with his claim such supporting evidence and legal arguments as he may wish to provide.

##### **§ 32.33 Definitions.**

*Application* means claim (i.e., a threshold claim or a financial claim).

*Assistance* means financial assistance.

*Child of an eligible public safety officer* means the child of a public safety officer, which officer is an eligible public safety officer.

*Dependent*—An individual is a dependent of an eligible public safety officer, if—

(1) Being a child of the officer, the individual—

(i) Was claimed properly as the officer's dependent (within the meaning of the Internal Revenue Code, at 26 U.S.C. 152) on the officer's federal income-tax return (or could have been claimed if such a return had been required by law)—

(A) For the tax year of (or immediately preceding) either the injury date or the date of the officer's death (with respect to a claim by virtue of such death); or

(B) For the relevant tax year (with respect to a claim by virtue of the officer's disability); or

(ii) Is the officer's posthumous child; or

(2) Being a spouse of the officer at the time of the officer's death or on the date of the officer's totally and permanently disabling injury, the individual received over half of his support from the officer (or had as his principal place of abode the home of the officer and was a member of the officer's household)—

(i) As of either the injury date or the date of the officer's death (with respect to a claim by virtue of such death); or

(ii) In the relevant tax year (with respect to a claim by virtue of the officer's disability).

*Educational assistance benefits* means benefits specifically to assist in paying educational expenses.

*Educational expenses* means such of the following as may be in furtherance of the educational, professional, or vocational objective of the program of education that forms the basis of a financial claim:

(1) Tuition and fees, as described in 20 U.S.C. 108711(1) (higher education assistance);

(2) Reasonable expenses for—

(i) Room and board (if incurred for attendance on at least a half-time basis);

(ii) Books;

(iii) Computer equipment;

(iv) Supplies;

(v) Transportation; and

(3) For attendance on at least a three-quarter-time basis, a standard allowance for miscellaneous personal expenses that is the greater of—

(i) The allowance for such expenses, as established by the eligible educational institution for purposes of financial aid; or

(ii) \$200.00 per month.

*Eligible dependent* means an individual who—

(1) Is a dependent of an eligible public safety officer;

(2) Attends a program of education, as described in the Act, at 42 U.S.C. 3796d–1(a)(1); and

(3) Is otherwise eligible to receive financial assistance pursuant to the Act or this subpart.

*Eligible educational expenses* means a claimant's educational expenses,

reduced by the amount of educational assistance benefits from non-governmental organizations that the claimant has received or will receive.

*Eligible public safety officer* means a public safety officer—

(1) With respect to whose death, benefits under subpart B of this part properly have been paid; or

(2) With respect to whose disability, benefits under subpart C of this part properly—

(i) Have been paid; or

(ii) Would have been paid, but for the operation of paragraph (b)(1) of § 32.6.

*Financial assistance* means financial assistance, as described in the Act, at 42 U.S.C. 3796d-1.

*Financial claim* means a request for financial assistance, with respect to attendance at a program of education, for a particular grading period.

*Financial need*—An individual is in financial need for a particular grading period to the extent that the amount of his eligible educational expenses for that period exceed the sum of—

(1) The amount of his educational assistance benefits as described in the Act, at 42 U.S.C. 3796d-1(a)(3)(A); and

(2) His expected family contribution calculated pursuant to 20 U.S.C. 1087nn (higher education assistance).

*Funds* means financial assistance.

*Grading period* means the period of attendance (e.g., a semester, a trimester, a quarter) in a program of education, after (or with respect to) which period grades are assigned, units of credit are awarded, or courses are considered completed, as determined by the eligible educational institution.

*Prospective financial claim* means a financial claim with respect to a grading period that ends after the claim is filed.

*Public safety agency* means a public agency—

(1) In which a public safety officer serves in an official capacity, with or without compensation, as such an officer (of any kind but disaster relief worker); or

(2) Of which a public safety officer is an employee, performing official duties as described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), as a disaster relief worker.

*Retroactive financial claim* means a financial claim with respect to a grading period that ends before the claim is filed.

*Spouse of an eligible public safety officer at the time of the officer's death or on the date of a totally and permanently disabling injury* means the spouse of a public safety officer (which officer is an eligible public safety officer) as of—

(1) The date of the officer's death (with respect to a claim by virtue of such death); or

(2) The injury date (with respect to a claim by virtue of the officer's disability).

*Tax Year*—With respect to a claim by virtue of an eligible public safety officer's disability, the relevant tax year is—

(1) The tax year of (or immediately preceding) the injury date;

(2) Any tax year during which the program of education that forms the basis of the claim is attended or is pursued;

(3) The tax year immediately preceding the date on which the program of education that forms the basis of the claim commenced (or is to commence); or

(4) The tax year of (or immediately preceding) the officer's death, where the program of education that forms the basis of the claim commenced (or is to commence) after the date of such death.

*Threshold claim* means a request for determination of general eligibility to receive financial assistance.

#### **§ 32.34 PSOB Office determination.**

(a) In the event of the PSOB Office's denying a claim, the notice it serves upon the claimant shall—

(1) Specify the factual findings and legal conclusions that support the denial; and

(2) Provide information as to requesting a Hearing Officer determination.

(b) No financial claim shall be approved, unless the claimant's threshold claim has been approved.

(c) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his filed claim, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

#### **§ 32.35 Disqualification.**

No claim shall be approved if the claimant is—

(a) In default on any student loan obtained under 20 U.S.C. 1091 (higher education assistance), unless, for good cause shown, the Director grants a waiver; or

(b) Subject to a denial of federal benefits under 21 U.S.C. 862 (drug traffickers and possessors).

#### **§ 32.36 Payment and repayment.**

(a) The computation described in the Act, at 42 U.S.C. 3796d-1(a)(2), shall be

based on a certification from the eligible educational institution as to the claimant's full-, three-quarter-, half-, or less-than-half-time student status, according to such institution's own academic standards and practices.

(b) No payment shall be made with respect to any grading period that ended before the injury date.

(c) With respect to any financial claim, no amount shall be payable that exceeds the amount of the eligible educational expenses that form the basis of the claim.

(d) In the event that appropriations for a fiscal year are insufficient for full payment of all approved or anticipated financial claims, the following payments shall be made—

(1) The amounts payable on approved prospective financial claims from claimants in financial need, to the extent of such need (if sufficient funds be available therefor), in the order the claims are approved;

(2) All other amounts payable on approved prospective financial claims (in the order the claims are approved), if sufficient funds be available therefor—

(i) After payment of all amounts payable pursuant to paragraph (d)(1) of this section; and

(ii) After making allowance for anticipated amounts payable in the fiscal year pursuant to paragraph (d)(1) of this section; and

(3) The amounts payable on approved retroactive financial claims (in the order the claims are approved), if sufficient funds be available therefor—

(i) After payment of all amounts payable pursuant to paragraphs (d)(1) and (2) of this section; and

(ii) After making allowance for anticipated amounts payable in the fiscal year, pursuant to paragraphs (d)(1) and (2) of this section.

(e) In the event that, at the conclusion of a fiscal year, any amounts remain payable on an approved financial claim, such amounts shall remain payable thereafter until paid (when appropriations be sufficient therefor).

(f) In the event that any amounts remain payable on an approved prospective financial claim after the end of the grading period that forms its basis, such claim shall be deemed an approved retroactive financial claim for purposes of paragraph (d) of this section.

(g) No payment shall be made to (or on behalf of) any individual, on the basis of being a particular living public safety officer's spouse, unless the individual is the officer's spouse on the date of payment.

(h) Unless, for good cause shown, the Director grants a full or partial waiver, a payee shall repay the amount paid to him (or on his behalf) pursuant to a prospective financial claim if, during the grading period that forms its basis—

(1) He fails to maintain satisfactory progress under 20 U.S.C. 1091(c) (higher education assistance);

(2) He fails to maintain the enrollment status described in his claim; or

(3) By his acts or omissions, he is or becomes ineligible for financial assistance.

#### **§ 32.37 Request for Hearing Officer determination.**

In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall request a Hearing Officer determination under subpart E of this part. Consistent with § 32.8, any denial that is not the subject of such a request shall constitute the final agency determination.

#### **Subpart E—Hearing Officer Determinations**

##### **§ 32.41 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to requests for Hearing Officer determination of claims denied under subpart B, C (including affirmances of negative disability findings described in § 32.27), or D of this part.

##### **§ 32.42 Time for filing request for determination.**

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be determined if the request therefor is filed with the PSOB Office later than thirty-three days after the service of notice of—

(1) The denial (under subpart B, C (except as may be provided in paragraph (a)(2) of this section), or D of this part) of a claim; or

(2) The affirmation (under subpart C of this part) of a negative disability finding described in § 32.27.

(b) A claimant may file with his request for a Hearing Officer determination such supporting evidence and legal arguments as he may wish to provide.

##### **§ 32.43 Appointment and assignment of Hearing Officers.**

(a) Pursuant to 42 U.S.C. 3787 (employment and authority of hearing officers), Hearing Officers may be appointed from time to time by the Director, to remain on the roster of such Officers at his pleasure.

(b) Upon the filing of a request for a Hearing Officer determination, the PSOB Office shall assign the claim to a

Hearing Officer on the roster; the PSOB Office may assign a particular claim to a specific Hearing Officer if it judges, in its discretion, that his experience or expertise suit him especially for it.

(c) Upon its making the assignment described in paragraph (b) of this section, the PSOB Office shall serve notice of the same upon claimant, with an indication that any evidence or legal argument he wishes to provide is to be filed simultaneously with the PSOB Office and the Hearing Officer.

(d) With respect to an assignment described in paragraph (b) of this section, the Hearing Officer's consideration shall be—

(1) *De novo*, rather than in review of the findings, determinations, affirmances, reversals, assignments, authorizations, decisions, judgments, rulings, or other actions of the PSOB Office; and

(2) Consistent with subpart B, C, or D of this part, as applicable.

(e) OJP's General Counsel shall provide advice to the Hearing Officer as to all questions of law relating to a claim assigned pursuant to paragraph (b) of this section.

##### **§ 32.44 Hearing Officer determination.**

(a) Upon his determining a claim, the Hearing Officer shall file notice of the same simultaneously with the Director (for his review under subpart F of this part (in the event of approval)), the PSOB Office, and OJP's General Counsel, which notice shall specify the factual findings and legal conclusions that support it.

(b) Upon a Hearing Officer's denying a claim, the PSOB Office shall serve notice of the same upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer), which notice shall—

(1) Specify the Hearing Officer's factual findings and legal conclusions that support it; and

(2) Provide information as to Director appeals.

(c) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his claim pursuant to his filed request therefor, the Director may, at his discretion, deem the request to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

##### **§ 32.45 Hearings.**

(a) At the election of a claimant under subpart B or C of this part, the Hearing Officer shall hold a hearing, at a

location agreeable to the claimant and the Officer, for the sole purposes of obtaining, consistent with § 32.5(c),

(1) Evidence from the claimant and his fact or expert witnesses; and

(2) Such other evidence as the Hearing Officer, at his discretion, may rule to be necessary or useful.

(b) Unless, for good cause shown, the Director extends the time for filing, no election under paragraph (a) of this section shall be honored if it is filed with the PSOB Office later than ninety days after service of the notice described in § 32.43(c).

(c) Not less than seven days prior to any hearing, the claimant shall file simultaneously with the PSOB Office and the Hearing Officer a list of all expected fact or expert witnesses and a brief summary of the evidence each witness is expected to provide.

(d) At any hearing, the Hearing Officer—

(1) May exclude any evidence whose probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(2) Shall exclude witnesses (other than the claimant, or any person whose presence is shown by the claimant to be essential to the presentation of his claim), so that they cannot hear the testimony of other witnesses.

(e) Each hearing shall be recorded, and the original of the complete record or transcript thereof shall be made a part of the claim file.

(f) Unless, for good cause shown, the Director grants a waiver, a claimant's failure to appear at a hearing (in person or through a representative) shall constitute a withdrawal of his election under paragraph (a) of this section.

(g) Upon a claimant's failure to pursue in timely fashion his filed election under paragraph (a) of this section, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

##### **§ 32.46 Director appeal.**

(a) In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall appeal to the Director under subpart F of this part.

(b) Consistent with § 32.8, any claim denial that is not appealed to the Director under paragraph (a) of this section shall constitute the final agency determination, unless the denial is reviewed otherwise under subpart F of this part.

**Subpart F—Director Appeals and Reviews**

**§ 32.51 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to Director appeals and reviews of claim approvals and denials made under subpart E of this part, and reviews of claim approvals under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37.

**§ 32.52 Time for filing Director appeal.**

(a) Unless, for good cause shown, the Director extends the time for filing, no Director appeal shall be considered if it is filed with the PSOB Office later than thirty-three days after the service of notice of the denial (under subpart E of this part) of a claim.

(b) A claimant may file with his Director appeal such supporting evidence and legal arguments as he may wish to provide.

**§ 32.53 Review.**

(a) Upon the filing of the approval (under subpart E of this part) of a claim, the Director shall review the same.

(b) The Director may review—

(1) Any claim denial made under subpart E of this part; and

(2) Any claim approval made under the Act, at 42 U.S.C. 3796c-1 or Public Law 107-37.

(c) Unless the Director judges that it would be unnecessary, the PSOB Office shall serve notice upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer) of the initiation of a review under paragraph (a) or (b) of this section. Unless the Director judges that it would be unnecessary, such notice shall—

(1) Indicate the principal factual findings or legal conclusions at issue; and

(2) Offer a reasonable opportunity for filing of evidence or legal arguments.

**§ 32.54 Director determination.**

(a) Upon the Director's approving or denying a claim, the PSOB Office shall serve notice of the same simultaneously upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer), and upon any Hearing Officer who made a determination with respect to the claim. In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to judicial appeals (for the claimant or claimants).

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his claim pursuant to his filed Director appeal, the Director may, at his discretion, deem the same to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

**§ 32.55 Judicial appeal.**

(a) A claimant seeking relief from the denial of his claim may appeal judicially under 28 U.S.C. 1491(a) (claims against the United States).

(b) Consistent with § 32.8, any approval or denial described in § 32.54(a) shall constitute the final agency determination.

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