

**DEPARTMENT OF JUSTICE****28 CFR Part 32**

[Docket No.: OJP (BJA) 1722]

RIN 1121-AA86

**Public Safety Officers' Benefits Program****AGENCY:** Office of Justice Programs, Justice.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This rulemaking proposes to make the following changes to current regulations implementing the Public Safety Officers' Benefits (PSOB) Act: Revising provisions pertaining to the filing of an application for benefits, revising provisions that define when an individual is a public safety officer, when an officer has sustained a line-of-duty injury, when payment of benefits is prohibited, and when individuals are ineligible for payment; revising provisions pertaining to the admissibility, sufficiency, and evaluation of evidence submitted in PSOB claims; revising provisions concerning the fees that may be charged for representation in PSOB claims, establishing provisions that prescribe the scope of legal review of PSOB claims and the completeness of applications for benefits, and revising provisions pertaining to the definitions of permanent and total disability, payment of benefits, educational assistance, and other matters necessary to implement the aforementioned changes.

**DATES:** Written comments must be postmarked and electronic comments must be submitted on or before October 21, 2016. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

**ADDRESSES:** Please address all comments regarding this rule by U.S. mail, to: Hope Janke, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531; or by telefacsimile to (202) 354-4135. To ensure proper handling, please reference OJP Docket No. [insert number] on your correspondence. Comments may also be sent electronically through <http://www.regulations.gov> using the electronic comment form provided on that site. An electronic copy of this document is also available at the <http://www.regulations.gov> Web site. OJP will accept attachments to electronic comments in Microsoft Word,

WordPerfect, or Adobe PDF formats only.

**FOR FURTHER INFORMATION CONTACT:** Hope Janke, BJA, OJP, at (202) 514-6278, or toll-free at 1 (888) 744-6513.  
**SUPPLEMENTARY INFORMATION:**

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**I. Posting of Public Comments**

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

The Office of Justice Programs (OJP) does not require you to submit personal identifying information (such as your name, address, medical information etc.) as part of your comment. However, if you wish to submit such information, but do not wish it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to only partially post that comment) on <http://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

**II. Executive Summary****A. Purpose of the Regulatory Action****1. Need for Regulatory Action**

The Public Safety Officers' Benefits Act of 1976 (PSOB Act) was enacted to address the emotional and economic burden placed on the families of deceased public safety officers by providing the assurance of a federal benefit to such survivors.<sup>1</sup> As recently as 2012, the House Committee on the Judiciary reaffirmed this purpose stating "[t]he [Public Safety Officers' Benefits Act] . . . is an important resource for the public safety officers and their families who would potentially face financial disaster because of the death or incapacitation of the public safety officer."<sup>2</sup>

As of February 1, 2016, 931 claims for benefits were pending before the agency: 761 initial claims for benefits pending at the PSOB Office, 123 appeals of PSOB Office determinations pending with Hearing Officers, and 47 appeals of Hearing Officer determinations pending with the BJA Director. A recent audit by the Department of Justice's Office of the Inspector General (OIG) found that although the PSOB Program processed 56% of determined claims within one year of filing, other claims took significantly longer to resolve.<sup>3</sup> A Business Process Improvement (BPI) review of the PSOB Program completed by an independent contractor in October 2015 noted, among other things, that "the combination of the lengthy processing times and the growing backlog of open claims indicates significant changes are needed for the program to operate efficiently and process existing and new claims in a timely manner."

To fulfill Congress' intent that the PSOB Program remain "an important resource" for public safety officers and their families, the proposed rulemaking would amend regulations implementing the Act to implement recommendations from the OIG audit and BPI review, simplify the process for claimants to establish eligibility, simplify the program, and implement statutory changes to the PSOB Act.

**2. Statement of Authority for Regulatory Action**

Under 42 U.S.C. 3796(a)-(b) (authorizing the agency to promulgate

<sup>1</sup> See S. Rep. No. 94-816, at 3-4, as reprinted in 1976 U.S.C.C.A.N. 2504, 2505.

<sup>2</sup> H.R. Rpt. 112-548 at 6 (Jun. 25, 2012).

<sup>3</sup> U.S. Dept. of Justice, Office of the Inspector General, *Audit of the Office of Justice Programs' Processing of Public Safety Officers' Benefit Programs Claims*, Audit Division 15-21 at 8 (July 7, 2015).

regulations for the determination of PSOB Program death and disability claims), 3796c(a) (authorizing the agency to promulgate regulations for (1) the determination of PSOB Program death and disability claims, (2) “the recognition of agents or other persons representing claimants” in PSOB death and disability claims, and (3) the establishment of “the maximum fees which may be charged for services performed in connection with any claim”), 3796d–3(a) (authorizing the agency to promulgate regulations for implementing PSOB Educational Assistance programs), and 3782(a) (authorizing the agency to establish regulations “necessary to the exercise of [its] functions”), the agency is authorized to promulgate regulations necessary to implement the PSOB Act. The agency has previously exercised its regulatory authority to define in regulations many of the terms essential to this rulemaking including “public agency,” “injury,” “line of duty,” “line of duty injury,” “official capacity,” “firefighter,” “involvement [in crime and juvenile delinquency control or reduction],” “gross negligence,” and “voluntary intoxication.”

#### B. Summary of Major Provisions

The proposed rule would make the following changes in response to the Dale Long Public Safety Officers’ Benefits Improvement Act of 2012 (Dale Long Act), as provided in sec. 1086 of Public Law 112–239:

- Revise the definition of “child of a public safety officer;”
- Define “line of duty activity or action” for members of rescue squads and ambulance crews;
- Revise the definition of “officially recognized or designated public employee member of a squad or crew;”
- Remove the definition of “public employee member of a squad or crew;” and
- Remove for purposes of educational assistance definitions of “dependent,” “eligible dependent,” and “tax year.”

The proposed rule would make the following changes in response to identified ambiguities and gaps in existing regulations, as well as opportunities to simplify and improve the program’s administration:

- Expand the definitions of “firefighter,” and “involvement [in crime and juvenile delinquency control or reduction]” (a necessary component to qualify as a “law enforcement officer”) to include firefighter and law enforcement officer trainees who are participants in an official training program required for employment or

certification as a firefighter or a law enforcement officer;

- Expand the definitions of “line of duty activity or action” and “official capacity” to include a public safety officer’s actions to save human life in certain limited circumstances but without regard to jurisdiction;
- Introduce a definition of “volunteer fire department” which provides that a department satisfying the definition qualifies as an “instrumentality” of a public agency thereby enabling otherwise qualified volunteer firefighters to more easily establish “public safety officer” status;
- Replace the current standard for determining admissibility of evidence (the Federal Rules of Evidence) with the requirement that evidence be “credible, probative, and substantial;”
- Replace existing prerequisite certification requirements for death and disability claims with a single provision authorizing PSOB determining officials to require that a claimant provide any evidence necessary to determine eligibility;
- Establish a limited exception to the requirement that a claimant must establish all issues by the standard of proof of “more likely than not;” when evidence is equivalent on a particular issue, the determining official will resolve such issue in the claimant’s favor;
- Change from “clear and convincing” to “more likely than not” the standard of proof required to establish (1) an officer was injured because of his or her status as a public safety officer, (2) total and permanent disability, and (3) parent-child relationship;
- Expand the types of permissible fee arrangements for representative services, establish a definition for “attorney” and limit paid representation in PSOB claims to such individuals;
- Establish, consistent with authority in 42 U.S.C. 3796c(a) providing that the Bureau of Justice Assistance may prescribe in regulations “the maximum fees which may be charged for services performed in connection with any claim,” a cap on fees of 12 percent of the total payment available to a claimant and establish fee amounts that are presumptively reasonable in claims determined at the PSOB Office level (8 percent) and at the Hearing Officer or BJA Director level (10 percent);
- Revise the definition of “totally disabled” and related provisions to address circumstances when a claimant performs work that is compensated but not substantial; and
- Require individuals seeking benefits to file minimum required

documents (a complete application) before the agency will treat the application as a claim for benefits.

#### C. Projected Costs and Benefits

The proposed rule is not economically significant as defined in Executive Orders 12866 and 13563. The estimated annual increase in PSOB Program death and disability benefit costs is \$3,398,810, which equates to 10 additional determinations approving death or disability benefits as compared to the number of annual approvals under existing rules. There is no significant projected increase in administrative or personnel costs. OJP estimates that the rulemaking will result in (1) reduced burden for claimants in establishing eligibility for benefits, (2) timelier processing of all claims for death and disability benefits, and (3) improved delivery of benefits to eligible claimants.

#### III. Background

The Public Safety Officers’ Benefits (PSOB) Program, 42 U.S.C. 3796 *et seq.* (established pursuant to the Public Safety Officers’ Benefits Act of 1976), is administered by the Bureau of Justice Assistance (BJA) of the Office of Justice Programs (OJP), U.S. Department of Justice. Generally speaking, the PSOB Program provides a one-time financial benefit, currently adjusted for inflation at \$339,881, to the statutorily-eligible survivors of public safety officers who die as the direct and proximate result of personal injuries sustained in the line of duty, as well as educational assistance for their spouses and eligible children. Alternatively, the PSOB Program also provides the same inflation-adjusted one-time financial benefit directly to public safety officers determined to be permanently and totally disabled as the direct and proximate result of personal injury sustained in the line of duty, as well as educational assistance for their spouses and eligible children.

Under 42 U.S.C. 3796(a), an individual seeking PSOB Program death benefits must establish the following: (1) That the deceased was a public safety officer as defined in 42 U.S.C. 3796b, (2) that the officer died as the direct and proximate result of an injury, (3) that the officer’s injury was sustained in the line of duty, (4) that the claimant is an eligible beneficiary as identified in 42 U.S.C. 3796(a)(1)–(6), and (5) that no limitations in 42 U.S.C. 3796a, *e.g.*, the decedent’s voluntary intoxication or gross negligence, bar recovery. Under 42 U.S.C. 3796(b), an individual seeking PSOB Program disability benefits must establish many of the same facts: (1) That the claimant was a public safety

officer as defined in 42 U.S.C. 3796b, (2) that the officer is permanently and totally disabled, (3) that such disability was the direct and proximate result of an injury, (4) that the officer's injury was sustained in the line of duty, and (5) that no limitations in 42 U.S.C. 3796a bar recovery. Under 42 U.S.C. 3796d-1, the spouse or child of a public safety officer determined to have been killed or permanently and totally disabled as the direct and proximate result of an injury sustained in the line of duty is eligible under 42 U.S.C. 3796d-1 to receive financial assistance for purposes of pursuing a program of higher education provided that the claimant is attending or has successfully completed a qualified education program.

The agency last published comprehensive regulations for the PSOB Program in December 2008. *See* 73 FR 76520 (Dec. 17, 2008). Since that time, the Dale Long Act was enacted, which made several significant amendments to the PSOB Act. Recently, in a separate notice of proposed rulemaking (NPRM) published in the **Federal Register** on on July 15, 2016, 81 FR 46019, the agency proposed regulations that would, among other things, implement the Dale Long Act's provisions offsetting certain payments, and ensure that the regulations reflect updated statutory language regarding the presumption in 42 U.S.C. 3796(k) covering certain heart attacks, strokes, and vascular ruptures. The present NPRM addresses other provisions in the Dale Long Act that the agency believes would benefit from rulemaking.

In addition to the Dale Long Act necessitating regulatory revisions, the agency has identified the need to revise its regulations to reflect current interpretations and practice. Since the last comprehensive regulatory revision in 2008, OJP has determined over 2,582 PSOB claims.<sup>4</sup> In so doing, it has identified ambiguities and gaps in existing regulations, as well as opportunities to simplify and improve the program's administration, while maintaining program integrity.

#### IV. Section-by-Section Analysis

##### *Section 32.2 Computation of Time; Filing*

Section 32.2 provides general definitions and guidance as to when something is "filed" with the PSOB Office or other PSOB determining officials. Other regulations, *e.g.*, 28 CFR 32.12(a), establish time frames for when

a particular type of claim must be filed and provide that the BJA Director may waive the time requirements for good cause shown. Neither the PSOB Act nor its implementing regulations, however, defines what constitutes "good cause." To establish uniform and transparent criteria for consistently evaluating what constitutes good cause, the proposed rule would add a new paragraph (e) describing the circumstances that may constitute good cause and warrant a waiver permitting an individual to file out of time. Under proposed § 32.2(e), circumstances beyond the individual's control such as lengthy illness or physical or mental incapacity, detrimental reliance on erroneous information provided by the public safety officer's agency, public agency determination of the officer's (or survivor's) eligibility or entitlement to death or disability benefits after the time for filing has passed, or other unavoidable circumstances showing that an individual could not have reasonably known about the time limits for filing may establish good cause. Examples of evidence establishing "good cause" would include a statement or affidavit from the individual seeking the extension or other person with knowledge of the particular basis for the extension. The proposed rule would limit the scope of the aforementioned exceptions by providing that, consistent with current practice, a lack of knowledge about the PSOB Program is not a valid basis for establishing good cause.

In addition, in preparation for going to a "paperless" claims processing system, proposed § 32.2(h) would permit the BJA Director, after publishing a Notice in the **Federal Register** consistent with 5 U.S.C. 552(a)(1)(C), and providing reasonable notice through the PSOB Program Web site, to require that all claims and supporting documents be filed in electronic form.

##### *Section 32.3 Definitions*

Section 32.3 provides definitions applicable to all three PSOB Program components, death, disability, and education. OJP proposes to amend the existing definitions in § 32.3 as follows:

- *Agent*: Under 42 U.S.C. 3796c, the agency is authorized to promulgate "regulations governing the recognition of agents or other persons representing claimants." The agency has exercised its regulatory authority to establish in current § 32.7 provisions governing the circumstances under which representatives may charge fees for representative services in a claim for benefits under the PSOB Act. However, the current rules do not define the

categories of individuals authorized to provide representative services in PSOB claims and the agency believes that such definitions are necessary for the implementation of proposed rules providing the categories of individuals that may charge fees for representative services. The proposed rule would define "agent" as an individual who represents persons seeking PSOB Program benefits and is not an attorney.

- *Attorney*: Pursuant to the authority granted by 42 U.S.C. 3796c(a) providing that the agency may promulgate regulations for purposes of recognizing the agents or other persons representing claimants under the PSOB Act, the proposed rule would define the term "attorney" as a member in good standing of a State bar. The agency believes that membership in good standing in a State bar is a reliable indicator that such a person would be capable of providing competent and ethical representation in a claim before the agency. This rule is intended to work in conjunction with proposed § 32.7, which would limit the ability to seek fees for representative services to attorneys as defined in this provision.

- *Authorized commuting*: the proposed rule would clarify that a public safety officer's return travel from responding to a fire, rescue, or police emergency is considered to be in the line of duty.

- *Child of a public safety officer*: From the time of the enactment of the PSOB Act in 1976,<sup>5</sup> until January 1, 2013, an individual's status as a child was determined based on the individual's status at the time of the public safety officer's death. Effective January 2, 2013, for all claims pending before BJA on that date, or filed or accruing thereafter, an individual's status as a child is determined at the time of the public safety officer's fatal (or catastrophic, for disability claims), injury." The revised rule implements the statutory change by removing provisions inconsistent with the amendment such as those that refer to a "child [ ] adopted by [the officer] after the injury date" and retaining the requirement that an officer's parental rights must be intact as of the officer's injury date to establish that an individual was "a child of a public safety officer."

- *Department or agency*: The PSOB Act, for most purposes, defines a public safety officer as an individual serving a public agency in an official capacity as a law enforcement officer, firefighter, or chaplain. 42 U.S.C. 3796b(9)(A). As defined in 42 U.S.C. 3796b(8), the term

<sup>4</sup> Claims determined at the PSOB Office, Hearing Officer, and BJA Director levels between December 17, 2008 and February 1, 2016.

<sup>5</sup> Public Law 94-430, 90 Stat. 1346, 1347 (1976).

public agency generally refers to a unit of government at the federal, state, or local level, and includes subordinate entities of such governments such as a “department” or “agency” as well as an “instrumentality” of any of the aforementioned entities. Nothing in the statutory definition of “public agency” or the regulatory definitions of “instrumentality” or “department or agency” in 28 CFR 32.3 expressly addresses or covers those entities created by interstate compact, many of which perform public safety activity pursuant to the terms of the compact (e.g., the Washington Metropolitan Area Transit Authority or the Port Authority of New York and New Jersey). Because OJP has consistently interpreted the terms “public agency” and “department or agency” to include such entities, it proposes to add a new provision in 28 CFR 32.3 (defining *Department or agency*) to make this interpretation clear. Under the proposed rule, the definition of “department or agency” would include an entity created by interstate compact between two or more States or between a State(s) and the District of Columbia with the consent of the United States Congress.

- **Determination:** Consistent with the proposed removal of current § 32.27, which provides claimants with the option to seek reconsideration of an adverse disability determination, the proposed rule would eliminate from the definition of “determination” reference to such a motion.

- **Divorce:** Under the current regulation, a spouse or purported spouse of an individual may be found to be “divorced” for purposes of the PSOB Program if, after the marriage or purported marriage, the spouse or purported spouse holds himself out as being divorced from, or otherwise not married to the individual, holds himself out as being married to another individual, or is a party to a marriage ceremony with another individual. The agency’s experience with such non-judicial divorce, particularly with long-estranged parties, is that evidence of such acts is inherently unreliable. To make more reliable agency findings of divorce and simplify the administration of the program, the proposed rule would eliminate as a basis for finding “divorce” all dissolutions of marriage other than ordered by a court.

- **Employee:** The proposed rule would clarify, pursuant to the statutory limitation in 42 U.S.C. 3796a(5), that the term does not include any active-duty member of the armed forces.

- **Firefighter:** Absent from the language of the PSOB Act is any mention of whether public safety officer

candidates or trainees qualify as public safety officers. In a recent report, the House Judiciary Committee noted that “certain provisions of the [PSOB Act] have the effect of excluding from the program some classes or subclasses of safety officers and of trainees who might better be included under certain circumstances,” including police academy and firefighter trainees.<sup>6</sup>

Under current regulations, a firefighter trainee, even if participating in a fire suppression exercise of the trainee’s public agency that is mandatory for his or her certification or employment as a firefighter by his or her public agency, generally does not qualify as a “public safety officer” for purposes of the PSOB Act. This is because the regulatory definition of “firefighter” requires that a firefighter possess, among other things, the legal authority and responsibility to engage in the suppression of fire outside of the training environment to be considered a “public safety officer.” As a result, such trainees are ineligible except where a trainee has the legal authority and responsibility to act without limitation at the time of the injury.<sup>7</sup>

As demonstrated by the claims for death benefits submitted on behalf of trainees, the hazards faced while participating in training mandatory to serve a public agency as a firefighter (e.g., the suppression of fire), are similar to that encountered in serving the public. Accordingly, OJP believes that a limited expansion of the current rule to include trainees is warranted.

The proposed rule expands the definition of “firefighter” to cover an individual who participates in an official training program of the officer’s public agency involving the suppression of fire or hazardous-material response that is mandatory for the individual’s employment or certification as a firefighter with a particular public agency. The proposed rule would permit payment on behalf of any individual who died or to any who was permanently and totally disabled as the direct and proximate result of an injury sustained while participating in such training.

- **Gross negligence:** Under 42 U.S.C. 3796a(3), the agency is prohibited from paying benefits when, at the time of the

<sup>6</sup> H.R. Rpt. 112–548 at 8–9 (June 25, 2012).

<sup>7</sup> As a result of the current definition of “firefighter,” a trainee firefighter who is killed or permanently disabled while participating in an official training program of his or her public agency, that is mandatory for the trainee’s certification or employment as a firefighter with that particular public agency, is ineligible for benefits under the PSOB Act by virtue of not qualifying as a “public safety officer.”

officer’s fatal or catastrophic injury, the officer is performing his or her duties in a grossly negligent manner. Under the current definition in 28 CFR 32.3, “gross negligence” is established when the officer’s performance of duty indicates an extraordinary departure from the appropriate degree of care, e.g., a heedless, wanton, or reckless action, and occurs in the face of significant hazards, where serious injury or damage is likely to follow, or where great danger is readily apparent. The agency’s experience is that the current rule is difficult to apply in part due to the multiple terms defining the degree of deviation from the standard of care required to establish such negligence as well as the breadth of circumstances under which such a deviation would establish such negligence.

The proposed rule streamlines the definition by using a single term, “reckless,” to describe the deviation from the appropriate standard of care, and by using a single set of conditions, “under circumstances where it is highly likely that serious harm will follow,” to describe the conditions under which such misconduct would implicate the statutory bar to payment in 42 U.S.C. 3796a(3). The proposed rule also provides that the standard for measuring a public safety officer’s conduct is that of a similarly situated public safety officer. The proposed rule is intended to simplify the agency’s application of this statutory bar to payment and limit its application to those circumstances in which it is apparent that the officer’s gross negligence was a substantial contributing factor in the officer’s injury.

- **Injury:** To establish an “injury” under current 28 CFR 32.3, a public safety officer must have sustained a traumatic physical wound or traumatized physical condition of the body that is the direct and proximate result of an external force or other factor listed in the definition, including, among other things, chemicals, bacteria, or climatic conditions.

The current rule expressly excludes from coverage as an injury “occupational disease” or “any condition of the body caused or occasioned by stress or strain,” both of which are defined further in 28 CFR 32.3. Under current regulations, conditions caused by stress or strain and thus excluded from coverage as an injury generally include those caused by physical exertion; chronic, cumulative, and progressive conditions; cardiovascular disease; and heart attacks, strokes, and vascular ruptures.

The agency’s experience is that the current regulatory requirement that an

injury must in all cases be the result of an external force or factor, taken together with the current “stress or strain” exclusion, excludes from coverage under the PSOB Act all physical conditions caused by exertion. As a result of the current definitions, an officer’s death or disability from an acute and immediate physical condition such as exertional heatstroke or rhabdomyolysis<sup>8</sup> would not be eligible for benefits. While retaining the longstanding interpretation that an injury under the PSOB Act is a traumatic physical wound or traumatized physical condition of the body directly and proximately caused by external forces or factors, the proposed rule would provide, consistent with BJA’s current interpretation, that injury also includes acute and immediate musculoskeletal strain or muscle damage, and heatstroke, each of which may be established as an acute condition, and without an external force or factor.

In addition, the agency’s experience in determining claims suggests that the definition of injury should be revised to make clear current agency interpretations that may not be obvious or intuitive to claimants and other stakeholders. The current definition of injury does not reflect the agency’s interpretation that an increase in the severity of an officer’s pre-existing physical wound or condition—regardless of the cause of the pre-existing wound or condition—is an injury under the PSOB Act so long as the increase in severity is itself the direct and proximate result of a line of duty injury. The proposed rule would provide that such aggravation of pre-existing conditions would constitute an injury. In stating that certain aggravation of a pre-existing injury may constitute an injury for purposes of the PSOB Program, the proposed rule clarifies that a pre-existing injury is not automatically excluded from consideration as the substantial factor in an officer’s death or permanent and total disability.

Based on the claims it has received, the agency believes that the regulatory definition of “injury” together with the separate definition of stress or strain, have proven very challenging for claimants to understand and apply, particularly to fatal heart attacks,

<sup>8</sup> “Rhabdomyolysis is the breakdown of muscle tissue that leads to the release of muscle fiber contents into the blood. These substances are harmful to the kidney and often cause kidney damage.” It may be caused by, among other things, “severe exertion, such as marathon running or calisthenics.” National Institutes of Health (MedlinePlus), *Rhabdomyolysis*, <https://www.nlm.nih.gov/medlineplus/ency/article/000473.htm> (accessed Feb. 11, 2016).

strokes, and vascular ruptures. The agency believes that this is in part due to the absence from the current definitions the agency’s longstanding interpretation that heart attacks and strokes, absent an external force or factor shown to have directly and proximately caused such condition, are not injuries. The agency’s interpretation dates back to the first PSOB regulations published in 1977, 42 FR 23252, 23260 (May 6, 1977), and has been upheld in a series of court decisions.<sup>9</sup>

Heart attacks, strokes, and vascular ruptures are eligible for death benefits under the presumption created by the Hometown Heroes Survivors’ Benefits Act of 2003 (Pub. L. 108–182) (Hometown Heroes Act) and amended by the Dale Long Public Safety Officers’ Benefits Improvement Act of 2012 (Pub. L. 112–239). Together, these amendments have established a rebuttable presumption that a heart attack, stroke, or vascular rupture satisfying the requirements of 42 U.S.C. 3796(k) constitutes a personal injury sustained in the line of duty. Generally speaking, the presumption is established in cases where a public safety officer sustains heart attack, stroke, or vascular rupture while engaging in a situation involving “nonroutine stressful or strenuous physical [line of duty] . . . activity” or participating in a training exercise “involving nonroutine stressful or strenuous physical activity” (or within 24 hours of such engagement or participation) and the heart attack, stroke, or vascular rupture is the direct and proximate cause of the officer’s death. Though not directly related to the definition of injury under § 32.3, in an NPRM published in the **Federal Register** on July 15, 2016, 81 FR 46019, the agency proposed regulations that would define the circumstances under which the presumption is rebutted in amended 42 U.S.C. 3796(k).

To make the agency’s interpretation clear, the proposed rule would eliminate the separate definition of stress or strain and would incorporate those conditions excluded by that definition directly into the definition of injury. In so doing, the proposed rule

<sup>9</sup> See e.g., *Juneau v. Dept. of Justice*, 583 F.3d 777, 782–83 (Fed. Cir. 2009) (holding that an officer’s heart attack following a foot chase of shoplifting suspects did not warrant payment of PSOB death benefits as the officer’s traumatic condition, i.e., a heart attack, was not caused by an injury as defined in PSOB regulations); see also *Smykowski v. United States*, 647 F.2d 1103, 1106 (Ct. Cl. 1981) (concluding that an officer’s physical struggle with a suspect immediately preceding a fatal heart attack, although different from stress or strain and cognizable itself as a traumatic event, was not an injury under the PSOB Act.)

would identify specific types of conditions excluded from the definition of injury including: “any chronic, cumulative, or progressive condition of the body,” and “cardiovascular disease.” To clarify for claimants and the general public that, under 42 U.S.C. 3796(k), certain heart attacks, strokes, and vascular ruptures may be presumed to be a personal injury, the proposed rule would so state.

Similarly, the current definition of injury does not, by itself, clearly reflect the agency’s longstanding interpretation that mental health conditions including post-traumatic stress disorder (PTSD) or anxiety do not constitute an injury, and therefore, the basis of a disability, under the PSOB Act. By way of background, the Law Enforcement Assistance Administration (LEAA) defined the term “traumatic injury” in 1977 as excluding “stress and strain.” Referring to the legislative history of the PSOB Act, and, in particular, the definition of “personal injury” in the House Judiciary Committee Reports, the LEAA stated that “[d]eaths caused by traumatic injuries do not therefore include deaths directly attributable to exertion or stress encountered in the performance of duty.”<sup>10</sup> Further supporting LEAA’s original interpretation, a 2001 case in the United States Court of Appeals for the Federal Circuit found permissible BJA’s regulatory definition “exclud[ing] from the definition of ‘traumatic injury’ stress and strain.”<sup>11</sup> In explaining its conclusion, the court stated that “the legislative history [of the PSOB Act] points away from an intent on the part of Congress to have the statutory term ‘personal injury’ include mental strain.”<sup>12</sup> More recently, in a House Report describing, among other things, amendments to the statute authorizing payment of disability benefits, 42 U.S.C. 3796(b), the Committee on the Judiciary stated that “a disability benefit is payable only when the Department determines that a public safety officer has sustained a line of duty injury whose direct *physical consequences* permanently prevent the performance of any gainful work.”<sup>13</sup>

To better communicate the agency’s longstanding interpretation regarding the ineligibility of mental health conditions for PSOB Program benefits, the revised definition of injury would expressly provide that mental health

<sup>10</sup> 42 FR 23252, 23260, May 6, 1977.

<sup>11</sup> *Yanco v. United States* 258 F.3d 1356, 1363 (Fed. Cir. 2001).

<sup>12</sup> *Id.* at 1364.

<sup>13</sup> H.R. Rep. No. 112–548 at 13 (2012) (emphasis added).

conditions are excluded from consideration as an “injury.”

- *Injury date:* Under current regulations defining “injury date,” such date generally means the time of the line of duty injury that directly and proximately resulted in the death or permanent and total disability of the public safety officer. Current regulations do not define when an injury occurs for purposes of 42 U.S.C. 3796(k) for purposes other than “determining beneficiaries under the Act.” As the “injury date” in a claim based on 42 U.S.C. 3796(k) is relevant for other purposes (e.g., determining voluntary intoxication), the proposed rule would define injury date in such a claim. The proposed rule would provide that, for all purposes relating to 42 U.S.C. 3796(k), injury date means the time of the officer’s qualifying engagement or participation referred to in the Act at 42 U.S.C. 3796(k)(1).

- *Involvement:* Under current regulations, a law enforcement officer trainee, even while participating in an official training program that is mandatory for his or her certification or employment as a law enforcement officer (e.g., firearms training), is generally not a “public safety officer” for purposes of the PSOB Act. This is because the regulatory definition of “involvement” requires that a law enforcement officer possess, among other things, the unrestricted “legal authority and -responsibility” to arrest or apprehend . . . persons for violations of criminal law to qualify as a “public safety officer.” As a result, such trainees are ineligible except in the unusual circumstances in which a trainee has the legal authority and responsibility to act as a law enforcement officer without limitation at the time of the injury.<sup>14</sup>

As demonstrated by the claims for death benefits submitted on behalf of trainees, the hazards faced while participating in training mandatory to be serve a public agency as a law enforcement officer (e.g., firearms training, unarmed self-defense, or physical training) are similar to what may be encountered in serving the public. Accordingly, a limited expansion of the current rule to include such circumstances is warranted.

The proposed rule expands the definition of “involvement” to cover as

<sup>14</sup> As a result of the current definition of “involvement,” a necessary element of the definition of “law enforcement officer,” a trainee police officer who is killed or permanently disabled while participating in an official training program of his or her public agency, that is mandatory for the trainee’s certification or employment as a police officer with that particular public agency, is ineligible for benefits under the PSOB Act by virtue of not qualifying as a “public safety officer.”

a “law enforcement officer” any individual who participates in an official training program of the individual’s public agency that is mandatory for that individual’s employment or certification in certain law enforcement positions such as a police officer, corrections officer, probation officer, or equivalent. The proposed rule would permit payment on behalf of any individual who died or to any who was permanently and totally disabled as the direct and proximate result of an injury sustained while participating in such mandatory training.

- *Line of duty activity or action:* The proposed rule would provide that certain activities or actions of a law enforcement officer or firefighter, performed under emergency circumstances and necessary to save or protect human life, in any jurisdiction, would be deemed to be line of duty activity or action for purposes of the PSOB Act.

Under 42 U.S.C. 3796(a) and (b), the agency pays death or disability benefits when it determines that a public safety officer has died or become permanently and totally disabled as “the direct and proximate result of a personal injury sustained in the line of duty.” Under current regulations, a public safety officer’s action or activity and resulting injury is “in the line of duty” only if it is an action or activity that the officer is legally authorized or obligated to perform as a public safety officer and the officer’s public agency recognizes it as such.<sup>15</sup> Where an officer acts outside his or jurisdiction, even if acting in an emergency to save human life, such actions are generally outside the legal authority of the officer’s public agency and, as a result, excluded from PSOB Act coverage as not “in the line of duty.”

As guardians of the public, public safety officers are trained to and called upon to engage in extraordinary acts of self-sacrifice and bravery to save the lives of others. However, these acts may not always occur within an officer’s jurisdiction. The regulations which require that an officer’s public agency affirm, or at least, not deny, that a public safety officer had the legal authority and responsibility to perform such actions, as currently written, do not take into account the extraordinary situations which require an urgent and immediate response and do not afford a public safety officer an opportunity to seek approval or authorization to act.

<sup>15</sup> See 28 CFR 32.3 (defining *Line of duty activity or action*).

Within the context of the PSOB Program, BJA recognizes that public safety officers, by virtue of their training, expertise, and experience, are often compelled to act where human life is endangered. Moreover, a public safety officer’s training and experience make them uniquely qualified to intervene to save human life. Accordingly, BJA believes that the actions of public safety officers, i.e., firefighters and law enforcement officers, in these extraordinary and limited circumstances should be covered by the PSOB Program.

As the PSOB Act does not define “line of duty” and expressly delegated to the agency in 42 U.S.C. 3796(c) the authority to promulgate implementing regulations, the agency may interpret the term “line of duty” in regulations so long as the interpretation is not arbitrary, capricious, or contrary to law.<sup>16</sup> The agency’s proposed regulatory interpretation recognizes, consistent with the language of 42 U.S.C. 3796(a) and (b), that “[t]he word ‘duty’ connotes a legal or moral obligation” and that “[i]n reference to public safety officers, ‘duty’ refers to the obligation to protect the public in their capacity as firefighters or police officers.”<sup>17</sup> The proposed rule recognizes the connection between an injury sustained by an officer in the course of performing a lifesaving act, even an officer who may be off-duty and outside of his or her jurisdiction, and the officer’s duty as a public safety officer to protect the public. Moreover, the proposed rule is consistent with existing provisions that deem an officer’s injury to be in the line of duty even in circumstances when the officer may have been off duty and without regard to the officer’s location—when “such injury resulted from the injured party’s status as a public safety officer.”<sup>18</sup> Other provisions of federal law similarly recognize public safety officers’ special role by granting rights beyond those enjoyed by the public at

<sup>16</sup> See *Hawkins v. United States*, 469 F.3d 993, 1004 (Fed. Cir. 2006) (providing that, as Congress did not define line of duty in the PSOB Act, “the BJA’s regulatory interpretation of ‘line of duty’ . . . must be upheld unless it is “arbitrary, capricious, or manifestly contrary to the statute”) (other citation omitted). Cf. *Davis v. United States*, 50 Fed.Cl. 192, 200 (2001) (“Congress has spoken on the issue of ‘line of duty’ and its scope. A public safety officer is killed in the ‘line of duty’ when his or her death results from the performance of any duty required by law or terms of employment or as a consequence of his or her identity as a safety officer.”).

<sup>17</sup> *Davis v. United States*, 50 Fed.Cl. 192, 207 (2001).

<sup>18</sup> See 28 CFR 32.3 (defining *Line of duty injury*).

large<sup>19</sup> and recognizing that local public safety officers often serve the public in areas other than the officer's immediate jurisdiction.<sup>20</sup> Finally, in recognizing and covering the risks faced by public safety officers in carrying out their obligation to protect the public, the limited expansion in the proposed rule is also consistent with one of the purposes of the PSOB Act, to recruit and retain public safety officers.

The proposed rule would add to the definition of "line of duty activity or action" a narrow exception that would deem the extraordinary acts of a firefighter or law enforcement officer to save a human life as "in the line of duty." To maintain the integrity and limited nature of the exception, such acts would be limited to those circumstances in which (1) the officer's actions constituted public safety activity, (2) the officer's actions were performed in the course of responding to an emergency situation requiring prompt actions to save human life, (3) the officer did not create the emergency situation to which he or she responded, (4) the human life the officer attempted to save or saved was other than that of the officer, and (5) the officer's acts were not contrary to the law of the jurisdiction in which performed.

Providing a narrowly drawn exception to the definition of line of duty is consistent with the purpose of the PSOB Act to extend coverage to firefighters and law enforcement officers who sacrifice their own lives to save the life of others, or who are catastrophically injured while doing so. The proposed rule will further prevent the anomaly of such a public safety officer being recognized or honored posthumously for extraordinary acts of heroism through BJA programs such as the Public Safety Officer Medal of Valor<sup>21</sup> while at the same time being denied, or having their family denied, PSOB benefits because of narrowly drawn eligibility criteria do not take

<sup>19</sup> See, e.g., Law Enforcement Officers Safety Act of 2004, Public Law 108-277, 118 Stat. 865, codified at 18 U.S.C. 926B, 926C (granting "qualified law enforcement officers" the right to carry concealed weapons across state lines, notwithstanding provisions of state law prohibiting or limiting concealed weapons).

<sup>20</sup> See, e.g., 5 U.S.C. 8191 (authorizing federal workers' compensation benefits to local law enforcement officers injured while pursuing or apprehending persons sought for crimes against the United States or material witnesses for federal prosecutions).

<sup>21</sup> Public Law 107-12, as amended, established the Public Safety Officer Medal of Valor, which is awarded by the President, in the name of Congress, to public safety officers for "extraordinary valor above and beyond the call of duty."

into account these extraordinary situations.

As provided in sec. 1086 of Public Law 112-239, the Dale Long Act amended the PSOB Act by adding a new provision defining as a public safety officer those members of a rescue squad or ambulance crew who, as authorized, are engaging in rescue activity or providing emergency medical services.<sup>22</sup> Notably, the amendment removed the requirement that an individual member be a "public employee" and expanded membership to "officially recognized or designated employee or volunteer member[s]" of public agencies as well as those employee or volunteer members of certain "nonprofit entit[ies] serving the public."

Under the proposed rule, the "line of duty activity or action" definition would reflect the Dale Long Act's expansion of PSOB Program coverage to employee or volunteer members of ambulance crews and rescue squads operated by certain nonprofit entities serving the public. The proposed rule would also implement the reduced scope of PSOB Program coverage in 42 U.S.C. 3796b(9)(D) for all employee and volunteer members of public agency and nonprofit entity ambulance squads and rescue crews based on statutory language limiting public safety officer status to those circumstances in which a member of an ambulance crew or rescue squad is actually engaging in rescue activity or providing emergency medical services.<sup>23</sup>

• *Line of duty injury*: Under current regulations, an injury is sustained in the line of duty if it was suffered during performance of a "line of duty activity or a line of duty action" or "authorized commuting."<sup>24</sup> In such circumstances, it is the nature of the officer's actions that determines whether an injury is "in the line of duty" and therefore eligible for benefits. Existing PSOB regulations provide an exception to this general principle in that an injury is deemed to be in the line of duty if clear and convincing evidence demonstrates that the injury resulted from a public safety officer's status as a public safety officer. Under the current rule, it is the actions and motivation of the assailant that

<sup>22</sup> 42 U.S.C. 3796b(9)(D).

<sup>23</sup> As the statutory language of the 2013 amendment limits the scope of coverage to circumstances in which the rescue squad or ambulance crew member is engaging in rescue activity or the provision of emergency medical services "as authorized or licensed by law and by the applicable agency or entity," OJP is unable to establish in regulations an exception for actions taken to save human life outside the member's jurisdiction.

<sup>24</sup> 28 CFR 32.3 (defining *Line of duty injury*).

determine whether an injury is in the line of duty and eligible for benefits; consequently, every injury inflicted upon an off-duty public safety officer is not automatically considered to be in the line of duty. Rather, it must be shown that the motivation for injuring the officer was the officer's status as a public safety officer as opposed to a personal dispute or other event unrelated to the officer's status as a public safety officer.

The agency's experience is that this provision, although appropriately narrow, has proved particularly burdensome for claimants in those claims in which both the officer and the assailant are deceased and there is little or no evidence as to the motivation for injuring the officer. Adding to a claimant's challenges in establishing a line of duty injury in such claims, the current regulation also requires that such injury must be established by clear and convincing evidence rather than the standard of proof of "more likely than not" applicable to nearly all other determinations in the PSOB Program. The agency believes that two minor changes to the current regulation would enable claimants to establish eligibility in such claims and maintain the necessarily limited nature of the provision.

The proposed rule would change from "convincing" to "more likely than not" the standard of proof for establishing that an officer was injured due to the officer's status as a public safety officer. In doing so, the proposed rule would address those situations in which the only evidence of the assailant's intent to injure the officer is circumstantial. As an assailant's intent to injure an officer on account of the officer's status is often intertwined with or manifested in an intent to retaliate against an officer for actions taken in the line of duty by the officer injured or other public safety officers, the proposed rule would also clarify that injury sustained by a public safety officer in retaliation for line of duty actions or activities is a valid basis for establishing line of duty injury as a result of an officer's status.

• *Official capacity*: In addition to the requirement in 42 U.S.C. 3796b(9)(A) and implementing regulations that an individual must possess the qualifications applicable for the particular category of officer to establish public safety officer status, the evidence must also establish that the individual law enforcement officer and firefighter was serving a "public agency in an official capacity" at the time of injury. Public agency is defined in 42 U.S.C. 3796b(8) and generally refers to a unit of government at the federal, state, or

local level, subordinate entities of such governments including a “department” or “agency,” or an instrumentality of any of the aforementioned entities “Official capacity” is not defined in the PSOB Act; however, the agency has exercised its regulatory authority to define it in 28 CFR 32.3 as based on two criteria. First, an individual must be officially acknowledged by the agency to be functionally within or part of the agency; an individual’s status as a contractor, by itself, does not establish that an individual is functionally within a public agency. Second, the public agency must accept legal responsibility for the acts and omissions of the individual.

Under these existing definitions, an otherwise qualified firefighter or law enforcement officer who is recognized by his or her agency as functionally within or part of the agency, but acts in emergency circumstances to save human life outside his or her agency’s jurisdiction or where he or she is otherwise not obligated to act, will generally not be found to be serving a public agency in an official capacity. This is because the firefighter’s or law enforcement officer’s acts and omissions in such circumstances will generally not be recognized by his or her own public agency as legally those of the agency.

As discussed in the analysis of the proposed revision to the “line of duty” regulation, it is not uncommon for public safety officers to respond to emergencies regardless of whether the emergency is in their jurisdiction. The PSOB regulations which require that a public agency affirm, or at least, not deny, that a public safety officer’s acts or omissions while acting outside the officer’s jurisdiction were legally those of the public agency, as currently written, do not take into account these extraordinary situations which require an urgent and immediate response and do not afford a public agency the opportunity to determine whether it will affirm, or at least not deny legal responsibility for an officer’s acts or omissions while so acting.

Within the context of the PSOB Program, BJA recognizes that public safety officers, by virtue of their training, expertise, and experience, are often compelled to act where human life is endangered. Moreover, a public safety officer’s training and experience make them uniquely qualified to intervene to save human life. Accordingly, BJA believes that the actions of public safety officers, *i.e.*, firefighters and law enforcement officers, in these extraordinary and limited circumstances should be covered by the PSOB Program.

As the PSOB Act did not define “official capacity” as to address whether an officer’s off-duty actions could satisfy such requirement and expressly delegated to the agency in 42 U.S.C. 3796(c) the authority to promulgate implementing regulations, the agency may interpret the term “official capacity” in regulations so long as the interpretation is not arbitrary, capricious, or contrary to law.<sup>25</sup> Moreover, the proposed rule is consistent with existing provisions that deem an officer’s injury to be in the line of duty without regard as to whether the officer was functioning in an official capacity at the time of his or her injury—when such injury resulted from the injured party’s status as a public safety officer.<sup>26</sup>

As mentioned with regard to the proposed changes to “line of duty,” other provisions of federal law similarly recognize public safety officers’ special role by granting rights beyond those enjoyed by the public at large<sup>27</sup> and recognizing that local public safety officers often serve the public outside the officer’s immediate jurisdiction.<sup>28</sup> The proposed rule is consistent with the recognition afforded by those provisions. Finally, in recognizing and covering the risks faced by public safety officers in carrying out their obligation to protect the public, the limited expansion in the proposed rule is also consistent with one of the purposes of the PSOB Act: To recruit and retain public safety officers.

The proposed rule would add to the definition of “official capacity” a narrow exception that would deem the extraordinary acts of a firefighter or law enforcement officer to save a human life as “serving a public agency in an official capacity.” To maintain the integrity and limited nature of the exception, such acts would be limited to those determined to be “line of duty activity or action” under the proposed exception to that definition. This proposed change is intended to work in conjunction with

<sup>25</sup> See *Groff v. United States*, 493 F.3d 1343, 1353 (Fed. Cir. 2007) (“Congress did not further define what it means to serve ‘in an official capacity,’ leaving the statute silent as to whether contract pilots fall within its ambit.”).

<sup>26</sup> See 28 CFR 32.3 (defining *Line of duty injury*).

<sup>27</sup> See, e.g., Law Enforcement Officers Safety Act of 2004, Public Law 108–277, 118 Stat. 865, codified at 18 U.S.C. 926B, 926C (granting “qualified law enforcement officers” the right to carry concealed weapons across state lines, notwithstanding provisions of state law prohibiting or limiting concealed weapons).

<sup>28</sup> See, e.g., 5 U.S.C. 8191 (granting federal workers’ compensation benefits to local law enforcement officers injured while pursuing or apprehending persons sought for crimes against the United States or material witnesses for federal prosecutions).

the proposed change regarding line of duty.

- *Officially recognized or designated public employee member of a squad or crew:* As provided in sec. 1086 of Public Law 112–239, the proposed rule would revise the existing definition to cover members of ambulance squads and rescue crews who are employed by or volunteer for certain nonprofit entities serving the public.

- *On-site hazard management:* As currently defined in 28 CFR 32.3, the term “fire suppression” includes “on-site hazard evaluation” but the latter term is not defined and does not include the more comprehensive task, “on-site hazard management.” To account for this necessary component of firefighter work, the proposed rule would define on-site hazard management as including actions taken to provide scene security or direct traffic in support of a fire, rescue, or law enforcement emergency.

- *Parent-child relationship:* As defined in 28 CFR 32.3, the terms “adopted child” and “stepchild” require a PSOB determining official to determine whether a public safety officer had a “parent-child relationship” with a child. The current definition of parent-child relationship, *i.e.*, a relationship between a public safety officer and another individual where the officer acts as a parent, requires that the relationship be shown by convincing evidence. This higher standard of proof has delayed the processing of claims involving claimants seeking benefits on behalf of (or as) the stepchild or adopted child of a deceased officer. In nearly all such claims, additional evidence sought to meet the higher standard has confirmed the initial assessment of the determining official.

As the higher standard proof has been shown to add little certainty in what is inherently a subjective determination about the existence of a relationship that is known best by the persons directly involved in it, the agency proposes to revise it. The proposed rule would revise the definition parent-child relationship by changing the standard of proof from “convincing evidence” to the standard of “more likely than not” applicable in nearly all other PSOB Program determinations.

- *PSOB Counsel:* In 2013, the Attorney General directed that the PSOB claims process be streamlined through the consolidation of legal and other claims functions within BJA. Apart from a final rule revising the definition of “PSOB Office” that was published in the *Federal Register* in 2013, 78 FR 29233 (May 20, 2013), the agency has published no regulations identifying the entity or individual providing legal

review within BJA. In order to make more transparent the legal review process associated with PSOB claims, the proposed rule would identify PSOB Counsel as the legal staff in BJA responsible for performing legal review of claims for PSOB Program benefits and providing PSOB determining officials with legal advice in PSOB Program matters.

- *Public employee member of a squad or crew:* The agency proposes to remove this definition as a recent amendment to 42 U.S.C. 3796b(7) in sec. 1086 of Public Law 112–239 removed the “public employee” requirement from the definition of “member of a rescue squad or ambulance crew.”

- *Stress or strain:* As discussed in the proposed revision of the definition of “injury,” the agency’s experience is that the public has found the definition of stress or strain very difficult to understand and apply. For the reasons provided, the proposed rule would eliminate this definition in favor of incorporating the specific conditions that are excluded into the definition of injury. In so doing, the proposed rule would make clear those conditions that are excluded from the definition of injury, streamline the processing of claims, and help to reduce the number of claims filed that, as a matter of law, cannot be paid due to a lack of injury.

- *Suppression of fire:* As currently defined, the term refers to the work and activities connected with extinguishing or containing a fire, beginning with its discovery, and includes extinguishment, physical prevention, or containment of fire, including on-site hazard evaluation. “On-site hazard evaluation” is logically part of a larger task, “on-site hazard management.” The current definition does not take into account the individual members of fire departments that are deployed to provide on-site hazard management activities including traffic incident management at emergency scenes. These individuals, often referred to as “fire police,” are officially designated members of a fire department, receive formal training, and perform operational duties that, in the absence of fire police, would be required to be performed by another member of the department.

When an officially designated member has the legal authority and responsibility to qualify as a firefighter or law enforcement officer as defined in 28 CFR 32.3, and is otherwise serving a public agency in an official capacity, the individual qualifies as a public safety officer. However, in the majority of claims involving personnel whose specialized duties are limited to traffic incident management and other on-site

hazard management tasks, the individual lacks the legal authority and responsibility to either engage in the suppression of fire (as currently defined), or arrest persons alleged to have violated the criminal laws, which precludes the individual from qualifying as a public safety officer as a firefighter or law enforcement officer.

The agency’s experience is that, apart from engaging in actual fire suppression, personnel providing on-site hazard management are at risk for many of the same hazards encountered at the scene of a fire as do personnel who engage directly in the suppression of fire as firefighters. Fire police and similar fire department personnel are exposed to the hazards of the emergency response, the hazardous materials and toxins released into the air at the scene of the fire, as well as the hazards posed by their traffic control duties that kill or disable firefighters.<sup>29</sup> The proposed rule would expand the type of activities covered as fire suppression to include on-site hazard management, which would be addressed separately in a new definition in 28 CFR 32.3 and would include duties such as providing scene security and directing traffic in response to a fire emergency.

- *Voluntary intoxication at the time of the officer’s fatal or catastrophic injury:* Under 42 U.S.C. 3796a(2), the agency is prohibited from paying benefits “if the public safety officer was voluntarily intoxicated at the time of his fatal or catastrophic injury.” Under the current regulation implementing 42 U.S.C. 3796a(2), a public safety officer is considered to be voluntarily intoxicated when a drug test establishes in the body of a public safety officer, the presence, in any amount, of a drug listed in the Schedules of Controlled Substances. *See e.g.*, 21 U.S.C. 812; 21 CFR, part 1308. In the overwhelming majority of claims, the officer is found to have been taking a prescribed drug consistent with such prescription and not intoxicated at the time of fatal or catastrophic injury. However, BJA and claimants expend significant resources in determining that this limitation is not implicated, which delays the processing of otherwise valid claims. To enable BJA to focus its inquiry on those drugs used as intoxicants and those that generally produce intoxication, the proposed rule

would make several substantive changes to the existing rule pertaining to how voluntary intoxication is determined with regards to drugs.

The proposed rule would, among other things, revise existing language to provide that voluntary intoxication is not automatically established when the presence of drugs in the body of the public safety officer is generally within prescribed limits and the public safety officer was not acting in an intoxicated manner immediately prior to the injury. To account for circumstances under which there is no witness available to attest as to whether an officer was acting in an intoxicated manner immediately before a fatal injury, the proposed rule would clarify, consistent with BJA’s current interpretation, that voluntary intoxication is not implicated when convincing evidence establishes that the drug would not produce intoxication in the amount present in the officer’s body.

- *Volunteer fire department:* Under 42 U.S.C. 3796b(9)(A), to be eligible for benefits as a public safety officer, a firefighter must be serving “a public agency in an official capacity.” Under the current definition of “official capacity” in 28 CFR 32.3, an otherwise qualified volunteer firefighter who is an officially recognized or designated member of a legally established volunteer fire department (VFD) cannot be considered to be serving a public agency in an official capacity and therefore cannot be a public safety officer, unless a public agency recognizes (or, at a minimum, does not deny) that the volunteer firefighter’s acts and omissions are legally those of the public agency.

BJA’s experience is that in most PSOB claims involving volunteer firefighters, the “public agency” and “official capacity” requirements for the individual volunteer firefighter are satisfied when the VFD establishes that it is an “instrumentality” of a public agency under 28 CFR 32.3 (defining *Instrumentality*) and that, as such, the public agency is legally responsible for the acts and omissions of its members. In a relatively recent trend, the agency has received claims in which a VFD does not fully qualify as an instrumentality despite providing fire protection to a public agency as a noncommercial, non-profit corporation. In nearly all claims in which a VFD does not qualify as an instrumentality, it is because the public agency denies legal responsibility for the acts and omissions of the VFD. Such denial is often manifested in a contract or similar agreement for services under which the public agency expressly states that it is not responsible for the acts or omissions

<sup>29</sup> Between 1996 and 2010, 253 firefighters were killed in vehicle collisions responding to and returning from incidents; 70 more were killed after being struck by vehicles at the scene of emergencies. U.S. Fire Administration, *Traffic Incident Management Systems*, FA–330/March 2012, 4–5, [https://www.usfa.fema.gov/downloads/pdf/publications/fa\\_330.pdf](https://www.usfa.fema.gov/downloads/pdf/publications/fa_330.pdf) (accessed Feb. 26, 2016).

of the VFD. Under such contracts, the public agency may require the VFD to obtain its own insurance (even as the public agency provides the VFD with funding for operations) and indemnify and hold harmless the public agency for its acts and omissions or those of its members. Such contracts may also refer to the volunteer firefighter members of such VFDs as “independent contractors” of the public agency despite the fact that the volunteer firefighters are officially recognized members of the VFD, itself a non-commercial, nonprofit corporation.

Since the enactment of the PSOB Act in 1976 and before the agency defined in regulations the terms “official capacity” and “instrumentality,” qualified members of legally organized VFDs have generally been considered to be public safety officers. To preserve this eligibility and address the trend of shifting liability, the proposed rule provides that a VFD qualifies as an instrumentality as defined in 28 CFR part 32 if it is legally established as a public entity or nonprofit entity serving the public, and it is legally established solely for the purpose of providing fire protection and related services on a noncommercial basis to or on behalf of a public agency or agencies. The proposed rule also provides that to qualify as an instrumentality under this provision, a VFD must provide fire protection to members of the public without preference or subscription fees. The proposed rule would preserve the existing PSOB Act coverage of volunteer firefighters serving the public in noncommercial, nonprofit VFDs and leave undisturbed the agency’s longstanding interpretation that, as a general rule, commercial entities cannot establish status as a public agency or as an instrumentality of a public agency.

#### Section 32.5 Evidence

Under current § 32.5(a), claimants have “the burden of persuasion as to all material issues of fact, and by the standard of proof of ‘more likely than not.’” The proposed rule would retain this standard of proof, and simplify the current description of claimants’ burden by providing that claimants are responsible for establishing all elements of eligibility for the benefit they seek.

The proposed rule would replace the standard for evidentiary submissions in current § 32.5(c), Federal Rules of Evidence 301, 401, 402, 602–604, 701–704, 901–903, and 1001–1007, with a general standard for admissibility similar to that used in other federal benefit programs. *See e.g.*, 20 CFR 10.115 (providing that the evidence submitted in a claim for Office of

Workers’ Compensation benefits “must be reliable, probative and substantial”). Although the Federal Rules of Evidence provide a precise set of rules for evaluating evidentiary submissions in litigation, BJA believes that a less formal and legalistic set of standards is better suited for an administrative, non-adversarial claims process in which most claimants are unrepresented. The proposed rule provides that a claimant’s evidence must be worthy of belief (credible), tending to prove an issue (probative), and actually existing (substantial). The proposed rule would also provide that, when deemed necessary by a PSOB determining official, a claimant must produce original documents or other copies verified as true and exact by a custodian of such records.

Under current 28 CFR 32.5(i), BJA considers a public safety officer’s response to a call to provide emergency service “prima facie evidence” that the activity was “nonroutine” for purposes of applying the presumption in 42 U.S.C. 3696(k). The agency’s experience, which is substantiated by research showing that a public safety officer’s sympathetic nervous system is activated with his or her receipt of an alarm, is that a public safety officer’s response to an emergency call to perform public safety activity, which generally begins when an officer receives such call, also constitutes evidence of the response’s physically stressful character. Accordingly, the proposed rule provides that a public safety officer’s response to a call for emergency service shall also constitute prima facie evidence that the response was physically stressful for purposes of 42 U.S.C. 3796(k).

As stated, generally, the evidence of record in a claim must establish material issues of fact to the standard of proof of “more likely than not.” However, the unique circumstances of public safety work results in PSOB claims in which many of the incidents or injuries that are the basis of the claim may be without numerous witnesses or extensive documentation. To address the evidentiary challenges posed by the hazards and risks of public safety activity and the unpredictable nature of such work, the agency proposes a limited exception to this standard of proof by adding a new § 32.5(k) that would address situations in which the proof on either side of an issue is equal. The proposed rule would provide that where the determining official determines the record evidence to be equivalent regarding a fact material to whether or not the circumstances of the death or injury of the officer warrant coverage as a death or permanent and

total disability incurred in the line of duty under the Act, the determining official shall resolve the matter in favor of the claimant. The proposed rule makes clear that the absence of evidence in support of a particular fact does not establish that the evidence is equivalent and that the provision is not a substitute for actual evidence establishing or disproving a particular fact.

The proposed rule would also replace the prerequisite certification regulations at 28 CFR 32.15 and 32.25 with a single provision at § 32.5(l) authorizing PSOB determining officials to require from a claimant any proof necessary to establish facts of eligibility essential for death, disability, or education claims under the PSOB Act including proof of birth, death, disability, earnings, education, employment, and injury. Under the current rule, without a waiver from the BJA Director for good cause shown, BJA may not approve any death or disability claim unless the public safety officer’s agency produces a certification as defined in § 32.3 and specific types of supporting documentation. For example, even in a claim for PSOB death benefits in which the public agency has paid death benefits to the public safety officer’s survivors, BJA may not pay benefits without a certification (or, as appropriate a waiver for good cause shown) from the public safety officer’s agency that the officer died as “a direct and proximate result of a line of duty injury”, or that the public safety officer’s survivors have received “the maximum death benefits legally payable by the agency” to similarly situated public safety officers.

BJA’s experience is that the prerequisite certification regulations impose an extremely high level of precision on the claims process, often require the public safety officer’s agency to make legal and medical conclusions they are not qualified to make, and produce delays in adjudication. The better course, and one keeping in line with other government claims programs would be to allow claimants and agencies to provide documents establishing eligibility from a variety of sources including but, not limited to, death certificates, autopsies, toxicology reports, coroner’s reports, police reports, investigative reports, workers compensation determinations, State-law line of duty death determinations, insurance policies, newspaper and media reports, and statements from the officer’s public agency. Taken together, such documents are more than adequate to establish the relevant facts and circumstances of a public safety officer’s injury and the eligibility of beneficiary.

In replacing the prerequisite certification and waiver requirements with a process tailored to the facts of individual claims, the proposed rule would reduce administrative burden and improve the efficiency of the process by reducing delays for unnecessary documents and or waivers.

In a recent report on the PSOB Program, the OIG recommended that BJA implement “an abandonment policy that gives claimants adequate opportunity to provide needed documentation to support their claims and ensures that the PSOB Office does not use its limited resources conducting outreach on claims, especially those which claimants do not intend to pursue.”<sup>30</sup> To aid in implementing the OIG’s finding, OJP proposes to define in a new § 32.5(m), the circumstances under which a claim is considered to be abandoned.

The proposed rule would consolidate most abandonment provisions in a single provision. Under the proposed rule, when a claimant or agency who does not furnish evidence necessary to a determination within one year of BJA’s request, or a claimant fails to pursue in a timely fashion a determination on his or her claim, following appropriate notice BJA will consider the claim abandoned and take no further action on the claim unless it received a complete claim, including the specific information requested, within 180 days from notice of abandonment. Consistent with current practice, the claim would be considered as though never filed, and abandonment would not toll the time periods remaining for filing. In providing claimants with a one-year period to respond to requests for evidence, as well as a “grace period” in which claimants may reopen an abandoned claim, the proposed rule provides adequate time for claimants to provide documents supporting their claims while permitting BJA to dedicate its resources to those claims that can be decided on the evidence of record.

#### *Section 32.7—Fees for Representative Services*

Under 42 U.S.C. 3796c, the agency is authorized to promulgate “regulations governing the recognition of agents or other persons representing claimants.” The agency has exercised its regulatory authority to establish in current § 32.7 provisions governing the circumstances under which representatives may charge

fees for representative services in a claim for benefits under the PSOB Act. Claimants for representative services provided in connection with a claim for PSOB Act benefits may not charge fees for representative services based on a stipulated, percentage, or contingency fee recovered and may not charge fees in excess of the amount permitted under the Equal Access to Justice Act, currently \$125 per hour. All petitions seeking authorization to charge fees, whether contested by the PSOB claimant-beneficiary or not, are subject to a review for reasonableness based on the factors in § 32.7(c)(1)–(8). Additionally, the current rules do not address who may provide representation in PSOB claims, nor do they address whether non-attorney representatives may charge fees for representation.

The agency proposes to revise § 32.7 to limit paid representation to attorneys and support staff under their direct supervision, keep fees at a reasonable level consistent with the purpose of the program, and improve the processing of claims involving attorney representatives. The intent in so doing is to enable claimants to more easily obtain qualified representation in claims for PSOB death or disability benefits.

In conjunction with a proposed definition of the term “attorney” as a member in good standing of a State bar, the proposed rule would limit authorization to charge fees for representative services to such attorneys. The agency views limiting paid representation to attorneys as a means of ensuring that individuals providing paid representation in PSOB claims are capable of providing competent representation, are obligated to provide representation according to code of professional ethics, and are subject to oversight and compliance by an independent licensing body. As non-attorney representatives are not subject to similar testing, ethical requirements, and independent monitoring, the agency proposes to continue to permit them to provide representation but prohibit such individuals from charging claimants fees for representative services.

The proposed rule would permit fees for representative services to be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. To enable BJA to maintain its oversight role regarding fees, the proposed rule would require that claimants provide to the PSOB Office before seeking authorization to charge fees a copy of any fee agreement for representative services under the Act. To keep fees reasonable, the proposed rule would prohibit fees for

representative services in excess of 12 percent of the total PSOB death or disability payment available to a claimant regardless of how the fee agreement is structured.<sup>31</sup> To expedite the review of fee petitions, the proposed rule would also establish a presumption of reasonableness for representative’s fees not exceeding 8 percent of the total PSOB death or disability payment available to a claimant in a claim resolved at the PSOB Office level, and establish a presumption of reasonableness for representative’s fees not exceeding 10 percent of the total PSOB death or disability payment available to a claimant in a claim resolved at the Hearing Officer or BJA Director level. These presumptions of reasonableness would be rebuttable if an examination of the factors in § 32.7(c) established that the fee is unreasonable.

#### *Section 32.9 Complete Application*

One of the recommendations of OJP’s independent BPI review of the PSOB Program was that, to improve the efficiency of claims processing, BJA should require a minimum set of supporting information before assigning a claim number and routing the claim for review to reduce the time incomplete claims remain unresolved and to focus BJA resources on those claimants who need assistance in submitting an application for benefits.<sup>32</sup> Consistent with other government claims programs, the BPI review recommended that the PSOB Office shift its focus from a one-on-one outreach model to an approach that returns the responsibilities to the claimant and agency to gather, organize, and submit all required prior to filing a PSOB claim, and being assigned a claim number. Related to the minimum required documents concept, for BJA to establish and implement meaningful timeliness standards for its processing of claims, claims must necessarily be complete and ripe for determination before the “clock” starts on calculating the days required by BJA to process a claim to completion.

To improve the efficiency of claims processing pursuant to the BPI recommendation, the agency proposes to add a new § 32.9 defining what

<sup>31</sup> By way of example, in a claim for benefits based on an officer’s death that occurred in FY2014, the total benefit payable under 42 U.S.C. 3796(a) is \$333,604.68. In a claim involving a surviving spouse and two children, an attorney representing the two children would be prohibited from charging fees in excess of \$20,016.28, which represents 12% of the children’s combined ½ share of benefits, \$166,892.34.

<sup>32</sup> In a sample of claims reviewed, the BPI review found that an average of 148 days was spent on outreach in death and disability claims.

<sup>30</sup> U.S. Dept. of Justice, Office of the Inspector General, *Audit of the Office of Justice Programs’ Processing of Public Safety Officers’ Benefit Programs Claims*, Audit Division 15–21 at 11 (July 7, 2015).

constitutes a “complete application” for benefits under the PSOB Act and implementing regulations prescribing BJA’s obligations when it receives such an application. BJA’s current practice when it receives an application for benefits that lacks the basic required documents to render a determination is to assign it a claim number, process it as a claim from the moment a claim form is received, and conduct biweekly outreach efforts to obtain from the applicant and the officer’s public agency information required to establish eligibility for benefits. BJA’s experience is that it allocates significant resources to repeatedly prompting applicants for benefits and public agencies as to what basic required documents they must submit to establish eligibility when BJA’s resources could be reallocated to processing otherwise complete applications.

Under the proposed rule, following publication of a Notice in the **Federal Register** consistent with 5 U.S.C. 552(a)(1)(C), the PSOB Office would maintain and publish on the PSOB Program Web site a list of basic required documents that claimants would be required to file with applications for PSOB Program death, disability, and education benefits. These documents would represent the *absolute minimum* documentation BJA would accept before treating an application as a claim, devoting resources to processing it. This documentation, once submitted, would constitute a “complete application.” By precluding incomplete applications from being considered as claims in the first instance, the proposed rule would support the OIG and BPI recommendations and BJA’s efforts to effectively allocate its resources and avoid issuing merits-based determinations denying benefits based on obviously incomplete applications, which would simply shift initial evidentiary development to determinations by Hearing Officers and the BJA Director.

The proposed rule provides that when BJA receives an application for benefits without the basic required documents (as indicated on the Web site), BJA will notify the applicant in writing of the evidence and information necessary to complete the application, and advise the applicant that BJA will not process the incomplete application as a claim for benefits until the remainder of the documents are received. For purposes of determining whether a claim was timely filed under proposed 28 CFR 32.12 and 32.22, an applicant’s submission of either a claim form or report form, *i.e.*, a Report of Public Safety Officer’s Death, Claim for Death Benefits, or

Report of Public Safety Officers’ Permanent And Total Disability, even though not constituting a complete application, would be sufficient to satisfy the requirement that a claim must be filed within three years of the officer’s death or injury. To prevent applicants from being prejudiced based on an inability to provide necessary information, the proposed rule would provide that an application will not be considered incomplete if an applicant’s inability to file basic required documents was the result of a public agency’s refusal or inability to provide the information identified in this section if the applicant provides to the PSOB Office written justification for his or her inability to provide the information and the justification demonstrates that such inability to file evidence is not due to any fault of the applicant.

#### Section 32.10 PSOB Counsel

Nothing in the PSOB Act or implementing regulations prescribes the relationship between PSOB Counsel and PSOB determining officials. To make transparent the role of PSOB Counsel and the scope of Counsel’s review in the PSOB claims process, proposed § 32.10 would require that PSOB determining officials seek legal advice from PSOB Counsel before determining a claim. However, the proposed rule would limit the scope of such advice to the interpretation of law under the PSOB Act and implementing regulations and, unless directed otherwise by the Assistant Attorney General for the Office of Justice Programs, PSOB Counsel would be precluded from reviewing findings of fact made by PSOB determining officials.

#### Section 32.12 Time for Filing a Claim

Under current § 32.12, unless the time for filing is extended by the BJA Director for good cause shown, a claimant (applicant under proposed § 32.9) must file a claim for PSOB Program death benefits before the later of three years from the date of the public safety officer’s death, or one year after a final determination of survivors benefits or statement from the public agency that it was not legally authorized to pay survivors benefits on behalf of such an officer. Consistent with proposed § 32.5(l), and to simplify administration of the program, the proposed rule would eliminate provisions associated with the one-year requirement as well as all provisions referring to prerequisite certification and provide that no application shall be considered if it is filed with the PSOB

Office more than three years after the public safety officer’s death.

#### Section 32.13 Definitions

Section 32.13 provides definitions applicable to claims for PSOB Program death benefits. OJP proposes to add new definitions or revise existing definitions in § 32.13 as follows:

- *Beneficiary of a life insurance policy of a public safety officer:* Where it has been established that public safety officer died as the direct and proximate result of a personal injury sustained in the line of duty injury, and there is no surviving spouse, surviving child, or surviving individual designated by the officer to receive the PSOB Program death benefit, under 42 U.S.C. 3796(a)(4)(B), BJA will pay the surviving individual(s) designated by the public safety officer to receive benefits under the officer’s most recently executed life insurance policy on file at the time of death with the public safety agency.

Under regulations in 28 CFR 32.13 defining “beneficiary of a life insurance policy of a public safety officer.” BJA may consider as revoked a life insurance beneficiary designation which lists a former spouse who, following the designation, was divorced from the public safety officer, unless it is demonstrated that the officer had no intentions of revoking the designation for his or her former spouse.

Similar to the regulation regarding former spouses, the proposed rule would add a new paragraph (3) permitting BJA to consider as revoked a designation in a life insurance policy of a beneficiary who dies after the public safety officer but before a determination can be made in favor of a living contingent beneficiary. In the circumstances described, the proposed rule would enable BJA to honor the public safety officer’s designation of a contingent beneficiary rather than disregarding it in favor of the next category of eligible beneficiaries, surviving parents.

- *Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity:* For a fatal heart attack, stroke, or vascular rupture to qualify for the statutory presumption of death resulting from a line of duty injury in 42 U.S.C. 3796(k), a public safety officer must, among other things, engage in a situation involving specific line-of-duty actions or participate in a training exercise as defined in 28 CFR

32.13.<sup>33</sup> A public safety officer engages in qualifying activity when he or she is actually engaging in law enforcement, suppressing fire, or performing one of the other types of activity currently defined in 28 CFR 32.13.

The agency's experience is that the "engagement" activities listed in the law, in some cases, necessarily require other activities to take place prior to a public safety engagement. For example, a firefighter may need to clear the snow from the driveway of a fire station, or change a flat tire on a fire truck before the public agency can engage in fire suppression. Although "engagement in a situation involving . . . fire suppression" generally begins with the department's or agency's request for a particular officer to perform this type of activity, under the current rules, it generally cannot be said to include the clearing of the station's driveway or the changing of a tire unless such action is performed in the course of the actual engagement.

The proposed rule would expand the current regulatory definition to cover only those line of duty actions or activities that, if not performed, would directly preclude the public agency from providing fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity. Thus, the proposed definition would cover as part of an engagement under 42 U.S.C. 3796(k) a public safety officer's changing of a flat tire on a fire truck necessary for the public agency to engage in fire suppression.

• *Nonroutine strenuous physical activity*: To be eligible for the presumption in 42 U.S.C. 3796(k), a public safety officer must, among other things, either participate in a training exercise or in a situation involving nonroutine stressful or strenuous physical activity. The agency has defined "nonroutine stressful or strenuous physical activity" in regulations as two distinct terms: "nonroutine stressful physical activity" and "nonroutine strenuous physical activity."

Generally speaking, nonroutine strenuous physical activity is defined in 28 CFR 32.13 as line of duty activity that (1) is not excluded as clerical, administrative, or non-manual in nature, (2) is not routinely performed, and (3) requires "an unusually-high level of physical exertion." Whether a

public safety officer's activity constitutes an "unusually high-level of physical exertion" has often proven challenging for claimants to demonstrate and the agency to evaluate.<sup>34</sup>

To make clear what constitutes "strenuous," and to facilitate more consistent decision making, the agency proposes to replace the term "unusually-high" with the term "vigorous." The use of vigorous as a descriptor is appropriate as it is used by the Centers for Disease Control (CDC) to characterize physical activity that exceeds a moderate level of intensity.<sup>35</sup> Relevant to a standard that must be applied to public safety officers, the CDC's examples take into consideration an individual's age and weight. The proposed rule would not expand the type of physical activity considered to be strenuous, but rather would make claims processing more efficient by providing the public and the agency with a recognized standard that is more easily understood and applied.

• *Nonroutine stressful physical activity*: To be eligible for the presumption in 42 U.S.C. 3796(k), a public safety officer's participation in a training exercise or engagement in a situation involving law enforcement, etc., must also involve either nonroutine stressful physical activity or nonroutine strenuous physical activity. Generally speaking, nonroutine stressful physical activity is defined in current 28 CFR 32.13 as line of duty activity that (1) is not excluded as clerical, administrative, or non-manual in nature, (2) is not routinely performed, and (3) is not capable of being performed without minimal physical exertion. The "stressful" component of an officer's nonroutine stressful physical activity is evaluated differently according to whether the officer was (1) engaged in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity, or

(2) was participating in a training exercise.

Under current 28 CFR 32.13, an officer's engagement in a situation is considered "stressful" if, when viewed objectively, the circumstances of the engagement expose, or appear to expose, the officer to "significant" perils or harms not encountered by the public in the ordinary course and, as a result, cause the officer to suffer an "unusually high" degree of distress manifested by fear, apprehension, anxiety, or unease. Similarly, under the same regulation, an officer's participation in a training exercise is considered "stressful" if, when viewed objectively, the circumstances replicate situations that expose the officer to significant perils or harms, and, as a result, cause the officer to suffer an "unusually-high" degree of distress manifested by fear, apprehension, anxiety, or unease.

Similar to the agency's experience with implementing the term "nonroutine strenuous physical activity," whether a public safety officer's activity exposes the officer to "significant" dangers or produces an "unusually-high" degree of distress has often proven challenging for claimants to demonstrate and the agency to evaluate. Although it is clear that a traffic stop, arrest of a suspect, response to a motor vehicle accident, or response to a structure fire each expose an officer to significant threats not ordinarily encountered by a member of the public when viewed objectively, produce in the officer some degree of distress, *i.e.*, "fear or anxiety," it is difficult for BJA, the public agency, or the claimant to establish whether these circumstances expose the officer a significant peril or an "unusually-high level" of distress, *i.e.*, "fear or anxiety."

To make clear what constitutes "stressful" activity and to facilitate more consistent decision making, the agency proposes to eliminate in the regulatory definition the term "significant," and to replace the term "unusually-high" with "unusual." The elimination of these qualifiers will maintain the integrity of the statutory requirement that the activity be "stressful" while aligning the text of the regulation with circumstances faced by public safety officers and the agency's interpretation of such circumstances. The proposed rule would not expand the type of physical activity considered to be stressful, but rather would make claims processing more efficient by providing the public and the agency with a standard that is more easily understood and applied.

<sup>34</sup> See Department of Justice, Office of the Inspector General, *The Office of Justice Programs' Implementation of the Hometown Heroes Survivors Benefits Act of 2003*, I-2008-005 i (March 2008) (explaining that OIG conducted its review "in response to concerns expressed by several members of Congress . . . that OJP's narrow interpretation of terms found in the Act—in particular the phrases "nonroutine stressful or strenuous physical activity" and "competent medical evidence to the contrary"—might be resulting in a high rate of claims denials").

<sup>35</sup> See *e.g.*, Centers for Disease Control, *General Physical Activities Defined by Level of Intensity*, [http://www.cdc.gov/nccdphp/dnpa/physical/pdf/PA\\_Intensity\\_table\\_2\\_1.pdf](http://www.cdc.gov/nccdphp/dnpa/physical/pdf/PA_Intensity_table_2_1.pdf) (accessed Feb. 11, 2016).

<sup>33</sup> The activities in which a public safety officer must engage to obtain the benefit of the presumption, *e.g.*, law enforcement, are defined in 28 CFR 32.3.

### Section 32.14 PSOB Office Determination

Consistent with proposed § 32.5(m), which consolidates all abandonment provisions into a single paragraph, the proposed rule would remove paragraph (b), which prescribes abandonment provisions for death claims.

### Section 32.15 Prerequisite Certification

Consistent with proposed § 32.5(l), which replaces §§ 32.15 and 32.25, the proposed rule would remove § 32.15 which prescribes prerequisite certification requirements for death claims.

### Section 32.16 Payment

Under current § 32.16(a), BJA may not pay more than one person on the basis of being a public safety officer's parent as a mother, or on that basis as a father. In cases where more than one parent qualifies as the officer's father, or as the officer's mother, the regulation currently limits BJA's payment to the "one with whom the officer considered himself, as of the injury date, to have the closest relationship." The regulation also provides that a biological or legally adoptive parent whose parental rights have not been terminated is rebuttably presumed to have had the closest relationship with the officer.

BJA's experience is that there may exist circumstances in which more than two persons share with the public safety officer a close personal relationship as a parent. The proposed rule would retain the presumption that a biological or legally adoptive parent whose parental rights have not been terminated is presumed to be a "parent," but permit BJA to pay in equal shares additional persons as the parent of a public safety officer when evidence demonstrates that there exists such a relationship as defined in 28 CFR 32.13.

Current regulations do not make clear the agency's interpretation regarding the payment of benefits to a surviving individual in a category of beneficiaries with more than one beneficiary. For example, in an approved PSOB claim in which the surviving parents are the appropriate beneficiaries under 42 U.S.C. 3796(a)(5), and one of the parents has not filed a claim for benefits but there is no evidence that the non-filing parent is deceased, agency practice is to hold the share payable to the surviving parent in the event that the non-filing parent may file a claim, or, if he or she failed to file a claim in the time prescribed, a request for an extension of time to file. To make clear the agency's interpretation and to provide for the timely payment of benefits to

individuals determined to be eligible for benefits, BJA proposes to add a new § 32.6(d) that would address such situations. The proposed rule would consider deceased and therefore ineligible, any person, who, being 18 years of age, or older at the date of the public safety officer's injury, and not incapable of self-support as defined in 42 U.S.C. 3796b(3)(C), failed to file an application for benefits within the time prescribed for such filing. Thus, if one of two surviving parents failed to file a written claim, the agency would hold the non-filing parent's share until the time for filing had expired. After such time, the agency would pay the remaining one-half share to the filing parent. The proposed rule is intended to prevent an adult beneficiary's failure to file a claim for benefits from hindering BJA's ability to fairly and timely distribute program benefits amongst a public safety officer's eligible beneficiaries.

### Section 32.22 Time for Filing a Claim

Under current § 32.22, unless the time for filing is extended by the BJA Director for good cause shown, a claimant must file a claim for PSOB Program disability benefits before the later of three years from the date of the public safety officer's injury, or one year after a final determination of disability benefits by the public agency or statement from the public agency that it was not legally authorized to pay disability benefits on behalf of such officer. Consistent with proposed § 32.5(l), and to simplify administration of the program, the proposed rule would eliminate provisions associated with the one-year requirement as well as all provisions referring to prerequisite certification, and provide that no application shall be considered if it is filed with the PSOB Office more than three years after the public safety officer's injury.

### Section 32.23 Definitions

Section 32.23 provides definitions applicable to claims for PSOB disability benefits. OJP proposes to revise existing definitions in § 32.23 as follows:

- *Gainful work*: The proposed rule would redefine the term "gainful work" to provide a framework for PSOB determining officials to analyze whether any type or amount of work performed for pay disqualifies a claimant for PSOB Program disability benefits who has been found by medical professionals to be permanently and significantly disabled from a line of duty injury.

To establish eligibility for the payment of disability benefits under the PSOB Act, it is not enough that a

claimant is unable to perform the duties of a public safety officer as the result of a line of duty injury.<sup>36</sup> Rather, the claimant must be permanently unable to perform any "gainful work" as the result of a line of duty injury.<sup>37</sup> "Gainful work" as currently defined in 28 CFR 32.23 generally refers to either full- or part-time activity for which an individual is paid or would ordinarily be paid. Under current PSOB regulations, the agency determines whether a claimant is unable to perform any gainful work based upon a medical, and in some cases, vocational assessment, of the claimant's residual functional capacity, *i.e.*, what the claimant is capable of doing despite the disabling conditions he or she incurred in the line of duty.<sup>38</sup>

As a part of its assessment of disability, the agency also reviews a claimant's tax records to determine whether a claimant has received wages in return for work since the date of injury, or, as appropriate, since the date the officer was found disabled by his or her public agency or separated from his or her public agency by reason of disability. The agency has generally interpreted current regulations defining "gainful work" as precluding a finding of total disability when a claimant has, after his or her disability retirement or separation, and contemporaneous with the filing of an application for disability benefits, received any wages in return for work, regardless of the amount of wages received or the type of work for which the wages were paid.

In the overwhelming majority of cases, the current regulations defining "gainful work" work well. However, in some complex cases, a claimant found by both medical and vocational professionals to be totally and permanently disabled has nevertheless performed activity that either is actually compensated, (*e.g.*, a claimant with significant orthopedic and cognitive disabilities received \$100 honorarium for serving on an organization's governance board), or is commonly compensated, (*e.g.*, a claimant with cognitive impairment resulting from a severe brain injury volunteers intermittently at a hospital by providing directions at an information desk). Despite each claimant having been found to be "incapable of performing

<sup>36</sup> Under 42 U.S.C. 3796(b), the agency pays disability benefits when it "determines that a public safety officer has become [both] permanently and totally disabled as the direct and proximate result of a personal injury sustained in the line of duty."

<sup>37</sup> See 42 U.S.C. 3796b(1) (defining "catastrophic injury").

<sup>38</sup> 28 CFR 32.23 (defining *Residual functional capacity*).

any gainful work” as demonstrated by objective medical examination and tests, under the current regulatory definition of “gainful work,” the claimant’s performance of work that “actually is compensated or commonly is compensated” would generally disqualify them from disability benefits.

In such circumstances, the current definition’s emphasis on whether work is actually or commonly paid as the single measure of what constitutes “gainful” work, without regard to the nature and quantity of work actually performed or the amount of payment received, does not provide an equitable framework for the PSOB determining official to determine whether the claimant is in fact totally disabled. The agency believes that evidence that a claimant received \$150 for intermittent work activity that was offered and performed for therapeutic reasons, sheltered work, or was otherwise performed outside the scope of competitive employment, should not, *by itself*, preclude a finding of total disability under the PSOB Act.

As a result, the agency proposes to revise the definition of gainful work to provide that any such work activity must be both substantial and gainful. The proposed rule would define substantial work activity on the basis of whether the activities performed involved significant mental or physical activities and would provide examples of work activity that is and is not considered substantial. The proposed rule would define gainful work activity similarly to the current definition of gainful work by characterizing work activity as gainful if it is actually or commonly compensated, *i.e.*, performed for pay, but exclude from compensation reimbursement for incidental expenses such as parking or de minimis compensation.

The revised definition will enable the agency to fairly determine whether a claimant who has been determined, pursuant to a medical assessment, to be permanently and totally disabled but nonetheless performs some sort of paid work activity, should be awarded disability benefits.

- **Permanently disabled:** Under 28 CFR 32.23, permanent disability is shown when a medical assessment establishes “to a degree of medical certainty,” *i.e.*, by clear and convincing evidence, that a claimant’s condition will progressively deteriorate or remain constant over his or her expected lifetime, or has reached maximum medical improvement. The higher standard of proof associated with “medical certainty” imposed by the current regulation but not required by

law often requires the agency to conduct additional evidentiary development, particularly in claims with conflicting medical opinions. The agency’s experience in applying the higher standard of proof is that it does not necessarily provide additional certainty as the determining official, as in other claims, makes determinations of eligibility by weighing the evidence, assessing its probative value, and determining which evidence is entitled to more weight and or credibility. As a result, the agency believes applying the standard of proof “to a degree of medical probability” would lessen the burden on claimants and the agency to establish permanent disability, would reduce delays in processing disability claims, and would not impact the integrity of the PSOB Program in any way. As a result, the agency proposes to revise the regulation to change the standard of proof required to establish a permanent level of disability from “medical certainty” to “medical probability.”

- **Totally disabled:** Under current regulations in 28 CFR 32.23, total disability is shown when a medical assessment establishes “to a degree of medical certainty,” *i.e.*, by clear and convincing evidence, that a claimant’s residual functional capacity (that which a medical and vocational assessment demonstrates that the claimant can do despite his or her disability) is such that he or she cannot perform any gainful work. For the reasons discussed in the proposed revision to the definition of “permanent disabled,” the agency proposes to revise the regulation to change the standard of proof required to establish such level of disability from “medical certainty” to “medical probability.”

#### *Section 32.24 PSOB Office Determination*

Consistent with proposed § 32.5(o), which consolidates all abandonment provisions into a single paragraph, the proposed rule would remove paragraph (b), which prescribes abandonment provisions for disability claims. The proposed rule would also remove references to reconsideration of negative disability findings.

#### *Section 32.25 Prerequisite Certification*

Consistent with proposed § 32.5(l), which replaces §§ 32.15 and 32.25, the proposed rule would remove § 32.25, which prescribes prerequisite certification requirements for disability claims.

#### *§ 32.27 Motion for Reconsideration of Negative Disability Finding*

Under current § 32.27, a claimant whose claim is denied on the basis that the evidence has not established that the 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 requesting a Hearing Officer determination with respect to the same. Although providing an alternative to a Hearing Officer determination, the process is cumbersome, confusing to claimants, and since fiscal year 2011, fewer than 10 claimants have sought to take advantage of this provision. Due to its lack of use, BJA proposes to remove this rule, but would continue its application for those claims currently in the reconsideration process. For the reasons discussed, BJA also proposes to remove § 32.28 and provisions in § 32.29 referring to such motions.

#### *§ 32.33 Definitions*

Section 32.33 provides definitions applicable to PSOB education benefits. OJP proposes to add new definitions or revise existing definitions in § 32.33 as follows:

- **Child of an eligible public safety officer:** The proposed rule would clarify that an individual found to be an eligible beneficiary under 42 U.S.C. 3796(a)(6) (*i.e.*, a person who would be eligible for death benefits as a child but for his age), is not a child of an eligible public safety officer under subpart D, and thus not eligible for educational assistance under the provisions of 42 U.S.C. 3796d–1 through 42 U.S.C. 3796d–7.

- **Dependent:** The proposed rule would eliminate this definition, as the Dale Long Act (sec. 1086 of Pub. L. 112–239) removed the term from the PSOB Act.

- **Educational expenses:** The proposed rule would revise this definition to provide that such expenses refers to out-of-pocket expenses incurred by a claimant or claimant’s family. The proposed rule is intended to provide that PSOB education benefits are to reimburse claimants for those expenses actually incurred for tuition, fees, and that other expenses and are not available when an educational institution has waived or otherwise discounted tuition, fees, or the cost of other expenses for the claimant. The proposed rule provides that in such circumstances, BJA would calculate reimbursement based on the actual costs incurred, not the amount of tuition or

fees charged before a waiver or other discount is applied.

- *Eligible dependent*: The proposed rule would eliminate this definition as the Dale Long Act (sec. 1086 of Pub. L. 112–239) removed the term from the PSOB Act.

- *Tax Year*: The proposed rule would remove this definition as the Dale Long Act (sec. 1086 of Pub. L. 112–239) removed the term from the PSOB Act.

#### *Section 32.34 PSOB Office Determination*

Consistent with proposed § 32.5(o), which consolidates all abandonment provisions into a single paragraph, the proposed rule would remove paragraph (b), which prescribes abandonment provisions for disability claims. Consistent with revisions to the definitions in § 32.33, the proposed rule would also remove references to “threshold claims.”

#### *Section 32.41 Scope of Subpart*

The proposed rule would remove all references to § 32.27 consistent with the proposal to remove §§ 32.27, 32.28, and 32.29.

#### *Section 32.42 Time for Filing Requests for Determination*

The proposed rule would remove all references to § 32.27 consistent with the proposal to remove §§ 32.27, 32.28, and 32.29.

#### *Section 32.44 Hearing Officer Determination*

The proposed rule would, consistent with proposed § 32.10, require that Hearing Officers seek legal advice from PSOB Counsel before determining a claim. Consistent with proposed § 32.5(o), which consolidates all abandonment provisions into a single paragraph, the proposed rule would remove paragraph (c), which prescribes abandonment provisions for Hearing Officer determinations.

#### *Section 32.45 Hearings*

The proposed rule would clarify that, at a hearing, Hearing Officers are the only individual permitted to examine or question a claimant, other than a claimant’s own representative, if any. The purpose of the proposed this rule is to preserve the non-adversarial nature of the Hearing Officer determination and to make clear that a hearing is not for purposes of providing claimants with the opportunity to engage in trial-type discovery as to other claimants.

#### *Section 32.54 Director Determination*

Consistent with proposed § 32.5(o), which consolidates all abandonment

provisions into a single paragraph, the proposed rule would remove paragraph (b), which prescribes abandonment provisions for Director determinations.

### **V. Regulatory Requirements**

#### *Executive Order 12866 and 13563—Regulatory Planning and Review*

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation. Although not an economically significant rulemaking under Executive Orders 12866 and 13563, the Office of Justice Programs has determined that this proposed rule is a “significant regulatory action” under section 3(f) of the Executive Order, and accordingly this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). As explained below, the agency has assessed the costs and benefits of this proposed rule as required by Executive Order 12866 and has determined that the benefits of the proposed rule justify the costs.

#### **A. Provisions That Define When an Individual Is a Firefighter**

Based on the number of claims received in the past involving similar situations and the circumstances of such claims, OJP estimates that the revised provisions could increase approvals by approximately 1 claim per year. If all such claims were paid at the current rate, the annual PSOB Program death and disability benefit cost would be increased by \$339,881. Based on amounts appropriated in FY2016 for PSOB Program death benefits (“such sums as necessary”—estimated at \$71,323,000) and disability and education benefits (\$16,300,000), the agency knows that it could pay the death claims from its current appropriations, and estimates that it could pay the disability claims from its current appropriations.

#### **B. Provisions That Define When an Organization or Entity Is a Volunteer Fire Department**

Under existing law and regulations, BJA currently determines that *certain* volunteer fire departments qualify as public agencies, and, as a result, that qualified firefighters serving such agencies qualify as public safety officers. In addition, the proposed definition of “volunteer fire department” does not expand the number or type of organizations that qualify as a public agency under the law but rather only codifies the agency’s interpretation of the status of such organizations as a public agency based on existing provisions of law and regulations. As such, OJP estimates that there are no additional death or disability benefit costs associated with this provision.

#### **C. Provisions Pertaining to the Filing of an Application for Benefits, That Define When an Individual Is a Public Safety Officer, When an Officer Has Sustained a Line of Duty Injury, an Officer Is Permanently and Total Disabled When Payment of Benefits Is Prohibited, When Individuals Are Ineligible for Payment, and Related Matters**

Based on the number of claims received in the past involving similar situations and the circumstances of such claims, OJP estimates that the revised provisions, taken together, could increase approvals by approximately 9 claims per year. If all 9 claims were paid at the current rate, the annual PSOB Program death and disability benefit cost would be increased by \$3,058,929. Based on amounts appropriated in FY2016 for PSOB Program death benefits (“such sums as necessary”—estimated at \$71,323,000) and disability and education benefits (\$16,300,000), the agency knows that it could pay the death claims from its current appropriations, and estimates that it could pay the disability claims from its current appropriations.

#### **D. Provisions Pertaining to the Admissibility, Sufficiency, Evaluation, and Disclosure of Evidence Submitted in PSOB Claims, and Related Matters**

The primary benefit of the proposed rules is that the revised requirements would reduce the burden on claimants to establish eligibility for benefits and provide a corresponding reduction in the agency’s processing burden in gathering and evaluating such evidence. The agency estimates that this across-the-board reduction in burden for both claimants and the agency will translate into reduced processing time for claims,

more timely determinations, and improved delivery of benefits. In terms of benefit costs, the agency estimates that there will not be a significant increase in claims approved as compared to the previous regulatory criteria. Accordingly, the proposed rule does not significantly increase benefit costs.

#### E. Provisions Concerning the Fees That May Be Charged for Representation in PSOB Claims

The primary benefit of the proposed rule is that it makes it easier for individuals seeking benefits to obtain qualified representation. In eliminating restrictions on the types of fee agreements permitted in representation for PSOB claims, eliminating the maximum hourly rate for representative's fees in favor of a percentage-based maximum limit, and establishing a presumption of reasonableness for fees below certain amounts, the agency believes that the proposed rules would encourage more attorneys to provide representation in PSOB claims. A secondary benefit of the proposed rules is that, in eliminating automatic review of all petitions for fees, the proposed rule will reduce agency burden and permit the agency to reallocate these resources to processing claims. These provisions have no impact on benefit costs.

#### F. Provisions Establishing When an Application for Benefits Is Complete and Will Be Accepted for Processing as a Claim

The primary benefit of the proposed rule defining a "complete application" is that it will (1) provide clarity to applicants for benefits as to precisely what documents and information are required for the agency to begin processing the application as a claim, and (2) enable the agency to allocate its resources to those applications that are sufficiently complete to warrant a determination on the merits. A secondary benefit of the proposed rule is that, as the agency transitions further to an entirely paperless processing system, the proposed rule would facilitate processing by releasing for processing, with few exceptions, only complete applications. These provisions have no impact on benefit costs.

#### G. Provisions Establishing the Scope of Administrative Legal Review of PSOB Claims

The primary benefit of the proposed rule is that it makes transparent the role of PSOB Counsel in the processing of claims. These provisions have no

impact on benefit costs, and no impact on administrative or personnel costs.

#### H. Provisions Pertaining to Educational Assistance and Other Matters Necessary To Implement the Proposed Rule

The primary benefit of the proposed rule is that it makes clear how educational expenses are calculated in the processing of such claims and implements recent amendments to the Act. These provisions have no impact on benefit costs.

#### I. Personnel and Training Costs for Agency Staff

As PSOB claims and applications under the provisions of the proposed rule would be processed by existing staff, the agency would not incur additional personnel costs in processing these claims. OJP acknowledges that there would be some costs associated with training current staff; however, OJP estimates that such costs would be nominal as such training is ordinarily conducted in-house by existing legal and program staff and is scheduled and conducted to minimize disruptions to claims processing.

This proposed rule would impose no costs on state, local, or tribal governments, or on the private sector.

#### Executive Order 13132—Federalism

This proposed rule would not have substantial direct effects on the States, on the relationship between the federal government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB program statutes provide benefits to individuals and do 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 sections 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to section 3(b)(1)(I) of the Executive Order, nothing in this proposed rule or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States, except as the same may be contained within part 32 of title 28 of the Code of Federal Regulations.

#### Regulatory Flexibility Act

This proposed rule would 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 would make amendments to clarify existing regulations and agency practice concerning public safety officers' death, disability, and education benefits and would do nothing to increase the financial burden on any small entities. Therefore, an analysis of the impact of this proposed rule on such entities is not required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### Paperwork Reduction Act of 1995

This proposed rule would impose or modify reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing a summary of the collection of information and a brief description of the need for and proposed use of the information. 44 U.S.C. 3507.

The proposed rule includes paperwork requirements in three collections of information previously approved by OMB for the PSOB Program. OJP published in the **Federal Register** on January 11, 2016, a 60-day notice of "Agency Information Collection Activities" for each of the following forms: *Claim for Death Benefits* (OMB Number 1121-0024), *Report of Public Safety Officer's Death* (OMB Number 1121-0025), and *Public Safety Officers' Disability Benefits* (OMB Number 1121-0166). In calculating the burden associated with these forms/collections, OJP reviewed its previous burden estimates and updated these to reflect the time required for claimants to gather the many different documents necessary to establish eligibility for these benefits, e.g., birth certificates, marriage certificates, divorce decrees (where applicable), public agency determinations as to death or disability benefits, medical records, etc. Information about the proposed collections is as follows:

#### *Claim for Death Benefits—Overview of Information Collection*

1. *Type of Information Collection:* Reinstatement with change of a previously approved collection.
2. *The Title of the Form/Collection:* Claim for Death Benefits.
3. *The agency form number, if any, and the applicable component of the*

*Department sponsoring the collection:* Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Eligible survivors of fallen public safety officers.

*Abstract:* BJA's Public Safety Officers' Benefits (PSOB) Office will use these Claim Form information to confirm the eligibility of applicants to receive Public Safety Officers' Death Benefits.

Eligibility is dependent on several factors, including public safety officer status, an injury sustained in the line of duty, and the claimant status in the beneficiary hierarchy according to the PSOB Act. In addition, information to help the PSOB Office identify an individual is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the claim form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 350 respondents will apply each year. Each application takes approximately 120 minutes to complete. OJP estimates that the total public burden (in hours) associated with the collection can be calculated as follows: Total Annual Reporting Burden:  $350 \times 120$  minutes per application = 42,000 minutes/by 60 minutes per hour = 700 hours.

*Public Safety Officer's Death—Overview of Information Collection*

1. *Type of Information Collection:* Reinstatement with change of a previously approved collection.

2. *The Title of the Form/Collection:* Report of Public Safety Officer's Death.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Public safety agencies experiencing the death of a public safety officer according to the PSOB Act.

*Abstract:* BJA's Public Safety Officers' Benefits (PSOB) Office will use these Report of Public Safety Officer's Death Form information to confirm the eligibility of applicants to receive Public Safety Officers' Death Benefits.

Eligibility is dependent on several factors, including public safety officer status, an injury sustained in the line of duty, and the claimant status in the beneficiary hierarchy according to these Act. In addition, information to help the

PSOB Office identify an individual is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the report form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 350 respondents will apply each year. Each application takes approximately 240 minutes to complete. OJP estimates that the total public burden (in hours) associated with the collection can be calculated as follows: Total Annual Reporting Burden:  $350 \times 240$  minutes per application = 84,000 minutes/by 60 minutes per hour = 1,400 hours.

*Public Safety Officers' Disability Benefits—Overview of Information Collection*

1. *Type of Information Collection:* Reinstatement with change of a previously approved collection.

2. *The Title of the Form/Collection:* Public Safety Officer's Disability Benefits.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Public safety officers who were permanently and totally disabled in the line of duty.

*Abstract:* BJA's Public Safety Officers' Benefits (PSOB) Office will use the PSOB Disability Application information to confirm the eligibility of applicants to receive Public Safety Officers' Disability Benefits. Eligibility is dependent on several factors, including public safety officer status, injury sustained in the line of duty, and the total and permanent nature of the line of duty injury. In addition, information to help the PSOB Office identify individuals is collected, such as Social Security numbers, telephone numbers, and email addresses. Changes to the application form have been made in an effort to streamline the application process and eliminate requests for information that are either irrelevant or already being collected by other means.

OJP estimates that no more than 100 respondents will apply each year. Each application takes approximately 300 minutes to complete. OJP estimates that the total public burden (in hours) associated with the collection can be calculated as follows: Total Annual Reporting Burden:  $100 \times 300$  minutes

per application = 30,000 minutes/by 60 minutes per hour = 500 hours.

*Unfunded Mandates Reform Act of 1995*

This proposed rule would 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 program 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.

#### 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 amended as follows:

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

■ 1. The authority citation for 28 CFR part 32 continues to read as follows:

**Authority:** 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) & (b), 3795a, 3796c-1, 3796c-2; sec. 1601, title XI, Pub. L. 90-351, 82 Stat. 239; secs. 4 through 6, Pub. L. 94-430, 90 Stat. 1348; secs. 1 and 2, Pub. L. 107-37, 115 Stat. 219.

■ 2. Amend § 32.2 by redesignating paragraphs (e) and (f) as paragraphs (f) and (g), respectively, and adding new paragraphs (e) and (h) to read as follows:

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

\* \* \* \* \*

(e) In determining whether an application, claim, or other document will be considered if filed after the time prescribed for such filing has passed, good cause for such filing (excluding a lack of knowledge about the PSOB Program) may be found if the individual acted with reasonable diligence after any circumstance contributing to the delay was removed, and the delay was attributable to—

(1) Circumstances beyond the individual's control such as not having reached the age of majority, extended illness, or mental or physical incapacity;

(2) Incorrect information provided by the public agency in which the public safety officer served, or another public

agency, related to the filing of a PSOB claim that the individual relied upon to his detriment;

(3) A determination of the officer's (or survivor's) eligibility or entitlement to death or disability benefits by the officer's public agency or other public agency, made after the time for filing has passed; or

(4) Other unavoidable circumstances demonstrating that the individual could not be reasonably expected to know about the time limits for filing an application or claim.

(h) The Director may, after publishing a Notice in the **Federal Register** consistent with 5 U.S.C. 552(a)(1)(C), and providing reasonable notice through the PSOB Program Web site, require all applications, claims, and supporting materials to be filed in electronic or other form as the Director shall prescribe.

■ 3. Amend § 32.3 as follows:

■ a. Add the definitions of "Agent" and "Attorney".

■ b. In the definition of "Authorized commuting" add ", including reasonable return travel" after "within his line of duty".

■ c. Revise the definition of "Child of a public safety officer".

■ d. Remove the definition of "Consequences of an injury that permanently prevent an individual from performing any gainful work".

■ e. Revise the definitions of "Department or agency", "Determination", "Divorce", "Employee", "Firefighter", "Gross negligence", "Injury", "Injury date", "Involvement", "Line of duty activity or action", and "Line of duty injury".

■ f. Add the definition of "Medical probability."

■ g. Revise the definitions of "Official capacity" and "Officially recognized or designated public employee member of a squad or crew".

■ h. Add the definition of "On-site hazard management".

■ i. Revise the definition of "Parent-child relationship".

■ j. Add the definition of "PSOB Counsel".

■ k. Remove the definitions of, and "Public employee member of a squad or crew," and "Stress or strain."

■ l. Revise the definitions of "Suppression of fire" and "Voluntary intoxication".

■ m. Add the definition of "Volunteer fire department".

The revisions and additions read as follows:

### § 32.3 Definitions

\* \* \* \* \*

*Agent* means an individual who provides representative services to an individual seeking benefits under the Act and is not an attorney as provided in this part.

\* \* \* \* \*

*Attorney* means a member in good standing of a State bar.

\* \* \* \* \*

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

(1) Who meets the definition provided in the Act, at 42 U.S.C. 3796b(3), and

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

\* \* \* \* \*

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

(1) A court;

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

(3) An entity created by interstate compact between two or more States or between a State or States and the District of Columbia with the consent (through consenting or enabling legislation, or similar mechanism) by the United States Congress; or

(4) Otherwise a public entity—

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

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

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

\* \* \* \* \*

*Determination* means the approval or denial of a claim, the determination described in the Act, at 42 U.S.C. 3796(c), or any recommendation under § 32.54(c)(3).

\* \* \* \* \*

*Divorce* means a legally valid, *i.e.*, court-ordered, dissolution of marriage.

\* \* \* \* \*

*Employee* does not include—

(1) Any independent contractor;

(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; or

(3) Any active duty member of the armed forces.

\* \* \* \* \*

*Firefighter* means (1) An individual who—

(i) Is trained in—

(A) Suppression of fire; or

(B) Hazardous-material response; and  
(ii) Has the legal authority and responsibility to engage in the suppression of fire, as—

(A) 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

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

(2) An individual who is a participant in an official training program of the officer's public agency that is mandatory for that individual's employment or certification as a firefighter and such training program involves the suppression of fire or hazardous-material response.

\* \* \* \* \*

*Gross negligence* means a reckless departure from the ordinary care used by similarly situated public safety officers under circumstances where it is highly likely that serious harm will follow.

\* \* \* \* \*

*Injury*—(1) Injury means—

(i) A traumatic physical wound or a traumatized condition of the body, or the increase in severity of such an existing wound or condition, directly and proximately caused by—

(A) External force such as bullets or physical blows;

(B) Exposure to external factors such as chemicals, electricity, climatic conditions, infectious disease, radiation, virus, or bacteria;

(C) Heatstroke; or

(D) Acute and immediate musculoskeletal strain or muscle damage such as a disc herniation or rhabdomyolysis,

(ii) But does not include—

(A) Any occupational disease;

(B) Any chronic, cumulative, or progressive condition of the body;

(C) Cardiovascular disease; or

(D) Any mental health condition including post-traumatic stress disorder, depression, or anxiety.

(2) With respect to claims based on a fatal heart attack, stroke, or vascular rupture, injury also means the presumption of personal injury established when the requirements of 42 U.S.C. 3796(k) are satisfied.

\* \* \* \* \*

*Injury date*—(1) In general, injury date means the time of the line of duty injury that—

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

(A) Subpart B of this part; or

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

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

(A) Subpart C of this part; or

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

(2) With respect to claims under the Act, at 42 U.S.C. 3796(k), injury date means the time of the public safety officer's qualifying engagement or participation referred to in the Act at 42 U.S.C. 3796(k)(1).

\* \* \* \* \*

*Involvement*—An individual is involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws (including juvenile delinquency), only if the individual is an officer, or in the case of an officer trainee, an employee, of a public agency and, in that capacity, is recognized by such agency, or the relevant government (or, at a minimum, not denied by such agency, or the relevant government) as having—

(1) Legal authority to arrest, apprehend, prosecute, adjudicate, correct or detain (in a prison or other detention or confinement facility), or supervise (as a parole or probation officer), persons who are alleged or found to have violated the criminal laws, or

(2) Legal authority to participate in an official training program of the officer's public agency that is mandatory for that individual's employment or certification as a police officer, corrections officer, probation officer, or their equivalent.

\* \* \* \* \*

*Line of duty activity or action*—Activity or an action is performed in the line of duty if it is not described in the Act, at 42 U.S.C. 3796a(1), in the case of a public safety officer who is—

(1) A law enforcement officer or firefighter—

(i) Whose primary function (as applicable) is public safety 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 (or any official training programs of his public agency) to which he is assigned, or for which he is compensated), under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(ii) Whose primary function is not public safety 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, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); and

(B) It is performed (as applicable) in the course of public safety activity (including emergency response activity the agency is authorized to perform), or taking part (as a trainer or trainee) in an official training program of his public agency for such activity (including participation as a trainee in an official training program of his public agency that is mandatory for that individual's employment or certification as a firefighter, police officer, corrections officer, probation officer, or equivalent), and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(iii) Only if it constitutes public safety activity, is performed in the course of responding to an emergency situation that the officer did not create through his own actions, requires prompt decisions and action to save another human life, and is not contrary to the law of the jurisdiction in which performed;

(2) A member of a rescue squad or ambulance crew, 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, under the auspices of the public agency or nonprofit entity he serves, it is performed in the course of engaging in rescue activity or providing emergency medical services, and such agency (or the relevant government) or nonprofit entity legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(3) A disaster relief worker, only if, it is disaster relief activity, and the agency he serves (or the relevant government), being described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(4) 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, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been 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 to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such).

\* \* \* \* \*

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

(1) It is sustained in the course of—

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

(ii) Authorized commuting; or

(2) Such injury resulted from the injured party's status as a public safety officer, or was sustained in retaliation for line of duty actions taken by the officer or other public safety officers.

\* \* \* \* \*

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

\* \* \* \* \*

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

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

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

(3) His acts and omissions while responding to an emergency for purposes of saving human life constitute a line of duty action or activity as defined in this part.

\* \* \* \* \*

*Officially recognized or designated employee or volunteer member of a rescue squad or ambulance crew* means an employee or volunteer member of a rescue squad or ambulance crew who—

(1) Is officially recognized (or officially designated) as such an employee or volunteer member, by the public agency or nonprofit entity serving the public under whose auspices the squad or crew operates, and

(2) Is engaging in rescue activity or in the provision of emergency medical services as authorized or licensed by

law and by the applicable agency or entity.

\* \* \* \* \*

*On-site hazard management* means on-site hazard evaluation and providing scene security or directing traffic in response to any fire, rescue, or law enforcement emergency.

\* \* \* \* \*

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

\* \* \* \* \*

*PSOB Counsel* means the legal staff within BJA that provides programmatic legal advice to PSOB determining officials and performs legal review of PSOB Program claims and related matters.

\* \* \* \* \*

*Suppression of fire* means extinguishment, physical prevention, containment of fire, and on-site hazard management.

\* \* \* \* \*

*Voluntary intoxication at the time of death or catastrophic injury* means the following, as shown by any commonly accepted tissue, -fluid, or -breath test or by other competent evidence:

(1) With respect to alcohol,

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

(ii) In any claim in which a public safety officer's death occurred after the injury date, unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally, it means intoxication—

(A) As defined in the Act, at 42 U.S.C. 3796b(5); and

(B) As of the injury date; or

(2) With respect to drugs or other substances, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), as evidenced by—

(i) The officer acting in an intoxicated manner as of the injury date, unless convincing evidence demonstrates that the introduction of drugs or other substances was not an intentional act of the officer's; or

(ii) The presence (as of the injury date) in the body of the public safety officer of drugs or substances included on Schedules I–III of the drug control and enforcement laws (see 21 U.S.C. 812(a)), unless convincing evidence demonstrates that—

(A) The introduction of such drug or other substance was not an intentional act of the officer's, or

(B) The drug or other substance would not produce intoxication in the amount present in the public safety officer's body.

\* \* \* \* \*

*Volunteer fire department*—a volunteer fire department is an instrumentality within the meaning of the Act at 42 U.S.C. 3796b(8) if—

(1) It is legally established as a nonprofit entity serving the public,

(2) It is legally established and operates solely for the purpose of providing fire protection and related services to or on behalf of a public agency or agencies, and

(3) It provides fire protection and related services to the public without preference or subscription.

■ 4. Amend § 32.5 as follows:

■ a. Revise paragraph (a).

■ b. Remove paragraphs (c) and (d)(3).

■ c. Redesignate paragraph (b) as paragraph (c).

■ d. In paragraph (i) add “and physically stressful” after “non-routine”.

■ e. Add new paragraphs (b), (k), (l), and (m).

The revision and additions read as follows:

**§ 32.5 Evidence.**

(a) Except as otherwise may be expressly provided in the Act or this part, a claimant is responsible for establishing all issues of fact for the particular benefit sought by the standard of proof of “more likely than not.”

(b) The evidence that a claimant produces, both circumstantial and direct, must be credible, probative, and substantial, and, when deemed necessary by a PSOB determining official, produced in original format or certified as a true and exact copy of a record by a custodian of such records or other person capable of verifying the authenticity of such records.

\* \* \* \* \*

(k) In instances where the determining official finds that there is a balance of positive and negative evidence for an issue material to the particular benefit sought, the PSOB determining official will resolve the point in favor of the payment of benefits. Such a finding of equivalence must be based on reason, logic, common sense, and the determining official's experience, and, under no circumstances, may a lack of evidence in support of a particular fact be understood to establish or create such equivalence.

(l) A PSOB determining official may require from a claimant proof of birth, death, disability, earnings, education, employment, expenses, injury, relationship, marriage, or other information deemed necessary to establish eligibility for a benefit under the Act. A PSOB determining official may also require waivers, consents, or authorizations from claimants to obtain directly from third parties tax, medical, employment, or other information that the PSOB determining official deems relevant in determining the claimant's eligibility, and may request an opportunity to review original documents submitted in connection with the claim.

(m) In the absence of reasonable excuse or justification, when evidence necessary to a determination on a claim that has been requested in writing in connection with a complete claim for benefits is not filed with the PSOB Office within one year of the date of such request, or a claimant has otherwise failed to pursue in a timely fashion a determination on his or her claim, the claim will be considered as abandoned, as though never filed. Not less than 33 days prior to the PSOB determining official finding the claim to be abandoned, the PSOB Office shall serve the claimant with notice of intent to deem the claim abandoned. In the event of abandonment, the time periods prescribed for filing an initial application for benefits or other filing deadline are neither tolled nor applicable. A claimant may reopen an abandoned claim within 180 days from the date of abandonment provided claimant files with the PSOB Office a complete claim, including any information previously requested but not provided. After a claim for benefits has been abandoned and a complete claim has not been filed with the PSOB Office in the time prescribed for reopening such claim, no further action on the claim will be taken by the agency.

■ 5. Revise § 32.7 to read as follows:

**§ 32.7 Fees for representative services.**

(a) Only attorneys, as defined in this part, or an individual working under the direct supervision of an attorney and for whose conduct the attorney is responsible for under applicable Rules of Professional Conduct (e.g., a paralegal), may charge fees for representative services provided in connection with any claim. Fees sought for representative services provided in connection with any claim must be reasonable. Subject to paragraphs (e) and (f) of this section, fees may be based on a fixed fee, hourly rate, a percentage

of benefits recovered, or a combination of such bases. An authorization under paragraph (c) of this section shall be based on consideration of the following factors:

- (1) The nature of the services provided by the petitioner;
  - (2) The complexity of the claim;
  - (3) The level of skill and competence required to provide the petitioner's services;
  - (4) The amount of time spent on the claim by the petitioner;
  - (5) The level of administrative or judicial review to which the claim was pursued and the point at which the petitioner entered the proceedings;
  - (6) The ordinary, usual, or customary fee charged by other persons (and by the petitioner) for services of a similar nature; and
- (b) Before submitting the petition described in paragraph (c) of this section, a person seeking to receive any amount of fees from a claimant for representative services provided in connection with any claim under the Act shall file with the PSOB Office a copy of the fee agreement.

(c) To receive fees for representative services provided in connection with any claim, a representative shall petition the PSOB Office for authorization under this section. Such petition shall include—

- (1) An itemized description of the services;
- (2) The total amount sought to be received, from any source, as consideration for the services;
- (3) An itemized description of any representative or other services provided to (or on behalf of) the claimant in connection with other claims or causes of action, unrelated to the Act, before any public agency or non-public entity (including any insurer), arising from the public safety officer's death, disability, or injury;
- (4) The total amount requested, charged, received, or sought to be received, from any source, as consideration for the services described in paragraph (c)(3) of this section;
- (5) A statement of whether the petitioner has legal training or is licensed to practice law, and a description of any special qualifications possessed by the petitioner (other than legal training or a license to practice law) that increased the value of his services to (or on behalf of) the claimant;

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

- (i) A copy of the petition; and
- (ii) A letter advising the claimant that he could file his comments on the

petition, if any, with the PSOB Office, within thirty-three days of the date of that letter; and

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

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

(e) No amount shall be authorized under this section for—

- (1) In excess of 12 percent of the total death or disability benefit payment available to a claimant regardless of how the fee agreement is structured; 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.

(f) Fees otherwise qualifying under this section shall be presumed reasonable—

(1) In a claim determined by the PSOB Office that does not exceed 8 percent of the total death or disability benefit payment available to a claimant, or

(2) In a claim determined by the Hearing Officer or Director that does not exceed 10 percent of the total death or disability benefit payment available to a claimant.

(g) The presumptions in paragraph (f) of this section may be rebutted through an examination of the factors in paragraph (a) of this section establishing by clear and convincing evidence that the fee is unreasonable.

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

(i) No agreement for representative services in connection with a claim shall be valid if the agreement provides for any consideration other than under this section. A person's receipt of consideration for such services other than under this section may, among other things, be the subject of referral by BJA to appropriate professional, administrative, disciplinary, or other legal authorities.

■ 6. Add § 32.9 to read as follows:

#### § 32.9 Complete applications.

(a) Before an application for benefits under the Act will be processed as a

claim, *i.e.*, assigned a claim number by the PSOB Office, determined by the PSOB Office, and reviewed for legal sufficiency, such application must be "complete" as provided in this section.

(b) Except as indicated in paragraph (d) of this section, an application for death benefits or disability benefits shall constitute a complete application only if all of the basic required documents identified on the "PSOB Checklist of Required Documents for Filing a PSOB Death [or Disability, as appropriate] Benefits Claim," available at the PSOB Program Web site, are filed with the PSOB Office.

(c) If an applicant files with the PSOB Office an application for benefits that, pursuant to paragraph (b) of this section, is not complete, the PSOB Office will serve the applicant with written notice of the information necessary to complete the application and defer any further processing of the application and consideration as a claim until such Office receives all of the information described in paragraph (b).

(d) An applicant's inability to file evidence as a result of a refusal by a public agency in which the officer served to provide the information identified in this section (or the public agency's demonstrated inability to provide such information) shall not render an application incomplete if the applicant provides to the PSOB Office evidence demonstrating that such inability to file basic required documents is not due to any fault of the applicant.

■ 7. Add § 32.10 to read as follows:

#### § 32.10 PSOB Counsel.

(a) Before determining a claim for benefits under the Act, PSOB determining officials shall seek legal advice from PSOB Counsel.

(b) Legal advice provided by PSOB Counsel to PSOB determining officials shall be limited to the interpretation and application of the PSOB Act and implementing regulations and law and regulations referenced in or having direct application to the PSOB Act or its implementing regulations.

(c) Unless otherwise ordered by the Assistant Attorney General for the Office of Justice Programs, the scope of PSOB Counsel's legal advice shall not include the review of findings of fact made by PSOB determining officials.

■ 8. Revise § 32.12 as follows:

#### § 32.12 Time for filing claim.

(a) Unless, for good cause shown, as defined in § 32.2(e) of this part, the Director extends the time for filing, no application shall be considered if it is filed with the PSOB Office more than

three years after the public safety officer's death.

(b) An applicant may file with the PSOB Office such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 9. Amend § 32.13 as follows:

■ a. Revise the definition of "Beneficiary of a life insurance policy of a public safety officer".

■ b. Remove from the definition of "child-parent relationship" the phrase "as shown by convincing evidence".

■ c. Revise the definition of "Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity".

■ d. Remove the definition of "Medical probability".

■ e. Revise the definitions of "Nonroutine strenuous physical activity" and "Nonroutine stressful physical activity".

The revisions read as follows:

§ 32.13 Definitions.

\* \* \* \* \*

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

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

(i) It did not take place for reasons other than personal differences between the officer and the individual; or

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

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

purported spouse) is divorced from such officer after the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer, and.

(3) Any designation of an individual, who was living on the date of the officer's death, but who dies before a determination of PSOB death benefits, shall be considered to be revoked by such officer on the date of the officer's death in favor of the officer's living contingent beneficiary or beneficiaries, if any.

\* \* \* \* \*
Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity—A public safety officer is so engaged only when, within his line of duty—

(1) He is in the course of actually—

- (i) Engaging in law enforcement;
(ii) Suppressing fire;
(iii) Responding to a hazardous-material emergency;
(iv) Performing rescue activity;
(v) Providing emergency medical services;
(vi) Performing disaster relief activity;
(vii) Otherwise engaging in emergency response activity; or

(viii) Performing a line of duty activity or action, that had it not been performed immediately, would have rendered the public agency unable to perform the activities in paragraphs (1)(i) through (vii) of this section; and

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

\* \* \* \* \*

Nonroutine strenuous physical activity means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

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

(3) Entails a vigorous level of physical exertion.

Nonroutine stressful physical activity means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

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

(3) Entails non-negligible physical exertion; and

(4) Occurs—

(i) With respect to a situation in which a public safety officer is engaged,

under circumstances that objectively and reasonably—

(A) Pose (or appear to pose) 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 unusual alarm, fear, or anxiety; or

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

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

(B) Provoke, cause, or occasion unusual alarm, fear, or anxiety.

\* \* \* \* \*

■ 10. Revise § 32.14 to read as follows:

§ 32.14 PSOB Office determination.

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—

- (a) Specify the factual findings and legal conclusions that support it; and
(b) Provide information as to requesting a Hearing Officer determination.

§ 32.15 [Removed]

■ 11. Remove § 32.15.

§ 32.16 [Redesignated as § 32.15]

■ 12. Redesignate § 32.16 as § 32.15 and revise newly redesignated § 32.15 to read as follows:

§ 32.15 Payment.

(a) For purposes of determining who qualifies as a parent under 42 U.S.C. 3796(a)(5), any biological or legally-adoptive parent whose parental rights have not been terminated as of the injury date shall be presumed rebuttably to be one. If evidence demonstrates that additional individuals also qualify as the parent of a public safety officer, such payment shall be made in equal shares.

(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.

(c) If more than one individual should qualify for payment—

(1) Under the Act, at 42 U.S.C. 3796(a)(4)(i), payment shall be made to each of them in equal shares, except that, if the designation itself should manifest a different distribution, payment shall be made to each of them in shares in accordance with such distribution; or

(2) Under the Act, at 42 U.S.C. 3796(a)(4)(ii), payment shall be made to each of them in equal shares.

(d) In determining whether an eligible survivor exists under 42 U.S.C. 3796(a)(2), (4), (5), or (6) such that payment must be divided amongst such survivors, the PSOB determining official shall consider any person (other than as defined in 42 U.S.C. 3796b(3)(C)) not to have survived the public safety officer and thus ineligible, who, being 18 years of age or older at the date of the officer's fatal injury, has not filed an application for benefits under 42 U.S.C. 3796(a) within the time prescribed in this part.

**§ 32.17 [Redesignated as § 32.16]**

- 13. Redesignate § 32.17 as § 32.16.
- 14. Revise § 32.22 to read as follows:

**§ 32.22 Time for filing claim.**

(a) Unless, for good cause shown, as defined in § 32.2(e) of this part, the Director extends the time for filing, no application shall be considered if it is filed with the PSOB Office more than three years after the injury date.

(b) An applicant may file with the PSOB Office such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

- 15. Amend 32.23 as follows:
  - a. Revise the definition of "Gainful work".
  - b. Remove the definition of "Medical certainty".
  - c. Amend the definition of "Permanently disabled" and "Totally disabled" by removing in the introductory sentence "certainty" and adding in its place "probability".

The revision to read as follows:

**§ 32.23 Definitions.**

\* \* \* \* \*  
*Gainful work* means work activity that is both substantial and gainful.

(1) Substantial work activity means work activity that involves doing significant physical or mental activities such as work that requires a claimant to use his or her experience, skills, supervision, or contribute substantially to the operation of a business. Evidence that work activity may not be substantial includes—

(i) Work involving ordinary or simple tasks that a claimant cannot perform without more supervision or assistance than is usually given other people doing similar work,

(ii) Work involving minimal duties that make little or no demands on a claimant and that are of little or no monetary value to an employer;

(iii) Work performed under special conditions take into account a

claimant's impairment such as work done in a sheltered workshop; and

(iv) Work offered despite a claimant's impairment because of family relationship, a past association with claimant's employer or other organization to which the claimant was affiliated with, or an employer's or affiliated organization's concern for claimant's welfare.

(2) Gainful work activity means full- or part-time work activity that actually is compensated or is commonly compensated, but compensation does not include reimbursement of incidental expenses such as parking, transportation, and meals, or de minimis compensation.

- \* \* \* \* \*
- 16. Revise § 32.24 to read as follows:

**§ 32.24 PSOB Office determination.**

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—

- (a) Specify the factual findings and legal conclusions that support it; and
- (b) Provide information as to requesting a Hearing Officer determination.

**§ 32.25 [Removed]**

- 17. Remove § 32.25.

**§ 32.26 [Redesignated as § 32.25]**

- 18. Redesignate § 32.26 as § 32.25.

**§§ 32.27 and 32.28 [Removed]**

- 19. Remove §§ 32.27 and 28.

**§ 32.29 [Redesignated as § 32.26]**

- 20. Redesignate § 32.29 as § 32.26 and revise newly redesignated § 32.26 to read as follows:

**§ 32.26 Request for Hearing Officer determination.**

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

- 21. Amend § 32.33 as follows:
  - a. Revise the definition of "Child of an eligible public safety officer".
  - b. Remove the definition of "Dependent".
  - c. Revise the definition of "Educational expenses".
  - d. Remove the definitions of "Eligible dependent", and "Tax year".

The revisions read as follows:

**§ 32.33 Definitions.**

\* \* \* \* \*

*Child of an eligible public safety officer* means the child of a public safety officer, which officer is an eligible public safety officer, but does not include any individual described in 42 U.S.C. 3796(a)(6).

\* \* \* \* \*

*Educational expenses* means out-of-pocket expenses actually incurred by the claimant or claimant's family and excludes expenses not incurred by reason of a waiver, scholarship, grant, or equivalent reduction for such of the following as may be in furtherance of the educational, professional, or vocational objective of the program of education that forms the basis of a financial claim:

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

- (2) Reasonable expenses for—
  - (i) Room and board (if incurred for attendance on at least a half-time basis);
  - (ii) Books;
  - (iii) Computer equipment;
  - (iv) Supplies;
  - (v) Transportation; and
- (3) For attendance on at least a three-quarter-time basis, a standard allowance for miscellaneous personal expenses that is the greater of—

- (i) The allowance for such expenses, as established by the eligible educational institution for purposes of financial aid; or
- (ii) \$200.00 per month.

\* \* \* \* \*

- 22. Revise § 32.34 to read as follows:

**§ 32.34 PSOB Office determination.**

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

- (a) Specify the factual findings and legal conclusions that support the denial; and
- (b) Provide information as to requesting a Hearing Officer determination.

- 23. Revise § 32.41 to read as follows:

**§ 32.41 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to requests for Hearing Officer determination of claims denied under subpart B, C, or D of this part, and of claims remanded (or matters referred) under § 32.54(c).

- 24. Revise § 32.42 to read as follows:

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

(a) Unless, for good cause shown, as defined in § 32.2(e) of this part, 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 the denial (under subpart B, C, or D of this part) of a claim.

(b) A claimant may file with his request for a Hearing Officer determination such supporting documentary, electronic, video, or other non-physical evidence and legal arguments as he may wish to provide.

■ 25. Revise § 32.44 to read as follows:

**§ 32.44 Hearing Officer determination.**

(a) Before determining a claim, the Hearing Officer shall seek legal advice from PSOB Counsel.

(b) Upon his determining a claim, the Hearing Officer shall file a notice of the same simultaneously with the Director (for his review under subpart F of this part in the event of approval), the PSOB Office, which notice shall specify the

factual findings and legal conclusions that support it, and PSOB Counsel.

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

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

(2) Provide information as to Director appeals.

■ 26. Amend § 32.45 as follows:

■ a. In paragraph (d)(1) remove “and” after “cumulative evidence:”.

■ b. In paragraph (d)(2), remove the period after “witnesses” and add in its place “; and”.

■ c. Add paragraph (d)(3)  
The addition reads as follows:

**§ 32.45 Hearings**

\* \* \* \* \*

(d) \* \* \*

(3) Shall be the only individual permitted to examine or question a claimant apart from that claimant’s representative, if any.

\* \* \* \* \*

**§ 32.54 [Amended]**

■ 27. Amend § 32.54 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

Dated: August 2, 2016.

**Karol V. Mason,**

*Assistant Attorney General.*

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