

## § 32.4

(i) Has been identified as certified-eligible under 42 CFR 88.7 (as in effect on January 17, 2017); or

(ii) Has received the status of a certified-eligible survivor from the WTC Health Program under 42 CFR 88.12 (as in effect on January 17, 2017);

(4) Has been determined by the September 11th Victim Compensation Fund to be an eligible claimant under section 104.2(b)(1) of this title (as in effect on January 17, 2017); or

(5) Subject to 42 U.S.C. 300mm-21(a)(5), meets the definition at 42 U.S.C. 300mm-21(a)(1).

[71 FR 46037, Aug. 10, 2006, as amended at 73 FR 76528, Dec. 17, 2008; 78 FR 29234, May 20, 2013; 79 FR 35492, June 23, 2014; 83 FR 22378, May 15, 2018]

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

(a) In determining the meaning of any provision of this part, unless the context should indicate otherwise, the first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.

(b) If benefits are denied to any individual pursuant to the Act, at 34 U.S.C. 10282(a)(4), or otherwise because his actions were a substantial contributing factor to the death of the public safety officer, such individual shall be presumed irrebuttably, for all purposes, not to have survived the officer.

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

(d) Unless the same should expressly provide otherwise (e.g., by use of the word “hereafter” in an appropriations proviso), any amendment to the Act (or any statutory enactment otherwise directly referent or -applicable to the program that is the subject of this part), shall apply only with respect to injuries (or, in connection with claims under the Act, at 34 U.S.C. 10281(k),

## 28 CFR Ch. I (7–1–23 Edition)

shall apply only with respect to heart attacks, strokes, or vascular ruptures referred to in the Act, at 34 U.S.C. 10281(k)(2)) occurring on or after the date it takes effect.

(e) Unless expressly provided otherwise, any reference in this part to any provision of law not in this part shall be understood to constitute a general reference under the doctrine of incorporation by reference, and thus to include any subsequent amendments to the provision.

[73 FR 76531, Dec. 17, 2008, as amended at 83 FR 22382, May 15, 2018]

### § 32.5 Evidence.

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

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

(c) Rules 301 (presumptions), 401 (relevant evidence), 402 (admissibility), 602 to 604 (witnesses), 701 to 704 (testimony), 901 to 903 (authentication), and 1001 to 1007 (contents of writings, records, and photographs) of the Federal Rules of Evidence shall apply, *mutatis mutandis*, to all filings, hearings, and other proceedings or matters. No extrinsic evidence of authenticity as a condition precedent to admissibility shall be required with respect to any document purporting to bear the signature of an expert engaged by the BJA.

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

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

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

(ii) Such authorizations or waivers as may reasonably be requested from time to time by such official to enable him

## Department of Justice

## § 32.5

(or to assist in enabling him) to obtain access to material- or relevant evidence or -information of a medical, personnel, financial, or other confidential nature;

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

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

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

(3) A claimant under subpart B or C of this part fails or refuses to apply for (or to pursue to completion), in timely fashion, the benefits, if any, described in § 32.15(a)(1)(i) or § 32.25(a)(1)(i), respectively.

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

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

(i) A consumer of alcohol—

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

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

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

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

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

(f) In determining a claim under the Act, at 34 U.S.C. 10286 or Public Law 107-37, the certification described therein shall constitute *prima facie* evidence—

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

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

(ii) Employed by the agency and performing official functions for, or on behalf of, the agency; and

(iii) One of the following:

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

(B) With respect to a firefighter,

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

(2) An employee of the agency;

(C) With respect to a chaplain,

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

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

(D) With respect to a member of a rescue squad or ambulance crew, an officially recognized or designated employee member or volunteer member of a rescue squad or ambulance crew that is (or is a component of) the agency; or

(E) With respect to a disaster relief worker, an employee of the agency (if it is described in the Act, at 34 U.S.C. 10284(9)(B) or (C));

(2) Of the public agency's acknowledgment that there are no eligible payees other than those identified in the certification; and

(3) That the public safety officer—

(i) Sustained a line of duty injury in connection with public safety activity (or, otherwise, with efforts described in the Act, at 34 U.S.C. 10286 or Public Law 107-37) related to a terrorist attack (under the former statute) or to the terrorist attacks of September 11, 2001 (under the latter statute); and

(ii) As a direct and proximate result of such injury, was (as applicable)—

(A) Killed (with respect to a claim under subpart B of this part); or

(B) Totally and permanently disabled (with respect to a claim under subpart C of this part).

(g) In determining a claim, the PSOB determining official shall have, in addition to the hearing-examiner powers specified at 34 U.S.C. 10225 (hearings, subpoenas, oaths, witnesses, evidence), and to the authorities specified at 34 U.S.C. 10226(b)–(d) (experts, consultants, government resources) and in the Act and this part, the authority otherwise and in any reasonable manner to conduct his own inquiries, as appropriate.

(h) Acceptance of payment (by a payee (or on his behalf)) shall constitute *prima facie* evidence that the payee (or the pay agent)—

(1) Endorses as his own (to the best of his knowledge and belief) the statements and representations made, and the evidence and information provided, pursuant to the claim; and

(2) Is aware (in connection with the claim) of no—

- (i) Fraud;
- (ii) Concealment or withholding of evidence or information;
- (iii) False, incomplete, or inaccurate statements or representations;
- (iv) Mistake, wrongdoing, or deception; or

(v) Violation of 18 U.S.C. 287 (false, fictitious, or fraudulent claims), 1001 (false statements), or 1621 (perjury), or 34 U.S.C. 10272 (falsification or concealment of facts).

(i) A public safety officer's response to an emergency call from his public safety agency for him to perform public safety activity (including emergency response activity the agency is authorized to perform) shall constitute *prima facie* evidence of such response's non-routine character.

(j) Public safety activity that is performed by a law enforcement officer or a firefighter shall be presumed to satisfy the requirements of paragraph (1)(i)(A) or (1)(ii)(A) (as the case may be) of the definition of *Line of duty activity or action* in §32.3 if the public safety activity—

(1) Was not forbidden (at the time performed) by any applicable statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law; and

(2) Occurred—

(i) Within a jurisdiction where he is authorized to act, in the ordinary course, in an official capacity as such a law enforcement officer or firefighter; or

(ii) Within a jurisdiction (not described in the immediately-preceding paragraph) that, at the time the public safety activity was performed, had a statute, rule, regulation, official mutual-aid agreement, or other law, in effect that authorized law enforcement officers or firefighters from outside such jurisdiction to perform, within the jurisdiction, the activity that occurred.

(k) Absent evidence that the public safety activity was forbidden as described in paragraph (j)(1) of this section, the requirements of such paragraph (j) shall be presumed to be satisfied in any case in which full line-of-duty death or disability benefits (as the case may be) have been paid—

(1) By (or on behalf of) any jurisdiction described in paragraph (j)(2) of this section;

(2) With respect to a law enforcement officer or firefighter; and

(3) Upon an administrative or judicial determination in the ordinary course (other than pursuant to a settlement or quasi-settlement) that such law enforcement officer or firefighter sustained an injury in the line of duty that caused his death or disability.

(l) In the event that the presumption established by paragraph (j) of this section should arise pursuant to paragraph (j)(2)(ii) thereof, the law enforcement officer or firefighter shall be presumed to have been serving the jurisdiction described in such paragraph (j)(2)(ii) in an official capacity at the time he performed the public safety activity.

(m) A volunteer fire department that is legally licensed or-authorized to engage in fire suppression shall be presumed to satisfy the requirements of paragraphs (1)(ii) and (2)(iii) of the definition of *Instrumentality*.

[73 FR 76531, Dec. 17, 2008, as amended at 83 FR 22383, May 15, 2018]

### §32.6 Payment and repayment.

(a) No payment shall be made to (or on behalf of) more than one individual,