

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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: Notice of proposed rulemaking with request for comments.

SUMMARY: The Office of Justice Programs, Department of Justice, proposes this rule to amend regulations which implement the Public Safety Officers' Benefits Act, as amended. The Act provides financial support to certain public safety officers, or their survivors and families, when such officers die, or become permanently and totally disabled, as a result of line-of-duty injuries. The proposed rule would incorporate recent statutory amendments to the program, specifically, to provide coverage for chaplains and the addition of certain life insurance beneficiaries, and to provide coverage for certain heart attack and stroke cases. The proposed rule also would amend the regulations to incorporate longstanding internal agency policy and practice, court decisions, and certain technical changes, in order to make the regulations more comprehensive and user-friendly.

DATES: Comments must be received by no later than 5 p.m., E.S.T., on September 26, 2005.

ADDRESSES: Please address all comments regarding this proposed rule, by U.S. mail, to: Hope Janke, Counsel to the Director, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, NW., Washington, DC 20531; by telefacsimile transmission, to: Hope Janke, Counsel to the Director, at (202) 305–1367; or by e-mail, to: PSOBREGS@usdoj.gov. To ensure

proper handling, please reference OJP Docket No. 1333 on your correspondence. You may view an electronic version of this proposed rule at <http://www.regulations.gov> and you may also comment by using the www.regulations.gov form for this regulation. When submitting comments electronically, you must include OJP Docket No. 1333 in the subject box.

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:

I. Background

The Public Safety Officers Benefits (PSOB) Program is administered by the Bureau of Justice Assistance (BJA), Office of Justice Programs (OJP), Department of Justice, pursuant to the statute, as a means of providing a one-time financial payment to the statutorily-eligible survivors of public safety officers who die as the direct and proximate result of a traumatic injury sustained in the line of duty, as well as educational assistance for certain of those survivors; and also providing a one-time financial payment to public safety officers who are permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty, as well as educational assistance for their spouses and certain of their children. As the 9th Circuit Court of Appeals observed, however, in *Russell v. United States*, 637 F.2d 1255, 1261 (1981), the statute did not create a comprehensive insurance-type compensation program, similar to those administered by many States and municipalities. *See also Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (*per curiam*); *Chacon v. United States*, 32 Fed. Cl. 684, 687 (1995); *Holstine v. Dep't of Justice*, No. 80–7477, slip op. at 2 (9th Cir. Aug. 4, 1982).

The statute, rather, provides for three specific types of benefits, each expressly dependent upon implementing regulations that BJA is authorized to issue: (1) “[i]n any case in which [BJA] determines, 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,” BJA is to provide a one-time financial benefit to the statutorily-eligible survivors; (2)

“[i]n accordance with regulations pursuant to this [Act],” BJA is to provide a one-time financial benefit to public safety officers who “become permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty”; and (3) pursuant to “reasonable and necessary regulations” that it may “promulgate * * * to implement [the Act],” BJA is to provide certain higher-education assistance for statutorily-eligible children and spouses of public safety officers who are killed or permanently and totally disabled in the line of duty. BJA—on which, by statute, the sole “[r]esponsibility for making final determinations * * * rest[s]”—is prepared to pay, in a timely fashion, every eligible claim relating to an officer who has died or been permanently and totally disabled in the line of duty, according to the requirements of the law.

Pursuant to the foregoing authorities, and to BJA's additional express statutory authority generally “to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of [the Act]” (which the statute also expressly provides will be “determinative of conflict of laws issues arising under [the Act]”), this rule now is being proposed—(1) to implement various statutory amendments to the program; (2) to incorporate longstanding internal policies, practices, and guidance, as well as many judicial holdings, into the regulation; (3) to make certain refining and technical changes to the regulation; and (4) to restructure the regulation to make it easier for the public to use.

Recent statutory amendments to the PSOB program include section 305 of the Disaster Mitigation Act of 2000, Pub. L. 106–390 (“Disaster Mitigation Act”) (effective for injuries sustained on or after Oct. 30, 2000); sections 611 and 613 of the USA PATRIOT Act, Pub. L. 107–56 (the former section effective Oct. 26, 2001; the latter section effective retroactively for injuries occurring on or after Jan. 1, 2001); the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. 107–196 (“Mychal Judge Act”) (effective retroactively for injuries occurring on or after Sept. 11, 2001); and the Hometown Heroes Survivors Benefits Act of 2003, Pub. L. 108–182 (“Hometown Heroes Act”) (effective for injuries sustained on

or after Dec. 15, 2003). These amendments represent an expansion of the scope of the PSOB Act and clarify some of its provisions.

Section 305 of the Disaster Mitigation Act amended the PSOB Act to include certain public employees performing disaster relief activities as eligible public safety officers. Under the amendment, eligible disaster relief workers include those performing official duties as either employees of the Federal Emergency Management Agency (FEMA) or employees of state, local or tribal emergency management agencies or civil defense agencies performing official duties in cooperation with FEMA; and such official duties must be conducted in relation to a major disaster or emergency and must be hazardous in nature. Pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule would provide a convenient, short-hand label for these particular employees, defining them in proposed 28 CFR 32.3 as “disaster relief worker[s],” in keeping with the requirements described in the PSOB Act at 42 U.S.C. 3796b(8)(B) and (C); and would make corresponding amendments to the “line of duty” provisions found in the current regulation.

Section 611 of the USA PATRIOT Act provides for expedited payment of death and disability benefits under specific circumstances relating to a “terrorist attack,” authorizing BJA to accept certain certifications from employing public agencies as *prima facie* evidence in determining claims for those benefits that arise from those circumstances. Section 611 thus creates a statutory distinction between cases described in that section (where resort to certain certifications as *prima facie* evidence is authorized) and all others (where resort to such certifications as *prima facie* evidence is not authorized). Pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), in addition to proposing a few other implementing provisions (generally of a clarifying nature), the proposed rule defines “terrorist attack,” largely by reference to analogous definitions enacted in the USA PATRIOT Act itself, but also taking into account the circumstances that prompted the enactment of section 611 and the rationale that supports the statutory distinction that section makes. The proposed definition of “terrorist attack” specifies the Department of Justice officers who must make determinations thereunder, and the standards they are to apply in making them; these officers, of course, may delegate their authority to make these determinations to any of their subordinates. It should be noted, however, that any determinations that

may be made pursuant to the proposed definition of “terrorist attack” would be only for the purpose of establishing what PSOB Act claims may fall within the scope of section 611 of the USA PATRIOT Act, and should not be understood to apply in any other context, or to create any inference that prosecution is warranted under the criminal code; *e.g.*, at 18 U.S.C. 2332b (if only because the standard proposed in the rule is less stringent than the standard required for a designation of international terrorism under 18 U.S.C. 2332b).

Section 613(a) of the USA PATRIOT Act increased the base amount for PSOB death and disability benefit awards to \$250,000, which is adjustable for inflation pursuant to 42 U.S.C. 3796(h). This amendment does not affect amounts payable for deaths or injuries occurring before January 1, 2001. Unlike the current regulation, the proposed rule does not specify specific dollar amounts for death and disability benefit awards (which quickly would fall out of date, as a result of the statutory inflation adjustment), thus avoiding the potential for confusion of the public.

The Mychal Judge Act provides that certain chaplains may be eligible public safety officers under the PSOB Act. Just as with law enforcement officers, firefighters, and ambulance crew and rescue squad members, covered chaplains must be serving a public agency in an official capacity, with or without compensation, at the time of death or catastrophic injury. Pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule implements this amendment to the PSOB Act by clarifying the definition of the term “chaplain” and by correspondingly expanding the provision in the current regulation relating to “line of duty.”

The Mychal Judge Act also provides that in cases where an officer has died without a surviving spouse or eligible children, the person designated as beneficiary on the officer’s “most recently executed life insurance policy” shall receive the PSOB benefit. Pursuant to 42 U.S.C. 3796(a) and 3796c(a), the proposed rule provides the definitions and procedures necessary to process claims for this category of beneficiary (*e.g.*, “execution of a life insurance policy,” “most recently executed life insurance policy of a public safety officer,” “beneficiary of a life insurance policy of a public safety officer”).

The Hometown Heroes Act amends the PSOB Act to make certain provisions for public safety officers who die as a result of heart attack or stroke under certain circumstances expressly set forth in the amendment.

Specifically, the amendment creates a statutory presumption of death by a line of duty injury, which may be rebutted by “competent medical evidence to the contrary,” in cases where a public safety officer dies of heart attack or stroke while engaging in, (or within 24 hours of engaging in) “nonroutine stressful or strenuous physical [line of duty] activity.” Where the requirements of the Hometown Heroes Act are not met (*e.g.*, where disability (rather than death) results), the absence of the statutory presumption does not necessarily entail the failure of claims based on heart attack or stroke; all such claims, rather, are governed by the ordinary rules otherwise applicable to the PSOB program. *See, e.g., Greeley v. United States*, 50 F.3d 1009 (Fed. Cir. 1995); *Durco v. United States*, 14 Cl. Ct. 424 (1988); *North v. United States*, 555 F.Supp. 382 (Cl. Ct. 1982); *Russell v. United States*, 231 Ct. Cl. 1022 (1982); *Smykowski v. United States*, 647 F.2d 1103 (Ct. Cl. 1981); *Morrow v. United States*, 647 F.2d 1099 (Ct. Cl. 1981).

A consequence of the new statutory language is that several new terms, which were not previously included in the PSOB Act, need to be defined to implement the amendment. With the clarity provided by the proposed rule, the user will have a better appreciation for how the amendment will be implemented by BJA, the hearing officer, and the judiciary. In drafting the regulatory definitions for these terms pursuant to 42 U.S.C. 3796(a) and 3796c(a), BJA consulted extensively with the Armed Forces Institute of Pathology and other medical experts knowledgeable in the field of cardiovascular disease and work-life-related diseases and afflictions, with particular focus on the circumstances surrounding heart attacks and strokes among public safety officers. Further, in order to elicit input and appreciate any potential concerns of the practitioners, BJA held several meetings with groups such as the Fraternal Order of Police Grand Lodge, NC State Fireman’s Association, International Association of the Chiefs of Police, the National Fire Fighters Foundation, National Sheriffs Association, Congressional Fire Services Institute, and Concerns of Police Survivors. It is only after receiving much guidance and input from these experts, and considering and deliberating over their advice that the regulation is now proposed for public comment. (In noting that various individuals and groups participated in meetings and discussions with OJP staff, OJP does not wish to imply that these individuals or groups have or have not

endorsed the provisions contained within the proposed rule.)

This program has evolved over three decades, and internal agency policy, practice, and guidance—based on internal legal opinions, on judicial rulings, and on the considerable and broad-ranging experience and expertise BJA has derived from innumerable claims—have come increasingly to inform the agency's decision-making, gradually taking on significant authority. Little of this is reflected on the face of the current regulation, however. And unfortunately, despite attempts over the years variously to disseminate information on BJA's evolving policy, practice, and guidance, to potential beneficiaries and their representatives, the efforts have been less successful than OJP would like. For example, since November 1981, the publication, *Legal Interpretations of the Public Safety Officers' Benefits Act*, has been a guiding authority for BJA, program hearing officers, OJP, and the judiciary. This publication has been relied upon so much that the legal opinions found in this publication have been quoted as authority in numerous cases decided by the United States Court of Federal Claims (and its predecessors) and United States Court of Appeals for the Federal Circuit. *E.g.*, *Yanco v. United States*, 258 F.3d 1356 (Fed. Cir. 2001); *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. Unfortunately, many are not aware of this publication's availability, or of its value in indicating the relevant BJA internal policies and practice. A principal reason for the proposed rule, therefore, is OJP's desire that the most significant internal guiding principles, opinions, policy, practice, and other information about the program be readily available, transparent, and easier for the public, including public safety officers and their survivors, and practitioners, to understand and apply.

The regulation currently is configured in such a way that simply introducing the new material described above into the existing language would be inadvisable. For this reason, OJP has taken the opportunity to propose a simplification and restructuring of the entire regulation, breaking it down into six distinct subparts. Pursuant to 42 U.S.C. 3796(a) and (b), 3796c(a), and 3796d–3(a), Subpart A proposes general terms and procedures common to all three PSOB benefit components. Pursuant to 42 U.S.C. 3796(a) and

3796c(a), Subpart B proposes terms and procedures applicable only to the death benefit component; pursuant to 42 U.S.C. 3796(b) and 3796c(a), Subpart C proposes those applicable only to the disability benefit component; and pursuant to 42 U.S.C. 3796d–3(a) and 3796c(a), Subpart D proposes those applicable only to the educational assistance benefit component.

Accordingly, pursuant to the proposed rule, those seeking to understand the basic law applicable to any one of these three PSOB benefits must refer to the PSOB Act itself, of course, and thereafter only to Subpart A (General Provisions) and to the applicable Subpart for the benefit at issue (be it Subpart B, C, or D). At present, for example, a disability claimant would by necessity have to skip around the regulation to appreciate what may be necessary for his particular type of claim; under the proposed rule, he would have to read only the Act itself, and Subparts A and C.

Pursuant to 42 U.S.C. 3796(a) and (b), 3796c(a), and 3796d–3(a), the last two subparts, Subparts E and F, propose procedures for hearing officer determinations and intra-agency review.

The various "Definitions" sections proposed in the subparts comprise three different types of definitions: (1) A concise comprehensive explanation of a precise term or phrase (*e.g.*, "Adopted child of a public safety officer means * * *"); (2) a non-comprehensive, non-exhaustive definition (*e.g.*, "Independent contractor includes * * *"); or (3) a contextual definition, setting forth the meaning of the term as used only in a particular or specific context (*e.g.*, "Cause—A death, injury, or disability is caused by intentional misconduct if * * *").

The general consonance of the express provisions of the proposed rule with the substance of current practice, *see, e.g.*, *Porter v. United States*, 63 Fed. Cl. 143 (2005); *One Feather v. United States*, 61 Fed. Cl. 619 (2004), should not be understood to suggest that some differences are not being proposed. The current regulation, for example, at 28 CFR 32.2(c), .4, and .5, contains provisions that differ significantly from those proposed here pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a). As a result, the holdings in *Bice v. United States*, 61 Fed. Cl. 420 (2004); *Davis v. United States*, 50 Fed. Cl. 192 (2001); and *Davis v. United States*, 46 Fed. Cl. 421 (2000), and that portion of the holding in *Demutiis v. United States*, 48 Fed. Cl. 81 (2000) that was affirmed in 291 F.3d 1373 (Fed. Cir. 2002)—all of which are grounded in one or more of those three sections of the current

regulation—would be affected much as the holding in *Melville v. United States*, 231 Ct. Cl. 776 (1982), and a portion of the holding in *Harold v. United States*, 634 F.2d 547, 549–552 (Ct. Cl. 1980), were nullified or rendered moot by subsequent amendments to the PSOB Act itself, and the jurisdictional portion of the holding in *Russell*, 637 F.2d at 1256–1260, was nullified by subsequent amendments to the Omnibus Crime Control and Safe Streets Act of 1968, *see, e.g.*, *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. Dept. of Justice*, 748 F.2d 1389 (10th Cir. 1984); *see also, e.g.*, *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); *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), of which the PSOB Act is a part.

Further to the foregoing general discussion, the following are a number of specific items that, pursuant to the proposed rule, would be reflected in the regulation:

1. Line of Duty

Since the original enactment of the PSOB Act, BJA and courts uniformly have recognized the nature of the acts performed by a public safety officer is key to determining whether he suffered a line-of-duty injury within the meaning of the Act. *See, e.g.*, *Tafoya*, 8 Cl. Ct. at 262; *Harold*, 634 F.2d at 551–552. In keeping with these decisions and pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the definitions of "line of duty activity or action" and "line of duty injury" in the proposed rule, which largely are drawn from provisions in the existing regulations and practice, make clear that in order for an injury to be considered a "line of duty injury," the injury must occur when the public safety officer is engaged in activity or an action that he is obligated or legally authorized to perform as a public safety officer, *see, e.g.*, *Wydra v. United States*, No. 764–83C, slip op. (Cl. Ct. Jan. 31, 1986); *North*, 555 F.Supp. at 387; *Howard v. United States*, 229 Ct. Cl. 507, 510 (1981); *Budd v. United States*, 225 Ct. Cl. 725 (1980), with the cognizance of the officer's public agency, which typically is in the best position to provide line-of-duty evidence in connection with a claim under the Act.

Additionally, and also pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule defines "authorized

commuting” by setting out the specific circumstances where a public safety officer would be considered to be engaged in a line of duty action or activity while commuting to or from work, or to a particular emergency. Essentially, this definition articulates—for the first time in a regulation—three particular exceptions to the “coming and going rule” that have been recognized by the PSOB Program since soon after the original enactment of the Act. See, e.g., *Russell*, 637 F.2d at 1265–1266.

2. Serving a Public Agency in an Official Capacity

The PSOB Act defines the term “public safety officer,” for most purposes, as “an individual serving a public agency in an official capacity” as a law enforcement officer, firefighter, chaplain, or rescue squad or ambulance crew member. 42 U.S.C. 3796b(8). The Act also defines “public agency” as a government (Federal, State, territorial, or of a district or possession of the United States) or “any unit of local government, department, agency, or instrumentality of any of the foregoing.” 42 U.S.C. 3796b(7). Some confusion has arisen over the years as to whether employees or volunteers who serve independent contractors or non-public entities that are working for public agencies are “serving a public agency in an official capacity” or are “employees” within the meaning of the PSOB Act, or whether those independent contractors or non-public entities are “instrumentalities” of public agencies within the meaning of the Act. Although BJA’s application of all the foregoing terms (largely drawn from pre-existing law, see, e.g., *Taylor v. Standard Gas and Electric Co.*, 96 F.2d 693, 704 (1938)) has been consistent over the years, see, e.g., *LaBare*, slip op. at 2, 6; *Porter*, 63 Fed. Cl. at 143 n.5; *Chacon*, 48 F.3d at 511–513, *aff’d* 32 Fed. Cl. at 687–689; *Holstine*, slip op. at 1–2, the current regulation does not on its face reflect that application well. In an effort to assist claimants, pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule sets out key definitions to clarify these terms within the four corners of the regulation. For example, the definition of the term “instrumentality” would set forth requirements that the entity in question be legally established, act as a functional part of a public agency, function with a solely public character, and serve the public indiscriminately, and be cloaked with the authority of a public agency for purposes of sovereign immunity or tort liability. For another example, the definition of “official

capacity” would clarify that an individual serves a public agency in an official capacity if his service is “officially authorized, -recognized, or -designated as functionally within or part of” a public agency, and “his acts and omissions, while so serving, are legally those of” his public agency, which recognizes them as such. See, e.g., *Chacon*, 48 F.3d at 512, *aff’d* 32 Fed. Cl. at 687–688.

3. Law Enforcement Officer

Over several decades of administering the PSOB Act, BJA has received a number of claims with respect to individuals who did not have authority actually to engage in “crime and juvenile delinquency control or reduction, or enforcement of the laws” in the way that “police, corrections, probation, parole, or judicial officers”—who are specified in the Act—do. 42 U.S.C. 3796b(7). Claimants there argued unsuccessfully that tenuous or distant connections to the criminal law made the decedent (or disabled person) a “law enforcement officer” within the meaning of the Act. The PSOB Act is not intended to cover all personnel who may happen to be employed by a law enforcement agency, but only those who actually are “law enforcement officers.” For this reason, pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule clarifies the definition of “law enforcement officer” in the PSOB Act by defining—for the first time as a matter of regulation rather than policy—the terms “crime,” “criminal law,” “enforcement of the criminal law,” “enforcement of the laws,” and “involvement.”

4. Firefighter/Rescue Squad/Ambulance Crew Member

The definition of firefighter in the PSOB Act combines two distinct concepts by providing that the term “firefighter” includes a “public employee member of a rescue squad and ambulance crew.” In order to avoid the confusion that has arisen in certain cases where it was not clear whether an individual’s actual authority was to act as a firefighter or as a public employee member of a rescue squad or ambulance crew, pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule bifurcates the statutory definition of “firefighter” as it appears in the PSOB Act into two separate regulatory definitions—“firefighter” and “rescue squad or ambulance crew member”—each of which provides more specific descriptions of the nature of each position. With this change, a rescue squad or ambulance crew member would be covered as a “rescue squad or

ambulance crew member,” as a matter of regulation, rather than as a “firefighter,” as a matter of statute. In either case, however, the substance of the result mandated by the Act, see, e.g., *Chacon*, 48 F.3d at 512–513, *aff’d* 32 Fed. Cl. at 688–689, of course, would remain the same.

5. Injury

The proposed rule defines “injury” using nearly identical language from the existing PSOB regulation for “traumatic injury”: A “traumatic physical wound (or a traumatized physical condition of the body) caused by some external force * * * but excluding stress or strain.” See *Greeley*, 50 F.3d at 1011–1012; *Canfield v. United States*, No. 339–79, slip op. at 1–2 (Fed. Cir. Dec. 29, 1982), *rev’d* No. 339–79C, slip op. (Ct. Cl. July 27, 1982); *Durco*, 14 Cl. Ct. at 428; *North*, 555 F.Supp. at 387; *Russell*, 231 Ct. Cl. at 1025; *Smykowski*, 647 F.2d at 1105; *Morrow*, 647 F.2d at 1101. Pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule, which is consonant with current practice with respect to injury generally, see, e.g., *Brister v. United States*, No. 01–180C, slip op. at 3–6 (Fed. Cl. Mar. 27, 2002); *Cartwright v. United States*, 16 Cl. Ct. 238 (1989), clarifies the definition of “injury” with respect to “mental strain,” to conform to the express reading of the Federal Circuit Court of Appeals in *Yanco*, 258 F.3d at 1365, *aff’d* 45 Fed. Cl. 782, 788–792 (2002); see *Porter*, 63 Fed. Cl. at 149 & n.6; *Davison v. United States*, No. 99–361C, slip op. at 8–11 (Fed. Cl. Apr. 19, 2002).

6. Disability

Current rules pertaining to the disability benefit are simplified in proposed Subpart C, which (pursuant to 42 U.S.C. 3796(b) and 3796c(a)) independently defines “permanently disabled” and “totally disabled,” in recognition that a subject officer may meet the criteria of one or the other requirement, but not both. Also pursuant to 42 U.S.C. 3796(b) and 3796c(a), the proposed rule, which otherwise conforms to existing practice, see, e.g., *Porter*, 63 Fed. Cl. at 147–150, incorporates an entirely new procedural alternative into the disability benefit claim process, allowing for “reconsideration” of certain disability denial determinations, at the option of the claimant. The procedure for reconsideration of disability claims responds to the reality that a line of duty injury may not have caused the public safety officer to be totally and permanently disabled at the time of the initial claim application, but may do so with the passage of time.

7. Limitations on Benefits

Pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the proposed rule defines a number of terms to implement the provision in the PSOB Act that sets forth limitations on benefits when public safety officer misconduct has occurred, (e.g., “intention,” “disturbance,” “drugs or other substances,” “gross negligence,” “intentional misconduct,” “intentional action or activity,” “voluntary intoxication at the time of death or catastrophic injury,” and “mental faculties”). See 42 U.S.C. 3796a. These definitions essentially are drawn from the existing regulations or current practice. See, e.g., *Wydra*, slip op. at 3–5; *Tafoya*, 8 Cl. Ct. at 260–266; *Harold*, 229 Ct. Cl. at 508–510; *Budd*, 225 Ct. Cl. at 727–730. Also pursuant to 42 U.S.C. 3796(a) and (b), and 3796c(a), the rule proposes evidentiary standards to determine if a public safety officer was intoxicated by drugs or other substances, by incorporating terms used in the Controlled Substances Act (21 U.S.C. 802(6) and 812(a)). In this way, the rule proposes to provide a workable mechanism by which to determine an occurrence of voluntary intoxication by drugs, which mechanism would parallel the one set forth in the PSOB Act itself for intoxication by alcohol. See 42 U.S.C. 3796b(5).

8. Timing for Filing Claims; Redeterminations; Appeals; Review by Director

Pursuant to 42 U.S.C. 3796(a) and (b), 3796c(a), and 3796d–3(a), the rule proposes clear procedural schedules for filing and notice requirements, and clear provisions for exhaustion of remedies, applicable to each stage of a PSOB claim. These schedules and provisions, which generally are derived from current practice, see, e.g., *LaBare*, slip op. at 5; *Yanco*, 45 Fed. Cl. at 793; *Tafoya*, 8 Cl. Ct. at 259–260 nn.2 & 4, advance the efficient and effective administrative processing of claims, and avoid undue delay on the part of the PSOB Office, the hearing officer, or BJA, or the claimant. The proposed schedules would provide specific periods of time by the end of which filings of requests, motions, appeals, etc., would have to be actually received by BJA. In most instances in which a time period related to a filing is proposed, the timeframe is thirty-three (33) days, which is derived from a standard thirty-day period, plus three additional days—thereby incorporating the additional time customarily given to parties in civil litigation, under the “Mailbox Rule,” when mailing their filings. See, e.g.,

Fed. R. Civ. P. 6(e). A definitive, concrete, and easily-established timeframe would allow for the timely disposition of claims.

Generally, the rule proposes the following scheme: If a claim is denied by the PSOB Office, a claimant may request a determination by a hearing officer, whereupon, the hearing officer conducts a *de novo* review of the claim and issues a determination. If the hearing officer denies the claim, the claimant may opt to appeal to the Director of BJA; where a hearing officer’s determination results in an approval of a claim, the Director shall review it.

II. Regulatory Certifications

Administrative Procedure Act

The Office of Justice Program’s publishing of the proposed rule with a comment period of 30 (thirty) days is to facilitate the timely implementation of the amendments in order to bring resolution to an estimated sixty-five Hometown Heroes Act cases that require the guidance in this regulation in order to be determined. To extend the comment period beyond this timeframe would unnecessarily delay the implementation of the provisions of this proposed rule and would be contrary to the public interest because it is in the public interest to pay in an expeditious manner benefits to public safety officers, or their family members.

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 proposed rule addresses Federal agency procedures; furthermore, this proposed rule makes minor amendments to clarify existing regulations and agency practice concerning death and disability 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 proposed 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 proposed rule are minimal. Claimants must complete and submit no more than three forms; a “Claim for Death Benefits,” OMB Form No. 1121–0024; a “Report of Public

Safety Officer’s Death,” OMB Form No. 1121–0025; and a “Consent to Release Information” pursuant to 5 U.S.C. 552a(b); and supply adequate documentation concerning the public safety officer death. The only costs to OJP consist of appropriated funds. The benefits of the proposed rule far exceed the costs. The minor amendments clarify the preexisting regulations and provide coverage for chaplains, life insurance beneficiaries, and the survivors of certain heart attack and stroke victims.

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

Executive Order 13132

This proposed 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 proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

This proposed 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 proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed 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 interim 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 must complete and return two OMB-approved forms: a "Claim for Death Benefits," OMB Form No. 1121 0024; and a "Report of Public Safety Officer's Death," OMB Form No. 1121-0025.

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 proposed to be 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.
- 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 disability finding.
- 32.28 Reconsideration of 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 Determination.
- 32.45 Hearings.
- 32.46 Appeal.

Subpart F—Appeals & Reviews

- 32.51 Scope of subpart.
- 32.52 Time for filing appeal.
- 32.53 Review.
- 32.54 Determination.
- 32.55 Appeal.

Authority: Public Safety Officers' Benefits Act of 1976 (42 U.S.C. ch. 46, subch. 12).

§ 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.

(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 aforescribed days.

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

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

(1) Mailed, by regular 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.

§ 32.3 Definitions

Act means the Public Safety Officers' Benefits Act of 1976 (42 U.S.C. 3796, *et seq.*; part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968), 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); Oct. 12, 1984 (deaths of disaster relief workers and Federal law enforcement officers and firefighters); Oct. 18, 1986 (rescue squad and ambulance crew members); Nov. 29, 1990 (disabilities); Nov. 13, 1998 (educational assistance); Sept. 11, 2001 (chaplains and insurance beneficiaries); Dec. 15, 2003 (certain heart attacks and strokes)), including Public Law 107-37 and sections 611 and 612 of the USA PATRIOT Act.

Adopted child of a public safety officer means any individual who, as of the event date, was—

(1) Known by the public safety officer not to be his biological child; and

(2) After the officer obtained such knowledge,

(i) Legally adopted by him; or

(ii) 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 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 a public safety officer's death in which the death was simultaneous (or practically simultaneous) with the injury; or

(B) In which the claimant is the officer's—

(1) Biological child, born after the event date; or

(2) Legally-adopted child, legally adopted by him after the event date; or

(ii) In any claim not described in paragraph (1)(i) of this definition, meets (as of the event 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"); and

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

Convincing evidence means clear and convincing evidence.

Crime means criminal misdemeanor or felony.

Criminal law 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(7), only if the entity is—

(1) A court;

(2) An agency described in the Act, at 42 U.S.C. 3796b(8)(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.

Dependent has the same meaning provided in the Internal Revenue Code, at 26 U.S.C. 152.

Determination means the approval or denial of a claim, or the determination described in the Act, at 42 U.S.C. 3796(c).

Director means the Director of BJA.

Disaster relief worker means any individual who meets the definition provided in 42 U.S.C. 3796b(8)(B) or (C).

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

Divorce means a legally-valid divorce from the bond of wedlock, except that, notwithstanding any other provision of law, a spouse (or purported spouse) of an 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—

(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 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.

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.

Enforcement of the criminal law includes control or reduction of crime or of juvenile delinquency.

Enforcement of the laws means enforcement of the criminal law.

Event date means the time of a public safety officer's—

(1) Fatal injury, 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) Totally and permanently disabling injury, with respect to a claim under—

(i) Subpart C of this part; or

(ii) Subpart D of this part, by virtue of his disability.

Filing means any claim, request, motion, election, petition, or appeal, and any item or matter (e.g., evidence,

certifications, legal arguments, or lists) that is, or may be, filed with the PSOB Office.

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

Firefighter means an individual, other than a rescue squad or ambulance crew member, who—

(1) Is trained in—

(i) Extinguishing or containing fire; or

(ii) Emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk; and

(2) Has the legal authority and responsibility to engage in activity described in paragraph (1) of this definition, 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).

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.

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.

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(7), unless, as of the event 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 action or activity 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—A public safety officer's action or activity is intentional misconduct if—

(1) As of the date it is performed,

(i) It—

(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) It—

(i) Is intentional; and

(ii) Is—

(A) Performed without reasonable excuse; or

(B) Objectively unjustified.

Involvement—An individual is involved in the enforcement of the criminal law 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 law, 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.

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) Rescue squad or ambulance crew members; and

(5) Disaster relief workers.

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, firefighter, or rescue squad or ambulance crew member—

(i) Whose primary function (as applicable) is enforcement of the criminal law, suppression of fire, or rescue or ambulance activity, only if 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 to which he is assigned, or for which he is compensated), by 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); or

(ii) Whose primary function is not enforcement of the criminal law, suppression of fire, or rescue or ambulance activity, only if—

(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, by 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

(B) It is performed in the course of enforcing the criminal law, preventing or suppressing fire, performing rescue or ambulance activity, 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 it is activity or an action encompassed within the duties described in the Act, at 42 U.S.C. 3796b(8)(B) or (C), and the agency he serves (or the relevant government) 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—

(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, by 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 it is sustained in the course of—

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

(2) Authorized commuting.

Mental faculties means brain function.

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) His service is officially authorized, -recognized, or -designated as functionally within or part of such agency; 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 means officially recognized or officially designated.

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 is the parent (other than biological or legally-adoptive), as shown by—

(1) A written acknowledgment of parenthood, signed by the officer;

(2) Specific identification of the officer's parenthood, in a final judicial decree ordering him to contribute to the individual's support, or to take some other burdensome action, for that reason;

(3) A public or religious record showing that the officer was the informant and naming him as the individual's parent;

(4) Affidavits or sworn statements from knowledgeable affiants without direct or indirect financial interest in any claim under the Act with respect to the officer, credibly attesting that the officer accepted the individual as his own child or otherwise held the individual out to be his own child;

(5) A record of a public agency, or of a private school or welfare agency, naming the officer, with his knowledge, as the individual's parent;

(6) The officer's claiming of the individual as his dependent child on his income tax return (if executed by the officer, or with his knowledge and consent); or

(7) Credible evidence otherwise clearly indicating the officer's acceptance of the individual as his own child or intention to hold the individual out to be his own child.

Performance of duties in a grossly negligent manner at the time of death or catastrophic injury means gross negligence, as of the event date, in the performance of line of duty activity or a line of duty action.

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, affirmation, 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(7), (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(7) 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 an entity means a member of an entity who is a public employee under the auspices of whose public agency employer the entity operates.

Public employee of an entity means a public employee whose public agency employer is the entity.

Qualified beneficiary—An individual is a qualified beneficiary under the Act, at 42 U.S.C. 3796c–1, only if he—

(1) Qualifies as a payee 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) Is not described in the Act, at 42 U.S.C. 3796a(4).

Representative services include expenses incurred in connection with such services.

Rescue squad or ambulance crew member means an ambulance worker, paramedic, emergency medical technician, or other similar rescue worker, who meets the definition provided in the Act, at 42 U.S.C. 3796b(4) (with the exception of that portion thereof relating to members of fire departments).

Spouse means an individual's lawful husband or wife, and includes a spouse living apart from the individual, other than pursuant to divorce, except that, notwithstanding any other provision of law, 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.

Stepchild of a public safety officer means a legally-adoptive or biological child of a public safety officer's current, deceased, or former spouse, which child—

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

(2) As of the event date, was known by the officer not to be his biological child and, after the officer obtained such knowledge,

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

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

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

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

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—

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

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

Substantial factor—A factor substantially brings about a death, injury, or disability, if—

(1) It alone was sufficient to have caused the death, injury, or disability; or

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

Suppression of fire means—

(1) Extinguishing or containing fire;

(2) Emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk; or

(3) Performing rescue or emergency response activity of the kind performed by firefighters who have the legal authority and -responsibility to engage in the activity described in paragraph (1) of this definition.

Terrorist attack—An event or act shall be considered a terrorist attack for purposes of the Act, at 42 U.S.C. 3796c–1(a), only if—

(1) The Attorney General determines that there is a reasonable indication that it was an act of domestic or international terrorism within the meaning of the criminal terrorism laws, at 18 U.S.C. 2331; and

(2) The Director determines that it was of such extraordinary or cataclysmic character as to make particularized factual findings impossible, impractical, 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); and

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

(A) Such introduction was not a culpable act of the officer's under the criminal law; and

(B) The officer was not acting in an intoxicated manner immediately prior to the event date; 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 indicates that—

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

(2) The officer was not acting in an intoxicated manner immediately prior to the event date; or

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

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

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

§ 32.4 Terms; construction, severability.

(a) The first three substantive 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), such individual shall be presumed irrebutably, for all purposes, not to have survived the public safety 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 this part, a claimant has the burden of persuasion as to all material issues of fact, and by a preponderance of the evidence.

(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 (personal knowledge), 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 inference of voluntary intoxication 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 that the public safety officer—

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

(i) An abuser of alcohol;

(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 event date, was under the influence of alcohol or controlled substances or otherwise acting in an intoxicated manner.

(e) In determining a claim under the Act, at 42 U.S.C. 3796c–1, the certification described therein shall constitute *prima facie* evidence—

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

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

(ii) Serving the agency in an official capacity (with respect to public safety officers of any kind but disaster relief workers), or performing official duties as described in the Act, at 42 U.S.C. 3796b(8)(B) or (C) (with respect to disaster relief workers);

(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 rescue squad or ambulance crew member, an officially recognized or designated public employee member of one of the agency's rescue 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(8)(B) or (C)); and

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

(2) That there are no eligible payees other than those identified therein.

§ 32.6 Payment and repayment.

(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).

(b) 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.

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

(1) On the date of the officer's death; or

(2) On the date of payment.

(d) 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) Approval of such claim.

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

(f) 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 claim if—

(1) Approval of the claim was based, in whole or in material part, on his (or any other person's or entity's) fraud, concealment of evidence or information, false or inaccurate statements, mistake, or deception; or

(2) His 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.

§ 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 as consideration for the services;

(3) An itemized description of the 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 disabling 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 that are unrelated to the Act;

(5) A description of any special qualifications possessed by the representative (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 him 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 it is filed with the PSOB Office later than one year after the date of the final agency decision on 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 representative;

(2) The complexity of the claim;

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

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

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

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

(7) The ordinary, usual, or customary fee charged by other persons (and by the representative) 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- or contingency fee; or

(2) 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 person'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 person 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 representative. Such notice shall specify the amount the representative 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 it provides for any consideration other than under this

section. A representative's receipt of consideration 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 disability finding that, at the time made, may be subject to a request for Hearing Officer determination, a motion for reconsideration, or a non-judicial appeal, shall be considered a final agency decision 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, at 42 U.S.C. 3796(a).

§ 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 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, as of the event date, was the legally-adoptive parent of a 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 event date) is designated as beneficiary of a life insurance policy of a public safety officer as of that date only if such 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 any designation of an individual made pursuant to, during, or in contemplation of, his marriage (or purported marriage) to such officer shall be considered revoked by such officer as of the event date if—

(1) The marriage (or purported marriage)—not having taken place as of the event date—did not take place when scheduled, unless preponderant

evidence indicates that the alteration in schedule was for reasons other than personal differences between the officer and the individual; or

(2) The spouse (or purported spouse) is divorced from the officer subsequent to the date of designation and before the event date.

Child-parent relationship means a relationship between a public safety officer and another individual, in which the individual is the parent (other than biological or legally-adoptive), as shown by—

(1) A written acknowledgment of the individual's parenthood, signed by—

(i) The individual, before the event date; or

(ii) The officer;

(2) Specific identification of the individual's parenthood, in a final judicial decree, issued before the event date, ordering the individual to contribute to the officer's support, or to take some other burdensome action, for that reason;

(3) A public or religious record naming the individual as the officer's parent, with respect to which record the informant was—

(i) The individual, before the event date; or

(ii) The officer;

(4) Affidavits or sworn statements from knowledgeable affiants without direct or indirect financial interest in any claim under the Act with respect to the officer, credibly attesting that—

(i) Before the event date, the individual accepted the officer as his own child or otherwise held the officer out to be his own child; or

(ii) The officer accepted the individual as his own parent or otherwise held the individual out to be his own parent;

(5) A record of a public agency, or of a private school or welfare agency, naming the individual, before the event date, as the officer's parent;

(6) The claiming—

(i) Of the officer as the individual's dependent child on his income tax return, before the event date; or

(ii) Of the individual as the officer's dependent parent on his income tax return (if executed by the officer, or with his knowledge and consent); or

(7) Credible evidence—

(i) Of the officer's receiving, before the event date, over half of his support from the individual;

(ii) Of the officer's having, before the event date, as his principal place of abode the home of the individual and being, before the event date, a member of the individual's household; or

(iii) Clearly indicating—

(A) The individual's intention, before the event date, to hold the officer out to be his own child; or

(B) The officer's acceptance of the individual as his own parent or intention to hold the individual out to be his own parent.

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—

(1) In the event of death as a result of a heart attack, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date,

(i) The officer's score under the most recent Framingham algorithm for predicting coronary heart disease within the next ten years, was not less than ten;

(ii) Not less than seventy percent of the risk factors for cardiovascular disease identified by the American Heart Association were present in the officer; or

(iii) The officer had not less than seventy-five percent stenosis by atherosclerotic plaques or a thrombosis in one or more of the following:

(A) Left main coronary artery;

(B) Left anterior descending coronary artery;

(C) Left circumflex coronary artery; and

(D) Right coronary artery; and

(2) In the event of death as a result of a stroke, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date, not less than seventy percent of the risk factors for stroke identified by the American Stroke Association were present in the officer.

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.

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

Engagement in a situation—A public safety officer is engaged in a situation only when he is in the course of actually enforcing the criminal law, actually suppressing fire, actually performing rescue or ambulance activity, actually performing activity encompassed within the duties described in the Act, at 42 U.S.C. 3796b(8)(B) or (C), or otherwise actually responding to a fire, rescue, or police emergency, and 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).

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 change in the beneficiary; or

(3) A change in the mode of benefit.

Most recently executed life insurance policy of a public safety officer means that policy insuring the life of a public safety officer that—designating a beneficiary as of the event date, and being legal and valid (as a life insurance policy) upon its execution and remaining in effect as of that date—is the most recently executed one filed with the PSOB Office before the later of—

(1) One year after the first filing of a claim with respect to such officer; or

(2) The first date of payment on a claim with respect to such officer.

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 an individual 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 an individual 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—

- (1) Biological or adoptive parent whose parental rights have not been terminated, as of the event date; or
- (2) Step-parent.

Participation in a training exercise—A public safety officer participates in a training exercise only if it is a formal part of an official training program whose purpose is to train him in, prepare him for, or improve his skills in, particular activity or actions encompassed within his line of duty.

Spouse of a public safety officer means a public safety officer's spouse, as of the date of the officer's death, except that, notwithstanding any other provision of law, the relevant jurisdiction of domicile is the officer's (as of the event date).

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 born or legally adopted (as the case may be) before the lawful marriage of the spouse and parent, which spouse, as of the event 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.

§ 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, no claim shall be approved without the following (which

shall be necessary, but not sufficient, for approval of such claim), unless, for good cause shown, the Director grants a waiver:

(1) Subject to paragraph (b) of this section, a certification from the public agency in which the public safety officer served (as of the event 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 officers of his kind, rank, and tenure; or

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

- (A) Any such benefits; or
- (B) Any such benefits to officers of such kind, rank, or tenure;

(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—

(i) Listing every individual known to him who is or might be—

(A) The public safety officer's child, spouse, or parent; or

(B) A beneficiary of any executed life insurance policy of the public safety officer's; and

(ii) Describing every executed life insurance policy of the public safety officer's of which he has any knowledge.

(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 the 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 event date, to have the closest relationship, except that any biological or legally-adoptive parent whose parental rights have not

been terminated as of the event 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 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 decision.

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, at 42 U.S.C. 3796(b).

§ 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 event 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 it about.

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

Permanently disabled—An individual is permanently disabled only if there is a degree of medical certainty (given the current state of medicine) 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) 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 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, no claim shall be approved without the following (which shall be necessary, but not sufficient, for approval of such claim), unless, for good cause shown, the Director grants a waiver:

(1) Subject to paragraph (b) of this section, a certification from the public agency in which the public safety officer served (as of the event 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 officers of his kind, rank, and tenure; or

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

(A) Any such benefits; or

(B) Any such benefits to officers of such kind, rank, or tenure; 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 event 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 event date, pursuant to the Act, at 42 U.S.C. 3796(b).

§ 32.27 Motion for reconsideration of 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 disability finding.

(a) Unless, for good cause shown, the Director extends the time for filing, no disability finding shall be reconsidered if the motion under § 32.27 is filed later than thirty-three days after the service of notice of the denial.

(b) Notwithstanding any other provision of this section, no 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 Hearing Officer determination has been filed 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 disability finding shall be stayed for not less than three years. Thereafter, the claimant shall have not more than nine years to file evidence 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 disability finding described in § 32.27 shall be reversed without 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 public safety officer from the year before the date of the motion for reconsideration to the date of reversal by the PSOB Office.

(f) Upon its affirming or reversing a 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 determination under subpart E of this part—

(1) Of—

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

(2) Of a 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 decision:

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

(3) Any affirmance that is not the subject of a request for 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

made under the Act, at 42 U.S.C. 3796–1.

§ 32.32 Time for filing claim.

(a) Subject to the Act, at 42 U.S.C. 3796d–1(c), a claim may be filed with the PSOB Office at any time after the event date.

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

§ 32.33 Definitions.

Application for assistance means claim.

Dependent means dependent, as of the event date.

Educational assistance benefits means assistance in paying educational expenses.

Educational expenses means expenses of or for such of the following as may be in furtherance of the educational, professional, or vocational objectives set forth in a claim:

- (1) Tuition;
- (2) Room and board;
- (3) Books;
- (4) Computer equipment;
- (5) Supplies;
- (6) Fees; and
- (7) Transportation.

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 properly would have been paid if a claim therefor had been filed in timely fashion by a proper claimant; or

(2) With respect to whose disability, benefits under subpart C of this part properly have been paid, or properly would have been paid if a claim therefor had been filed in timely fashion.

Financial assistance means educational assistance benefits.

Financial need—An individual is in financial need if he would be unable to attend a program of education but for payment of the amount payable on his claim if appropriations were sufficient for full payment of all claims.

Spouse of an eligible public safety officer means an eligible public safety officer's spouse, as of the date of the officer's death (where the officer's eligibility is pursuant to subpart B of this part), or as of the date of the claim (where the officer's eligibility is pursuant to subpart C of this part).

§ 32.34 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 requesting a Hearing Officer determination.

(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.

§ 32.35 Disqualification.

No claim shall be approved if the child (or spouse, as applicable) 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 child's (or spouse's, as applicable) full-, three-quarter-, half-, or less-than-half-time student status, according to such institution's own academic standards and practices.

(b) In the event that appropriations are insufficient for full payment of all claims from children (or spouses, as applicable)—

(1) The amount payable on claims from those in financial need shall be the full amount otherwise payable; and

(2) The amount payable on claims from those not in financial need shall be reduced accordingly.

(c) 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 claim if—

(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 becomes ineligible for educational assistance benefits.

§ 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 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 decision.

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 subparts B, C (including affirmances of disability findings), and 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 affirmance (under subpart C of this part) of a disability finding.

(b) A claimant may file with his request for 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 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 the

assignment described in paragraph (b) of this section.

§ 32.44 Determination.

(a) 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 factual findings and legal conclusions that support it; and

(2) Provide information as to appeals.

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

(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 may exclude any evidence whose probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(e) Each witness at any hearing shall be sworn by oath or affirmation.

(f) Each hearing shall be recorded, and the original of the complete record or

transcript thereof shall be made a part of the claim file.

(g) 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.

(h) 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 Appeal.

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

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

Subpart F—Appeals & Reviews

§ 32.51 Scope of subpart.

Consistent with § 32.1, this subpart contains provisions applicable to appeals and reviews of approvals and denials made under subpart E of this part, and reviews of approvals under the Act, at 42 U.S.C. 3796c–1.

§ 32.52 Time for filing appeal.

(a) Unless, for good cause shown, the Director extends the time for filing, no 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 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) The denial (under subpart E of this part) of any claim; and

(2) The approval (under the Act, at 42 U.S.C. 3796c–1) of any claim.

(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 Determination.

(a) Upon the Director's 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 appeals.

(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 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 Appeal.

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

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

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 541

[Docket No. BOP–1118–P]

RIN 1120–AB18

Inmate Discipline Rules: Subpart Revision and Clarification

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes to amend its Inmate Discipline and Special Housing Unit (SHU) regulations. We intend this amendment to streamline and clarify these regulations,