

MSNBC.com

Officers denied on-duty death benefits

Despite passage of 2003 law, no claims for medical deaths have been paid

By Bill Dedman

Investigative reporter

MSNBC

Updated: 9:54 a.m. PT March 27, 2007

BOSTON — More than three years after President Bush signed a law granting federal benefits to families of firefighters, police officers and EMTs who die of heart attacks and strokes on the job, not a dollar has been paid. The U.S. Justice Department has denied all 34 claims that have been decided, and has yet to act on more than 200 others, MSNBC.com has learned.

In the Hometown Heroes Act of 2003, Congress said that heart attacks and strokes on the job should be presumed to be line-of-duty deaths, making survivors eligible for federal benefits.

"I think the Department of Justice has intentionally misinterpreted the intent of Congress and the president," the sponsor of the legislation, Rep. Bob Etheridge, D-N.C., told MSNBC.com on Wednesday.

The Department of Justice confirmed on Wednesday afternoon that no claims have yet been paid, while 34 have been denied and about 206 are pending. A spokeswoman said the delays are caused by the complexity of the cases, not by any disagreement with the intent of the law.

The denials come to light as a [new study demonstrates that firefighters are at much higher risk of heart attacks](#) when fighting fires or responding to alarms. In the study to be published Thursday in the New England Journal of Medicine, researchers from the Harvard School of Public Health found that firefighters face up to 100 times their normal risk of heart attack while working at a fire.

About 11 of the 34 Hometown Heroes claims denied so far were filed by the families of law enforcement officers, according to the Fraternal Order of Police, which also got its numbers this week from the Justice Department.

Most of the remaining denied claims have been filed by families of firefighters. The Justice Department didn't say whether any claims by families of emergency medical workers have been denied.

'Nonroutine strenuous activity'

At least some of the denials were based on Justice Department judgment that some of the duties the firefighters were performing at the time of their deaths do not meet the law's requirement of "nonroutine strenuous activity."

In Kansas, 44-year-old volunteer firefighter Cordell "Cory" French died of a heart attack on Aug. 28, 2004, in the small town of Towanda, east of Wichita. His wife, Kelly, said he had been carrying hoses during a training exercise in the high school parking lot that morning, then collapsed at home that afternoon. She said the Justice Department told her last week that her claim was denied, because his work was "non-strenuous activity."

"He contributed many, many, many hours as a volunteer to that department," Kelly French said. "He was awarded firefighter of the year many times. That day he went to work as a volunteer. He loved it. He was an extremely healthy man. If he was in training, and working with the hoses, that is a strenuous duty."

In New York, the claim by the family of one volunteer firefighter was denied because he had responded to a call but hadn't actually fought the fire, and his duties were therefore "nonstrenuous," said Dave Finger, director of government relations for the National Volunteer Fire Council. He said his account was based on an e-mail from the

firefighter's family.

Medical reviews cause delays

Other claims are being held up as the Justice Department searches the medical records for pre-existing medical conditions. The law says that the presumption in favor of the claims can be overturned by "competent medical evidence," but didn't specify what that meant. Families of some firefighters say they have been required to provide 10 years of medical records.

The Justice Department spokeswoman said that only 20 cases have so far begun the medical review process, while about 180 or so haven't reached that stage. The department rewrote the rules for the entire benefit program for public safety officers, postponing any action until September 2006, and delays since then have been caused by the complexity of the cases, she said.

"With few exceptions, PSOB (Public Safety Officer Benefits) death claims involve diverse facts and documents; complex legal issues; beneficiary uncertainties; and frequent outreach to claimants and agencies," said the spokeswoman, Sandra Gunn. "Additionally, if a claim fails to meet the Hometown Heroes Act criteria, it gets processed under the criteria applicable to all other PSOB claims; thus, processing can be extensive and time-consuming, because different tracks must be followed in many cases."

With heart attacks recognized as the leading cause of on-the-job deaths of firefighters, the Hometown Heroes Act easily passed the Congress with support of both parties. President Bush signed the law in a ceremony on Dec. 15, 2003, and both he and Vice President Dick Cheney have used their support for the law as a sure-fire applause line in speeches before fire and police organizations.

But those organizations said this week that the Bush administration's Justice Department has turned the intent of Congress on its head, seeking any reason to deny the claims instead of giving them the positive presumption that the legislation intended. Justice took nearly three years to write rules for the program, and began deciding claims only in recent weeks.

"The Justice Department has been beyond difficult from day one," Harold A. Schaitberger, the general president of the International Association of Fire Fighters, told MSNBC.com. "They've made it pretty clear they don't like the law. I don't think this is about regulatory issue, medical issues, issues of potential fraud. They've done everything in their power to disregard the law, they have stonewalled it. I think it's showing a complete disrespect for the memories of firefighters and law enforcement officers who have laid it on the line for their communities."

'Some sort of political payback'

Schaitberger said it was his view that the administration was holding up the payments as "some sort of political payback" for the union supporting Al Gore in 2000 and John Kerry in 2004.

The Public Safety Officers Benefits' Program became law in 1976, providing death and disability payments primarily to police officers killed in the line of duty. Congress added coverage for firefighters in 1984 and for emergency medical personnel in 1986. In 2002, after the Sept. 11 terrorist attacks, police and fire chaplains were added.

The Hometown Heroes Act of 2003 extended the same benefits to victims of heart attacks and strokes on the job. The death benefit, which is adjusted each October for inflation, is now \$295,194. To qualify, the victim had to have been involved in "nonroutine stressful or strenuous work" in law enforcement, fire protection, prison security or disaster relief, among other duties. And the heart attack or stroke had to occur within 24 hours of such activity. Contractors, such as those widely used by the Forest Service to fight wildland fires, are not eligible for the benefits.

Etheridge, the legislation's sponsor, said the goal of the bill was fairness. "If you go in a building and a beam falls on your head, or if you go in a building and come out and have a heart attack and die, either way you're dead," he said. "... If a soldier dies in battle, we don't check to see what condition that soldier was in when they lost their life."

Widow's claim hinges on judgment calls

The intent of the Congress is being tested by cases such as that of Fire Chief Gary Tilton, from Katy, Texas, just west of Houston.

On Oct. 20, 2004, Tilton was at a church supper when he was called to a traffic accident at a major intersection. He stood directing traffic and other operations for nearly an hour. Witnesses said the chief, age 58 and overweight, "appeared pale, was breathing a little hard, and sweating," but felt well enough to go home. Three hours later his wife found him collapsed in the shower after suffering a heart attack. He died that night.

The Tilton family's claim is still pending with the Justice Department, but his case demonstrates two judgment calls that the government, so far, has not made in favor of any claimants.

First, was the chief's work "nonroutine stressful or strenuous" activity? The law didn't define that phrase, though the Congress made a point of saying that it didn't include "actions of a clerical, administrative or nonmanual nature." So if the chief had keeled over while pushing papers at the office, he would not have been covered.

The Justice Department rules for the program say that the phrase requires "non-negligible physical exertion" and requires the officer to be involved in a situation that would:

- pose, or appears to pose, "significant dangers, threats or hazards (or reasonably foreseeable risks thereof), not faced by similarly situated members of the public in the ordinary course; and
- "provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety.

Justice will have to decide: Does directing traffic at a major intersection in the Texas heat qualify?

The Harvard study of 449 heart attack deaths among firefighters nationwide found that 32 percent died when they were involved in fire suppression or other activity at a fire. But less stressful duties were associated with higher-than-expected risk of heart attack as well: 13 percent occurred while responding to an alarm; 17 percent in returning from an alarm; 13 percent in physical training; 9 percent in emergency medical services and other nonfire emergencies; and 15 percent in a fire-station or while performing nonemergency duties.

The second issue open to debate, in Tilton's case, is whether he was at high risk of a heart attack because of pre-existing medical conditions.

Defining 'competent medical evidence'

Congress said that the presumption of a line-of-duty death could be overturned "by competent medical evidence to the contrary," but didn't explain what that meant.

The Justice Department has interpreted this phrase to mean that claims should be denied if there is evidence of a non-duty-related medical factor or event that would have independently caused the stroke or heart attack. That evidence has to rise to "a degree of medical probability" that the other factor was "a substantial factor" in causing the heart attack or stroke, under the Justice Department's interpretation.

The first draft of the regulations from the Bush administration in September 2005 would have used criteria from the Framingham heart study and known risk factors from the American Heart Association and the American Stroke Association to determine whether the officer was already at risk. Because such risk factors include not just medical

conditions – including high blood pressure, high cholesterol and obesity -- but being male, older than 40 and nonwhite, the firefighters union and others argued that use of the criteria would have made it practically impossible for anyone to collect benefits for heart attacks or strokes.

The union lobbied hard for changes, and the Justice Department removed the specific criteria from the final rules issued in August 2006. The union declared a victory.

But the new rules left a void: They don't say what the Department of Justice will use to determine the medical probability.

The suspicions of firefighter advocates were raised when the Justice Department began asking claimants to provide 10 years of medical records.

A history of risk factors

Chief Tilton's records show a history of risk factors for heart problems. At age 58, he was 5 feet 9 inches tall and weighed 343 pounds at his last checkup. He had been diagnosed with high blood pressure, high cholesterol (both of which were well controlled by prescription medication), severe sleep apnea and had a family history of heart problems, according to the report on his death by the Centers for Disease Control, which investigates many firefighter fatalities.

Chest discomfort in 2001 had caused him to have a stress test, which he passed with "no chest pain or shortness of breath with good exercise tolerance." His fire department required no periodic medical evaluations or physical agility tests "for budgetary reasons," the CDC found.

On top of that, he had recently survived cancer. Two months before he died, he underwent surgery for colon cancer, and was undergoing chemotherapy at the time of his attack.

"Before you say, 'Oh my, no wonder he had a heart attack,' I will tell you that he was doing great with the chemo," his wife, Jo Ann Tilton, told MSNBC.com this week. "His blood work was all normal (which is not always the case with chemo). I have a detailed deposition from our doctor describing my husband's health. Several times the doctor has stated that the chemo did not contribute to his attack," she said.

"This is one of the things that makes this ordeal so hard: It is considered a line of duty death, but there are people out there who would say that he would have had a heart attack no matter what the circumstances. I have come to grips with those folks by knowing that my husband lived as a hero and he is being honored for that life.

"Yes, he may have had a heart attack one day, but I am convinced that it would not have necessarily been that day."

Postscript: U.S. Sen. John Kerry, D-Mass., responded to this article by sending a letter to the Department of Justice's inspector general, requesting an investigation into the slow pace of decisions under the Hometown Heroes Act.

"It's wrong to think that the families of first responders who die in the line of duty would be abandoned by their government," Kerry said in a written statement on Mar. 22. "Endless excuses, constant delay, promising one thing then doing another — these are unacceptable examples of a government in Washington that doesn't have the right priorities. Congress didn't pass the Hometown Heroes Act so the Administration could pass the buck. The Department of Justice must change its policy and change it now."

© 2007 MSNBC Interactive© 2007 MSNBC Interactive

URL: <http://www.msnbc.msn.com/id/17704748/>

