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September 26, 2005

Ms. Hope Janke
Counsel to the Director
Bureau of Justice Assistance
Office of Justice Programs
810 7th Street, N.W.
Washington, D.C. 20531

Re: OJP Docket 1333, PSOB Amendments

Dear Ms. Janke,

On behalf of the 238,000 sworn law enforcement officers represented by the National Association of Police Organizations ("NAPO"), please accept these comments on the proposed rule amending the regulations which implement the Public Safety Officers' Benefits Act ("PSOB"). (See, Federal Register Vol. 70, No. 142, beginning at page 43078 (July 26, 2005))

Subpart A – General Provisions

Computation of Time, section 32.2

NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

We suggest that a new section heading titled "Service of Filings and Notices" be placed in this Subpart, with the information contained in proposed section 32.2(b) and (c) moved to the new section. This would give proper prominence to the crucial information regarding service and notice that is not presently emphasized.

We also urge that the regulations establish fairness and equity between the PSOB Office and a claimant. Presently, the proposed regulations state that a filing is deemed filed with the Office "only on the day that it is actually received by the same." [please note that "actually received" is not defined] and also provide that a filing which is supposed to be filed with more than one PSOB or OJP entity is only considered filed when the *last* person or entity "actually receives the same." Meanwhile, the PSOB office need only drop a copy in the mail, or with a courier, or even email a copy to a last-known address, and service is deemed complete. Given the importance of actual notice to the preservation of claims under the regulations, actual notice from the PSOB office to claimants ought to be required. At a minimum, electronic notice ought be, at most, supplemental, and not constitute in itself fulfillment of a legal obligation to provide and serve notice. Finally, fundamental fairness argues in favor of

allowing claimants the same easy means of satisfying the notice requirement as the government proposes allowing itself. Remember, these claimants may or may not be legally savvy, they may or may not have even heard of the PSOB program, and they almost certainly will not have read the regulations. And even a person who is ordinarily thorough and detail-oriented ought to be excused if under the duress of losing a loved one she fails to ensure that “actual receipt” has been achieved in an office a thousand miles away. It may sound silly, but the way the proposed regulations are written, a vacationing OJP officer or employee may inadvertently nullify an otherwise valid claim simply by being out of town on the day when the filing was required to be “actually received.” Surely receipt by the Office in the normal course of business would serve the interest of justice and ease the life of the claimant while still assuring proper notice to the Office.

“Authorized commuting”, Definitions, section 32.3

We submit that the definition as proposed is too restrictive. Commuting, in our opinion, ought to focus on the fact that an officer is traveling to or from work, and not on the vehicle or type of conveyance being used. The regulation as proposed does not appear to cover officers who walk to work nor those who choose to use public transportation. The mode of commuting ought not to be a decisive factor in passing judgment on a survivor’s claim.

“Crime”, Definitions, section 32.3

Crimes should include those offenses *punishable as* a misdemeanor or felony. This would thus include cases committed by a juvenile offender, who may have murdered, but is guilty only of an adjudication of delinquency in many states, and not technically a misdemeanor nor a felony.

“Intention” and “Intentional action or activity”, Definitions, section 32.3

We are concerned that the proposed regulation, as written, would disqualify the cases of officers who clearly were intended by Congress to be covered. For example, Port Authority and New York City officers who entered into and remained in the World Trade Center second tower, after the first tower had already collapsed, did so intentionally [indeed, with great purpose and resolve], and their acts in remaining certainly were a “substantial factor” in their deaths, and the collapse of the second tower was “reasonably foreseeable” in light of the first tower’s collapse. No one would argue, though, that these officers’ deaths were brought about by their own intention. Yet the way the definition is worded, a judge or hearing officer who followed the strict language would be forced to conclude that their “death, injury, or disability [was] brought about by [their own] intention . . .” as defined.

Payment and Repayment, section 32.6

NAPO suggests that the paragraph (d) be liberalized to cover the case where a proper claimant, for example an officer’s widow, makes a claim within the proper time limit, then passes away before payment is made, but after the expiration of time to file the initial claim, leaving behind the minor children of the widow and officer. The way the proposed regulation is written, the widow could not take the benefit, since she has passed away, and the minor children could not take the benefit, since the initial claim had not been “filed by (or on behalf of) such payee.”

Subpart B – Death Benefit Claims

“Hometown Heroes Act” Coverage

NAPO joins with its brother and sister public safety officers in the fire services in respectfully voicing the following concerns regarding implementation of the Hometown Heroes Survivors Benefits Act of 2003 (Public Law 108-182). NAPO also wishes to acknowledge the valuable assistance of the Congressional Fire Services Institute for their expert assistance in preparing these remarks.

We are concerned with the definition of “Competent medical evidence to the contrary” found in Subpart B, § 32.13:

“The presumption raised by the Act, at 42 U.S.C. 3796(k) , is overcome by competent medical evidence to the contrary –

- (1) In the event of death as a result of heart attack, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date,
 - (i) The officer’s score under the most recent Framingham algorithm for predicting coronary heart disease within the next ten years, was not less than ten;
 - (ii) Not less than seventy percent of the risk factors for cardiovascular disease identified by the American Heart Association were present in the officer; or
 - (iii) The officer had not less than seventy-five percent stenosis by atherosclerotic plaques or a thrombosis in one or more of the following:
 - (A) Left main coronary artery;
 - (B) Left anterior descending coronary artery;
 - (C) Left circumflex coronary artery; and
 - (D) Right coronary artery; and
- (2) In the event of death as a result of a stroke, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date, not less than seventy percent of the risk factors for stroke identified by the American Stroke Association were present in the officer;” (Federal Register, Vol. 70 No. 142; page 43089).

The American Heart Association (AHA) risk factors for cardiovascular disease referenced in (1)(ii) are: high blood pressure, tobacco smoke, high blood cholesterol, physical inactivity, obesity, diabetes mellitus, increasing age, male gender, race, heredity/family history, individual response to stress, aging and menopause, excessive alcohol use, and some illegal drugs (Heart and Stroke Facts; American Heart Association; Pages 36 – 43). Of these risk factors, AHA describes the following as being uncontrollable:

- Increasing Age;
- Gender;
- Race;

- Heredity/Family History (Heart and Stroke Facts; American Heart Association; Pages 41 – 42).

The American Stroke Association risk factors for cardiovascular disease referenced in (2) are: high blood pressure, tobacco smoke, diabetes mellitus, carotid or other artery disease, atrial fibrillation, other heart disease, transient ischemic attacks ("TIA's"), certain blood disorders, sickle cell anemia, high blood cholesterol, physical inactivity or obesity, excessive alcohol, some illegal drugs, increasing age, gender, heredity (family history) and race, prior stroke or heart attack, individual response to stress, aging and menopause, and use of birth control pills (Heart and Stroke Facts; American Heart Association; Pages 47 – 49). Of these risk factors, the following are described as being uncontrollable:

- Increasing Age;
- Gender;
- Heredity (Family History) and Race;
- Prior Stroke or Heart Attack (Heart and Stroke Facts; American Heart Association; Page 49).

Many of these risk factors are vague and poorly defined. The use of uncontrollable risk factors established by the American Heart Association and American Stroke Association also raise the specter of unjust discrimination based on race, age, gender and medical history. Similarly, the Framingham algorithm employs factors such as gender and age. We suggest that the Office needs to address these concerns to ensure that no officer is discriminated against based on these factors.

The presence of a thrombosis, as referenced in section (1)(iii) of Subpart B, § 32.13 of the proposed rule, confirms the occurrence of a heart attack. By defining the presence of a thrombosis as “competent medical evidence to the contrary,” the Office would almost guarantee that a public safety officer who died in the line of duty as the result of a heart attack would be disqualified. Moreover, we are concerned that the requirements under section (1)(iii) of Subpart B, § 32.13, could potentially cause a downward trend in autopsies performed on fallen public safety officers. This would undermine the research efforts of NIOSH and other agencies attempting to reduce public safety deaths and injuries.

NAPO is also concerned with the proposed interpretation of “nonroutine strenuous physical activity.” The Hometown Heroes Survivors Benefits Act of 2003 stated that a public safety officer who dies from a heart attack or stroke shall be presumed to have died in the line of duty if “involved in nonroutine stressful or strenuous physical law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity...” (P.L. 108-182 Sec. 2(k)(1)(A)). Following passage of the legislation by the House of Representatives, the Chairman of the House Judiciary Committee, Congressman James Sensenbrenner, clarified the term “nonroutine strenuous physical activity:”

“For the purposes of this Act, the phrase ‘nonroutine stressful or strenuous physical’ activity will exclude actions of a clerical, administrative or non-

manual nature. Included in the category of ‘actions of a clerical, administrative or non-manual nature’ are such tasks including, but not limited to, the following: sitting at a desk; typing on a computer; talking on the telephone; reading or writing paperwork or other literature; watching a police or corrections facility’s monitors of cells or grounds; teaching a class; cleaning or organizing an emergency response vehicle; signing in or out a prisoner; driving a vehicle on routine patrol; and directing traffic at or participating in a local parade...

“For the purposes of this Act, the phrase ‘nonroutine stressful or strenuous physical’ actions will include, but are not limited to, the following: involvement in a physical struggle with a suspected or convicted criminal; performing a search and rescue mission; performing or assisting with emergency medical treatment; performing or assisting with fire suppression; involvement in a situation that requires either a high speed response or pursuit on foot or in a vehicle; participation in hazardous material response; responding to a riot that broke out at a public event; and physically engaging in the arrest or apprehension of a suspected criminal.

“The situations listed above are the types of heart attack and stroke cases that are considered to be in the line of duty. The families of officers who died in such cases are eligible to receive Public Safety Officers Benefits” (Congressional Record; November 21, 2003; Page H12300).

In the proposed rule, “nonroutine strenuous physical activity” is defined as;

“Except as excluded by the Act..., nonroutine strenuous physical activity means line of duty activities that –

- (1) Is not performed as a matter of routine; and
- (2) Entails an unusually-high level of physical exertion” (Federal Register, Vol. 70 No. 142; page 43089).

We also recommended that there be added in the definition of “nonroutine strenuous physical activity”, “mental or emotional” in addition to physical exertion as cause shown in (2).

The proposed rule continues in its definition of “nonroutine stressful physical activity”:

Except as excluded by the Act...,nonroutine stressful physical activity means line of duty activity that –

- (1) Is not performed as a matter of routine;
- (2) Entails non-negligible physical exertion; and
- (3) Occurs –
 - (i) With respect to a situation in which an individual is engaged, under circumstances that objectively and reasonably –

- (A) Pose (or appear to pose) significant dangers, threats, or hazards (or reasonably-foreseeable risks thereof) not faced by similarly-situated members of the public in ordinary course; and
- (B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety;...” (Federal Register, Vol. 70 No. 142; page 43089).

Our concern is with what the Office considers “routine.” It is clear from Chairman Sensenbrenner’s statement that the intent of Congress is to cover emergency activities that public safety officers face in the course of the day, and are activities of a highly stressful or strenuous nature that the general public is not likely to face. Because the proposed definition of “routine” is vague, we are concerned that the above language could be interpreted to mean that only those incidents of a rare and extreme nature (terrorist attacks, WMD) would be considered nonroutine. We submit that the Office should more explicitly define the terms “routine” and “non-routine” as to comport with Congressional intent.

Conclusion

Thank you for the opportunity to comment on the proposed regulations. Please feel free to contact the undersigned directly with any questions or concerns.

Respectfully submitted,

William J. Johnson, Esq.
Executive Director