PREFACE TO FECA PROGRAM MEMORANDUMS

Program Memorandums contain policy concerning claims under the FECA. Each Program Memorandum is identified by the section of the law to which it refers as well as the particular subject covered. It also bears a sequence number and the date of issuance, and remains in effect unless modified, superseded, rescinded or declared obsolete. The series should be maintained in numerical order within the FECA Program Memorandum binder.

Preceding the Program Memorandums are three indexes:

A Table of Contents, which lists all Program Memorandums in numerical sequence, showing the subject, section of the Act, and corresponding section of the U. S. Code (U.S.C.).

An Alphabetical Index of subjects covered. To make the index as useful as possible, extensive cross-references have been included. Therefore, a Program Memorandum may be listed under several different headings.

A Subject Index, which groups Program Memorandums according to the section of the FECA which they address.

These indexes will be revised periodically. Pending release of updated editions, the user should list each newly released Program Memorandum in the Table of Contents and the Subject Index.

Release of Program Memorandums to personnel outside OWCP is authorized under the Freedom of Information Act.

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FECA PROGRAM MEMORANDUM - NO. 1

SUBJECT: SECTION 17, FECA
TIMELY KNOWLEDGE OF INJURY WHEN WRITTEN NOTICE OF INJURY AND CLAIM IS NOT TIMELY FILED.

Failure to file a written notice of injury and claim for compensation for disability does not bar an employee's rights to receive medical benefits for the effects of an employment-related injury provided that the employer had actual knowledge of the injury as provided by Sections 15 to 17 of the FECA.

The provision of Section 17 permitting notice to be filed within one year after the injury pertains only to written notice and does not apply to notice acquired through actual knowledge of the employer.

Actual knowledge must be acquired by the employer within 48 hours after the injury.

Actual knowledge is acquired when the immediate superior is a witness to the alleged injury or when the employee or someone acting in his behalf gives him oral notice of an alleged injury. In cases of disease, it is not sufficient that the superior merely know or be informed that the employee is suffering from a disease. There must also be knowledge or allegation that the employee believes this condition to be related to the employment.

Thomas A. Tinsley
Acting Deputy Director

Date: February 23, 1960

ADDENDUM:

The Amendment made to 5 USC 8122(a) by PL 93-416 states that, "The (actual knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death." The information contained above pertains to injuries which occurred prior to September 7, 1974. For any injuries occurring on or after that date, actual knowledge may be acquired within 30 days of the injury. If there is such timely actual knowledge, any subsequent claim filed would be a timely claim and all benefits would be applicable. If there is no timely actual knowledge and no timely (i.e., within three years) claim, neither medical nor monetary benefits would be allowed.

ALBERT KLINE
Associate Director for

PROMEMO

Federal Employees' Compensation

Dated: February 12, 1975

Distribution: List No. 1Encl. to FECA Bulletin No. 6-75

FECA PROGRAM MEMORANDUM - NO. 2

SUBJECT: SECTION 42, FECA
SPANISH NATIONALS LOCALLY HIRED.

There is in existence certain agreements between the United States and Spain which provide for compensation coverage of locally hired Spanish Nationals under Spanish law. The Bureau has found that the agreements and arrangements for compensation coverage made in accord with them by agencies of the Department of Defense have the legal effect of superseding the Federal Employees' Compensation Act.

Any claim submitted by a locally hired Spanish National in the employ of the U.S. Air Force in Spain for injury or death which occurred on or after September 7, 1958, will be rejected on the ground that there is in effect an agreement between the United States and Spain which renders the Federal Employees' Compensation Act inapplicable to such employees.

Any claim submitted by a locally hired Spanish National in the employ of the U.S. Navy in Spain for injury or death which occurred on or after July 1, 1958, will be rejected for the same reason.

Thus far, the U.S. Army has no Spanish National employees in Spain. It is logical to assume that when and if they do, arrangements will be made for local coverage in accordance with the agreements in existence.

Thomas A. Tinsley
Acting Deputy Director

Date: February 23, 1960

FECA PROGRAM MEMORANDUM - NO. 3

SUBJECT: PUBLIC LAW 86-233, APPROVED September 8, 1959.
AUTHORITY OF BUREAU TO DISTURB A DETERMINATION MADE BY THE MARITIME ADMINISTRATION.

Section 2 of Public Law 86-233 provides in part that "nothing in this section shall be construed to authorize

any appeal to, or review or redetermination by, the Secretary of Labor from any order, finding, determination, or adjudication in respect of eligibility for benefits made by the Secretary of Commerce in force on the effective date of this Act, except upon a showing to the satisfaction of the Secretary of Labor of a change in the nature and extent of the disability for which benefits were approved for payment in accordance with the provisions of such Acts."

It seems clear from the quoted language that Congress intended that the transfer of functions from the Maritime Administration to the Bureau provided by this law should not result in disturbing the status quo of decisions of the former in effect on the date of the transfer.

Determinations made in cases by the Maritime administration will not be disturbed unless and until there is evidence showing that there has been a change in the nature and extent of the disability upon which the original award was based.

Our determination would be made and effect entitlement as of the date such a change was established. This normally would be some time subsequent to July 1, 1959, the effective date of the transfer of authority. It appears that it would be an extremely rare case in which a review or redetermination could be made which would affect an award for any period of time during which the program was administered by the Maritime Administration.

Thomas A. Tinsley
Acting Deputy Director

DATE: March 2, 1960

PUBLIC LAW 86-233
86th Congress, S. 2334

September 8, 1959
An Act

To transfer from the Department of Commerce to the Department of Labor certain functions in respect of insurance benefits and disability payments to seamen for World War II service-connected injuries, death, or disability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Commerce shall certify to the Secretary of Labor amounts payable under crew life and injury and second seamen's war risk insurance policies issued under authority of subtitle "Insurance" of title II of the Merchant Marine Act, 1936, as amended, extended, and supplemented (Act of June 29, 1940, section 222 (54 Stat. 689); Act of March 6, 1942 (56 Stat. 140); Act of April 11, 1942 (56 Stat. 214); Act of March 24, 1943, section 2 (57 Stat. 45); Act of September 30, 1944 (58 Stat. 758); Act of August 8, 1946 (60 Stat. 937)). Payments of such amounts so certified shall be made by the Secretary of Labor from the Employees' Compensation Fund established under the Federal Employees' Compensation Act of September 7, 1916, as amended (5 U.S.C. 751, 785).

Sec. 2. The powers, duties, and functions of the Secretary of Commerce in respect of permanent total or partial disability benefits (allowable upon exhaustion of insurance benefits referred to in section 1 hereof)

under section 2(c) of the Act of March 24, 1943 (Public Law 17, Seventy-eighth Congress; 57 Stat. 45), as amended by the Act of September 30, 1944 (Public Law 449, Seventy-eighth Congress; 58 Stat. 758), are hereby transferred to the Secretary of Labor. Payments of such benefits, including costs and payments on account of medical case authorized by the Secretary of Labor, shall be made by him from the Employees' Compensation Fund as established under the Federal Employees' Compensation Act of September 7, 1916, as amended (5 U.S.C. 751, 785). The Secretary of Commerce shall furnish to the Secretary of Labor such information, data, and reports and certifications in respect of cases within the purview of this section as the Secretary of Labor may request. Nothing in this section shall be construed to authorize any appeal to, or review or redetermination by, the Secretary of Labor from any order, finding, determination, or adjudication in respect of eligibility for benefits made by the Secretary of Commerce in force on the effective date of this Act, except upon a showing to the satisfaction of the Secretary of Labor of a change in the nature and extent of the disability for which benefits were approved for payment in accordance with the provisions of such Acts.

Sec. 3. The Secretary of Labor is authorized to make such rules and regulations as he may deem necessary or appropriate to carry out the provisions of this Act and the functions vested in him by this Act.

Sec. 4. This Act shall become effective as of July 1, 1959.
APPROVED September 8, 1959.

FECA PROGRAM MEMORANDUM - NO. 4

SUBJECT: SECTION 10, FECA
REINSTATEMENT OF COMPENSATION UPON ANNULMENT OF MARRIAGE

We are frequently confronted with the situation in which a claimant whose compensation has been terminated by remarriage subsequently obtains an annulment.

A decree of annulment is a judicial determination that a valid marriage did not in fact exist. This finding is not without limitations with respect to the interests of parties who are strangers to the annulment proceedings. Compensation may be reinstated upon a decree of annulment. The date of reinstatement is dependent upon whether the marriage in question is voidable or void.

A voidable marriage has all the attributes of a valid relationship until such time as its nullity is decreed by a court of competent jurisdiction. A void marriage has none of these attributes. In the case of a voidable marriage, compensation is reinstated only from the date of the decree of annulment. Where the marriage is void, reinstatement as of the date the marriage terminated benefits is proper. The use of the word "void" in the judgment decree cannot be accepted as indicative in itself of a void relationship.

Since these situations usually involve the interpretation and application of the various state laws and judicial decisions concerning marriage, they should be submitted to this office in order that appropriate legal advice and opinion can be obtained.

Thomas A. Tinsley
Acting Deputy Director

DATE: March 15, 1960

FECA PROGRAM MEMORANDUM - NO. 5

(See also FECA PM No. 48.)

SUBJECT: SECTION 12(b), FECA
PREMIUM PAY RECEIVED FOR CERTAIN TYPES OF WORK
INCLUDED IN PAY RATE FOR COMPENSATION PURPOSES.

There is attached a copy of Section 208(a) of Public Law 763, 83rd Congress, approved September 1, 1954. This amended the Federal Employees Pay Act of 1945 (59 Stat. 295) by adding a new Title IV thereto. This provision has been codified as section 926 of Title 5, United States Code. Its application is also covered in Part 25 of the Federal Personnel Manual.

The premium pay provided by this Section should be included in the pay rate for compensation purposes in those cases in which it is received. It is not considered "overtime pay" or a pay differential which would be excluded by the provisions of Section 12(b) of the Act.

Thomas A. Tinsley
Acting Deputy Director

DATE: March 15, 1960

Sec. 208. (a) The Federal Employees Pay Act of 1945, as amended, is amended by inserting after title III thereof a new title to read as follows:

"TITLE IV--SPECIAL PROVISIONS FOR CERTAIN TYPES OF WORK

"Sec. 401. The head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia may, with the approval of the Civil Service Commission, provide that--

"(1) any officer or employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium compensation for such duty on an annual basis in lieu of premium compensation provided by any other provisions of this Act. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 25 per centum) of such part of the rate of basic compensation for any such position as does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended,

by taking into consideration the number of hours of actual work required in such position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of such position are made more onerous by night or holiday work, or by being extended over periods of more than forty hours a week, and any other relative factors; or

"(2) any officer or employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty and duty at night and on holidays with the officer or employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium compensation for such duty on an annual basis in lieu of premium compensation provided by any other provisions of this Act, except for regularly scheduled overtime duty. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 15 per centum) of such part of the rate of basic compensation for any such position as does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended, by taking into consideration the frequency and duration of night, holiday, and unscheduled overtime duty required in such position."

FECA PROGRAM MEMORANDUM - NO. 6

SUBJECT: SECTION 40(b), FECA
REFEREE IN BANKRUPTCY, EMPLOYEE

Section 108(b) of Public Law 357, 81st Congress, approved October 14, 1949, amended Section 40(b) of the Federal Employees' Compensation Act in that it broadened the definition of "employee" to include "all civil officers and employees of all branches of the Government..." Prior to this change a referee in bankruptcy was considered an "officer" and it was held that as such he was not entitled to benefits under the compensation Act. At present, referees in bankruptcy are under the administrative jurisdiction of the Division of Bankruptcy, Administrative Office of the U.S. Courts, Washington, D.C. Their salaries ar paid from a special fund in the Treasury of the United States. (11 U.S.C. Section 68).

Since Section 40(b) now includes all types of civilian officers in all branches of the Federal Government, referees in bankruptcy as officers who receive a salary remuneration from the United States are covered by the provisions of the Federal Employees' Compensation Act.

Thomas A. Tinsley
Acting Deputy Director

DATE: March 28, 1960

FECA PROGRAM MEMORANDUM - NO. 7

SUBJECT: **SECTION 9(b), FECA**
PROVIDING VOCATIONAL REHABILITATION UNDER SECTION 9(b)
WHEN CLAIMANT IS IN RECEIPT OF AN AWARD UNDER SECTION 5(a)

The question has been raised as to whether an award under Section 5(a) would preclude the providing of vocational rehabilitation under Section 9(b) of the Act.

Section 9(b) provides in substance that the Bureau may direct any permanently disabled employee whose disability is compensable to undergo vocational rehabilitation and shall make provisions for furnishing vocational rehabilitation services in such cases (utilizing state services where possible).

The only stated requisite for applicability of Section 9(b) is that the employee be permanently disabled and that such disability be compensable. There is no provision excluding certain types of permanent partial disability from the applicability of Section 9(b); for example, schedule disabilities. It is to be noted, however, that the direction in Section 9(b) is discretionary. The entire matter of who should be rehabilitated is left to the judgment and discretion of the Bureau. But such discretion should not be exercised under the erroneous impression that persons receiving schedules under Section 5(a) may not receive vocational rehabilitation.

Thomas A. Tinsley
Acting Deputy Director

DATED: May 13, 1960

FECA PROGRAM MEMORANDUM - NO. 8

SUBJECT: **SECTION 5, FECA**
PERMANENT DISABILITY DETERMINATION

All evaluations of permanent disability will be made in accordance with American Medical Association Standards where such standards exist and are accepted by the Association and appropriate specialty group for a particular type of disability.

When a claimant is requested or is being afforded an opportunity to submit medical reports containing such evaluations, he should be informed that the examination and evaluation should be reported in terms of the accepted American Medical Association Standards.

The Medical Director will furnish such instructions as may be necessary and advice concerning the existence of specific standards and their application in a particular case may be obtained from his office.

Thomas A. Tinsley
Acting Deputy Director

DATED: July 22, 1960

FECA PROGRAM MEMORANDUM - NO. 9

SUBJECT: FEDERAL EMPLOYEES' HEALTH BENEFITS ACT
PUBLIC LAW 86-382, Approved September 28, 1959
MEANING OF "RETURN TO DUTY"

Section 2(c) of the Health Benefits Act provides a definition of an annuitant for purposes of entitlement to enrollment under a health plan provided by the law. It includes, under certain conditions, recipients of compensation under the Federal Employees' Compensation Act.

Section 2(c)(3) contains the phrase "and who is determined by the Secretary of Labor to be unable to return to duty." Section 2(c)(4) contains the phrase "and has been held by the Secretary of Labor to have been unable to return to duty."

The meaning of "return to duty" as used in the Health Benefits Act is return to the duty or occupation or work which the employee was doing at the time of the injury. The United States Civil Service Commission, Bureau of Retirement and Insurance, agrees with this interpretation.

You will note that this interpretation is the same as that adopted for similar language contained in Public Law 541, 84th Congress, The Federal Employees' Group Life Insurance Act.

Thomas A. Tinsley
Acting Deputy Director

DATED: September 2, 1960

FECA PROGRAM MEMORANDUM - NO. 10

SUBJECT: SECTION 5 (f) (8) - WAR CLAIMS ACT
RECEIPT OF BENEFITS UNDER THE WAR CLAIMS ACT AND THE SOCIAL SECURITY ACT

Section 5 (f) (8) of the War Claims Act provides in effect that the compensation for death awarded under

Section 5 (f) shall be reduced by the amount of payments received by the dependents from the United States on account of the same death. The question presented is whether the provisions under Section 5 (f) (8) apply in respect to the benefits received by a widow from the Social Security Administration.

Social Security benefits are not payments received from the United States on account of the same death. These payments are in fact financed by the employer and employee through the Social Security insurance fund to the widow of an individual who died fully insured. Basically, they are paid not just on account of the death but because the individual was insured under the Social Security system and had made payments to that fund prior to his death.

Under the circumstances, it does not appear that it was intended that this type of benefit should be considered under Section 5 (f) (8) of the War Claims Act as one requiring reduction of the award under that Act.

Thomas A. Tinsley
Acting Deputy Director

DATED: October 14, 1960

FECA PROGRAM MEMORANDUM - NO. 11

SUBJECT: SECTION 104 - PUBLIC LAW 86-767 - APPLICABILITY
FEDERAL EMPLOYEES' COMPENSATION ACT AMENDMENTS OF 1960

Section 104 of Public Law 86-767 provides in part "That nothing in this or any other Act of Congress shall be construed to make the increase in the monthly pay provided by this section applicable to military personnel, or to any person or employee not within the definition of section 40(b)(1) or (2) of the Federal Employees' Compensation Act." The language clearly excludes military personnel and also limits the increase in compensation provided by this section to persons within the definition of section 40(b)(1) and (2) of the Compensation Act. Various groups, such as the employees of the District of Columbia Government; Coast Guard Auxiliary; Women's Army Auxiliary Corps; Civil Air Patrol; etc., to whom the provisions of the Federal Employees' Compensation Act were extended by specific legislation are not civil employees of the United States within the definition of section 40(b)(1) or (2) and therefore would not be entitled to the increase in compensation provided in section 104. This section would be applicable to seamen employed through the United States Shipping Board and seamen employed through the War Shipping Administration since these seamen have been held by the former Commission to be civil employees of the United States.

We might point out that any provision of Public Law 86-767 which amends the Federal Employees' Compensation Act generally would be applicable to all persons to whom the Act has been extended unless it expressly provides otherwise (as in section 104) or unless the provision is such that it obviously does not apply to the person to whom the Compensation Act has been extended.

Thomas A. Tinsley
Acting Deputy Director

DATED: October 27, 1960

FECA PROGRAM MEMORANDUM - NO. 12

SUBJECT: SECTION 7(a) FECA
EFFECTIVE DATE AND APPLICATION OF PROVISIONS OF SECTIONS 202 AND 211(d) OF P. L. 86-767, APPROVED SEPTEMBER 13, 1960.
PAYMENT OF COMPENSATION FOR SCHEDULED DISABILITIES IN ADDITION TO CIVIL SERVICE RETIREMENT.

Basically the question involved might be stated as follows: While the provisions contained in Section 202 of P. L. 86-767 permitting the payment of a scheduled award in addition to benefits under the Civil Service Retirement Act is applicable to cases of injury occurring within three years prior to the law's enactment, can these benefits be paid for any periods prior to September 13, 1960, the date of enactment?

The combination of Sections 202 and 211(d) has been interpreted to mean that any person who was injured within three years prior to September 13, 1960, is entitled to whatever rights he would have had if that portion of Section 202 enunciated in Section 211(d) was in force at the time of injury. Therefore, we may retroactively pay, in appropriate cases, the scheduled award even though the claimant may have previously chosen to receive benefits under the Civil Service Retirement Act.

The Civil Service Commission has informed us that they view the wording contained in Section 211(d) as authorizing retroactive dual payments of annuity and scheduled award benefits in the case of each employee meeting the under-three-year requirement thereof.

Thomas A. Tinsley
Acting Deputy Director

DATED: December 1, 1960

FECA PROGRAM MEMORANDUM - NO. 13

PROMEMO

(Superseded by FECA PM No. 123)

FECA PROGRAM MEMORANDUM - NO. 14

(Supplemented by FECA PM No. 238.)

**SUBJECT: SECTION 7(a), FECA
FOREIGN SERVICE ACT AMENDMENTS OF 1960, PUBLIC LAW 86-723, APPROVED SEPTEMBER 8, 1960
ELECTION OF BENEFITS--FECA AND FOREIGN SERVICE RETIREMENT AND DISABILITY SYSTEM**

Section 35(b) of Public Law 86-723, approved September 8, 1960 (75 Stat. 841), amended Section 831 of the Foreign Service Act of 1946 by adding several new paragraphs relating to the receipt of benefits under the Foreign Service Retirement and Disability System and the FECA. There is attached a copy of the new paragraphs which became Sections 831(d) and (e) of the Foreign Service Act.

These amendments, while they prohibit the concurrent payment of benefits under the Foreign Service Retirement and Disability System and the FECA, permit the claimant to receive for any period of time the greater of the two benefits. They are substantially the same as the provisions contained in Section 7 of the Civil Service Retirement Act and produce the same results on entitlement and election of benefits.

It should be noted, however, that the recent amendments to the Compensation Act by Public Law 86-767, which permit the furnishing of medical care and the payment of a schedule award while an employee is in receipt of Civil Service retirement benefits would not be applicable to employees receiving benefits under the Foreign Service Retirement and Disability System. Such employees are still prohibited from receiving such benefits and benefits under the Foreign Service Retirement and Disability System.

The above provision became effective on October 16, 1960.

**Thomas A. Tinsley
Acting Deputy Director**

DATED: January 5, 1961

Attachment to FECA PM No. 14

FOREIGN SERVICE ACT OF 1946, AS AMENDED

TITLE VIII--THE FOREIGN SERVICE RETIREMENT AND DISABILITY SYSTEM

PART D--BENEFITS ACCRUING TO CERTAIN PARTICIPANTS

Retirement for Disability or Incapacity--Physical Examination--

PROMEMO

Recovery

SEC. 831. (d) No participant shall be entitled to receive an annuity under this Act and compensation for injury or disability to himself under the Federal Employees' Compensation Act of September 7, 1916, as amended, covering the same period of time. This provision shall not bar the right of any claimant to the greater benefit conferred by either Act for any part of the same period of time. Neither this provision nor any provision of the Act of September 7, 1916, as amended, shall be so construed as to deny the right of any person to receive any annuity under this Act by reason of his own services and to receive concurrently any payment under such Act of September 7, 1916, as amended, by reason of the death of any other person.

(e) Notwithstanding any provision of law to the contrary, the right of any person entitled to an annuity under this Act shall not be affected because such person has received an award of compensation in a lump sum under section 14 of the Act of September 7, 1916, as amended, except that where such annuity is payable on account of the same disability for which compensation under such section has been paid, so much of such compensation as has been paid for any period extended beyond the date such annuity becomes effective, as determined by the Secretary of Labor, shall be refunded to the Department of Labor, to be paid into the Federal Employees' Compensation Fund. Before such person shall receive such annuity he shall (1) refund to the Department of Labor the amount representing such computed payments for such extended period, or (2) authorize the deduction of such amount from the annuity payable to him under this Act, which amount shall be transmitted to such Department for reimbursement to such Fund. Deductions from such annuity may be made from accrued and accruing payments in such manner as the Secretary of Labor shall determine, whenever he finds that the financial circumstances of the annuitant are such as to warrant such deferred refunding.

FECA PROGRAM MEMORANDUM - NO. 15

SUBJECT: SECTION 40(b), FECA
JURORS IN FEDERAL COURTS

Jurors are selected for jury duty in the Federal courts and are summoned to serve pursuant to statute. Their compensation for serving on the jury is likewise fixed by statute. The Government does not negotiate with a citizen for his services as a juror, nor does the citizen apply to the Government for such preferment. It is not by virtue of a contract that a juror performs jury duty, but by virtue of the requirements of the law. A juror selected in the manner prescribed by law is not "hired" to perform services on behalf of the Government. He is selected to perform a service as part of his duties as a citizen. Jury duty is an obligation of each qualified citizen and the juror's consent to serve is not essential. It is obvious that the relationship does not stem from a contract of employment. Unlike other true employees, jurors are not subject to the direction and control of an employer, and what a juror determines in matters submitted from his attention is not subject to control from any source whatever.

A juror serving on a jury in a Federal court is not a civil employee of the United States within the meaning of Section 40(b) of the FECA.

Thomas A. Tinsley
Acting Deputy Director

DATED: April 24, 1961

ADDENDUM:

The 1974 Amendment made to 5USC 8101 by PL 93-416 makes the above Program Memorandum applicable only in case of injury prior to September 7, 1974. After that date, coverage is provided to Federal employees who serve as petit or grand jurors.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 12, 1975

Distribution: List No. 1

Encl. to FECA Bulletin No. 6-75

ADDENDUM:

Public Law 97-463 further amended section 5 USC 8101 effective January 12, 1983 to include all grand and petit jurors, not just Federal employees. Therefore, this Program Memorandum applies only to cases for injury prior to that date.

THOMAS M. MARKEY
Director for
Federal Employees' Compensation

Dated: December 20, 1994

Distribution: **Distribution: List No. 1**
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants, Rehabilitation Specialists, and Staff Nurses)

Encl. to FECA Bulletin No. 95-06

FECA PROGRAM MEMORANDUM - NO. 16

PROMEMO

SUBJECT: SECTION 40(b) FECA
SCHOOL TEACHERS AND PRINCIPALS HIRED UNDER AUTHORITY
OF PUBLIC LAW 874, 81ST CONGRESS

Section 6 of Public Law 874, 81st Congress provides in substance that where local educational agencies are unable to provide suitable free public education for the children of military personnel, suitable arrangements shall be made to provide free public education for such children. Under this authority the military agencies in various localities have undertaken the operation of their own schools for the children of military personnel. A necessary part of this operation is the hiring of school teachers and principals.

The teachers and principals so employed, although they are parties to individual contracts for their services, are employees of the United States within the meaning of Section 40 of the Federal Employees' Compensation Act.

Thomas A. Tinsley
Acting Deputy Director

DATED: April 28, 1961

FECA PROGRAM MEMORANDUM - NO. 17

SUBJECT: SECTION 40(b) FECA
COUNTY COMMITTEES, COMMODITY STABILIZATION SERVICE,
DEPARTMENT OF AGRICULTURE

The use of county committees of farmers in administering agricultural programs was first specifically authorized by the Congress in the enactment of the original Agricultural Adjustment Act (48 Stat. 37). Similar authority was contained in Section 8(b) of the Soil Conservation and Domestic Allotment Act, approved February 29, 1936 (16 U.S.C. 590h(b)). That subsection was amended on February 16, 1938, by Section 101 of the Agricultural Adjustment Act of 1938 (52 Stat. 31) to prescribe in detail the procedure by which the county and community committees were to be selected. Under the amendment, the Secretary was directed to: "utilize the services of local and State committees selected as hereinafter provided." Provision was made for the election of the membership of the committees by and from the farmers within local administrative areas designated by the Secretary. Committees thus selected have administered the agricultural conservation programs in the counties and communities each year since enactment of that Act. In addition, section 388(a) of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1388(a)), made it mandatory, and the Federal Crop Insurance Act, as amended, (7 U.S.C. 1501-1519) and the Sugar Act of 1937, as amended (7 U.S.C. 1100-1183), made it permissive, for the Secretary to utilize county committees in administering those Acts in the counties.

The Soil Conservation and Domestic Allotment Act, as amended, also directed the Secretary to "make such regulations as are necessary relating to the selection and exercise of the functions of the respective committees, and to the administration, through such committees, of such programs." Under these regulations, contained in Part 7, Subtitle A, Title 7, Code of Federal Regulations, the committees are now known as the Agricultural Stabilization and Conservation Community Committees and Agricultural Stabilization and Conservation County Committees. The purpose of these committees is spelled out in section 7.3 thereof as follows:

> **"to direct the administration of sections 7 to 17 inclusive, of the Soil Conservation and Domestic Allotment Act of 1936, the Agricultural Adjustment Act of 1938, the Sugar Act of 1948, the Soil Bank Act, and any amendments to such acts, and such other acts of Congress as the Secretary of Agriculture or the Congress may designate ..... The county and community committees shall not engage in any other activity." (underscoring supplied.)**

These committees as they exist today are engaged exclusively in carrying out Federal programs and serve no other purpose. We have concluded that the county committeemen are employees within the meaning of Section 40 of the Federal Employees' Compensation Act and thereby entitled to benefits under the law and that the employees of the county offices engaged in this program are also employees within the meaning of Section 40.

Thomas A. Tinsley
Acting Deputy Director

DATED: May 9, 1961

FECA PROGRAM MEMORANDUM - NO. 18

(See FECA Program Memorandum 216)

SUBJECT: SECTION 40(b)(3) FECA
EMPLOYEES OF MENOMINEE INDIAN MILLS

The Federal Register of Saturday, April 29, 1961, contains a proclamation signed by the Secretary of the Interior on April 26, 1961, terminating Federal supervision over the property of the Menominee Tribe of Wisconsin and of the individual members thereof effective midnight April 30, 1961. This proclamation was issued pursuant to the authority contained in P.L. 83-399 (68 Stat. 250) as amended by P.L. 85-488 and P.L. 86-733.

Section 40(b)(3) of the FECA specifically provides coverage to certain persons employed in lumber operations on the Menominee Indian Reservation authorized by the Act of March 28, 1908.

We have interpreted the termination of Federal jurisdiction over the tribe to mean that the lumber operations on the Reservation will no longer be performed under the jurisdiction of the United States pursuant to the Act of March 28, 1908. Therefor as of May 1, 1961, there are no persons who will be within

the coverage provided in Section 40(b)(3). While Section 40(b)(3) has not been repealed it will, for all practical purposes, exist in a vacuum since there will be no one who can meet its requirements.

Persons employed by the Menominee Indian Mills who were injured prior to May 1, 1961, are and will continue to be entitled to benefits under the FECA for the results of such injuries. Persons employed in these logging operations who are injured on or after May 1, 1961, have no rights under the Act.

Thomas A. Tinsley
Acting Deputy Director

DATED: May 12, 1961

FECA PROGRAM MEMORANDUM - NO. 19

SUBJECT: SECTION 104, PUBLIC LAW 86-767
APPLICABILITY WHEN BENEFITS ARE PAYABLE PURSUANT TO
PUBLIC LAW 449, 78TH CONGRESS
PUBLIC LAW 86-233, SECTION 2

The question has been posed as to whether Section 104 of Public Law 86-767 is applicable to cases in which benefits are being paid pursuant to Public Law 449, 78th Congress. Public Law 449 provides for disability benefits under prescribed conditions to seamen employed on vessels owned, operated by or chartered to the Maritime Commission or the War Shipping Administration. The payments made thereunder are to be "in accordance with the rate schedules provided by the U.S. Employees' Compensation Act". These payments were made by the Department of Commerce, War Shipping Administration. In 1960 Congress, by Public Law 86-233, transferred the power, duties and functions formerly residing with the Secretary of Commerce with respect to those benefits to the Secretary of Labor and, in effect, this Bureau.

Until the passage of Public Law 17 on March 24, 1943, the seamen in question had been held by the former Compensation Commission to be employees within the meaning of the Compensation Act but by that passage such persons were removed from the definition of employee in the Compensation Act. Subsequently, by the Act of September 30, 1944, Public Law 449, the War Shipping Administration benefits were made available to these individuals. The benefits were payable with respect to war-related causes "whether heretofore or hereafter arising".

Seamen injured prior to the passage of the Act of March 24, 1943, would be entitled to the increased compensation benefits provided by Section 104 of Public Law 86-767 since prior to that date they were considered to be employees within the meaning of the Compensation Act. This would not conflict with the injunction contained in Section 2 of Public Law 86-233 with respect to disturbing decisions made by the Secretary of Commerce in effect on the effective date of that law since we would merely be applying an automatic increase granted by Congress.

This particular memorandum applies to a rather small group of cases that are presently docketed in the "R" prefix number series within the Bureau.

Thomas A. Tinsley
Acting Deputy Director

DATED: June 15, 1961

FECA PROGRAM MEMORANDUM - NO. 20

(See also FECA Program Memorandum No. 81)

SUBJECT: SECTION 7(a), FECA
PAYMENTS UNDER THE FECA AND THE SOCIAL SECURITY ACT

It has bene determined that Section 7 of the Federal Employees' Compensation Act does not prohibit the payment of benefits under the Social Security Act and under the Compensation Act. This applies to old-age, survivors and disability insurance benefits under Title II of the Social Security Act, as amended. As a result an election between FECA benefits and Social Security benefits is not required.

Thomas A. Tinsley
Acting Deputy Director

DATED: August 9, 1961

FECA PROGRAM MEMORANDUM - NO. 21

(Superseded by FECA PM No. 123.)

FECA PROGRAM MEMORANDUM - NO. 22

SUBJECT: SECTION 104 - PUBLIC LAW 86-767 MADE APPLICABLE TO EMPLOYEES OF THE DISTRICT OF COLUMBIA GOVERNMENT
PUBLIC LAW 87-339

Public Law 87-339, approved October 3, 1961, amends section 104 of Public Law 86-767, approved September 13, 1960, so that the reference to the definition in section 40(b)(1) or (2) of the Federal Employees' Compensation Act will not operate to exclude employees of the government of the District of Columbia from its application unless they were otherwise excluded (policemen and firemen) from the benefits of the Compensation Act.

PROMEMO

The effect of this amendment is to make the provisions of section 104, Public Law 86-767, applicable to employees of the District of Columbia Government in the same manner as regular Federal employees. The amendment, since it contains an October 1, 1960 effective date, provides for the retroactive payment of benefits.

A copy of Public Law 87-339 is attached.

This Memorandum modifies Program Memorandum No. 11, dated October 27, 1960, only insofar as it relates to employees of the District of Columbia Government.

Thomas A. Tinsley
Acting Deputy Director

DATED: October 13, 1961
Attachment to FECA PM No. 22

PUBLIC LAW 87-339
87TH Congress, H. R. 8871

October 3, 1961

AN ACT

To amend the Federal Employees' Compensation Act of 1960.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the first proviso of section 104 of the Federal Employees' Compensation Act Amendments of 1960 (74 Stat. 906) is amended by adding immediately preceding the colon, the following: ", except that this section shall apply to employees of the government of the District of Columbia other than members of the police and fire departments who are pensioned or pensionable under the provisions of the Policemen and Firemen's Retirement and Disability Act".

Sec. 2. This Act shall take effect October 1, 1960.

Approved October 3, 1961.

FECA PROGRAM MEMORANDUM - NO. 23

SUBJECT: SECTION 42, FECA
TURKISH NATIONALS LOCALLY HIRED

PROMEMO

Certain agreements between the United States and Turkey provide for insurance against industrial accidents and occupational diseases for locally hired Turkish Nationals under Turkish law. The Bureau has found that the agreements and arrangements for compensation coverage made in accord with them by agencies of the Department of Defense have the legal effect of suspending the Federal Employees' Compensation Act.

Any claim submitted by a locally hired Turkish National in the employ of the U.S. Air Force in Turkey for injury or death which occurred on or after March 1, 1960, will be rejected on the ground that there is in effect an agreement between the United States and Turkey which renders the Federal Employees' Compensation Act inapplicable to such employees.

Thomas A. Tinsley
Acting Deputy Director

DATED: December 21, 1961

FECA PROGRAM MEMORANDUM - NO. 24

SUBJECT: PUBLIC LAW 87-234, APPROVED SEPTEMBER 14, 1961
EXTENSION OF TIME FOR FILING CLAIM - NATIONAL GUARD OFFICERS

For many years the Bureau held that National Guard officers were not member of the Officers' Reserve Corps and consequently were not entitled to the benefits of the Federal Employees' Compensation Act. In December 1955 the Employees' Compensation Appeals Board set aside this determination and held that Air National Guard Officers, when on active Federal duty, were "Reserve officers" and therefore entitled to benefits. There were many survivors of National Guard officers who were precluded from filing a timely claim because of the prior ruling of the Bureau. Public Law 87-234 was enacted to remedy this situation. This legislation contains authority for members of the Army National Guard and the Air Force National Guard who suffered disability or death from compensable causes which arose during the period from August 7, 1947, to December 31, 1956 and their survivors to file a claim for compensation under the Federal Employees' Compensation Act as extended to military Reservists provided it is filed within one year from September 14, 1961. It also contains language permitting an election where Veterans Administration benefits are being received.

Claims filed pursuant to this law will be initially adjudicated in the Washington Office of the Bureau.

A copy of the law is attached.

Thomas A. Tinsley
Acting Deputy Director

PROMEMO

DATED: January 12, 1962
Attachment to FECA PM No. 24

PUBLIC LAW 87-234
87th Congress, S. 935

September 14, 1961

AN ACT

For the relief of certain members of the Army National Guard of the United States and the Air National Guard of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that sections 15 through 20, inclusive, of the Federal Employees' Compensation Act, as amended (U.S.C., title 5, secs. 765-770), are hereby waived with respect to cases involving those members of the Army National Guard and the Air National Guard of the United States alleged to have suffered disability or death from compensable causes which arose during the period from August 7, 1947, to December 31, 1956, inclusive, and their claims or the claims of their dependents for compensation by reason of the Act of July 15, 1939 (5 U.S.C. 797, 797a), are authorized and directed to be considered and acted upon under the remaining provisions of the Federal Employees' Compensation Act, as amended and extended to members of military reserve components, if filed with the Department of Labor (Bureau of Employees' Compensation) within one year from the date of enactment of this Act.

Sec. 2. Notwithstanding the provisions of section 206(b)(1) of the Servicemen's and Veterans' Survivor Benefits Act any person whose rights may be affected by section 1 of this Act may receive any benefits to which he should be found eligible under the Federal Employees' Compensation Act provided he makes the election required under section 7 thereof. In the event of such an election, any benefit amounts received under any other Act for the same death shall be deducted from amounts payable for similar purposes under the Federal Employees' Compensation Act.

Approved September 14, 1961

FECA PROGRAM MEMORANDUM - NO. 25

(See Program Memorandum No. 82.)

SUBJECT: SECTION 40(b), FECA
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

The authority, program, functions, and operations of the Board of Governors of the Federal Reserve System have been studied and it has been determined that employees of the Board are employees within the meaning

of the Federal Employees' Compensation Act.

This decision should not be interpreted to include employees of the Federal Reserve Banks.

Thomas A. Tinsley
Acting Deputy Director

DATED: February 26, 1962

FECA PROGRAM MEMORANDUM - NO. 26

(Superseded by FECA PM No. 123.)

FECA PROGRAM MEMORANDUM - NO. 27

SUBJECT: SECTION 7(a) AND SECTION 9(b), FECA PROHIBITION AGAINST PROVIDING VOCATIONAL REHABILITATION SERVICES WHILE EMPLOYEE IS IN RECEIPT OF CIVIL SERVICE RETIREMENT BENEFITS.

We have considered a case in which the claimant is receiving a schedule award under Section 5 of the Federal Employees' Compensation Act and is also receiving Civil Service retirement benefits. The concurrent payment of these benefits is permitted by the 1960 amendments to the Compensation Act (Public Law 86-767). The question presented is whether or not the claimant may also receive vocational rehabilitation services.

Prior to the 1960 amendments, the Bureau was unable to pay compensation, furnish medical treatment, or provide for rehabilitation services while an employee was receiving Civil Service retirement benefits. It was necessary to amend the law to permit the payment of medical benefits and the schedule benefits provided by Section 5 concurrently with the Civil Service benefits. It would therefore seem that a similar amendment would be necessary in order to provide rehabilitation services.

We have, thereof, concluded that rehabilitation services under Section 9(b) of the Federal Employees' Compensation Act may not be provided while an employee is receiving Civil Service retirement benefits.

Thomas A. Tinsley
Acting Deputy Director

PROMEMO

DATED: August 31, 1962

FECA PROGRAM MEMORANDUM - NO. 28

(See Program Memorandum No. 167.)

SUBJECT: CIVILIAN WAR BENEFITS PROGRAM

During World War II a "Civilian War Benefits Program" was initiated to provide benefits for disability and death of certain specified civil defense workers. The program was administered through the facilities of the Federal Security Agency, specifically the Social Security Administration. Coverage of civil defense workers as a special class was terminated for injuries occurring after April 30, 1945, by Presidential direction dated May 2, 1945. The program itself was non-statutory. It was authorized by Presidential letter and allocation of funds from the Emergency Fund for the President. Details of the program, including the schedule of benefits, are embodied in Social Security Board regional field letters and the Civilian War Benefits Handbook.

Following the termination of the program Congress appropriated funds for the continued payment of benefits. Benefit payments are currently paid from the Employees' Compensation Fund.

In January 1947 the program was transferred to this Bureau by the Federal Security Administrator and subsequently transferred to the Department of Labor with the other Bureau functions pursuant to Reorganization Plan No. 19 of 1950. The program is liquidating in nature.

The Secretary of Labor, in a letter to the Director dated November 7, 1962, authorized administrative action to increase the benefits provided by the Civilian War Benefits program. Pursuant to this authority the following changes in the sections of the Civilian War Benefits Handbook are being made effective December 1, 1962:

1. Section 33, entitled "adjustments" is repealed and there will be no deductions because of Social Security payments.

2. The benefits provided by section 31 are increased by 50 percent.

3. The maximum monthly payment of $85 provided in sections 31 and 32 is increased to $127.50.

4. The maximum monthly allowance of $50 provided by section 23(b) for an attendant is increased to $75.

5. The maximum allowance of $100 for the burial expenses provided by section 22 is increased to $150. This increase will apply to any case coming within the provisions of section 22 where the death occurs on or after December 1, 1962.

The above changes will apply to any award in effect on December 1, 1962, or to any new or adjusted award made after that date. Existing awards for disability or death will be revised in the following manner: Any deductions made pursuant to section 33 will be excluded thereby increasing the basic benefit entitlement. The award as computed under section 31 will be increased by 50 percent. In the future, new or adjusted awards for disability or death will be computed in the manner provided by section 31 and then increased by 50 percent for benefits for periods on and after December 1, 1962.

This memorandum affects a very small number of cases currently within the jurisdiction of the Washington, D. C., FECA Office.

Thomas A. Tinsley
Acting Deputy Director

DATED: December 17, 1962

FECA PROGRAM MEMORANDUM - NO. 29

SUBJECT: SECTION 5(a), FECA
LOSS OF HEARING DETERMINATIONS

There apparently is some misunderstanding on the part of some personnel concerning awards under Section 5(a) for loss of hearing in that they believe that an employee must be removed from the offending environment for a period of six months before a determination can be made and a schedule award paid. We can find nothing in the law specifically requiring such a practice. If such a rule was ever formally adopted by the Bureau it has not been the policy to follow it for many years. If such a rule were followed it would require that the employee give up his employment and, in effect, his livelihood in order to obtain the award or it would be paid to him on his separation, retirement, or to his heirs at his death. This would not appear to be consistent with the purpose of the law or to be the best administrative practice.

A schedule award for hearing loss should be made in a case when competent medical evidence shows that a permanent hearing impairment exists. Such medical evidence received from an appropriate specialist must describe the permanent loss of hearing and contain a prognosis specifically commenting on whether or not removal from the offending environment would or could be expected to result in a lessening of the degree of permanent loss of hearing. If such improvement would be probable, the specialist's best estimate as to what the extent of the permanent hearing loss might be following removal from the environment should be obtained. A tentative award under Section 5(a) may then be made on the basis of this estimate utilizing the lower percentage of hearing loss. The award will be reviewed following examinations at subsequent intervals, usually not longer than annually, if the employee remains in the noisy environment. If the employee should, for any reason, leave the environment then a final rating may be made following a reasonable period of time. What constitutes a reasonable period is a matter of judgment and discretion based upon the facts and situation in each case.

Under no circumstances should we require that the employee be removed from the offending environment as a condition for receiving a schedule award. Upon making a tentative rating the employee should be fully informed that such a rating is tentative indicating the reason this is so and advising him that it will be re-evaluated and a final determination made at a later date

Thomas A. Tinsley

PROMEMO

Assistant Director

DATED: January 7, 1963

FECA PROGRAM MEMORANDUM - NO. 30

SUBJECT: SECTION 5(a), FECA, AS AMENDED BY SECTION 201, PUBLIC LAW 86-767, SEPTEMBER 13, 1960.

The purpose of this memorandum is to specifically bring to your attention the general principles of the interpretation of this amendment to Section 5 enunciated in the decision of the Employees' Compensation Appeals Board in the case of Elijah M. Ellis, III, Docket Number 62-281, issued October 5, 1962.

The Board has construed the amendment to Section 5(a) as follows:

> **"(1) The amendment did not intend to change the interpretation previously made that where the injury results in an impairment not covered by the schedule in addition to a schedule impairment, compensation may be paid only for a loss of wage-earning capacity. Cecil P. Hann, 9 ECAB 195; Lorraine B. Ford, 9 ECAB 742, Petition for Reconsideration, 10 ECAB 232; Stephen M. Svoren, 10 ECAB 360; Rupert A. Moore, 11 ECAB 6; Philip A. Fox, Docket No. 61-252.**
>
> **"(2) Where the cause of the disability originates in a part of the body not covered by the schedule but the resulting condition reflects itself solely in the permanent partial loss of use of a schedule member, an award under the schedule is required. Congress intended that in a situation in which the injury or its residuals cause a medical effect in a part of the body not covered by the schedule, but reflects itself entirely in a permanent loss of use or function of a schedule member, the origin or cause of the disability should be disregarded for the purpose of the schedule. However, where the origin of the disability reflects itself not only in an impairment of a schedule member but also in an impairment of a part of the body not covered by the schedule, then the sole disability is not a schedule impairment and compensation may be paid only for loss of wage-earning capacity.**
>
> **"(3) For the purpose of determining whether an 'impairment' exists so as to take the case out of the schedule provisions, it must be a significant condition, that is, not merely a medical defect with no consequential effects; it must be one which is physically or functionally limiting or requires medical care and attention. The impairment must be such that, in fixing the loss of wage-earning capacity of an individual, it would be a consideration in determining his physical or mental capacity. An impairment should be given a meaning as commonly understood in everyday life. An inconsequential medical defect or condition is not a basis for destroying the right to an award under the schedule provisions of the Act."**

Thomas A. Tinsley
Assistant Director

PROMEMO

DATED: January 7, 1963

FECA PROGRAM MEMORANDUM - NO. 31

SUBJECT: SECTION 40(b), FECA
READERS FOR BLIND EMPLOYED UNDER PUBLIC LAW 87-614

Public Law 87-614, approved August 29, 1962, authorized the employment, without compensation from the Government, of readers for blind Federal employees. Each such reading assistant may be paid by the blind employee or by any non-profit organization.

Study of the Act and the legislative reports on it has resulted in the conclusion that "readers" employed under the provisions of Public Law 87-614 would come within the definition of "employee" in Section 40(b)(2) of the Federal Employees' Compensation Act. They would therefore be entitled to the benefits provided by the Act for injuries sustained in the performance of duty. The pay rate for compensation purposes would be determined in accordance with the provisions of Section 40(f) and Section 12 of the Act.

Thomas A. Tinsley
Assistant Director

DATED: May 8, 1963

FECA PROGRAM MEMORANDUM - NO. 32

SUBJECT: SECTION 6(d)(1) FECA
MONTHLY PAY - MINOR OR LEARNER AT TIME OF DEATH

Section 6(d)(1) provides for the recomputation of compensation in case of injury to a minor or learner after the time the earnings would have increased but for the injury.

This provision of the Act relates solely to the payment of compensation for disability. It does not apply to the payment of death benefits except in those cases where the pay rate was adjusted prior to the date of death.

Thomas A. Tinsley
Assistant Director

DATED: June 17, 1963

FECA PROGRAM MEMORANDUM - NO. 33

SUBJECT: SECTION 1(a) FECA
IDIOPATHIC FALLS

The employee who falls to the level floor or level supporting surface because of some inherent personal state of health is not entitled to compensation benefits for the effects of the fall. The injury caused by such an idiopathic fall is merely an extension of the worker's inherent disability and is therefore not personal injury within the meaning of the Compensation Act, unless some element of the work environment contributed a hazard which led to the final injury.

Where the evidence fails to establish that an idiopathic condition was the cause of the fall or where there is an intervening environment factor, i.e., striking against an object, falling down stairs or from a height, the injury is compensable. The principles applied in cases of this type may be found in the following decisions of the Employees' Compensation Appeals Board: Rebecca C. Daily, 9 ECAB 255; Wilford M. Smith, 9 ECAB 259; Paull W. Johnson, 9 ECAB 856; Carol Connett, 10 ECAB 575; Calvin Mengle, Jr., 13 ECAB 94.

Thomas A. Tinsley
Assistant Director

DATED: June 18, 1963

FECA PROGRAM MEMORANDUM - NO. 34

SUBJECT: SECTIONS 9(b) AND 27, FECA
REHABILITATION IN THIRD PARTY CASES

An injured employee's right and obligation to undergo vocational rehabilitation is not affected by the fact the injury may have occurred under circumstances creating a legal liability in some person other than the United States to pay damages therefore. During the period of litigation in a third party case the beneficiary may be provided with vocational rehabilitation services if he is otherwise eligible and the Bureau may pay for the cost of such services if they are approved by the Bureau and are otherwise in order. The amounts paid by the Bureau will be recovered from a third party settlement in the same manner as is done for other amounts paid.

After a surplus third party recovery has been set up against future compensation payments, the cost of

vocational rehabilitation services must be paid directly by the injured employee. The amounts of such approved service will be used to reduce or exhaust the third party credit.

John J. Newman
Assistant Director-FECA

DATED: March 11, 1964

FECA PROGRAM MEMORANDUM - NO. 35

(Superseded by Program Memorandum No. 123.)

FECA PROGRAM MEMORANDUM - NO. 36

(Superseded by FECA Program Memorandum No. 37.)

FECA PROGRAM MEMORANDUM - NO. 37

SUBJECT: SECTION 40(b), FECA
CADETS AT STATE MARITIME ACADEMIES

This memorandum supersedes FECA Program Memorandum No. 36 of March 11, 1964. That memorandum should be so marked.

State Maritime Academies are being operated in Maine, Massachusetts, New York, Texas, and California. It has been ascertained that cadets at State Maritime Academies are enrolled as cadets in the United States Maritime Service and are assigned to active duty at the State Academies. Since enrolled members of the United States Maritime Service, while on active duty, are civil employees of the United States, it has been determined that cadets at the State Maritime Academies are eligible to receive the benefits of the FECA by reason of their status as enrolled members of the United States Maritime Service.

The administrators, instructors, and supporting personnel at the State Academies are state employees and have no Federal status. For this reason these officials may not properly discharge the duties and functions of an official. In view of these circumstances the reporting office for these cases will be: Supervisor for the State Maritime Academies, Office of Personnel Management, U.S. Department of Commerce, Maritime Administration, Washington, D. C. 20235.

John J. Newman
Assistant Director-FECA

DATED: April 30, 1964

FECA PROGRAM MEMORANDUM - NO. 38

SUBJECT: SECTION 40(b), FECA, APPALACHIAN REGIONAL COMMISSION

Public Law 89-4, approved March 9, 1965, established the Appalachian Regional Commission.

Section 101(a) states:

> **"There is hereby established an Appalachian Regional Commission (hereinafter referred to as the 'Commission') which shall be composed of one Federal member, hereinafter referred to as the 'Federal Cochairman', appointed by the President by and with the advise and consent of the Senate, and one member from each participating State in the Appalachian region. The Federal Cochairman shall be one of the two Cochairmen of the Commission. Each State member may be the Governor, or his designee, or such other person as may be provided by the law of the State which he represents. The State members of the Commission shall elect a Cochairman of the Commission from among their number."**

Section 101(c) states:

> **"Each State member shall have an alternate, appointed by the Governor or as otherwise may be provided by the law of the State which he represents. The President, by and with the advice and consent of the Senate, shall appoint an alternate for the Federal Cochairman. An alternate shall vote in the event of the absence, death, disability, removal, or resignation of the State or Federal representative for which he is an alternate."**

To carry out its duties, Section 106(3) authorizes the Commission to:

> **"request the head of any Federal department or agency (who is hereby so authorized) to detail to temporary duty with the Commission such personnel within his administrative jurisdiction as the Commission may need for carrying out its functions, each such detail to be without loss of seniority, pay, or other employee status."**

Section 106(2), however, contains the following language:

> **"No member, alternate, officer, or employee of the Commission, other than the Federal Cochairman on the Commission, his staff, and his alternate and Federal employees detailed to the Commission under paragraph (3) shall be deemed a Federal employee for any purpose."**

Accordingly:

(a) Employees of the Appalachian Regional Commission, other than those named in Section 106(2), will not be considered employees for the purpose of the Federal Employees' Compensation Act.

(b) Those who will be considered employees for the purpose of the Federal Employees' Compensation Act are, specifically, the Federal Cochairman on the Commission, his staff, and his alternate and Federal employees detailed to the Commission under Section 106(3).

John J. Newman
Assistant Director-FECA

DATED: July 7, 1965

Distribution: List No. 7, (7/28/64)

FECA PROGRAM MEMORANDUM - NO. 39

(Superseded by FECA PM 2-804, pp. 27-28, now paragraph 16)

FECA PROGRAM MEMORANDUM - NO. 40

SUBJECT: PUBLIC LAW 605, 80TH CONGRESS, APPROVED JUNE 4, 1948
EMPLOYEES OF DISTRICT OF COLUMBIA ARMORY BOARD

Employees of the Government of the District of Columbia have the protection of the FECA by reason of the Act of Congress approved July 11, 1919, as amended.

Public Law 605, 80th Congress, approved June 4, 1948, established the District of Columbia Armory Board. The Armory Board was given control and jurisdiction over the operation of the District of Columbia Armory.

It has been determined the Armory Board is an agency of the Government of the District of Columbia. Therefore, employees of the Armory Board are covered by the FECA.

John J. Newman
Assistant Director-FECA

DATED: July 19, 1965

PROMEMO

Distribution List No. 7 (7/28/64)

FECA PROGRAM MEMORANDUM - NO. 41

SUBJECT: SECTION 40(b), FECA
CONTRACT CHAPLAINS - VETERANS ADMINISTRATION

The VA employs hospital chaplains under contracts that call for services on a when-needed basis. (See reverse side [below] for copy of a contract that is typical.)

The services of the contract chaplain are used when the regular chaplain is absent. The schedule for the visits of the contract chaplain is arranged by the regular chaplain and the latter is considered the technical adviser of the former. From an administrative standpoint the contract chaplain is supervised by the Chief of Staff.

It has been determined that these contract chaplains are civil employees for the purpose of the FECA.

The pay rate is to be determined in accordance with sections 40(f) and 12(c)(2)(C).

John J. Newman
Assistant Director-FECA

DATED: July 30, 1965

Distribution List No. 7 (7/28/64)

Attachment to FECA PM No. 41

COPY OF CONTRACT

The undersigned _____, _____, (Hereinafter called "the contractor") agrees to furnish personal services as a spiritual adviser to patients as required by the Veterans Administration Hospital, Baltimore, Maryland, 21218, subject to the terms and conditions described below:

1. SERVICES: The Contractor agrees to perform professional chaplain services as required by the Veterans Administration Hospital, Baltimore, Maryland 21218.

2. PERIOD OF CONTRACT: This contract will cover the period from _____ to _____, or subject to availability of appropriations, until such later date as may be authorized in writing by the contracting Officer and agreed to by the Contractor.

3. TERMS: The Contractor agrees to furnish services herein specified at the rate of $5.00 for the first

hour or fraction thereof and $3.50 for each additional hour or fraction thereof per each visit to the hospital. For purposes of computing rates, no more than one $5.00 rate for the first hour or fraction thereof shall occur on any one day.

4. PAYMENT: Payment for services rendered will be made in arrears by the Veteran Administration Hospital, Baltimore, Maryland, 21218, upon submission by the Contractor of properly prepared invoices.

5. TERMINATION: This proposal, if accepted, shall become a contract and shall remain in force during the period stated above, unless terminated at the request of either party after fifteen (15) days notice in writing.

6. OFFICIALS NOT TO BENEFIT: No member of or Delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

7. AUTHORITY: This contract is entered into under the authority of Section 602.01 (d) (1) MP-2, Part II.

_____

Signature of Contractor

VA Approved and Accepted:

_____

FECA PROGRAM MEMORANDUM - NO. 42

(Supplemented by FECA Program Memorandum No. 186.)

SUBJECT: SECTION 1, FECA
PERFORMANCE OF DUTY
INJURY SUSTAINED AS A RESULT OF DELETERIOUS EFFECTS
OF AGENCY-FURNISHED MEDICAL SERVICES

Public Law 658, 79th Cong., approved August 8, 1946, authorized Federal agencies and Government owned and controlled corporations to established (by contract or otherwise) health service programs to provide health services for employees under their respective jurisdictions. These services are limited to (1) treatments of on-the-job illness and dental conditions requiring emergency attention; (2) pre-employment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive programs relating to health.

The Executive Offices of the President, Bureau of the Budget, in Circular A-72 of June 18, 1965, outlined to all departments the means of carrying out P.L.-658. The agency head is authorized to determine the health services which are to be provided as he deems necessary. He may utilize professional staff or facilities existing in his department or agency, he may share facilities with another Federal agency, or he may contract for qualified professional services with private or public sources. The circular makes it clear that the health service program carries with it certain benefits for the employer among which are (a) elimination of health

risks under the FECA, and (b) efficient performance of their assigned work.

It is clear from the content of the Act cited above and the circular which relates directly to it that the health service is within the ambit of the employment. An in-service employee who responds to the employer's invitation that he participate voluntarily in this health service program will therefore be considered in the performance of duty on those occasions when such participation causes him to be absent from his regular duties for the specific purpose of availing himself of the medical service offered him by his employer. Deleterious effects such as injury while undergoing a periodic medical examination, reaction to agency-sponsored inoculation, or disease contracted from instrumentation will be compensable.

The medical procedures involved in a pre-employment medical examination also come within the rule, provided the person has already been appointed or hired when the examination is performed. A mere prospective employee is not so covered for compensation benefits.

This Program Memorandum is not in conflict with, and does not amend, Section 2.03(9)(p) on page 2-9 of the Medical Services Procedure Manual. That section prohibits authorization under FECA of medical treatment for preventive purposes. The actual medical services rendered employees under the health service program are furnished by the employer pursuant to P.L. [79]-658, cited above. The services are not furnished under the provisions of the FECA.

This memorandum is not intended to grant any authority for such preventive examinations or preventive treatment at Bureau expense. It simply authorizes compensation coverage when an injury results from a medical procedure performed under the circumstances described herein. Coverage for deleterious effects does not extend beyond the immediate service contemplated by P.L. [79]-658; therefore it does not follow the employee when he is referred for outside medical services or obtains them on his own initiative in connection with a personal health problem.

John J. Newman
Assistant Director - FEC

DATED: March 3, 1966

Distribution List No. 7 (9/1/65)

FECA PROGRAM MEMORANDUM - NO. 43

SUBJECT: SECTION 40(b), FECA
GAGE READERS WORKING FOR CORPS OF ENGINEERS

The Corps of Engineers contracts with individuals to perform part-time service making daily readings of water-level and other gages at or near their homes, recording the readings, and making daily and/or periodic reports to nearby Federal establishments by mail and/or telephone. Performance of this duty usually consumes only a very few minutes each day.

These individuals and the Corps of Engineers execute contracts whereby the individuals agree to make the

readings at an agreed rate per reading. The Corps of Engineers provides the needed instruments, instructions, and material; and decides the frequency of the readings.

We have concluded these gage readers are "employees" within the meaning of Section 40(b) of the FECA when they are reading the gages and doing all things which may properly be regarded as within the ambit of their work for the Corps of Engineers. A copy of the contract between the individual and the Corps of Engineers should be required in all cases.

In many of these cases the more difficult question to decide will be whether the injury occurred while the individual was in the performance of duty. This will require special attention. The pay rate will be determined by Section 12(c)(2)(C) since the work does not provide full time employment.

John J. Newman
Assistant Director, FEC

DATED: April 22, 1966

Distribution: List No. 7 (9/1/65)

FECA PROGRAM MEMORANDUM - NO. 44

SUBJECT: POLICE CADETS EMPLOYED BY THE POLICE DEPARTMENT OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA

Employees of the Government of the District of Columbia have the protection of the FECA by reason of the Act of Congress approved July 11, 1919, as amended.

The D. C. Government employs male youths, ages 17« to 19 years, as police cadets to provide (1) the Metropolitan Police Department with a source of supply of younger and better trained men who desire a permanent career in police work, and (2) a source of employees to relieve police officers of clerical and similar type non-police assignments. The cadets are appointed from certificates of eligibles furnished by the U. S. Civil Service Commission and are subject to the provisions of the Civil Service Retirement Act. They are not subject to the provisions of the Policemen and Firemen's Retirement and Disability Act.

It has been determined these police cadets are employees of the Government of the District of Columbia. Therefore, they are covered by the FECA.

Since police cadets are minors and employed in learners' capacities Section 6(d)(1) will be applicable if there is prolonged or permanent disability.

John J. Newman
Assistant Director, FEC

DATED: April 22, 1966

Distribution: List No. 7 (9/1/65)

FECA PROGRAM MEMORANDUM - NO. 45

SUBJECT: SECTION 40(b), FECA
YOUTH OPPORTUNITY CAMPAIGN
YOUTH OPPORTUNITY BACK-TO-SCHOOL DRIVE

On May 23, 1965, the President launched his nationwide Youth Opportunity Campaign to provide temporary summer jobs for youths who are 16 through 21 years of age. The President asked for participation by each of the states, all cities with a population of 10,000, and private employers which employ 10 or more workers. He also directed the Federal departments and agencies to provide meaningful work or training opportunities for boys and girls who need these opportunities because of economic or educational disadvantages.

On August 21, 1965, the President announced his nationwide Youth Opportunity Back-to-School Drive. The President asked the Federal agencies, along with other employers in the private and public sectors, to influence youths to complete their education. Under this Drive the Federal departments and agencies may provide part-time or intermittent employment to needy or disadvantaged youths, ages 16 through 21, while they are attending school.

No specific legislation was enacted to implement these programs. Individuals employed by the Federal establishments under these two programs are "employees" within the meaning of section 40(b), FECA. The agencies should report their injuries to BEC in the usual manner. Likewise, claims for these people will be adjudicated in the respective BEC district offices in the same manner as other Federal employees.

The employment of these individuals is of a seasonal, part-time, or intermittent character. Therefore, if the total disability exceeds 90 calendar days or there is permanent disability, the pay rate for compensation purposes will be computed in keeping with section 12(c)(2)(C).

Individuals employed under these programs are usually minors or may be working learners' capacities. Consideration should be given to the possible application of section 6(d)(1) in any case where there is prolonged or permanent disability.

These employees, as indicated in paragraph three, are not covered by reason of any special enactment but by reason of the general application of the law. Youths and others who come under programs arising out of special enactments have been or will be dealt with in separate memoranda.

Clarification should be requested of the official superior if the reports fail to clearly show which particular program is involved.

John J. Newman
Assistant Director,FEC

PROMEMO

DATED: June 8, 1966

Distribution: List No. 7 (9/1/65)

FECA PROGRAM MEMORANDUM - NO. 46

CANCELED PER FECA BULLETIN 6-75

FECA PROGRAM MEMORANDUM - NO. 47

SUBJECT: SECTION 40(b), FECA
MEMBERS OF THE NAVAL RESEARCH ADVISORY COMMITTEE

The Act of Congress approved August 1, 1946 established the Office of Naval Research within the Department of the Navy. Section 4 of this legislation authorized the Secretary of the Navy to establish a Naval Research Advisory Committee. The Committee consists of not more than 15 civilians preeminent in the fields of science, research and development work.

The Committee meets at such times as the Secretary specifies to consult with and advise the Chief of Naval Operations and the Chief of Naval Research. Each member of the Committee is entitled to compensation of $50 for each day or part of a day he attends any regularly called meeting of the Committee and to reimbursement for all travel expenses incident to this attendance.

The Bureau has concluded these Committee members are "employees" within the meaning of Section 40(b) of the FECA when they are (1) attending a regularly called meeting, or (2) traveling to and from regularly called meetings. A copy of the member's appointment should be required in all cases. A copy of the applicable travel orders should be required in any case where the injury is sustained while enroute to or from a meeting.

There may be times when a Committee member is working on Committee matters without compensation even though he is not attending a regularly called meeting or traveling to or from such meeting. The determination of coverage in these situations can only be resolved on an individual case basis giving consideration to the attendant circumstances in each case. In these situations the reporting establishment should be asked to submit all pertinent facts relating to the status of the Committee member at the time of the injury. Cases in this category should be sent to this office for a decision after the facts have been adequately developed.

The pay rate will be determined by section 12(c)(2)(C) since the work does not provide full time employment.

John J. Newman
Assistant Director, FEC

DATED: December 28, 1966

PROMEMO

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 48

SUBJECT: 5 USC 8114
PREMIUM PAY RECEIVED FOR CERTAIN TYPES OF WORK
INCLUDED IN PAY RATE FOR COMPENSATION PURPOSES

FECA Program Memorandum No. 5 transmitted a copy of Section 208(a) of P. L. 763, 83rd Congress, approved September 1, 1954. This legislation now appears as 5 USC 5545 (c)(1). The program Memorandum also stated premium pay provided by this legislation should be included in the pay rate for compensation purposes in those cases in which it is received.

Section 1 of P. L. 89-737, approved November 2, 1966, amends 5 USC 8114(e) by striking out "is included" and inserting in lieu thereof "and premium pay under section 5545 (c)(1) of this title are included." 5 USC 8114(e) now reads:

> **"The value of subsistence and quarters, and of any other form of remuneration in kind for services if its value can be estimated in money, and premium pay under section 5545 (c)(1) of this title are included as part of the pay, but account is not taken of--**
>
> **(1) overtime pay;**
> **(2) additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances; or**
> **(3) bonus or premium pay for extraordinary service including bonus or pay for particularly hazardous service in time of war."**

The underscoring shows the effect of the amendment. This does not change the decision stated in FECA Program Memorandum No. 5. It merely gives statutory effect to the Bureau's administrative determination.

John J. Newman
Assistant Director, FEC

DATED: April 20, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 49

SUBJECT: "ROUNDING OUT" -- POLICY

PROMEMO

Schedule Awards (5 USC 8107)

The percentage forming the final basis for the award should be rounded out to the nearest whole point. By final basis is meant the percentage decided upon by the appropriate claims official after consideration by him of whatever factual and medical reports, recommendations and advices he deems appropriate or necessary under the circumstances of the case.

Accordingly, 42 1/3% would become 42%. 42« or 42 2/3 would become 43%.

Awards for Loss of Earning Capacity (5 USC 8106, 8115)

An earning capacity is a dollar and cents determination. There are times, --when using the Shadrick formula for example, -- when the loss of earning capacity is translated into a percentage figure for purposes of administrative facility. That percentage figure should be rounded out to the nearest whole point in the same manner as illustrated above for schedule awards.

Summarization:

With respect to the percentages described, the intent is to limit the extent of rounding out to a maximum of « of 1%.

John J. Newman
Assistant Director, FEC

DATED: May 1, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 50

SUBJECT: SECTION 10, FECA
REINSTATEMENT OF COMPENSATION FOR A STUDENT

Section 10(G) provides compensation for a child, brother, sister, or grandchild may be continued after he reaches age 18 for so long as he continues to be a student or until he marries. The statute is silent whether compensation may be reinstated where he quits school between ages 18 and 23 and later returns to school.

The Bureau has concluded in these situations that compensation may be reinstated when a student returns to school before he reaches age 23 or before he has completed 4 years of education beyond the high school level.

John J. Newman
Assistant Director, FEC

DATED: July 14, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 51

SUBJECT: SECTION 13, FECA AMENDMENTS OF 1966
SECTION 43, FECA COST-OF-LIVING ADJUSTMENTS

Section 13 of the 1966 Amendments authorizes an increase of compensation payable on account of disability or death which occurred before October 1, 1965. The statute is silent where the awards will be increased in those death cases where the injury occurred before October 1, 1965 and the death occurred after that date. In these situations the Bureau has concluded the compensation for death should be increased.

Section 43 of the FECA, as amended by the 1966 Amendments, authorizes future increases of compensation payable on account of disability or death which occurred more than one year before the effective date of the increase. Here too the statute is silent whether the awards will be increased in those death cases where the injury occurred before the cut-off date and the death occurred after that date. Compensation for death may be increased in these situations.

John J. Newman
Assistant Director, FEC

DATED: August 3, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 52

SUBJECT: SECTION 9, FECA EXPENSES INCURRED IN OBTAINING
PERMISSION TO EXAMINE AND/OR TREAT MINORS

It has been determined that expenses incurred in obtaining parental/guardian permission to examine or treat minors will be reimbursable from the Compensation Fund. Ordinarily the required permission is secured by the claimant, employing establishment or examining facility. Expense is occasionally incurred when the parent or guardian is not immediately available for the signed consent, and telegrams and/or witnessed telephone calls are made.

Federal establishments, other than military, may submit their claims for reimbursement on SF-1081; military establishments on SF-1080, and claimants on SF-1012 as part of the travel or incidental expenses incurred.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: December 13, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 53

SUBJECT: SECTION 40(b), FECA
GRATUITOUS ENTERTAINERS WITH THE ARMED FORCES
PROFESSIONAL ENTERTAINMENT PROGRAM OVERSEAS (AFPEP)

Gratuitous entertainers on tour with the Armed Forces Professional Entertainment Program Overseas receive no pay, however, they do receive transportation, food and billeting expenses. These expenses are paid from appropriated funds contributed by all military services and administered by the Department of the Army. The Policies and Procedures of the Armed Forces Professional Entertainment Program Overseas are set forth in DOD Instruction 1330.13, dated August 20, 1959, and relate to both paid and gratuitous entertainers. Pursuant to this Instruction an "Invitational Travel Order" is prepared to cover the gratuitous entertainers when such are involved, and an "Agreement" setting forth the conditions of service, is signed by each individual gratuitous entertainer.

The Bureau has concluded that gratuitous entertainers would be "employees" for the purposes of the FECA and, while on tour with the Armed Forces Professional Entertainment Program Overseas, would be entitled to benefits under the Act in the event of death or disability.

The pay rate will be determined by Section 12(c) (2)(C) or (D) since the work does not provide full time employment.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: December 13, 1967

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 54

SUBJECT: 5 U.S.C. 8101 (1) [Section 40(b), FECA]
WORK-STUDY PROGRAMS FOR VOCATIONAL EDUCATION STUDENTS
(SECTION 13 OF P.L. 88-210--VOCATIONAL EDUCATION ACT

PROMEMO

OF 1963)

The Vocational Education Act of 1963 was approved on December 18, 1963. Its purpose is to authorize Federal grants to States to assist them to improve and develop vocational education programs and to provide part-time employment for youths who need the earnings to continue their vocational training.

Section 13 of the Act authorizes States to provide work-study programs including employment for full-time students in a vocational education program. The students must be at least age 15 and less than 21. A student is not to be employed for more than 15 hours in any week in which his classes are in session. Further, the employment shall be for "the local educational agency or some other public agency or institution." Federal establishments may provide employment for these students.

Section 13 also provides that students employed in work-study programs shall not by reason of such employment be deemed employees of the United States. Despite this prohibition the possibility of coverage for benefits of the FECA exists when the employment is in a Federal agency.

The Bureau has found it cannot decide generally whether students engaged in work-study programs are "employees" within the meaning of 5 U.S.C. 8101 (1) when assigned to a Federal establishment. This question will therefore be determined on an individual case basis following referral of the case to the central office.

It is expected that the Federal establishments will report these injuries to BEC in the same manner as for regular Federal employees. Cases in this category will be developed but not adjudicated in the respective district offices having FECA responsibilities.

In each case the district office will obtain (1) copies of the agreements or arrangements between the Federal establishment and the student and the State agency under which the work is performed and (2) a statement from the Federal establishment showing the source of pay, the job site, the kind of work performed by the student, whether the work performed is similar to that normally performed by the employees of the Federal establishment, the extent of the control the Federal establishment exercises over the student, the right of the Federal establishment to exercise such control, and whether the Federal establishment benefited from the student's services. After this information is obtained, the case file will be referred to the central office and the "employee" question will be determined in the light of the employer-employee relationship which exists as that relationship is defined in the general principles of law governing workmen's compensation.

The pay rate will be determined by 5 U.S.C. 8114 (d)(3) since the work does not provide full-time employment.

These individuals will be minors or may be working in learners' capacities. Consideration will be given to the possible application of 5 U.S.C. 8113 (a) in any case where there is prolonged or permanent disability.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: January 23, 1968

Distribution: List No. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 55

SUBJECT: PUBLIC LAW 89-301 - SEVERANCE PAY

Section 9 of the Federal Employees' Salary Act of 1965, Public Law 89-301, approved October 29, 1965, created the right to severance pay for Federal employees who are involuntarily separated from their employment.

Section 9(b)(5) provides that the right to severance pay does not apply to --

> **"An officer or employee who, at the time of separation from the service, is receiving compensation under the Federal Employees' Compensation Act, as amended, except one receiving this compensation concurrently with salary or on account of the death of another person."**

It has been determined that the language "concurrently with salary" permits payment of severance pay to those persons who, at the time of separation, were being paid compensation for loss in wage-earning capacity concurrently with their Federal salary. Also, severance pay may be received by persons being paid compensation in the form of a scheduled award -- provided they were receiving their Federal salary at the time of separation.

Since an unauthorized dual payment will occur in all other instances where compensation for disability is paid concurrently with severance pay, care should be taken to clarify the severance pay status of all beneficiaries who are involuntarily separated from their employment. This should be done immediately upon receipt of information that a Bureau beneficiary (or claimant who may likely become a beneficiary) has been or will be involuntarily separated from his Federal employment.

It should be noted that the primary responsibility for prevention of dual benefits is upon the employing agency and the Bureau need not require clarification on severance pay status in any instance other than when information is received regarding an involuntary separation.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: January 24, 1968

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 56

SUBJECT: 5 U.S.C. 8114 [SECTION 12, FECA]
EXTRA COMPENSATION FOR SUNDAY AND HOLIDAYS TO BE INCLUDED IN PAY RATE OF REGULAR EMPLOYEES OF POSTAL FIELD SERVICE FOR

PROMEMO

COMPENSATION PURPOSES

The Federal Employees Salary Act of 1965, P. L. 89-301, approved October 29, 1965, provides in part for employees of the Postal Field Service as follows:

> **"Each regular employee whose regular work schedule includes an eight-hour period of service any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday, shall be paid extra compensation at the rate of 25 per centum of his hourly rate of basic compensation for each hour of work performed during that eight hour period of service."**

Pursuant to Section 5 of P. L. 89-301 both annual rate regular employees and hourly rate regular employees of the Postal Field Service shall normally work a week of five eight-hour days. But any regular employee, regardless of whether he had already completed a normal work week at the time he was ordered to work on a holiday, will be paid extra compensation at the rate of 100 per centum of the hourly rate of basic compensation for his level and step for such holiday work. This is exclusive of Christmas Day. For work performed on Christmas Day, extra compensation will paid at the rate of 150 per centum.

Thus, if the Bureau is informed that a regular employee of the Postal Field Service has received extra compensation for Sunday or holiday work, such extra compensation shall be included in the pay rate for compensation purposes.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: January 26, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 57

SUBJECT: 5 U.S.C. 8101 (1) [SECTION 40(b), FECA]
NEIGHBORHOOD YOUTH CORPS
(TITLE I PART B OF P.L. 88-452 - ECONOMIC OPPORTUNITY ACT OF 1964)

The purpose of Title I Part B of P. L. 88-452 is to provide useful work experience opportunities for unemployed young men and women (enrollees), who have reached age 16 but have not reached age 22, through participation in State and community work-training programs, so as to increase their employability or to facilitate their education.

This program is known as the Neighborhood Youth Corps. It is administered by the Department of labor which assists and cooperates with State and local agencies and private nonprofit organizations (sponsors) in developing appropriate programs. Enrollees may be employed on publicly owned and operated facilities and

projects.

Unless specifically meeting the conditions in the following paragraph, enrollees are not considered to be employees of the United States within the meaning of 5 U.S.C. 8101.

The Department has ruled that sponsors may arrange for enrollees to be employed by Federal establishments only if (1) enrollees perform work of the type appropriate for performance by Federal employees and (2) they are under the supervision of Federal employees. On this basis the Bureau has concluded an enrollee has status as an "employee" within the meaning of 5 U.S.C. 8101 when working at a Federal establishment.

Because all other enrollees of the Corps are not employees of the United States, care must be exercised to insure that the above conditions are certified by officials of the Federal establishment concerned. The Bureau's official report forms will normally provide the basis for this certification.

In most cases the pay rate will be determined by 5 U.S.C. 8114 (d)(3) [Section 12 (c)(2)(C)] since the work does not usually provide full time employment.

Most of these individuals will be minors or may be working in learners' capacities. Consideration should be given to possible application of 5 U.S.C 8113 [Section 6 (d)(1)] in any case where there is prolonged or permanent disability.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: February 15, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 58

SUBJECT: 5 U.S.C. 8104 [SECTION 9 (b) FECA] and
5 U.S.C. 8111 (b) [SECTION 6 (b)(2) FECA]
FURNISHING REHABILITATIONS SERVICES TO BENEFICIARIES
OF THE WAR HAZARDS COMPENSATION ACT

Beneficiaries receiving disability compensation pursuant to Section 101 (a) of the War Hazards Compensation Act are entitled to the vocational rehabilitation services provided by 5 U.S.C. 8104, but are not entitled to the additional compensation provided by 5 U.S.C. 8111 (b) for maintenance while undergoing vocational rehabilitation.

Section 102(a) of the War Hazards Compensation Act adopts the FECA as the measure of medical benefits; and vocational rehabilitation is considered a medical benefits under the FECA. This same section expressly adopts the provisions of the Longshoremen's Act as the measure of payments. Consequently, beneficiaries receiving disability compensation under section 101(a) of the War Hazards Compensation Act are precluded from receiving maintenance expenses under the FECA.

This particular memorandum applies to a rather small group of cases presently located in the district office in Washington, D. C.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: February 15, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 59

SUBJECT: 5 U.S.C. 8101 (4) [SECTION 40 (f) FECA]

The purpose of this memorandum is to specifically bring to your attention an interpretation of the phrase "at the time compensable disability recurs" contained in 5 U.S.C. 8101 (4) and as enunciated in the second decision of the ECAB in the case of Johnny A. Muro, Docket No. 67-205 issued October 9, 1967.* This interpretation would have a practical application in those cases where the six month requirement of regular full-time employment with the United States had been satisfied, and where the work stoppage was due to an increase of injury-related disability.

5 U.S.C. 8101 (4) provides, in part:

> **"The term 'monthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater ...."**

The Board has interpreted the phrase "at the time compensable disability recurs" as follows:

> **"The Board finds an increase in disability for work due to an employment injury is a recurrence of disability under this phrase, such as an increase from partial disability to total disability, as occurred here. On the other hand, a decrease in disability, as from total to partial is, of course, not a recurrence of disability. Thus, under the third alternative provision of 5 U.S.C. 8101 (4), the monthly pay rate at the time of an increase in injury-related disability for work is to be used in computing appellant's compensation."**

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: February 15, 1968

Distribution List No. 7

Enclosure to FECA Bulletin No. 7-76

***Note: Your attention is also directed to a careful reading of the first Johnny A. Muro decision, Docket No.**

65-239, issued April 27, 1966 andcondensed in 17 ECAB 537. In this decision the ECAB construed the phrase "resumes regular full-time employment" as meaning the first return to work, which under the specific circumstances, constitutes resumption of regular full-time employment. It was pointed out that the employment with the United States during the required six months need not have been "continuous". The word "resume" was held to mean return to; "regular" to mean established and not fictitious, odd lot or sheltered; and "full-time" as meaning other than part-time. It was also held that the six month proviso pertained only to the first recurrence of disability, and was not a requirement with regard to subsequent recurrence.

Of additional significant importance is the Board's decision that the use of a higher recurrent pay rate determined in accordance with the provisions of 5 U.S.C. 8101 (4) will not change the established principles of determining a wage-earning capacity as enunciated in the Albert C. Shadrick decision, 5 ECAB 376. The percentage of loss of wage-earning capacity with the current value of the job he held at the time of injury. Compensation for partial disability should then be computed by applying that percentage to the monthly pay defined in 5 U.S.C. 8101 (4) as construed in the decision of April 27, 1966.

ADDENDUM:

The payment of a schedule award after a period allowed for the attainment of maximum improvement does not denote a recurrence of compensable disability. The pay rate to be used in the payment of schedule awards is the greatest of the following: (1) the pay rate at the time of injury; (2) the pay rate at the time disability begins; or (3) the pay rate at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States.

REGINALD J. JOHNSON
Acting Associate Director for
Federal Employees' Compensation

Dated: February 11, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 60

SUBJECT: 5 U.S.C. 8107(c)(21) [SECTION 5(a)(21)]
FORM CA-4B, APPLICATION FOR AWARD FOR DISFIGUREMENT

It has been deetermined that reasonable photographic expense incurred in filing Form CA-4B, Application for Award for Disfigurement, will be reimbursable from the compensation Fund. Heretofore, the cost of the required two photographic prints was paid by the claimant.

Payment for reasonable photographic expense may be made direct to the photographer upon receipt of an itemized bill, in duplicate, on his billhead stationery. If the claimant paid the photographer, reimbursement may be claimed by submitting an itemized receipted bill, in duplicate, marked "paid."

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: February 19, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 61

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b) FECA]
CONTRACT PHYSICIANS AND NURSES EMPLOYED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

The Public Health Service of the Department of Health, Education, and Welfare employs physicians and nurses on a nationwide basis who work under contract. They perform work on a relatively regular basis, and are paid directly out of Federal funds. While the amount of supervisory control exercised by the employing Government agency may be minimal, the right to exercise supervisory control definitely exists.

It has been determined that contract physicians and nurses employed by the Public Health Service of the Department of Health, Education, and Welfare are civilian employees of the United States within the meaning of 5 U.S.C. 8101(1). They are therefore entitled to the benefits of the FECA for injuries sustained in the performance of duty.

Care should be exercised to insure that the individual under contract is not a consultant or performs work indicative of any other type of independent contractor. This means that the individual must perform a service normally expected of an employee and that it is shown that all of the conditions in the first paragraph have been met.

Since the work may not provide full-time employment, it will be necessary to determine the pay rate under the provisions of 5 U.S.C. 8114(d)(3).

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: March 7, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 62

SUBJECT: 5 U.S.C. 8101(1)(B) [SECTION 40(b)(4)]
NON-SALARIED VOLUNTEER TRAINEE PROBATION OFFICERS

PROMEMO

It has been determined that non-salaried volunteer trainee probation officers, who are granted appointments in United States District Courts, are employees of the United States within the meaning of 5 U.S.C. 8101(1)(B).

These appointments are usually granted to students in a graduate university program who are completing their professional training for careers in social work. Although they do not receive a salary they do receive their travel expenses. Some of the typical duties performed by these volunteer trainee officers are: visits to police departments to verify police records on offenders referred to the probation office by the court or special investigations; visits to other courts such as the juvenile court or criminal court to view prior records on such offenders; visits to schools or social agencies to secure information about school adjustments, medical care, or other similar services; visits to the homes of parolees and probationers and to their prospective employers; pre-parolee [sic] investigations.

The duties of a non-salaried trainee probation officer are similar to those performed by compensated probation officers and found in 18 U.S.C. 3655--thereby meeting the first requirement for "employee" coverage of 5 U.S.C. 8101(1)(B). The second requirement is satisfied by 18 U.S.C. 3654, which authorizes the appointment of non-salaried probation officers and also in U.S.C. 5703(c) which authorizes pay of travel and/or other expense of individuals serving the United States gratuitously.

The pay rate will be determined by 5 U.S.C. 8114(d)(3) or (4) since the work does not provide full-time employment and no salary is paid.

These individuals may be minors and will be working in learners' capacities. Consideration will be given to the possible application of 5 U.S.C. 8113(a) in any case where there is a prolonged or permanent disability.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: March 7, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 63

SUBJECT: TEMPORARY MEMBERS OF THE COAST GUARD RESERVE AND AUXILIARY MEMBERS

Questions occasionally arise concerning coverage under the Federal Employees' Compensation Act for temporary members of the Coast Guard Reserve and Auxiliary members.

Temporary members of the Coast Guard Reserve and Auxiliary members have the protection of the Federal Employees' Compensation Act by reason of P.L. 77-8 of February 9, 1941 and the computation of their monthly pay is fixed, not by any provision of the Federal Employees' Compensation Act, but by 14 U.S.C. 760(a).

Under the provisions of 14 U.S.C. 760(a) the pay rate for compensation was deemed to be $150 per month. Public Law 84-955, August 3, 1956, provided that such persons shall be deemed to have a monthly pay of $300. Thus compensation in these cases should be computed on a monthly pay of $300 beginning September 1, 1956.

Temporary members of the Coast Guard Reserve and Auxiliary members are not entitled to have their compensation payments increased by the amendments made to the Compensation Act by P.L. 81-357, October 14, 1949; or by P.L. 86-767, September 13, 1960; or by P.L. 89-488, July 4, 1966.

HERBERT A. DOYLE, JR.
Assistant Director, FEC

DATED: March 7, 1968

DISTRIBUTION LIST NO. 7

ADDENDUM: SEE REVERSE [BELOW]

Encl. to FECA Bulletin No. 47-75

ADDENDUM:

Public Law 93-283, May 14, 1974, provided that temporary members of the Coast Guard Reserve and Auxiliary members shall be deemed to have a monthly pay of $600. Thus, compensation in these cases should be computed on a monthly pay of $600, beginning May 14, 1974.

The performance of a specific duty as the term is used in the Act (P.L. 93-283) includes time engaged in traveling back and forth between the place of assigned duty and the permanent residence of an Auxiliary member.

There is no change in compensation because of P.L. 93-416, approved September 7, 1974 (The 1974 Amendments to the FECA).

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 3, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 64

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b), FECA]
GRATUITOUS SPORTS CLINIC PERFORMERS WITH THE ARMED FORCES OVERSEAS SPORTS CLINIC PROGRAM

PROMEMO

Gratuitous Sports Clinic Performers with the Armed Forces Overseas sports Clinic Program are generally among the national leaders in their respective fields. Such persons receive no salary but are provided transportation and a nominal food and billeting allowance. While the program itself is supported through nonappropriated funds, the Nonappropriated Fund Instrumentalities Act is considered to be applicable only to employees paid from nonappropriated funds [see 5 U.S.C. 2105(e)]. As noted above, these performers are volunteers and are therefore paid no salary.

As is the case with gratuitous entertainers with the Armed Forces, [see Program Memorandum No. 53 of December 13, 1967] an "Invitational Travel Order" is prepared to cover the Sports Clinic performers, and an "Agreement" setting forth the conditions of service, is signed by each individual performer.

The Bureau has concluded that Gratuitous Sports Clinic Performers would be "employees" within the purview of 5 U.S.C. 8101(1)(B) and, while on tour with the Armed Forces Overseas Sports Clinic Program, would be entitled to benefits under the Act in the event of death or disability.

The pay rate will be determined by 5 U.S.C. 8114(d)(3) or (4) since the work does not provide full-time employment.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: March 12, 1968

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 65

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b), FECA]
NATIONAL TEACHER CORPS

Title V of P. L. 89-329, approved November 8, 1965, established in the Department of Health, Education, and Welfare, Office of Education, a National Teacher Corps in order to strengthen the educational opportunities available to children in areas having concentrations of low income families and to encourage colleges and universities to broaden their programs of teacher preparation. Under this program the Teacher Corps is to attract and train qualified teachers as well as inexperienced teacher-interns who will be made available to local educational agencies for teaching and in-service training. Under some circumstances a member of the Teacher Corps may undergo a period of not more than three months of training before he undertakes his teaching duties.

Section 515(b) of Title V of P. L. 89-329 provides that such members shall, for the purposes of the administration of the Federal Employees' Compensation Act, be deemed to be civil employees of the United States within the meaning of the term "employee" as defined in 5 U.S.C. 8101(1), and the provisions of the Compensation Act shall apply except for the following:

(A)The term "performance of duty" in the Compensation Act shall not include any act of a member of the Teacher corps while on authorized leave or while absent from his assigned post of duty, except while participating in an activity authorized by or under the direction or supervision of the commissioner of education; and

(B)In computing compensation benefits for disability or death under the Compensation Act, the monthly pay or a member of the Teacher Corps shall be deemed to be his actual pay or that received under the entrance salary for Grade 6 of the General Schedule of the Classification Act of 1949, whichever is greater.

Members of the Teacher Corps are deemed to be employees of the Government for the purpose of the Federal tort claims provisions of Title 28, United States Code.

In the case of an inexperienced teacher-intern who sustains prolonged or permanent disability, consideration should be given to the possible application of 5 U.S.C. 8113(a).

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: March 26, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 66

SUBJECT: 5 U.S.C. 8101 (1)(B) [SECTION 40(b) FECA]
SAVINGS BONDS PROGRAM VOLUNTEERS, TREASURY DEPARTMENT

The Savings Bonds Division of the Treasury Department uses various types of volunteer workers at the National, State and local levels. All volunteers receive an official appointment letter or certificate. The following is a brief description of each type of volunteer:

1.Industrial Task Force Volunteers - This force consists of individuals on loan to the Savings Bonds Division from their regular private industry employers. The employers continue to pay the salary and expenses of the volunteers, notwithstanding the fact that the volunteers work with the Savings Bonds Division of the Treasury Department.

Task Force volunteers are recruited throughout the country, by Savings Bonds State Offices from corporations, banks, national organizations and other similar sources whose employers agree to their serving with the Division for a specific length of time to assist in current year Savings Bonds campaigns. They receive no salary or travel expenses from the Savings Bonds Division.

2.County Chairmen - These are outstanding citizens who are well and favorably known within the geographical area of their assignment. The Chairmen have a wide and respected acquaintanceship with leaders in all fields of endeavor within their county.

Letters of authority to travel on Savings Bonds business are issued infrequently on an "as requested" basis, to these persons.

3.<u>State Chairmen</u> - Each state has a State Chairman. This is a top level volunteer--banker, industrialist, executive or professional man--who is well and favorably known throughout the state. He is available for advice and counsel to the State Director and his staff. He uses the prestige of his name and position to help the State Directors and his staff [sic] make contacts or open doors with top management and other influential leaders in important situations. He serves without compensation.

State Chairmen are appointed by the Secretary of the Treasury for a two-year term. They may be reappointed. They are issued fiscal year travel authority letters for travel within the state. Letters of authority to travel outside the state are issued as required.

4.<u>National Committee Chairmen</u> - These Chairmen are selected from nationally known leaders in the fields of industry, agriculture, education, media and civic and fraternal organizations. They and members of their committees advise, counsel and assist in carrying out the Savings Bonds Program in their particular field of endeavor.
Chairmen are appointed through the National Office of the Division.

Letters of authority to travel on Savings Bonds business throughout the country are issued on an "as required" basis only.

It has been determined that all four categories of these volunteers are civilian employees of the United States within the meaning of 5 U.S.C. 8101 (1)(B).

Care should be exercised, however, to insure that the individual was injured while performing duties related to his volunteer assignment in the Savings Bonds Program. When such injury is reported to the Bureau, the Treasury has been requested to submit (1) a copy of the volunteer's official appointment letter or certificate and (2) a statement from an appropriate official informing whether the volunteer was injured while in the performance of his duties in the Savings Bonds Program. If not initially received this information should be requested from the Treasury. Clarification of the circumstances surrounding an injury must also be requested if there is any doubt concerning whether the volunteer was actually performing duties in the Savings Bonds Program.

Since these volunteers work without compensation and the work is not full time, the pay rate will be determined by 5 U.S.C. 8114(d)(3) or (4).

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: April 24, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 67

PROMEMO

SUBJECT: 5 U.S.C. 8101(1)(A) [SECTION 40(b)(1)]
EMPLOYEES PROCURED BY STEAMSHIP COMPANIES ACTING AS GENERAL AGENTS OF THE UNITED STATES

Under "service agreements" the United States contracts with steamship companies to be "General Agents" for vessels owned by the United States. Under this type agreement the General Agent takes care of the shoreside business of the ship but has no part in the actual management or navigation of the vessel. In performing its services, the General Agent relies upon the instruction and direction of the Director, National Shipping Authority of the Maritime Administration, U. S. Department of Commerce.

The United States retains possession and management of the vessel and control over the ship's officers and crew to the exclusion of the General Agent. The General Agent is authorized to procure the Master of the Ship subject to the approval of the United States. The Master is an agent and employee of the United States and exercises full control, responsibility and authority with respect to manning, navigation and management of the vessel.

The General Agent also procures the officers and men required by the Master to fill the complement of the vessel through the usual channels upon the terms and conditions customarily prevailing in the services in which the vessels will be operated. The officers and members of the crew and hired by the Master of the Ship and are subject only to the orders of the Master.

The Bureau has determined that persons procured by the Alaska Steamship Company to man the vessels serviced by them under a "General Agency Agreement of March 19, 1951" are employees of the United States within the meaning of 5 U.S.C. 8101(1)(A). In addition, the Bureau has determined that persons procured by other steamship companies acting as General Agents under similar service agreements are also employees of the United States.

Care must be exercised to insure that the United States has actually contracted with a specific company to be a General Agent. The National Shipping Authority of the Maritime Administration should be contacted in any instance where there is doubt that an applicable service agreement exists.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: May 2, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 68

SUBJECT: 5 U.S.C. 8114 [SECTION 12, FECA]
EXTRA DUTY PAY FOR IMMIGRATION OFFICERS/INSPECTORS

Immigration and naturalization officers/inspectors, at GS-12 or below, are eligible to receive certain extra duty pay in accordance with the Act of 1931 (8 U.S.C. 1353). This pay is only granted for extra work

performed between the hours of 5:00 p.m. and 8:00 a.m., when such work is not a part of the regular shift of the employee, and for all work performed on Sundays and holidays. Any extra work performed on weekdays between 8:00 a.m. and 5:00 p.m. is considered overtime and is not paid for under the provisions of the 1931 Act but rather under the Federal Employees Pay Act of 1945 (5 U.S.C. 5542).

The definition of overtime pay for the purposes of the Federal Employees' Compensation Act, insofar as here pertinent, limits the term to include only those payments for hours in excess of a basic limit of work time, as observed by the establishment in which the employee is employed. This does not preclude the inclusion of extra payments for assigned work outside the officially scheduled duty hours. Authorized payments made without regard to excessivity do not constitute overtime pay excludable from the computation of FECA benefits.

The payments under the 1931 Act do not meet the Federal Employees' Compensation Act test of payments for hours "in excess of" a basic work period observed by the employing establishment; rather, they constitute payments for normal work assignments outside of scheduled hours which these employees are expected to perform as a part of their regular duties. They are therefore not excludable as overtime pay for FECA purposes.

The Immigration and Naturalization Service has been requested to supply information concerning payments under the 1931 Act in appropriate cases. Such information will only be provided when Form CA-4 is submitted to the Bureau.

All pay information for employees of the Immigration and Naturalization Service is only provided through the four Regional Offices of the Service. If the claims examiner finds it necessary to obtain pay information, the letter should be addressed to the Regional Commissioner (Attention: Finance Branch) U.S. Department of Justice, Immigration and Naturalization Service. The following is a list of the addresses of the Regional Offices and the states which come under their jurisdiction:

Regional Office: Federal Building, Burlington
Vermont 05402
Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont;

Regional Office: 790 South Cleveland Avenue, St. Paul,
Minnesota 55116
Alaska, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington, Wisconsin;

Regional Office: Federal Building, Room 6226,
400 North 8th St.
Richmond, Virginia 23240
Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, District of Columbia, Puerto Rico, Virgin Islands;

Regional Office: Terminal Island, San Pedro
California 90731
Arizona, California, Colorado, Hawaii, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming.

Herbert A. Doyle, Jr.
Assistant Director, FEC

DATED: May 7, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 69

(See Program Memorandum Nos. 166 and 180.)

SUBJECT: 5 U.S.C. 8108 [SECTION 5(c) FECA]
PAYMENT OF A SCHEDULED AWARD WHERE PRIOR, PERMANENT DISABILITY OF THE SAME MEMBER OR FUNCTION EXISTS

Recent inquiries indicate that it is necessary to reiterate the Bureau's general policy concerning reduction of compensation for subsequent injury to the same member or function or for disfigurement.

It has been and continues to be the Bureau's policy to include in the payment of a scheduled award, any preexisting permanent disability of the same member or function. There are, however, two exceptions; (1) where the Bureau has paid or will pay a scheduled award under 5 U.S.C. 8107 on account of an earlier injury, and (2) where the Veterans Administration has paid or is paying an award for a preexisting disability. These are the only exceptions believed to be authorized by the provisions of 5 U.S.C. 8108.

In the first exception, the period of compensation paid or payable for the preexisting disability will be deducted from the period of compensation found payable for the combined loss or loss of use. In the second exception, credit should be taken for the percentage of loss or loss of use for which the Veterans Administration has paid or is making payments.

Thus, in appropriate instances the Bureau must contact the Veterans Administration to determine the extent of the preexisting disability involved. The Veterans Administration must also be notified of the Bureau's determination to insure that they do not increase their percentage loss--thereby creating the possibility that the Bureau and the Veterans Administration would be paying for the same injury and disability.

It is also necessary to comment on those injury cases involving a preexisting 100 percent loss or loss of use of a member or function of the body. In such cases, a scheduled award is not necessarily ruled out. Cases of this type should be developed to determine (1) the prior usefulness of the member or function and (2) whether the injury in Federal employment has diminished any such usefulness in whole or in part.

When the question of scheduled award entitlement arises in cases involving what appears to be a prior 100 percent loss or loss of use, the case should be referred to the central office for review and decision after all necessary factual and medical evidence has been obtained.

Herbert A. Doyle, Jr.
Assistant Director, FEC

PROMEMO

DATED: May 6, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 70

SUBJECT: 5 U.S.C. 8115 (SECTION 13, FECA)
EFFECT OF CHANGE IN RESIDENCE ON DETERMINATIONS OF LOSS OF WAGE-EARNING CAPACITY

One of the elements in the determination of an employee's wage-earning capacity is "the availability of suitable employment." The availability of such employment is usually applied to the area in which the employee resides.

There is no problem when the employee remains in the area where he was injured. Some problems may be encountered, however, when he moves from this area.

Where the employee voluntarily takes himself away from general job opportunities by moving to an isolated locality with few such opportunities, the question of the availability of suitable employment should be applied to the area in which he resided at the time of injury.

Where the employee moves to an area which is not isolated and which has diversified job opportunities or where he is required to move to any area because of health conditions caused by his injury or by health condition which pre-existed his injury, then the question of the availability of employment in the area of residence must be applied (see also ECAB decision in the case of Sidney Kawalick, Docket No. 67-248, issued January 15, 1968).

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: May 23, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 71

SUBJECT: 5 U.S.C. 8112 [SECTION 6(c), FECA] AND 5 U.S.C. 8133(e) [SECTION 10(k), FECA] EFFECT OF FEDERAL PAY INCREASES ON MINIMUM COMPENSATION

PROMEMO

The minimum status of a case is determined from the compensation pay rate. However, the provisions of 5 U.S.C. 8112 and 5 U.S.C. 8133(e) differ as to the application of minimum compensation in total disability and death cases.

In total disability cases the entitlement to increased minimum compensation rates brought about by Federal pay increases is determined by the amount of compensation being paid. Included in the compensation rate are the cost-of- living adjustments. If the monthly rate of compensation as adjusted by cost-of-living allowances is more than 75 percent of the first step of a new GS-2 pay rate, then such pay increase would have no effect on the monthly rate or compensation because the new minimum will already have been exceeded. If the pay rate is below a new monthly pay for the first step of GS-2, the case will continue to paid at 100 percent of the pay rate, plus any appropriate cost-of-living adjustments.

In death cases, determinations of minimum entitlement are geared to the monthly pay rate and not to the amount of compensation payable. If the monthly pay of the first step of GS-2 increases, then the compensation in appropriate cases can be determined on this increased pay rate, irrespective of any cost-of-living increase. In effect, the cost-of-living increases would be added separately; however, the compensation should never exceed the pay rate as established under 5 U.S.C. 8114.

Herbert A. Doyle, Jr.
Assistant Director for FEC

Dated: June 18, 1968

ADDENDUM:

The 1974 Amendment made to 5 USC 8133(e)(1) permits the compensation to exceed the pay rate, for any period after September 7, 1974, if such excess was created by a CPI increase.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 12, 1975

Encl. to FECA Bulletin No. 6-75Distribution: List No.1

FECA PROGRAM MEMORANDUM - NO. 72

SUBJECT: 5 U.S.C. 8116(a) [SECTION 7(a), FECA] and
5 U.S.C. 8111(a) [SECTION 6(b), FECA]
PAYMENT OF ATTENDANT'S ALLOWANCE WHILE EMPLOYEE IS
IN RECEIPT OF CIVIL SERVICE RETIREMENT BENEFITS

An employee entitled to total or partial disability benefits under 5 U.S.C. 8105 or 5 U.S.C. 8106 who has elected to receive the benefits of the United States Civil Service Retirement Act <u>may not</u> receive the attendant's allowance provided by 5 U.S.C. 8111(a) during the time he received benefits under the

Retirement Act.

When an employee is entitled to a scheduled award under 5 U.S.C. 8107, the attendant's allowance is considered incidental to the award and may be paid concurrently with Civil Service Retirement benefits during the period of the award.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: June 28, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 73

SUBJECT: 5 U.S.C. 8101(1)(A) [SECTION 40(b)(1), FECA]
MAINTENANCE MEN EMPLOYED BY THE FEDERAL HOUSING ADMINISTRATION

The Federal Housing Administration of the Department of Housing and Urban Development contracts with a number of maintenance workers to perform work in connection with the maintenance of its acquired properties. These employees perform various types of work in connection with the maintenance of these residences, such as initial cleanup at time of acquisition; lawn care, mowing, weed spraying, etc., in the summer; and ice and snow removal in the winter. The work is contracted on a month-to-month basis under the FHA's purchase order procedure.

It has been determined that FHA maintenance workers, hired by purchase order, are civilian employees of the United States within the meaning of 5 USC 8101(1)(A). They are therefore entitled to the benefits of the FECA for injuries sustained in the performance of duty.

Care should be exercised to insure that the individual does, in fact, fulfill the requirements of an employee. For this reason, any case of this type must include in the record information showing that the FHA had the right to exercise complete control over the work activity; that the FHA had the prerogative to terminate the individual's service; and, that the work and other duties performed were an integral part of the FHA's business.

Since the work may not provide full-time employment, it may be necessary to determine the pay rate under the provisions of 5 U.S.C. 8114(d)(3).

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: July 24, 1968

PROMEMO

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 74

SUBJECT: APPLICATION OF 5 U.S.C. 8133(b) [SECTION 10, FECA] to 5 U.S.C. 8109(3)(D) [SECTION 5(d)(1), FECA]

5 U.S.C. 8109(a)(D) provides for payment of unpaid compensation benefits due at time of death to specified beneficiaries including children of the decedent. Under 5 U.S.C. 8133(b), as amended, by Public Law 89-488 there is provision for continuation of benefits for students over 18 years of age.

It has been determined that students over the age of 18 are entitled to receive their appropriate share of the balance of a scheduled award when death is due to causes unrelated to the injury.

Application for the balance of the scheduled award will be made in the usual manner. Care must be exercised, however, to insure that the file reflects the fact that any child over 18 has status as a student at the time of the death.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: July 24, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 75

SUBJECT: [5 U.S.C. 8102(a)--Section 1(a), FECA]
CIVILIAN EMPLOYEES OF THE NATIONAL GUARD HANDLING EXPLOSIVES AT REQUEST OF STATE OR LOCAL AUTHORITIES

Some civilian employees of the National Guard serve as Explosive Ordnance Disposal (EOD) personnel. In addition to Federal authorities, State and local authorities (such as local fire or police departments) occasionally call upon them for assistance in disposal when explosives are discovered in their area.

These EOD personnel, when serving in their civilian capacity as Federal employees and under order of their supervisors to perform this particular duty, would be considered to be on a "special mission" and acting in the course of employment. An injury sustained during the "special mission" would be considered as occurring in the performance of duty. In addition to the usual statement that the injury occurred while working in a civilian capacity, an injury sustained under these circumstances must be substantiated by a statement that the duty was being performed under instructions of the supervisor.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: July 24, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 76

(See FECA Program Memorandum No. 100.)

SUBJECT: 5 U.S.C. 8114 [SECTION 12 FECA]
PAY RATE FOR COMPENSATION PURPOSES FOR EMPLOYEES OF THE U. S. PROPERTY AND FISCAL OFFICERS (NATIONAL GUARD)

Civilian employees of the National Guard have heretofore been paid compensation based only on their earnings from such civilian employment. The Bureau has now determined that the wages paid for National Guard service should be included in the pay rate for compensation purposes when membership in the National Guard is a condition of civilian employment with the Guard.

The Chief of the National Guard Bureau has been requested to advise the U. S. Property and Fiscal Officer of each of the states concerning this determination. Henceforth, the U. S. Property and Fiscal Officer (or some other responsible official of the National Guard who is in a position to know the facts) will include the wages paid to the employee for attending drills or field training on the Form CA-4 when an employee's membership in the National Guard is a condition of his civilian employment with the Guard.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: July 25, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 77

SUBJECT: DETERMINATION OF WAGE-EARNING CAPACITY IN ACCORDANCE WITH 5 U.S.C. 8115 [SECTION 13, FECA] BEFORE 5 U.S.C. 8106(c) [SECTION 4(b), FECA]

5 U.S.C. 8115 provides for the determination of an employee's wage-earning capacity after the beginning of partial disability. 5 U.S.C. 8106(c) provides for termination of compensation when an injured employee refuses or neglects to work after suitable work is offered to, procured by, or secured for him.

In the case of Alfred Rindler, 9 ECAB 941, it was decided that the Bureau may not terminate compensation

benefits under 5 U.S.C. 8106(c), without first determining an employee's loss of wage-earning capacity. This decision makes it mandatory for the Bureau to first determine an employee's wage-earning capacity before it can make the determination of whether any work offered to, procured by, or secured for the employee is "suitable".

In the case of Lucille J. H. Manion, 18 ECAB 219, it was decided that the Bureau could not involve 5 U.S.C. 8106(c) when an injured employee in good faith relies on the advise of his physician and refuses to seek work. The Manion case was remanded for the purpose of determining the employee's loss of wage-earning capacity.

In the case of Harry Wiseberg, Docket No. 68-77, issued May 16, 1968, the Board called attention to both the Rindler and Manion decisions. The Board found that the essential facts paralleled those in the Manion case and the case was remanded for the purpose of determining the employee's loss of wage-earning capacity.

The above decisions are reiterated in this memorandum primarily for purposes of calling attention to the need to apply 5 U.S.C. 8115 before applying 5 U.S.C. 8106(c). A proper determination of "suitable" work under 5 U.S.C. 8106(c) must, of course, take into consideration the employee's ability to perform work in his disabled condition and the advice of the attending physician is a very important factor in this consideration.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: August 29, 1968

DISTRIBUTION LIST NO. 7

ADDENDUM:

In determining the employee's loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirement's (3) ensure that the work offered to the claimant is consistent with the work capacity described in the medical report. If there is any question about compatibility, the case must be referred to the Office medical adviser or to the attending physician.

Where there is a written offer of employment which specifies duties and physical limitations, it is sufficient to determine that the offer is suitable to the claimant's disabled condition and made in good faith. It is not necessary, before applying 5 U.S.C. 8106 for a refusal to accept the position, to ascertain whether this work is reasonably available in the open labor market, or to compute a compensation rate based on the salary of the offered job. The Office should prepare a compensation order, the findings of which include a description of the offered work, that it was suitable to the employees' disabled condition, and that it reflected the employee's capacity to earn wages.

JOHN D. MCLELLAN JR.
Associate Director for
Federal Employee's Compensation

Dated: May 9, 1983

PROMEMO

Distribution: **List No. 1**
(All Claims Examiners, Supervisors, District Medical Directors, Systems Managers, Technical Advisers and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 78

SUBJECT: **5 U.S.C. 8101(1)(B) [SECTION 40(b)(2), FECA]**
PERSONS APPOINTED AS COLLABORATORS BY THE NATIONAL PARK SERVICE OF THE DEPARTMENT OF THE INTERIOR

The National Park Service appoints persons as Collaborators to advise or assist the Service on a gratuitous basis. The appointments are usually limited to scientists or specialists who perform wildlife or ecological research or collect scientific specimens. In some cases, they attend advisory board meetings or assist in an advisory capacity on National Park Service "Master Plan Study Teams". Those engaged in research are usually affiliated with a university or are working under some type of grant.

Each Collaborator is appointed on a temporary basis under Civil Service Schedule A, Regulation 213.3102(k) and within the authority of Public Law 74-292 (16 U.S.C. 461 et seq.). They are subject to termination of their appointments in the same manner as other persons serving in temporary positions. They are required to complete an oath of office and to sign a waiver of compensation before appointment. They may, however, be reimbursed by the Service for expenses incurred in doing work for the Service.

Collaborators receive no formal supervision, but they are under the general director of the National Park Service Superintendent having jurisdiction over the area involved.

It has been determined that Collaborators appointed by the National Park Service as described above are civilian employees of the United States within the meaning of 5 U.S.C. 8101(1)(B). They are therefore entitled to the applicable benefits of the FECA for injuries sustained in the performance of duty.

Since these appointees serve without pay, it will be necessary to determine the pay rate under the provisions of 5 U.S.C. 8114(d)(4).

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: August 29, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 79

(Superseded by FECA Program Memorandum No. 123.)

FECA PROGRAM MEMORANDUM - NO. 80

PROMEMO

SUBJECT: **5 U.S.C. 8116(b) [SECTION 7(a), FECA] AND**
5 U.S.C. 8133(b) [SECTION 10(G), FECA]
EDUCATIONAL BENEFITS PROVIDED BY THE FECA AND GI BILL ENEFITS PROVIDED BY THE VETERANS ADMINISTRATION

Educational assistance under 38 U.S.C. Chapter 34, Veterans' Readjustment Benefits Act of 1966, (commonly referred to as the "GI Bill"), extended the benefits of higher education to those servicemen and women whose careers were interrupted or impeded by reason of active duty after January 31, 1955. The benefits are based on the veteran's own military service. Educational benefits payable under 5 U.S.C. 8133(b), are based on the employment and the disability or death of the recipient's parents. The prohibition against concurrent payments contained in 5 U.S.C. 8116(b) applies only to payments based on the same disability or death.

Continuation of the FECA educational benefits after age 18 is based on a parent's Federal civilian employment. Eligibility under 38 U.S.C. Chapter 34 is based upon military service rendered by the individual and is in no way contingent upon the disability or death of the parent. Accordingly, payment under Chapter 34 concurrently with compensation paid by the FECA based on the same program of education, does not constitute a duplication of Federal benefits within the meaning of 5 U.S.C. 8116(b).

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: September 19, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 81

SUBJECT: **5 U.S.C. 8116 [SECTION 7 FECA]**
PAYMENTS UNDER 5 U.S.C. 8191 ET SEQ. AND THE SOCIAL SECURITY ACT

NOTE: This Program Memorandum should be considered in conjunction with Program Memorandum No. 20 of August 9, 1961 and an appropriate notation should be made on the earlier Memorandum.

The Social Security Act was amended on July 30, 1965 by Public Law 89-97. Section 224 of the amended Act (42 USC 424a) provides for a reduction in payments of Social Security benefits to certain individuals who are receiving compensation "under a Workmen's Compensation Law or plan of the United States or a State."

This does not in any way alter the Bureaus's policy as contained in Program Memorandum No. 20. If a Bureau beneficiary makes inquiry, he should be advised to contact the Social Security Administration. That agency will inform the beneficiary concerning any possible reduction of Social Security benefits.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: October 9, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 82

SUBJECT: 5 U.S.C. 8116(b) [SECTION 7(a), FECA]
ELECTION OF BENEFITS--FECA AND FEDERAL RESERVE BOARD RETIREMENT SYSTEM

Employees of the Board of Governors of the Federal Reserve System are employees of the United States within the meaning of 5 U.S.C. 8101(1)(A). See FECA Program Memorandum No. 25 of February 26, 1962.

The Board provides a retirement plan for its employees as well as an annuity plan for survivors in the event of an employee's death. This plan is fully funded by the employees contributing a percentage of their salaries with the balance contributed by the Board from assessment funds levied on member banks. The benefits payable out of the fund are based on services as Federal employees. Benefits received under the Boards's retirement plan may reasonably be considered as received "from the United States" within the intent of 5 U.S.C. 8116(b).

It has been determined that concurrent payments of benefits under the Board's retirement plan and 5 U.S.C. 8101 et seq. constitute prohibited dual payments. Claimants having entitlement to both benefits must elect to receive one or the other.

In a disability case, an election to receive benefits of the Board's retirement plan would not prevent the claimant from receiving medical care at Bureau expense under 5 U.S.C. 8103, or a scheduled award under 5 U.S.C. 8107.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: October 11, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 83

PROMEMO

SUBJECT: **5 U.S.C. 8101(17) [SECTION 10(M), FECA]**
INTERPRETATION OF "FOUR YEARS OF EDUCATION BEYOND THE HIGH SCHOOL LEVEL"

The Bureau has determined that the phase "has not completed four years of education beyond the high school level" in 5 U.S.C. 8101(17) limits compensation benefits under 5 U.S.C. 8133 to four years of full-time attendance at a qualified educational institution and not necessarily graduation with a degree.

Therefore, in any case where a student's educational program extends beyond four years of full-time attendance at a qualified educational institution, benefits would terminate at the end of the four-year period.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: October 14, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 84

SUBJECT: **5 U.S.C. 8101(17) [SECTION 10(M), FECA]**
CONTINUATION OF COMPENSATION BENEFITS ON ACCOUNT OF "STUDENTS" WHO PARTICIPATE IN "WORK-STUDY PROGRAMS"

Some educational institutions have set up "work-study programs" in a cooperative education participation agreement between the school and industry (i.e., employer). In some cases, the "industry" is an agency of the Federal Government. The objective of such an agreement is that of providing students with an integrated program of work and education leading to a diploma or degree. Generally, the school and the employer seek to provide a schedule which allows for maximum educational benefits. Work assignments are based on a mutual agreement between the school and the employer. Occasionally, the cooperative program is scheduled for five years beyond the high school level intermixing approximately six months of work and six months of study. The student receives a salary only for the period when he is actually employed. At times, the employer provides the student's tuition fees and supplies for part or all of the five-year program.

The Bureau has determined that participation in such a work-study program is a proper basis for continuation of benefits under 5 U.S.C. 8133. These students are, in the words of 5 U.S.C 8101(17), "regularly pursuing a full-time course of study or training at an institution". A participant in such a program is considered a student not only during the "study" phase but during the "work" portion also.

In no case, however, can compensation benefits extend beyond four years of full-time "attendance" in either the study or work portions (see Program Memorandum No. 83 of October 14, 1968).

Herbert A. Doyle, Jr.

Assistant Director for FEC

DATED: October 15, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 85

SUBJECT: 5 U.S.C. 8103 [SECTION 9(a) FECA]
Periodic Medical Examinations in Cases of Inactive Tuberculosis

When the Bureau approves a claim for tuberculosis, it assumes the full responsibility for the medical care involved. Heretofore, as a rule, the Bureau only authorized follow-up examinations in such cases for approximately one year after release from active medical care. Thereafter it was considered that follow-up observations became the responsibility of the employing establishment through their personnel program.

The Bureau has determined that periodic examinations, including X-ray of the chest, may be authorized following release from active medical care. Whenever possible this should be done at no expense to the Compensation Fund through the Health Unit of the Federal facility where the employee is employed, as part of the preventive services program.

Following release from active medical care, the Bureau will make arrangements for periodic physical examinations either through the agency's Health Unit, through Federal medical facilities, or through designated physicians.

The examinations should be authorized on an annual basis, unless special medical considerations require them more frequently.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: November 8, 1968

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 86

SUBJECT: 5 U.S.C. 8107 [SECTION 5, FECA]
PAYMENT OF SCHEDULED AWARDS WHERE PERMANENT TOTAL DISABILITY EXISTS

PROMEMO

When an employee sustains permanent total disability it is appropriate to pay an indicated scheduled award in lieu of compensation for permanent total disability for the period covered by the scheduled award. The payment of the scheduled award is permitted by 5 U.S.C. 8107(a) and (b) and provides the employee with benefits not obtainable while in receipt of compensation for permanent total disability--i.e., he can receive an annuity from the Civil Service Commission concurrently with the scheduled award (provided the injury occurred on or after September 13, 1957), 1/ and should he die before the expiration of the period from non-injury connected causes, his family is assured of the balance of the scheduled award.

However, no award for disfigurement under the provisions of 5 U.S.C. 8107(c)(21) can be paid where the Bureau is paying compensation to an employee for permanent total disability. If an employee is considered permanently totally disabled, and thereby unable to work because of such disability, it cannot be said that he has disfigurement of a character likely to handicap him in securing of maintaining employment. If a finding of permanent total disability is subsequently overcome by a demonstrated wage-earning capacity, the employee is no long permanently totally disabled and consideration of an award for disfigurement would be appropriate.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: December 30, 1968

DISTRIBUTION LIST NO. 7

1/ Section 211(d) of P. L. 86-767 of September 13, 1960.

FECA PROGRAM MEMORANDUM - NO. 87

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b), FECA]
PARTICIPANTS IN PROGRAMS UNDER TITLE I-B, SECTION 123(a)(3) and (4) OF THE ECONOMIC OPPORTUNITY ACT OF 1964, AS AMENDED BY PUBLIC LAW 90-222

The purpose of the Title I, Part B of the Economic Opportunity Act, as amended by Public Law 90-222, the 1967 Amendments to the Economic Opportunity Act, is to provide useful work and training opportunities, together with related services and assistance, that will assist low income youths to continue or resume their education and to help unemployed or low-income persons, both young and adult, to obtain and hold regular competitive employment, with maximum opportunities for local initiative in developing programs which respond to local needs and problems and with emphasis upon a comprehensive approach which includes programs using both public and private resources.

Certain agencies of the Federal Government (e.g., the Forest Service and the Soil Conservation Service of the U.S. Department of Agriculture) have instituted programs to assist and cooperate with both public and private sources in this program. It has been determined that participants in these programs are employees of the United States within the meaning of 5 U.S.C. 8101(1) in those instances where they are assigned to a Federal Agency of the U. S.

Government and where their service will:

1. Further the program of the Federal Agency; and

2.Be of a type appropriate for a Federal employee of the agency; and

3.Be performed under the technical direction and supervision of an employee of the Federal agency.

Since all other participants in this program are not employees of the United States, care must be exercised to insure that the above conditions are certified by appropriate officials of the Federal agency involved. The Bureau's official report forms will normally provide the basis for this certification.

In many instances the pay rate will be determined by 5 U.S.C. 8114(d)(3) since the work does not always provide full-time employment.

Many of these individuals will be minors or may be working in learners' capacities and many of them may be elderly. Consideration should therefore be given to possible application of the appropriate provisions of 5 U.S.C. 8113 in any case where there is prolonged or permanent disability.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: January 3, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 88

SUBJECT: 5 U.S.C. 8107 [SECTION 5, FECA]
LOSS OF LESS THAN FIRST PHALANX OF ONE DIGIT

5 U.S.C. 8107(c)(15) provides that compensation for loss of more than one phalanx of a digit is the same as for loss of the entire digit and that compensation for loss of the first phalanx is onehalf of the compensation provided for loss of the entire digit. The code is silent as to the compensation provided for the loss of less than the first phalanx.

It has been determined that if there is loss of one-half of more of the first phalanx, the award shall be the same as for the loss of the first phalanx or 50 percent of the digit.

If there is loss of less that one-half of the first phalanx of a digit with some loss of bone, or amputation of bony tuft, the award for this loss shall be one-half of the amount payable for the loss of the first phalanx or for 25 percent of the digit.

Where there is a significant amputation of the soft tissue of the tip of the first phalanx with no loss of bone or bony tuft, the award shall be one-fourth of the amount payable for the loss of the first phalanx or for 13 percent of the digit.

If the injury has caused disability in addition to the amputation, such as impairment of flexion or extension, swelling, gross deformity and/or change in sensation, such additional disability must be taken into consideration in the overall award determination.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: January 6, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 89

SUBJECT: 5 U.S.C. 8107 [SECTION 5, FECA]
LOSS OF TWO OR MORE DIGITS OF A HAND OR FOOT

As provided by 5 U.S.C. 8107(a)(17), where there is a loss of two or more digits or one or more phalanges of each of two more digits of a hand or foot, the award therefor is proportioned to the loss of use of the hand or foot occasioned thereby.

It has now been determined that in those cases involving loss of two or more digits, the individual loss of the digits will be evaluated as provided in 5 U.S.C. 8107(c)(15). That is, the loss of one phalanx will be considered to be 50 percent of the digit and the loss of more than one phalanx will be considered to be 100 percent of the digit. the value of each digit lost as determined above will then be applied to the hand or foot in accordance with the appropriate AMA Guide.

For award determinations where there is loss of less than the first phalanx of a digit, see Program Memorandum No. 88, dated January 6, 1969, which will also apply where such loss affects two or more digits of a hand or foot.

Examples of the above are as follows:

1. Where there is loss of more than the first phalanx of the first and second fingers of a hand, it will be considered that there is 100 percent loss of both fingers. The appropriate AMA Guide evaluates 100 percent loss of the first finger to 25 percent impairment of the hand and 100 percent loss of the second finger to 20 percent impairment of the hand. Thus, the award in this instance would amount to 45 percent of the hand.

2. Where there is loss of one-half or more of the first phalanx of the first and second fingers it will be considered that there is 50 percent loss of both fingers. The appropriate AMA Guide evaluates 50 percent loss of the first finger to 13 percent impairment of the hand and 50 percent loss of the second finger to 10 percent impairment of the hand. Thus, the award in this instance would amount to 23 percent of the hand.

3. Where there is loss of less than one-half of the first phalanx of the first and second fingers with some loss of the bone or bony tuft, the loss will be considered to be 25 percent of each finger and the procedure outlined above for relating this loss to the hand will be followed.

4. Where there is loss of soft tissue of the tip of two or more digits of a hand or foot without involvement or loss of bone or bony tuft, the loss will be considered to be one-fourth or 13 percent of each finger and the procedure outlined above for relating this loss to the hand will be followed.

This policy will also be followed with any combination of losses of phalanges of two or more digits of a hand or foot.

If the injury has caused disability in addition to the amputation, such as nerve or palm involvement, such additional disability must be taken into consideration in the overall award determination. Also, all cases involving the loss of two or more digits of a hand or foot will be referred to the District Medical Director for the AMA Guide impairment evaluation.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: January 6, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 90

(See Program Memorandum No. 277.)

SUBJECT: 5 U.S.C. 8132 [SECTION 27, FECA]
COMPENSATION STATUS FOLLOWING REFUND AFTER RECOVERY FROM A THIRD PARTY

In accordance with 5 U.S.C. 8132, when a beneficiary entitled to compensation receives money as a result of a "third party settlement", he shall refund to the United States the amount of compensation paid. If compensation has not been paid, he shall credit the money on compensation payable to him for the same injury. The beneficiary, however, is entitled to retain portions of the refund, namely, at least one-fifth of the net amount remaining after the expenses of suit or settlement have been deducted, plus an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.

Retention of these portions is permitted for purposes of requiting the beneficiary for his trouble and inconvenience in pressing collection of the settlement; and the Bureau does not consider their retention to have any effect on the beneficiary's compensation status. Consequently, it is the Bureau's position that a beneficiary is "not in receipt of compensation" during any period for which he has submitted a refund of his compensation to the United States, even though he retained the above-mentioned portions of the third party settlement.

Inquiries from Government agencies concerned with the compensation status of beneficiaries (e.g., the U. S. Civil Service Commission) and other interested parties should be answered in accordance with the above.

Herbert A. Doyle, Jr.

PROMEMO

Assistant Director for FEC

DATED: January 7, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 91

SUBJECT: 5 U.S.C. 8102 [SECTION 1, FECA]
COVERAGE OF FEDERAL EMPLOYEES WHILE ON FAMILY OR EMERGENCY VISITATION TRIPS PROVIDED UNDER P. L. 90-221

Public Law 90-221, approved December 23, 1967, amended the Foreign Service Act of 1946 in order "To improve certain benefits for employees who serve in high-risk situations..." Among the new benefits are the following:

> **"...the travel expenses of officers and employees of the [Foreign] Service for up to two round trips each year for purposes of family visitation in situations where the family of the officer or employee is prevented by official order from accompanying such officer or employee to, or has been ordered evacuated from his assigned post because of danger from hostile activity, except that, with respect to any such officer or employee whose dependents are located abroad, the Secretary may authorize such additional trips as he deems appropriate not to exceed the equivalent cost of two round trips of less than first class to the District of Columbia, and the travel expenses of officers or employees stationed abroad (or their dependents located abroad), for purposes of family visitation in emergency situations involving personal hardship: Provided, that the facilities of the Military Airlift Command shall be utilized whenever possible for travel authorized under this section."**

Hostile areas at which dependents cannot reside, and from which family visitation travel may be authorized, are designated by joint decision of the Washington headquarters of the Department of State, Agency for International Development (AID), and United States Information Agency (USIA). Designation may change from time to time to reflect changing circumstances. At the present time the only area so designated is the Republic of Vietnam. Emergency visitation travel, however, is authorized from any overseas post.

Official travel orders are not issued for family visitation travel from a hostile area. Travel orders are issued, however, in instances of emergency visitations.

It has been determined that officers and employees of the Department of State, AID, and USIA have the benefit of compensation coverage during actual travel for purposes of family or emergency visitation in accordance with P. L. 90-221. This means that while in the course of such travel, these employees are considered in the performance of duty although they may be in leave, compensatory time, or LWOP status. Although the issue of performance of duty is resolved in favor of these individuals, their claims must be subjected to the same adjudicative procedures as any other claim with regards to the issues of timely filing, fact of injury, deviation from the most direct travel route, etc.

The Department of State has been advised that as a general rule, these employees have compensation coverage while actually in the course of travel. Since official travel orders are not issued for visitation travel

from a hostile area, the Bureau has requested that copies of the authorizing documents or an appropriate certification from the head of the employee's post or other responsible official be submitted with the official reports of injury. Also, the Bureau has requested a copy of the travel orders in instances where emergency visitation travel is authorized; plus, in all instances of visitation travel, a statement from the head of the employee's post or other appropriate official showing that the employee was on the authorized route between his post and his family's home at the time of injury. If there are deviations from the authorized route, full explanation will be required.

The Department of State has also been advised that coverage of employee would be unlikely while they are actually at the residence of their families (i.e., while they are not actually traveling). If such cases are reported they should, after full development, be referred to the central office for decision.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: February 14, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 92

SUBJECT: 5 U.S.C. 8101(17) [SECTION 10(M), FECA]
CONTINUATION OF COMPENSATION BENEFITS ON ACCOUNT OF "STUDENTS" AT POLICE ACADEMIES

Many police departments require their trainees to undergo a period of instruction at a police academy in order to qualify as patrolmen. The trainees are usually selected on the basis of an examination, and are paid a salary while attending the academy. Their training usually includes both academic and physical instruction, and upon graduation they are eligible for probational appointments as patrolmen.

The Bureau has determined that attendance at a police academy is proper basis for considering a child to be a "student" under
5 U.S.C. 8101(17) providing the academy qualifies as an institution as defined in the Regulations (20 CFR 1.14, FEDERAL REGISTER, Vol. 32, No. 27, Feb. 9, 1967).

The test for coverage is not the source of the student's educational funds and provisions or whether he is being paid by his employer, but whether he is regularly pursuing a full-time course of study or training at one of the enumerated institutions.

If, after development, a determination cannot be made concerning a particular police academy, the case should be referred to the central office for decision.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: February 20, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 93

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b), FECA]
PARTICIPANTS IN PROGRAMS UNDER 25 U.S.C. 309 and 309a

The stated purpose of 25 U.S.C. 309 and 309a is to help adult Indians obtain reasonable and satisfactory employment. It authorizes the Secretary of the Interior to undertake a program of vocational training that provides for vocational counseling or guidance, institutional training in any recognized vocation or trade, apprenticeship, or on-the-job training; transportation to the place of training; and subsistence during the course of training. The Secretary of the Interior is authorized to enter into contracts with any Federal, State, or local governmental agency, or with certain private schools, corporations, or associations in order to carry out the purposes of this law.

As an example, special efforts have been made to expand Federal employment opportunities for Alaskan Natives in Alaska. The Bureau of Indian Affairs, in this instance, serves as the sponsor in the recruitment and supervision of Indians, Aleuts, and Eskimos. Participants are assigned to work and training experiences under a host arrangement with another Federal agency. During this training period, salaries and other benefits are provided by the Bureau of Indian Affairs. Upon successful completion of such training, it is expected that participants will be appointed to competitive positions in the Federal Service.

It has been determined that participants in this program are employees of the United States within the meaning of 5 U.S.C. 8101(1) in those instances where they are assigned to a Federal agency of the U. S. Government and where their service will:

1.Further the program of the Federal agency; and

2.Be of a type appropriate for a Federal employee of the agency; and

3.Be performed under the technical direction and supervision of an employee of the Federal agency.

Since all other participants in this program are not employees of the United States, care must be exercised to insure that the above conditions are certified by appropriate officials of the Federal agency involved. The Bureau's official report forms will normally provide the basis for this certification.

In many instances the pay rate will be determined by 5 U.S.C. 8114(d)(3) since the work does not always provide full-time employment.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: April 1, 1969

DISTRIBUTION LIST NO. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 94

SUBJECT: **5 U.S.C. 8101(1) [SECTION 40(b), FECA]**
PARTICIPANTS IN THE WIN (WORK INCENTIVE) PROGRAM ESTABLISHED AND FUNDED UNDER THE PROVISIONS OF THE 1967 AMENDMENTS TO THE SOCIAL SECURITY ACT

The WIN (Work Incentive) Program is established and funded under the provisions of the 1967 Amendments to the Social Security Act as a replacement for the Audit Work Experience Program authorized under Title V of the Economic Opportunity Act. Federal administration of the program has been transferred to the United States Training and Employment Service (formerly Bureau of Work-Training Programs) of the Department of Labor and local operation is assigned to local manpower agencies.

The purpose of the WIN Program is to provide meaningful work experience and other needed training for members of families in various Federal-State categories of public assistance. Priority is given to unemployed fathers, volunteer mothers, and youths over 16 years of age. Employment is directed toward a position where career patterns permit achievement of salary in excess of welfare payments. Referrals are made by county or State agencies. All or most of the allowances paid to participants come from Federal program funds. Federal agencies are eligible to serve as host employers.

It has been determined that participants in this program are employees of the United States within the meaning of 5 U.S.C. 8101(1) in those instances where they are (1) working or training at a Federal installation and are (2) under the supervision of a Federal employee.

Since all other participants in this program are not employees of the United States, care must be exercised to insure that the above conditions are certified by appropriate officials of the Federal agency involved. The Bureau's official report forms will normally provide the basis for this information.

In many instances the pay rate will be determined by 5 U.S.C. 8114(d)(3) since the work does not always provide full-time employment.

Many of these individuals will be minors or may be working in learners' capacities and many of them may be elderly. Consideration should therefore be given to possible application of the appropriate provisions of 5 U.S.C. 8113 in any case where there is prolonged or permanent disability.

Herbert A. Doyle, Jr.
Assistant Director for DFEC

DATED: April 2, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 95

PROMEMO

SUBJECT: **5 U.S.C. 8101(1)(A) or (B) [SECTION 40(b)(1) or (2), FECA] AND 5 U.S.C. 8146a [SECTION 43, FECA] CONSUMER PRICE INDEX COST-OF-LIVING INCREASES FOR PEACE CORPS VOLUNTEERS**

The 1966 Amendments to the Federal Employees' Compensation Act authorized increases in compensation payments based on increases in the Consumer Price Index. The CPI increases are applicable to those who are "employees" as defined in 5 U.S.C. 8101(1)(A) or (B).

As a general rule, CPI increases are not applicable to those persons who depend upon separate legislation for Federal compensation coverage, i.e., Reserve Officers Training Corps (ROTC), Civil Air Patrol (CAP), Emergency Relief Employees (CCC, WPA, CWA, FH and ERA), etc.

It has been recently decided that an exception to this rule occurs when the Bureau decides that a person or group of individuals would, regardless of the separate legislation, come within the statutory definition of "employee."

As one application of this rule, the Bureau has determined that Peace Corps Volunteers are, by virtue of their actual employment circumstance, employees of the United States as defined in 5 U.S.C. 8101(1). Injured Peace Corps Volunteers or their survivors are therefore entitled to all appropriate CPI compensation increases.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: April 3, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 96

SUBJECT:5 U.S.C. 8101(1)(A) or (B) [SECTION 40(b)(1) or (2), FECA] AND 5 U.S.C. 8146a [SECTION 43, FECA]
CONSUMER PRICE INDEX COST-OF-LIVING INCREASES FOR NEIGHBORHOOD YOUTH CORPS ENROLLEES

The 1966 Amendments to the Federal Employees' Compensation Act authorized increases in compensation payments based on increases in the Consumer Price Index. The CPI increases are applicable to those who are "employees" as defined in 5 U.S.C. 8101(1)(A) or (B).

As a general rule, CPI increases are not applicable to those persons who depend upon separate legislation for Federal Compensation coverage, i.e., Reserve Officers Training Corps (ROTC), Civil Air Patrol (CAP), Emergency Relief Employees (CCC, WPA, CWA, FH and ERA), etc.

PROMEMO

It has been recently decided that an exception to this rule occurs when the Bureau decides that a person or group of individuals would, regardless of the separate legislation, come within the statutory definition of "employee."

As one application of this rule, the Bureau has determined that Neighborhood Youth Corps Enrollees are, by virtue of their actual employment circumstance, employees of the United States as defined in 5 U.S.C. 8101(1). Injured Neighborhood Youth Corps Enrollees or their survivors are therefore entitled to all appropriate CPI compensation increases.

Herbert A. Doyle, Jr,
Assistant Director for DFEC

DATED: April 3, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 97

SUBJECT:5 U.S.C. 8101(1)(A) or (B) [SECTION 40(b)(1) or (2), FECA] AND 5 U.S.C. 8146a [SECTION 43, FECA]
CONSUMER PRICE INDEX COST-OF-LIVING INCREASES FOR VOLUNTEERS IN SERVICE TO AMERICA

The 1966 Amendments to the FECA authorized increases in compensation payments based on increases in the Consumer Price Index. The CPI increases are applicable to those who are "employees" as defined in 5 U.S.C. 8101(1)(A) or (B).

As a general rule, CPI increases are not applicable to those persons who depend upon separate legislation for Federal compensation coverage, i.e., Reserve Officers Training Corps (ROTC), Civil Air Patrol (CAP), Emergency Relief Employees (CCC, WPA, CWA, FH and ERA), etc.

It has been decided that an exception to this rule occurs when the Bureau decides that a person or group of individuals would, regardless of the separate legislation, come within the statutory definition of "employee." One such group is Volunteers In Service To America.

As one application of this rule, the Bureau has determined that Volunteers In Service To America are, by virtue of their actual employment circumstance, employees of the United States as defined in 5 U.S.C. 8101(1). Injured Volunteers In Service To America or their survivors are therefore entitled to all appropriate CPI compensation increases.

Herbert A. Doyle, Jr.
Assistant Director for DFEC

DATED: April 3, 1969

DISTRIBUTION LIST NO. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 98

SUBJECT: 5 U.S.C. 8135 [SECTION 14, FECA] LUMP-SUM PAYMENTS

The purpose of this memorandum is to specifically bring to your attention the general principles of the interpretation of 5 U.S.C. 8135 enunciated in a recent decision of the Employees' Compensation Appeals Board. In the case of Bruce E. Hickey, Docket No. 69-32, issued February 27, 1969, the claimant alleged that he was about to become a nonresident of the United States. He claimed that on this basis, he was entitled to a lump-sum settlement.

5 U.S.C. 8135a) provides, in part:

> **"The liability of the United States for compensation to a beneficiary in the case of death or of permanent total or permanent partial disability may be discharged by a lump-sum payment equal to the present value of all future payments of compensation computed at 4 percent true discount compounded annually if--**

(1)the monthly payment to the beneficiary is less than $5 a month;

(2)the beneficiary is or is about to become a nonresident of the United States; or

(3)the Secretary of Labor determines that it is for the best interest of the beneficiary."

The claimant took the position that the Bureau cannot exercise its discretion when a lump-sum request is made on the basis of the first two alternatives (i.e., that the exercise to discretion is limited only to the third alternative).

The Board construed 5 U.S.C. 8135(A)(2):

> **"...as giving the Bureau discretion to grant or reject applications of claimants who are about to become nonresidents of the United States. The section specifically provides that a lump-sum settlement 'may' be paid under any one of the 3 alternatives described there. It is not necessary to decide here whether appellant has shown that he was about to become a nonresident of the United States. The question to be decided by the Board is whether, assuming that appellant is about to become a nonresident, there was an abuse in the exercise of discretion by the Bureau in denying the application for a lump-sum settlement."**

The Board concluded that the Bureau's denial of the claimant's application for a lump-sum settlement did not constitute an abuse of discretion.

Herbert A. Doyle, Jr.
Assistant Director for FEC

DATED: April 9, 1969

DISTRIBUTION LIST NO. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 99

SUBJECT: **5 U.S.C. 8101(1) [section 40(b), FECA]**
Participants in Work-Training Programs Under Title III of Public Law 89-10 [Elementary and Secondary Education Act of 1965]

Under the authority of Title III of Public Law 89-10, the Elementary and Secondary Education Act of 1965, a local school system can develop a cooperative program with a Federal agency in which students engage in work-training at the Federal agency. One such cooperative program, known as the "Flexible Occupations Curriculum Program," places students in work-training situations at Veterans Administration Hospitals.

In this particular program, participating students attend school for a half day and spend the other half at a hospital where they receive formal instructions in the area in which they are "working." Although the students receive no pay in this "learning situation," they do perform services inuring to the direct benefit of the hospital. For example, the students may repair pipes, air vents, switches and do rewiring. They also do routine office work, label test tubes, and perform various other housekeeping and maintenance duties.

When these students are "working" at a Federal agency, they are considered employees of the Federal Government within the provisions of 5 U.S.C. 8101(1)(3). They are working on Federal premises under the supervision of a Federal employee; are rendering personal service to the United States; and a United States statute [Section 603(b) of Public Law 89-10] authorizes acceptance or use of such service.

The pay rate for compensation purposes in these cases will be determined under the provisions of 5 U.S.C. 8114(d)(4). Since the participants may be as young as 14 years of age, appropriate provisions of 5 U.S.C. 8113 should be applied where indicated.

As part of these programs, the school system provides "coordinators" who supervise and correlate the specific program between the participating schools and Federal agencies. It has been determined that these persons do <u>not</u> fall within the category of Federal employees as defined by 5 U.S.C. 8101(1).

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: June 2, 1969

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 100

SUBJECT: **5 U.S.C. 8114 [SECTION 12 FECA]**
PAY RATE FOR COMPENSATION PURPOSES FOR EMPLOYEES OF THE U. S.

PROMEMO

PROPERTY AND FISCAL OFFICERS (NATIONAL GUARD)

Program Memorandum No. 76 concerns the Bureau's determination that the wages paid for National Guard service should be included in the pay rate for compensation purposes when membership in the National Guard is a condition of civilian employment with the Guard. BEC Bulletin No. 44-68 supplemented and explained the application of the Program Memorandum.

Generally speaking, the term "wages paid for National Guard service" as used above includes any form of remuneration for services performed for the National Guard except for the types of payments specifically excluded by the terms of 5 U.S.C. 8114(e)(1), (2), and (3). Travel allowances and per diem pay are also excluded.

Specifically, and in addition to the wages paid for attending drills or for field training, the Bureau has advised the National Guard that the following shall be included in the pay rate for compensation purposes:

(1) Earnings received for active Federal service under a presidential "call";

(2) All inactive military training pay regardless of the frequency or type of training;

(3) Subsistence and quarters authorized by 37 U.S.C. 402 and 403;

(4) Additional pay given to commanders of units for performing administrative duties under 37 U.S.C. 309;

(5) Dependents Assistance Act payments made to enlisted members in Grades E-4 and below;

(6) Incentive pay authorized by 37 U.S.C. 301;

(7) Payments in accordance with 32 U.S.C. 319 or 37 U.S.C. 204(h) during periods of disability sustained by a National Guardsman who has contracted a disease or incurred an injury in line of duty.

Information concerning such earnings and payments will be provided to the Bureau in the same manner as described in Program Memorandum No. 76.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: June 3, 1969

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 101

SUBJECT: 5 U.S.C. 8146a [SECTION 43, FECA] CONSUMER PRICE INDEX (CPI) COMPUTATIONS--COST-OF-LIVING ADJUSTMENTS

PROMEMO

5 U.S.C. 8146a provides for increases in compensation payments based on increases in the Consumer Price Index. Although the statute provides for the effective date of the CPI increases, it is silent with regard to the method of recomputation when there is a subsequent change of rate. The recomputation question most frequently occurs in fatal cases where, following one or more CPI adjustment [sic], a change of rate becomes necessary, e.g., a child's compensation rate is increased from 15 percent to 35 percent upon the remarriage of the widow.

It has been determined that each time there is a change in rate, the compensation adjustment will include a recomputation of the CPI entitlement. For example, if a child's compensation rate is increased and benefits are to be recomputed at 35 percent, the CPI entitlement will also be recomputed and appropriately increased at the time of the change in rate.

The percentages of multiple CPI entitlements will not simply be totalled and applied against the new compensation rate since such a method fails to recognize the compound effect of a series of increases. Therefore, using the example cited above, effective on the date of the change in rate it will be necessary to:

(1)Compute the child's compensation at the 35 percent rate
(2)Determine the initial applicable CPI entitlement by applying the appropriate percentage
(3)Add the basic monthly amount of compensation and CPI entitlement rounded to the nearest dollar, to arrive at the month compensation

A second and all other CPI entitlement will entail the following:

(4)Determine the CPI entitlement by applying the appropriate percentage against the rounded monthly compensation, see item (3) above
(5)Add and round to the nearest dollar for the new monthly compensation

HERBERT A. DOYLE, JR,
Assistant Director for FECA

DATED: June 26, 1969

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 102

SUBJECT: PARTICIPATION OF TEMPORARY MEMBERS OF THE COAST GUARD RESERVE AND AUXILIARY MEMBERS IN THE FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM

Recent inquiries indicate that it is necessary to call attention to a prior determination made by the U. S. Civil Service Commission concerning health benefits coverage for temporary members of the Coast Guard Reserve. In this connection, temporary members of the Coast Guard Reserve include Auxiliary members (see Program Memorandum No. 63 of March 7, 1968).

Members and beneficiaries of a "uniformed service" as defined in 10 U.S.C. 1072 are excluded from coverage in the Health Benefits Program. The Civil Service Commission, however, has determined that this prohibition does not include temporary members of the Coast Guard Reserve. Thus, such members and their beneficiaries are eligible to participate in the Federal Health Benefits Program.

The Commission's determination is contained in Federal Personnel Manual Supplement 890-1, Federal Employees Health Benefits, Sub-chapter S4-2, paragraph a. and states as follows:

> **Members of a "uniformed service" as defined in section 1072 of title 10 of the United States Code. The effect of this exclusion is that no person can acquire coverage by virtue of his status as a member of a uniformed service. For this purpose, "member of a uniformed service" means a person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component, but excluding a temporary member of the Coast Guard Reserve), or in one of these services without specification of component; a commissioned officer of the Coast and Geodetic Survey or of the regular or Reserve Corps of the Pubic Health Service, and any person serving in the Army or Air Force under call or conscription.**

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: June 30, 1969

DISTRIBUTION LIST NO. 7

FECA PROGRAM MEMORANDUM - NO. 103

Cancelled per FECA Bulletin 6-75

FECA PROGRAM MEMORANDUM - NO. 104

(See FECA Program Memorandum NO. 142.)

SUBJECT: 5 U.S.C 8102(Aa) [Section 1(a), FECA]
RURAL LETTER CARRIERS DRIVING THEIR OWN VEHICLES

Recent inquiries indicate the necessity to reiterate the Bureau's interpretation of the term "performance of duty" in connection with rural letter carriers who sustain injury while between their home and the Post Office.

A rural letter carrier is considered to be in the performance of his duty while driving his own vehicle between his home and the Post Office and between the Post Office and his home, provided the record shows that the Post Office required him to furnish the vehicle for handling the mail.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: October 24, 1969

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 105

(See Program Memoranda Nos. 139 and 162.)

SUBJECT: 5 U.S.C. 8107
LOSS OF HEARING DETERMINATIONS

Hearing loss evaluations by the Bureau are made in accordance with the American Medical Association standards as indicated in FECA Program Memorandum No. 8 of July 22, 1960. The AMA standards recommend utilization of the decibel loss at the three frequencies of 500, 1000, and 2000 cps (cycles per second). Under present procedures for rating hearing loss, no compensation has been paid for loss above the 2000 cps frequency.

It has been observed in many cases that hearing loss with attendant effect on an employee's wage-earning capacity exists up to the 4000 cps frequency and the question has arisen as to whether an evaluation of loss of hearing should also include the decibel loss at this frequency in addition to losses sustained at lower frequencies.

The Bureau has determined that hearing loss up to 4000 cps frequency will be included in loss of hearing evaluations. The three frequencies that will now be considered in evaluating the extent of industrial hearing loss for compensation purposes are 1000, 2000, and 4000 cps.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: October 31, 1969

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 106

SUBJECT: 5 U.S.C. 8114 [Section 12, FECA]
PREMIUM PAY UNDER 5 U.S.C. 5545(c)(2) AND 5 U.S.C.

PROMEMO

5546(a) TO BE INCLUDED IN PAY RATE FOR COMPENSATION PURPOSES

5 U.S.C. 5545(c)(2) provides:

> **The head of an agency, with the approval of the Civil Service Commission, may provide that--**
>
> **an employee in a position in which the hours of duty cannot be controlled adminstratively, and which requires substantial amounts of irregular, unscheduled, overtime duty and duty at night, on Sundays, and on holidays with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of night, Sunday, holiday, and unscheduled overtime duty required in the position.**

5 U.S.C. 5546(a) provides:

> **An employee who performs work during a regularly scheduled eight-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.**

A close reading of 5 U.S.C. 5545(c)(2) makes clear that the "substantial amounts of irregular, unscheduled, overtime duty and duty at night, on Sundays, and on holidays" are in reality part of the regularly scheduled tour of duty of the employee. Consequently, the premium pay for such hours does not constitute overtime pay in excess of a statutory or other basic workweek or other basic unit of overtime as observed by the employing establishment. For reference purposes attention is directed to Program Memorandum No. 48 which provides that premium pay, received in certain types of employment under 5 U.S.C. 5545(c)(1), is also included for pay rate purposes.

The premium pay provided under 5 U.S.C. 5546(a) is similar to the Post Office's Sunday premium pay discussed in Program Memorandum No. 56. Since 5 U.S.C. 5546(a) provides for the extra pay when an employee's regular work schedule includes an eight-hour period, any part of which falls on a Sunday, this premium pay is not overtime pay within the meaning of 5 U.S.C. 8114(a)(1).

The Bureau has determined that premium pay under both 5 U.S.C. 5545(c)(2) and 5 U.S.C. 5546(a) may be included in the pay rate for compensation purposes in those cases in which such premium pay is received.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: October 30, 1969

Distribution: List No. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 107

(Supplemented by Program Memoranda Nos. 228 and 254)

SUBJECT: **5 U.S.C. 8102 [Sec. 1, FECA]**
5 U.S.C. 8104 [Sec. 9(b), FECA]
5 U.S.C. 8147 [Sec. 35, FECA]
COVERAGE OF INJURED EMPLOYEES WHILE UNDERGOING VOCATIONAL REHABILITATION

The Bureau has determined that an individual who is undergoing vocational rehabilitation in accordance with 5 U.S.C. 8104 is considered to be "in performance of duty" while undergoing training or while going to and from the training institution. If he should sustain injury under these circumstances, he would be entitled to appropriate benefits.

In this respect, although these injuries are not job related in the usual sense, they are nevertheless related to the employment in that they occur during the performance of necessary or reasonable activity that would not have been undertaken but for the compensable injury.

Incidental to this determination, it has been decided that school accident insurance is not included in vocational rehabilitation services authorized by 5 U.S.C. 8104 on the theory that the FECA provides adequate protection. Consequently, the cost of such insurance is not a proper charge against the Employees' Compensation Fund.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: November 13, 1969

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 108

SUBJECT: 5 U.S.C. 8116 [Section 7, FECA]
5 U.S.C. 8133 [Section 10, FECA]
WIDOW ELECTION OF VA EDUCATIONAL BENEFITS VS. BEC BENEFITS

On October 23, 1968, the Congress enacted Public Law 90-631, which among other things provides payment of educational benefits beginning December 1, 1968, to a veteran's widow, in her own right, if she continues her education. While the Federal Employees' Compensation Act does not provide educational benefits on behalf of widows, it has been determined that where a widow is eligible for both BEC and VA educational

benefits as a result of the same death, an election is required (i.e., the two benefits arise out of the same death, and the widow cannot receive both benefits concurrently).

In this connection, the same general principles will apply regarding elections as outlined in FECA Program Memorandum No. 79 of September 19, 1968.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 109

SUBJECT: 5 U.S.C. 8115 [Sec. 13, FECA]
DETERMINATION OF WAGE-EARNING CAPACITY

There are times when an employee is found to be partially disabled and the work limitations indicate that the job held at the time of injury may be compatible with the work limitations. In such cases, before a determination may be made that there is no loss of wage-earning capacity, the record must contain a copy of the job description for the specific job held at the time of injury.

In the case of Edwin M. Jones, Docket No. 69-147, issued November 4, 1969, the employee was a postal clerk at the time of injury. After a period of total disability, he was referred for medical evaluation and the report indicated that he could perform work which does not include heavy manual labor, climbing, bending, or lifting objects weighing more than 50 pounds.

A Bureau Vocational Rehabilitation Adviser studied the job requirements for a postal clerk, DOT 232.368, as defined in the Dictionary of Occupational Titles, and noted that the job was classified as moderate work, which involves lifting 50 pounds maximum. The Adviser stated that the work of a postal clerk was within the employee's physical capabilities.

The Appeals Board held that the Bureau did not consider the actual duties of the job performed by the employee at the time of injury. The record shows that the employee worked as postal clerk in a parcel post section and that the injury was sustained when he was pulling an 85 pound sack of mail.

In this case, the term "postal clerk" was not definitive of a specific job. Rather, it was a general descriptive term and was viewed as not applicable to the case at issue.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: December 1, 1969

PROMEMO

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 110

SUBJECT: 5 U.S.C. 8101(17) [SECTION 10(M), FECA]
CONTINUATION OF COMPENSATION BENEFITS ON ACCOUNT OF "STUDENTS" WHO PARTICIPATE IN THE APPRENTICESHIP PROGRAM AT THE U. S. NAVAL RESEARCH LABORATORY

The apprenticeship program at the U. S. Naval Research Laboratory, Washington, D. C., consists of a four-year course based on a 40-hour workweek with a full pay schedule. All training costs are borne by the United States. In addition to regular work assignments in the respective trades apprentices are required to pursue 1600 hours of related training over a four-year period and to attend formal classes for this purpose. About 25 percent of their time is spent in formal study. The apprentice program constitutes a vocational school as defined in the Bureau's Regulations [20 CFR 1.14(c)(4)].

The Bureau has determined that participation in this apprenticeship program is a proper basis for considering a child to be a "student" under 5 U.S.C. 8101(17). As stated in FECA Program Memorandum No. 92 of February 20, 1969, the test for coverage is not the source of the student's educational funds and provisions or whether he is being paid by his employer, but whether he is regularly pursuing a full-time course of study or training at one of the enumerated institutions.

In effect, these apprentices are "regularly pursuing a full-time course of study or training at an institution." A participant in the program is considered a student not only during the "formal class" phase but during the "work" portion also.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: December 3, 1969

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 111

SUBJECT: 5 U.S.C. 8101(17) [SECTION 10(M), FECA]
CONTINUATION OF COMPENSATION BENEFITS ON ACCOUNT OF "STUDENTS" AT UNITED STATES SERVICE ACADEMIES

An individual attending one of the United States Service Academies receives a college education in addition

to military training. The academies qualify as institutions as defined in 5 U.S.C. 8101(17)(A).

The Bureau has determined that attendance at a U. S. Service Academy is a proper basis for considering a child to be a "student" under 5 U.S.C. 8101(17). As stated ion FECA Program Memorandum No. 92 of February 20, 1969, the test for coverage is not the source of the student's educational funds and provisions or whether he is being paid by his employer, but whether he is regularly pursuing a full-time course of study or training at one of the enumerated institutions.

A child's admission to a service academy is not based upon a parent's service as a Federal employee. Thus, the "dual benefits" aspect of 5 U.S.C. 8116(b) would not prohibit receipt of FECA educational benefits while attending an academy.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: December 3, 1969

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 112

SUBJECT: 5 U.S.C. 8106 [Section 4, FECA]
5 U.S.C. 8115 [Section 13, FECA]
MODIFICATION OF LOSS OF WAGE-EARNING CAPACITY DETERMINATION

Recent inquiries indicate that it is necessary to reiterate that once a loss of wage-earning capacity is determined, a modification of such determination is not warranted unless:

(a) There is a material change in the nature and extent of the injury-related condition, or

(b) The employee has been retained or otherwise vocationally rehabilitated, or

(c) The original determination was, in fact, erroneous.

Where a loss of wage-earning capacity determination has been made, it should not be disturbed nor should compensation be terminated merely because of actual earnings. The burden of justifying a modification is up to the Bureau and any modification must be based on evidence in support of at least one of the three factors listed above.

This policy was enunciated by the Employees' Compensation Appeals Board in the case of Elmer Strong, 17 ECAB 226.

HERBERT A. DOYLE, JR.

PROMEMO

Assistant Director for FEC

DATED: December 22, 1969

(See Addendum on Reverse [Below])

Encl. to FECA Bulletin No. 6-75

ADDENDUM:

The 1974 Amendment made to 5 USC 8104 by PL 93-416 removes the requirement of Section 8106 that compensation be reduced in instances where the disability changes from total to partial when the employee is directed by the OWCP to undergo vocational rehabilitation. Provision is made for deduction of any earnings received in remunerative employment, other than employment undertaken as part of the rehabilitation.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 12, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 113

SUBJECT: 5 U.S.C. 8116(b) [Section 7(a), FECA]
ELECTION OF BENEFITS--FECA VERSUS P.L. 85-157, THE
[D.C.] POLICEMEN AND FIREMEN'S RETIREMENT AND DISABILITY ACT

When a person is receiving benefits under P. L. 85-157 because of an injury which he sustained, and is subsequently found to be entitled to compensation benefits under the FECA on account of a new injury, the limitation on the right to receive compensation contained in 5 U.S.C. 8116(b) does not arise. From the Bureau's point of view, he is entitled to receive both benefits.

In this respect, from the language of the Act and legislative history of the amendments pertaining to 5 U.S.C. 8116(b), it appears that the duality of payment sought to be avoided arises only in situations where a person would receive benefits under two or more acts <u>for the same injury</u>.

It should also be noted that the Bureau considers payments under the FECA to be a basic benefit and that the first sentence of 5 U.S.C. 8116(a) does not restrict the Bureau in paying compensation. If it restricts any agency, it would appear to be the one paying under the provisions of the [D. C.] Policemen and Firemen's Retirement Disability Act. Any decision on such a restriction would come within the jurisdiction of that agency.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: January 13, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 114

SUBJECT: 5 U.S.C. 8101(4) [Section 40(f), FECA]
5 U.S.C. 8146(a) [Section 43, FECA]
APPLICABILITY OF CPI INCREASES IN CASES OF RECURRENT DISABILITY

The provisions of 5 U.S.C. 8101(4) state that the term "monthly pay" shall refer to the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if such recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. The two Muro decisions, 17 ECAB 537 and 19 ECAB 104 (see Program Memorandum No. 59 of February 15, 1968), and the Chinchillo decision, 18 ECAB 647, further clarify the provisions of 5 U.S.C. 8101(4).

5 U.S.C. 8146(a) provides that compensation shall be increased by the percent rise in the cost-of-living price index and gives a specific formula for determining the amount of the increase.

Although differing in approach, both of the above sections provide for increases in compensation attendant to increased living costs. 5 U.S.C. 8101(4) indirectly accomplishes this by providing authority to base compensation on a pay rate higher than that in effect at the time of injury. On the other hand, 5 U.S.C. 8146(a) provides for specific increases in compensation based on the rise in the cost of living.

It has been determined that in cases involving recurrent disability, compensation must be based on the highest pay rate as defined by 5 U.S.C. 8101(4). The use of a higher pay rate precludes the adding of a CPI increase effective within one year following the use of such a pay rate. If, however, the highest pay rate is that which was in effect at time of injury or disability began, such subsequent CPI increase should be added if otherwise appropriate (i.e., if disability occurred more than one year before the effective date of the CPI increase).

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: January 13, 1970

Distribution: List No. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 115

SUBJECT: 5 U.S.C. 8135 [SECTION 14, FECA]
LUMP-SUM PAYMENTS

Recent inquiries have prompted the Bureau to reiterate its policy that a lump-sum settlement of compensation under 5 U.S.C. 8135 does not bar the furnishing of medical treatment or the payment of additional compensation for increased or additional disability caused by the original injury.(1) This policy was based on an Assistant Solicitor's opinion dated January 3, 1951 and approved by the Director on August 20, 1951, concerning the case of Robert T. Schaffer, File No. X-467052.

It is difficult if not impossible to determine accurately the character and extent of any medical treatment which a claimant would need and the Government would be required to furnish, so that a commutation of the value of medical treatment would be impossible and a lump-sum settlement would not discharge the liability of the United States for such treatment.

Also, a lump-sum settlement does not constitute a full and complete discharge of all obligations to a claimant with respect to any right to additional compensation which may arise in the future, but is merely a commuted payment of the compensation to which the claimant appears entitled at the time of the settlement.

In this respect, it has been generally held by the courts that such a settlement does not bar a further award upon a change in a claimant's condition. The rationale is that the commutation of an existing award represents at most payment for the particular disability for which the award was made; that additional or increased disability, for which no award has been made, could not have been compensated for in such commutation or contemplated by it and hence the right to compensation for such additional disability is not barred.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

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(1) The Appeals Board, in the case of Virgil O. Maynard (10 ECAB 271) appears to indicate that a lump-sum settlemnet would bar the furnishing of medical treatment inasmuch as the Board stated that one of the reasons considered by the Bureau was "that a contingency of additional medical treatment existed, the cost of which he [appellant] would have to bear if a lump-sum award were granted." However, a careful reading of the decision discloses that the Board did not so rule. Further, there is nothing the transcript of the proceedings before the Appeals Board or in the case file which would indicate that the Bureau considered the payment of a lump sum as a bar to the payment for any further necessary treatment.

DATED: January 19, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 116

PROMEMO

SUBJECT: 5 U.S.C. 81169a)(b) [SECTION 7(a), FECA]
CONCURRENT PAYMENT OF COMPENSATION WITH U. S. NAVAL FLEET RESERVIST PAY

5 U.S.C. 8116(a) provides that compensation cannot be paid concurrently with any salary, pay or remuneration from the United States, except for services actually performed and except for pensions for military service. 5 U.S.C. 8116(b) requires that an injured employee elect between compensation benefits and any other benefits payable for the same injury.

In cases where the facts show an employee is receiving military retirement or retainer pay, it is the Bureau's policy to notify the military finance center making payment that compensation from the Bureau is also payable. The finance center decides whether the retirement/retainer pay is subject to the prohibition against dual payment as defined by 8116(a). If such prohibition exists, the employee is so advised by the Bureau and given an opportunity to elect the benefits he desires. In the event he refuses to elect, and since compensation is a basic right, compensation is paid to him and the finance center is advised of the details of the payment.

On February 4, 1969, the Comptroller General issued a decision, B-165726, copy of which is attached, which in essence removes U. S. Naval Fleet Reservists from the restriction on payment of dual benefits under 5 U.S.C. 8116(a). If a claim is filed by an injured employee who is receiving retirement or retainer pay as a U. S. Naval Fleet Reservist, this fact should be verified by contacting the finance center making the payment. If the center advises that the employee is, in fact, receiving pay as a U. S. Naval Fleet Rservist, then compensation benefits can be paid without the need for an election.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Attachment

DATED: February 5, 1970

(See Addendum on Reverse [Below])

Encl. to FECA Bulletin No. 6-75

ADDENDUM:

In view of the 1974 Amendment made to 5 USC 8116 by PL 93-416, the above Program Memorandum applies only to claims for compensation for any periods prior to September 7, 1974. Concurrent payments may be made for periods after September 7, 1974.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

PROMEMO

DATED: February 12, 1975

Distribution: List No. 1

COMPTROLLER GENERAL OF THE UNITED STATES

COPY

Washington, D. C. 20548

B-165726

February 4, 1969

Dear Mr. Secretary:

Reference is made to the claim of Charlie Bates, 236 50 46, SD1, USNFR, for retainer pay withheld while in receipt of Federal employees' compensation, pursuant to 5 U.S.C. 8116(a). By letter dated December 14, 1967, from the Navy Finance Center, Cleveland, Ohio the claim was referred to the Claims Division of this Office for consideration.

The record indicates that Mr. Bates was transferred to the Fleet Reserve after more than 20 years of service in the U. S. Navy and that he became entitled to retainer pay at the rate of $164.83 per month. While employed at the Norfolk Naval Shipyard, Portsmouth, Virginia, he was injured in an accident on April 14, 1966. On June 27, 1967, the Bureau of Employees' Compensation awarded him compensation for 288 weeks at the rate of 3/4 of $86.40 per week for the period from June 1, 1967 to December 6, 1972, inclusive. Effective July 1, 1967, his retainer pay account was placed in a suspended status and the check for June 1967 was canceled.

By settlement dated February 12, 1968, our Claims Division disallowed Mr. Bates' claim for retainer pay on the basis that the provisions contained in section 7(a) of the Federal Employees' Compensation Act of 1916, as amended, 5 U.S.C. 757(a) (1964 ed.) now 5 U.S.C. 8116(a), barred the payment of naval retainer or retired pay concurrently with civilian disability compensation payments. That action was in line with the long standing rule of the accounting officers of the Government in such cases. See 18 Comp. Gen. 747, 38 id. 243 and 40 id. 660. In letter dated November 5, 1968, Mr. Bates requested review of that settlement.

In the case of Mulholland v. United States, 139 Ct. Cl. 507 (1957), the Court of Claims held that a member of the Fleet Reserve may receive retainer pay concurrently with disability compensation as a civilian employee because (1) section 4 of the Naval Reserve Act of 1938, ch. 690, 52 Stat. 1176, made the provisions contained in section 7(a) of the Federal Employees' Compensation Act inapplicable to members of the Naval Reserve (which then included the Fleet Reserve) and because (2) Fleet Reserve retainer pay is paid in part for past services and in part for readiness to render service when called upon and to that extent it is paid "in return for services actually performed" within the meaning of the Federal Employees' Compensation Act.

In our decision of September 25, 1958, B-124204, B-134067, 38 Comp. Gen. 243, we said that the concurrent payment of retainer pay and civilian disability compensation for periods before 1953 is authorized under the holding in the Mulholland case. However, section 4 of the 1938 law was repealed by section 803 of the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 505, effective on January 1, 1953, and thereafter the Fleet Reserve ceased to be a part of the United States Naval Reserve and it has since been considered a complete entity and a component of the Regular Navy. As we did not know how much weight the court gave to each of the two grounds on which its opinion was based, we did not authorize payment of retainer pay concurrently

with disability compensation after 1952.

In the case of Tawes v. United States, 146 Ct. Cl. 500 (1959), the Court of Claims held that Federal employees' disability compensation under the Federal Employees' Compensation Act is "pay incident to" civilian employment and as such is within the dual compensation exemption provided in section 1(b) of the act of July 1, 1947, ch. 192, 61 Stat. 239, as amended, 10 U.S.C. 371(b) (1952 ed.), currently codified in 5 U.S.C. 5534. Compare Steelman v. United States, 162 Ct. Cl. 81 (1963).

The case of Merlyn E. Horn v. United States, Ct. Cl. No. 71-68, decided October 17, 1968, involved the claim of a member of the Fleet Reserve for retainer pay withheld during the period for which he received disability compensation under circumstances similar to those in the case of Mr. Bates. Upon consideration of Horn's motion and the Government's cross motion for summary judgment, oral argument of counsel and the briefs of the parties and on the basis of the decisions in the Mulholland and Tawes cases, the court granted Horn's motion for summary judgment. While we do not agree with the action taken by the court and while the grounds on which it decided in favor of the plaintiff are not clear, the judgment has now become final and it seems most unlikely that any future similar cases coming before the court would not be decided in the same way.

In view of the foregoing, we will not object to application of the rule in the Mulholland case as to periods after 1952. Accordingly, the retainer pay withheld from Mr. Bates may be released to him and future monthly payments of retainer pay due in his and other similar cases may be paid concurrently with civilian disability compensation. 38 Comp. Gen 243 is modified accordingly.

Sincerely yours,

/s/ R. F. Keller

For the Comptroller General
of the United States

The Honorable
The Secretary of the Navy

Encl. to FECA Program Memorandum No. 116

FECA PROGRAM MEMORANDUM - NO. 117

SUBJECT:5 U.S.C. 8101(1) [SECTION 40(b), FECA] MEMBERS OF STATE POLICE FORCES CONDUCTING SAFETY PROGRAMS FOR THE DEPARTMENT OF THE NAVY

The Department of the Navy employs the services of members of various State police forces in conducting safety programs to reduce the loss of life and injuries to service personnel through motor vehicle accidents. These services are authorized under 10 U.S.C. 7205 which provides that the Secretary of the Navy may make such expenditures as he considers appropriate to prevent accidents and to promote the safety and occupational health of members of the Naval service on active duty. Payment for travel expenses and the per diem rate for the area as determined by Navy regulations are the only payments made by the Department of the Navy. Persons utilized in this program continue to receive their usual salary from the State during the

period of their assignments with the Department of the Navy.

The Bureau has determined that members of State police forces utilized by the Department of the Navy for conducting safety programs are employees of the United States within the meaning of 5 U.S.C. 8101(1)(B) and are eligible for coverage under the FECA in case of injury or death while conducting such safety programs or while being transported to and from the Naval installation for the purpose of conducting such programs.

The pay rate for compensation purposes in these cases will be determined in accordance with the provisions of 5 U.S.C. 8114(d)(4).

HERBERT A. DOYLE JR.
Assistant Director for FEC

DATED: February 20, 1970

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 118

SUBJECT: 5 U.S.C. 8101(1) [SECTION 40(b), FECA]
DOL ADVISORY COMMITTEE ON CONSTRUCTION, SAFETY AND HEALTH

The Contract Work Hours Standards Act was amended by Public Law 91-54, approved August 9, 1969. Section 107(e) of the amended Act provides as follows:

"(1) The Secretary shall establish in the Department of Labor an Advisory Committee on Construction Safety and Health ... consisting of nine members appointed, without regard to the civil service laws, by the Secretary ....

"(2) The Advisory Committee shall advise the Secretary in the formulation of construction safety and health standards and other regulations, and with respect to policy matters arising in the administration of this section. The Secretary may appoint such special advisory and technical experts or consultants as may be necessary to carry out the functions of the Advisory Committee.

"(3) Members of the Advisory Committee shall, while serving on the business of the Advisory Committee, be entitled to receive compensation at rates fixed by the Secretary, but not exceed $100 per day, including travel time; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 of the United States Code for persons in the government service employed intermittently."

The Bureau has determined that members of the Advisory Committee are employees of the United States within the meaning of 5 U.S.C. 8101(1)(B) and are eligible for coverage under the FECA in case of injury or death while performing services contemplated under section 107(e) of the Contract Work Hours Standards

Act, as amended by Public Law 91-54. A copy of the member's appointment should be required in all cases. A copy of the applicable travel orders should be required in any case where the injury is sustained while enroute to or from a meeting.

Since these Committee members are employed on an intermittent basis, the pay rate for compensation purposes will be determined by 5 U.S.C. 8114(d)(3).

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: February 20, 1970

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 119

SUBJECT: 5 U.S.C. 8129(a) [SECTION 38(a), FECA]
RECOVERY OF OVERPAYMENT

5 U.S.C. 8129(a) provides for adjustment of compensation overpaid a claimant because of an error of fact or law by decreasing later payments to which the individual is entitled.

Although compensation due minor children because of the death of a parent is payable to the remaining parent or guardian for facility of payment purposes, the compensation belongs to the children individually. Hence, money owing to a child as compensation may not be used to set off an overpayment made to any other person, including another child or a widow, widwer, or other adult beneficiary.

The situation is different when compensation has been overpaid to a parent or other person on behalf of a child and the parent or other person is also receiving compensation. Adjustment of the overpayment may be made in this situation by decreasing the payments of compensation made to the parent or other person on his own behalf.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: February 24, 1970

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 120

PROMEMO

SUBJECT: 5 U.S.C. 8137 [Section 42, FECA
BRITISH NATIONALS LOCALLY HIRED

Certain agreements between the United States and Great Britain provide for insurance against industrial accidents and occupational diseases for locally hired British nationals under the United Kingdom National Insurance Act. The Bureau has found that the agreements and arrangements for compensation coverage made by agencies of the Department of Defense have the legal effect of superseding the Federal Employees' Compensation Act.

Any claim submitted as a result of an injury or death of a locally hired British national in the employ of the Department of the Army, Department of the Air Force, or Department of the Navy which occurred on or after January 1, 1967, will be rejected on the ground that there is in effect an agreement between the United States and Great Britain which renders the Federal Employees' Compensation Act inapplicable to such employees.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: March 25, 1970

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 121

SUBJECT:5 U.S.C. 8101(1) [Section 40(b), FECA] PARTICIPANTS IN "MAINSTREAM" AND "NEW CAREERS" PROGRAMS

Two special work and career development programs shown as "Main-stream" and "New Careers" have been established and are funded under P. L. 91-177, the Economic Opportunity Amendments of 1969.

"Mainstream" involves work activities directed toward the needs of those chronically unemployed poor who have poor employment prospects and are, because of age, physical condition, obsolete or inadequate skills, or other economic reasons unable to secure appropriate employment or training assistance under other programs; and which, in addition to other services provided, will enable such persons to participate in projects for the betterment or beautification of the community or area served by the program including activities which will contribute to the management conservation, or development of natural resources, recreational areas, Federal, State, and local government parks, highways, and other lands, the rehabilitation of housing, the improvement of public facilities, and the improvement and expansion of health, education, day care, and recreation services.

The "New Careers" program provides unemployed or low-income persons with jobs leading to career

opportunities, including new types of careers, in programs designed to improve the physical, social, economic, or cultural condition of the community or area served in fields of public service, including health, education, welfare, recreation, day care, neighborhood redevelopment, and public safety.

A further description of these programs may be found in Title I, part E, section 162 of the Economic Opportunity Act of 1964, as amended by the above-citied Amendments.

It has been determined that participants in these programs are employees of the United States within the meaning of 5 U.S.C. 8101(1) in those instances where they are (1) working or training at a Federal installation and are (2) under the supervision of a Federal employee, and (3) all other indicia of employment relationship normally applied under the FECA exists.

Since all other participants in this program are not employees of the United States, care must be exercised to insure that the above conditions are certified by appropriate officials of the Federal agency involved. The Bureau's official report forms will normally provide the basis for this information.

In many instances the pay rate will be determined by 5 U.S.C. 8114 (d)(3) since the work does not always provide full-time employment.

Many of these individuals will be minors or may be working in learners' capacities and many of them may be elderly. Consideration should therefore be given to possible application of the appropriate provisions of 5 U.S.C. 8113 in any case where there is prolonged or permanent disability.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: April 23, 1970

Distibution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 122

SUBJECT: 5 U.S.C. 8113(a) [Section 6(d)(1), FECA]
CHANGE IN LEARNER'S STATUS

5 U.S.C. 8113(a) provides for an adjustment of the compensation rate of an individual employed in a learner's capacity after the time the wage-earning capacity of the individual would probably have increased but for the injury.

In the case of Robert H. Merritt, 11 ECAB 64, the Employees' Compensation Appeals Board held that "the Act contemplates but one probable increase in wage-earning capacity upon the learner's completion of training..." In the case of Bruce E. Hickey, 19 ECAB 98, the Board acknowledged, however, that learners do proceed from one level to another while in a training program and that the completion of certain levels or

phases within a learner's training program involve increases in wage-earning capacity.

In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner's status which would have brought him either (1) to a new level within or (2) to completion of his learner's program.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: May 19, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 123

(See FECA Program Memoranda 169 and 200.)

SUBJECT:5 U.S.C. 8110 [Section 6, FECA], 5 U.S.C. 8133 [Section 10, FECA] AND 5 U.S.C. 8116 [Section 7, FECA] BENEFITS PAYABLE BY VA AND BEC BASED ON SAME DISABILITY OR DEATH

Note: This Program Memorandum describes the results of the recent decision handed down by the ECAB in the Etzel case (Docket No. 69-67).

Superseded:

FECA Program Memorandum No. 13, December 1, 1960
FECA Program Memorandum No. 21, August 30, 1961
FECA Program Memorandum No. 26, March 9, 1962
FECA Program Memorandum No. 35, March 11, 1964
FECA Program Memorandum No. 79, September 19, 1968

Reference:

FECA Program Memorandum No. 108, November 28, 1969

An appropriate notation should be made on each of the above (the superseded memoranda should be retained for purposes of understanding case actions taken in accordance with the policy established at the time).

To provide continuity and reiterate policy development concerning this particular issue (VA versus BEC benefits), the basic intent of each Program Memorandum is reviewed briefly as follows:

By Program Memorandum No. 13 of December 1, 1960, the Bureau endorsed the policy that concurrent awards made by the VA and BEC prior to September 13, 1960, the effective date of Public Law 86-767, the FECA Amendments of 1960, were not prohibited and beneficiaries could receive both. Program

Memorandum No. 21 issued on August 30, 1961, reflected the Bureau's opinion that concurrent payment of benefits under the FECA and payment of pensions for non-service connected disability or death by the VA was not prohibited. The claimant could receive both benefits since the VA payment was pension as defined in 5 U.S.C. 8116 [Section 7(a) of the FECA].

It was subsequently determined that awards made by the VA and BEC on or after September 13, 1960 for the same injury or death constituted a prohibited dual payment and an election would be required (see Program Memorandum No. 35 of March 11, 1964 and the clarifying memorandums by Assistant Director Newman of March 11, 1964 and July 31, 1964). In effect, it was decided that for awards made on or after September 13, 1960, a claimant could not receive concurrent benefits from the VA and the BEC as a result of the same injury or death. If the claimant had dual eligibility for benefits from the VA and the BEC as a result of the same injury or death, an election was required even if the benefit being paid by the VA was designated as a pension.

Prior to July 4, 1966, the FECA made no provision for educational benefits, and Program Memorandum No. 26 of March 9, 1962 was issued to explain Bureau policy as it related to the War Orphans' Educational Assistance Act. As a result of Public Law 89-488, educational benefits are payable under the FECA effective July 4, 1966; and Program Memorandum No. 79 of September 19, 1968, was issued to advise that when a child is eligible for benefits based on school attendance from the VA, an election must be made since he cannot receive both benefits concurrently.

On October 23, 1968, Congress enacted Public Law 90-631 which provided payment of educational benefits beginning December 1, 1968 to a veteran's widow, in her own right if she continued her education. Program Memorandum No. 108 of November 28, 1969, was issued by the Bureau to explain that where a widow was eligible for BEC benefits and VA educational benefits simultaneously an election was required. She cannot receive both benefits concurrently.

In the case of Bernard E. Etzel, deceased, ECAB Docket No. 69-67, issued December 12, 1969, the Appeals Board found that the language of the exception in 5 U.S.C. 8116(a)(2) with respect to pensions, contained in the statute since its inception, was not repealed by implication by the FECA Amendments of 1960 or by any other enactment; and that the exception applies to survivors as well as to the employee himself. Consequently, an election is not required in instances where benefits of the FECA are payable concurrently with a non-service connected pension payable by the VA.(1) This change applies both to new injuries and deaths and in cases previously adjudicated.

With respect to benefits payable under the FECA simultaneously with benefits payable by the Veterans Administration--when such VA benefits are <u>not</u> in the form of a pension (but are in the form of VA compensation; VA dependency and indemnity compensation; or educational assistance), it is important to note that the VA has advised the Bureau that under certain circumstances, VA benefits for a widow and her children are divisible. To state it another way, the widow may elect to receive benefits from the BEC, and the children (or their guardian on their behalf) may elect to receive benefits from the VA or vice versa. For sake of identification and to provide a common vocabulary, this divisibility of benefits is created when the child has a "separate and independent right of entitlement" to VA benefits, and will be referred to as such hereafter.

The VA and the BEC are in accord that the following basic principles apply regarding dual VA/BEC benefits:

(1)Where a child is eligible for benefits under both the FECA and VA law, based on school attendance, an election to receive benefits from one agency or the other must be made.

(2)Where a widow is eligible for both FECA benefits and educational assistance benefits under VA law, an election to receive benefits from one agency or the other must be made.

(3)If a child has a separate and independent right of entitlement under VA law, an election of VA or Bureau benefits by the veteran or the widow does not preclude a separate election of benefits by the child.

(4)If a child does not have a separate and independent right of entitlement under the VA law, then the election by the veteran or the widow is binding on the child in that the benefits for the child are payable only by the same agency as selected by the veteran or the widow.

(5)An election is binding only for the period of concurrent eligibility.

(6)Where BEC benefits, based on a full-time course of school study or training have been elected, but payments have been terminated because the child has reduced his school course of study or training to part-time, the election is irrevocable and VA benefits are not payable forf as long as there is concurrent eligibility.

(7)The election of VA benefits by one or more claimants in a family will not serve to increase the rate of compensation payable by the BEC to or on behalf of the other claimants who continue to receive Bureau benefits.

(8)Although an election may have been made between September 13, 1960 and July 4, 1966, when BEC educational benefits first became available, a new election with reference to educational benefits is allowed since there were no alternative educational benefits in existence at the time of the first election, and consequently no period of concurrent eligibility.

(9)The VA and the BEC are also in accord that all claimants who have dual eligibility for educational benefits subsequent to July 4, 1966, are required to elect benefits from one agency or the other; that an election will be effective retroactively to July 4, 1966, or the date of the child's 18th birthday whichever is later.

(10)Where an election was previously required and made between non-service connected VA pension and BEC compensation, such election is null and void. If otherwise qualified, the claimant may receive both payments from date of eligibility as determined by the paying authority.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

DATED: June 8, 1970

DISTRIBUTION: List No. 7

FECA PROGRAM MEMORANDUM - NO. 124

(See Program Memorandum No. 141)

SUBJECT: 5 U.S.C 8114(c) [Section 12(c)(1), FECA]

PROMEMO

COMPUTATION OF COMPENSATION ON A DAILY BASIS

In determining the pay rate for periods of total disability that do not exceed 90 days, the Bureau has generally used a standard Monday through Friday, five-day workweek, without taking cognizance of the employee's actual "days off." In some instances, this has resulted in an overpayment or underpayment of compensation.

The Bureau has decided to modify this policy, and in cases where compensation is to be paid on a daily basis, the employee will now be paid compensation only for his regularly scheduled work days. he will not rountinely be paid on a Monday through Friday basis unless these days actually constitute his workweek at the time his pay stopped.

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: June 16, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 125

Rescinded, along with FECA Program Memorandum No. 169, by FECA Bulletin No. 86-2.

FECA PROGRAM MEMORANDUM - NO. 126

SUBJECT: 5 U.S.C. 8137 [Section 42, FECA]
AUSTRALIAN NATIONALS (AND OTHERS) LOCALLY HIRED

Certain agreements between the United States and Australia provide for insurance against industrial accidents and occupational diseases (under the Australian Commonwealth Employees' Compensation Act) for locally hired civilian employees of the U. S. Navy employed at the U. S. Naval Communications Station in Australia.

The Bureau has found that the agreements and arrangements for compensation coverage made by the Department of the Navy have the legal effect of superseding the Federal Employees' Compensation Act for all locally hired civilian employees of the U. S. Navy employed at the U. S. Naval Station in Australia except for U. S. nationals.

Any claim submitted as a result of an injury or death of the locally hired civilian in the employ of the Department of the Navy at the U. S. Naval Station in Australia other than a U. S. national employee on or

after June 24, 1968, will be rejected on the ground that there is in effect an agreement between the United States and Australia which renders the Federal Employees' Compensation Act inapplicable to such employees.

It has also been determined that U. S. national employees of the Department of the Navy at the U. S. Naval Station in Australia are entitled to either the benefits of the Federal Employees' Compensation Act or the benefits of the Australian Commonwealth Employees' Compensation Act--subject to an irrevocable election.

Details of the election procedure for such employees have been made available to the Department of the Navy and the Bureau's Honolulu District Office (and may also be found in the Office of the Director's files).

HERBERT A. DOYLE, JR.
Assistant Director for FEC

Dated: August 3, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 127

SUBJECT: 5 U.S.C. 8101(1) [Section 40(b), FECA]
NATIONAL PARK SERVICE VOLUNTEERS

On July 29, 1970, P. L. 91-357 was approved by Congress. This law authorized the Secretary of the Interior to recruit, train and accept the services of unpaid individual volunteers for use in interpretive functions or other visitor services or activities in and related to areas administered by the Department of the Interior through the National Park Service.

For purposes of providing workmen's compensation coverage, volunteers are deemed to be civil employees of the United States within the meaning of the term "employees" as defined by 5 U.S.C. 8101(1) et seq.

Since these volunteers receive no pay or salary, pay rate for compensation purposes must be determined under the provisions of 5 U.S.C. 8114(d)(4).

Some volunteers may be minors and in such cases the provisions of 5 U.S.C. 8113 will apply where there is prolonged or permanent disability.

ALBERT KLINE
Assistant Director for FEC

Dated: September 23, 1970

PROMEMO

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 128

SUBJECT:5 U.S.C. 8115 [Section 13, FECA] DETERMINATION OF WAGE-EARNING CAPACITY WHERE WAGES ARE BASED SOLELY ON COMMISSION

Occasionally a wage-earning capacity rating is made on the basis of an occupation wherein earnings are based solely on commissions. In the case of Donald R. Shively, ECAB Docket No. 70-128, the Board held that it was improper to use a position for which only a commission is paid, without making provision for payment of a higher rate of compensation during the beginning period in which the claimant would earn less than the amount used by the Bureau in the wage-earning capacity rating.

Where a wage-earning capacity rating is to be made on the basis of commissions only, the claims examiner should obtain information as to the average number of weeks, or months it takes for starting person to reach the level of commissions used as the basis of the wage-earning capacity rating. Compensation should then be paid on the basis of the claimant's actual wage loss for that period of time. Thereafter, compensation should be paid on the wage-earning capacity rating which is predicated on the commission.

ALBERT KLINE
Assistant Director for FEC

Dated: September 23, 1970

Distribution: List No. 7

NOTE: Add this Program Memorandum to the list of References on page 1-8-96.1, paragraph 1-883.1, Wage-earning Capacity Determination, Chapter 1-800, Part 1, Claims, of the Federal Procedure Manual.

FECA PROGRAM MEMORANDUM - NO. 129

SUBJECT: 5 U.S.C. 8106 [Section 4, FECA]
5 U.S.C. 8115 [Section 13, FECA] RETROACTIVE ADJUSTMENT WHEN PRIOR WAGE EARNING-CAPACITY DETERMINATION WAS IMPROPER

Occasionally in cases where a wage-earning capacity (WEC) rating has been made, evidence is received*

which shows the employee continued to be totally disabled subsequent to the effective date of the rating. In such cases, compensation for temporary total disability should be resumed retroactive to the date of the rating and continued as indicated by the facts of the case.

In a few instances, following determination of a WEC rating, evidence is submitted* which shows the employee is not totally disabled but that the WEC was improper. This may result from an unclear medical evaluation, lack of full information on injury-related physical limitations or pre-existing conditions, etc.

In such instances, the cases fall into two categories:

(1)Combined Total and Partial Disability. In cases where the evidence shows the employee was totally disabled during part of the intervening period and partially disabled during the balance, compensation for total disability should be reinstated retroactively only for the specific period of total disability. The new (corrected) WEC rating should be applied retroactively for the period during which the claimant was only partially disabled.

(2)Partial Disability. In cases where the evidence indicates the employee did have a WEC during the intervening period, but it was different from the initial or prior rating, the new (corrected) rating should apply retroactive to the appropriate date, whether it be the date of the prior rating or some other date during the intervening period.

When making a new WEC to correct a prior improper rating, the Bureau must take credit, where appropriate, for compensation paid during the intervening period. Also, the compensation beginning as of the new WEC must be paid on the basis of wage rates in effect as of the date of the new WEC. For example, consider a case where the WEC determination is being made retroactive to 1961. In this instance, a comparison must be made, if possible, between the 1961 wage rate for the job held at the time of injury and the 1961 wage rate for the job he is considered capable of performing.

ALBERT KLINE
Assistant Director for FEC

***without an application for hearing or review (In such instances, the case file is referred to the Division of Hearings and Review.)**

Dated: September 23, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 130

(See Program Memorandum No. 277.)

SUBJECT:5 U.S.C. 8116 [Section 7, FECA] and 5 U.S.C. 8132 [Section 27, FECA] PAYMENT OF CSC ANNUITY CONCURRENTLY WHILE ABSORBING THIRD PARTY CREDIT

Where a claimant has made a third party recovery resulting in a credit balance and it appears that

additional compensation will be paid and medical expenses claimed, compensation payments are calculated and continue to be charged against the credit as are medical expenses paid by the claimant. This procedure continues until the third party credit is absorbed.

The CSC has held that there is no prohibition against a claimant receiving an annuity during the period that the third party credit is being absorbed. The claimant is receiving no compensation from the Bureau during this period; therefore, payment of an annuity does not constitute a prohibited dual payment under the provisions of 5 U.S.C. 8116. Receipt of the annuity during the third party credit period does not prejudice the claimant's rights. Thus, when the credit has been exhausted, the claimant should be given an opportunity to elect between Bureau compensation and continuance of the CSC annuity.

If Bureau benefits are elected, the Bureau will not take credit for the amount of the annuity paid by the CSC while the third party credit was being exhausted.

ALBERT KLINE
Assistant Director for FEC

Dated: October 23, 1970

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 131

SUBJECT:5 U.S.C. 8116(a) (b) [Section 7(a) FECA] CONCURRENT PAYMENT OF COMPENSATION WITH U.S. NAVAL FLEET RETAINER PAY

On February 5, 1970, FECA Program Memorandum No. 116 was released describing the Bureau's policy with reference to dual payments to Fleet Reservists. Since that date, additional information has been received from the Department of the Navy which further explains the status of Fleet Reservists.

The Navy has advised that the Fleet Reserve and the U.S. Naval Reserve are separate and distinct entities. The Fleet Reserve primarily consists of members who are transferred to the Fleet Reserve, under 10 U.S.C. 6331, with the at least 19« years of service. These men constitute a ready reserve and may be recalled to active duty in a national emergency or when otherwise needed. They remain in the Fleet Reserve and receive retainer pay until they have completed 30 years of active or inactive service, at which time they are transferred to the Retired List of the regular Navy. If a Fleet Reservist is found not physically fit for duty, even though he has not completed the required 30 years of service, he is immediately placed on the Retired List of the regular Navy. When transferred to that "List" he receives retired pay as distinguished from retainer pay and his status likewise changes from Fleet Reservist to a Retired member of the regular Navy.

Although the Comptroller General has ruled in decision B-165726 that a Fleet Reservist may receive his retainer pay concurrently with compensation from the BEC, the result of the Navy's procedure as explained above, terminates such entitlement upon transfer to the Retired List. It is possible, however, that a Fleet

Reservist may receive both benefits concurrently for the period of time preceding the transfer. It is the policy of the Navy to transfer a Fleet Reservist to the Retired List if he is no longer capable of serving on active duty.

If a claim is filed by a Fleet Reservist receiving retainer pay, this fact should be verified by contacting the finance office making payment. When confirmed, compensation benefits can be paid without an election. Upon receipt of information from the Finance Center that the employee has been transferred to the Retired List of the regular Navy, election procedures should be followed as presently incorporated in the form letter Ltr. BEC 1080.

ALBERT KLINE
Assistant Director for FEC

Dated: January 25, 1971

ADDENDUM:

In view of the 1974 Amendment made to 5 USC 8116 by PL 93-416, the above Program Memorandum applies only to claims for compensation any periods prior to September 7, 1974. Concurrent payments may be made for periods after September 7, 1974.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 12, 1975

Encl. to FECA Bulletin No. 6-75

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 132

SUBJECT:5 U.S.C. 8112 [Section 6(c), FECA], and 5 U.S.C. 8133(e) [Section 10(K), FECA] THE EFFECT OF THE POSTAL REORGANIZATION ACT ON MAXIMUM AND MINIMUM COMPENSATION RATES

The Postal Reorganization Act, PL 91-375 (84 Stat. 719 et seq.), created new per annum salary rates under the General Schedule for postal employees. Such rates are higher than those for non-postal Federal employees under the General Schedule of the Classification Act of 1949, as amended. However, this does not affect the maximum and minimum limitations upon FECA benefits contained in 5 U.S.C. 8112 and in 5

U.S.C. 8133(e).

Prior to the 1966 amendments (PL 89-488), the FECA contained monthly maximum and minimum limitations of $525 and $180 (or actual pay, whichever was less). Those dollar amounts created increasing hardships as Federal employees' salaries kept increasing. Accordingly, in passing the 1966 amendments, the Congress provided a formula whereby the limitations would automatically change whenever a particular event occurred, namely, a change in the highest rate paid to a Grade 15 under the General Schedule of the Classification Act of 1949 and/or to the lowest rate paid to a Grade 2 under that Schedule.

The increases for the postal service provided by Section 9 of PL 91-375 has no effect upon the benefit limitations because the General Schedule of the Classification Act of 1949 was not amended thereby. The Postal Service is not under the General Schedule.

ALBERT KLINE
Assistant Director for FEC

Dated: January 26, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 133

SUBJECT:5 U.S.C. 8101(1)(B) [Section 40(b), FECA] PARTICIPANTS IN COLLEGE WORK-STUDY PROGRAMS UNDER TITLE IV PUBLIC LAW 89-329 (HIGHER EDUCATION ACT OF 1965)

Under Part C of Title IV of Public Law 89-329, the Higher Education Act of 1965, students attending defined institutions of higher learning and vocational schools, are placed by the schools in work-study programs which may involve part-time work in Federal agencies.

Students may work up to an average of fifteen hours per week. Participants are paid wages by the institutions, such wage costs reimbursed in part by the Federal Government.

When these students are assigned to a Federal agency, they are considered employees of the Federal Government within the provisions of 5 U.S.C. 8101(1)(B). While working they are under the supervision of a Federal employee; their wages are paid in part from Federal funds; and they are rendering personal service to the United States, of a type similar to services rendered by civil employees.

It is anticipated that some work-study activities will be performed in the field, off the Federal premises. Where an injury occurs to a participant while so engaged, any issue involving performance of duty will be resolved under criteria applying to regular civil employees in similar situations.

The pay rate for compensation purposes in these cases will be determined under 5 U.S.C. 8114(d)(4). The

participants will generally be minors. Regardless of age, they may frequently be performing as trainees, the Federal agency assigning duties of increasing complexity or responsibility, with the hope and expectation that the student will become a civil employee of the agency upon completion of his education. Where the participant is a minor, or where it is determined that he was employed to perform duties similar to those of a learner, appropriate provisions of 5 U.S.C. 8113 should be applied as indicated.

ALBERT KLINE
Assistant Director for FEC

Dated: January 28, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 134

(See Program Memorandum No. 181.)

SUBJECT:5 U.S.C. 8107 [Section 5, FECA] LOSS OR LOSS OF USE OF TWO OR MORE DIGITS OF A HAND OR FOOT

Reference: FECA Program Memorandum No. 89, January 6, 1969.

Title 5 U.S.C. 8107(c)(17) provides that compensation for loss of use of two or more digits, or one or more phalanges of each of two or more digits, of a hand or foot, is proportioned to the loss of use of the hand or foot occasioned thereby.

When an injury causes loss or loss of use of two or more digits of the hand or foot, the cumulative allowances for each of the digits may occasionally be greater than the percentage value of impairment of the hand or foot assigned by the AMA Guide. In enacting this section of the Federal Employees' Compensation Act, it is reasonable to assume that the Congress was trying to insure that an injured employee would be compensated for any permanent functional impairment of the hand or foot in an amount at least equal to the scheduled allowance for the digits alone.

Where the cumulative allowances for the digits is greater than the value of the percentage loss of the hand or foot, the employee should have the benefit of the more favorable award and be compensated in accordance with the scheduled allowances for the sum of the digits.

For example, where an employee sustained a loss of 50% of the great toe and 100% of each of the other four toes, application of the AMA Guide would result in an evaluation of 25% loss of use of the foot which amounts of 51.25 weeks of compensation. This would be an inequity since the sum of the digits would amount to 83 weeks of compensation. Therefore, in such a case, the employee will be awarded 83 weeks compensation and the entry "degree and nature of permanent disability" on form BEC 181 will show 50% loss of the great toe and 100% loss of each of the other four toes.

An appropriate memorandum will be placed in the file which will make reference to this program memorandum and will show why the award was based on each of the digits rather than on the hand or foot.

ALBERT KLINE
Assistant Director for FEC

Dated: February 3, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 135

SUBJECT: 5 U.S.C. 8101 [Section 40(b), FECA]
5 U.S.C. 8114(d)(1) and (2) [Section 12(c)(2)(A) or (B), FECA] REGULAR CIVIL EMPLOYEES SERVING AS VOLUNTEER TEMPORARY U.S. DEPUTY MARSHALS

Under certain conditions--usually in times of crisis or emergency--the United States Marshals Service may appoint temporary U.S. Deputy Marshals from a list of regular Federal civil employees who have volunteered to serve in this capacity. The service is voluntary and without pay or remuneration of any kind. The volunteers would probably not be called upon except in the event of serious or potentially serious situations within a radius of 75 miles to their home. When sworn in for such temporary duty, the volunteers are employees for compensation purposes under 5 U.S.C. 8101(1).

It is apparent that while on duty as a temporary volunteer Deputy Marshal, a regular Federal employee is engaged in work for the same employer-the Federal Government. Therefore, the pay rate for compensation purposes will be determined by the pay rate of the individual's regular Federal job under 5 U.S.C. 8114(d)(1) or (2).

ALBERT KLINE
Assistant Director for FEC

Dated: February 3, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 136

SUBJECT:5 U.S.C. 8106(b) [Section 4(a)(2), FECA] FORFEITURE OF COMPENSATION WHEN EARNINGS ARE NOT REPORTED

The forfeiture provision of 5 U.S.C. 8106(b) is applicable only "with respect to any period for which the affidavit or report was required." Therefore, if an injured employee files claims for compensation during

periods when he has had earnings and knowingly omits or understates any part of his earnings from employment or self-employment, he forfeits his right to compensation for the specific periods for which claims were filed. However, if any of the claims covers an inclusive period when there were no earnings, he is entitled to compensation for that specific period.

In the case of Charles A. Griffin, ECAB Docket No. 70-101, the employee had earnings from December 20, 1959 to May 13, 1964, and filed 37 CA-8 Forms in which he omitted any reference to his earnings. He was then informed that he no longer had to file CA-8's; however, he was told several times that it would be necessary for him to report any outside earnings he might have. He failed to do so. When the Bureau discovered that the claimant had actually worked, it applied the forfeiture provision and declared an overpayment of compensation for the entire period in question.

The Board remanded the case to the Bureau and pointed out that "when an injured employee failed to report any part of his earnings as required..., the forfeiture should occur 'with respect to any period for which such report was required to be made.' Thus, the Bureau should consider separately each CA-8 filed by appellant and determine whether for the period covered by such CA-8 he had any earnings...which he did not report. On several occasions during the period in issue appellant was in the hospital and obviously did not have earnings from employment or self-employment while in the hospital. There may have been other periods from December 20, 1959 to May 13, 1964, when he did not have earnings... If he was in the hospital for the entire period covered by his CA-8, and thus had no outside earnings during the period covered by the report, it would not be proper to require a forfeiture of compensation for such period. However, if he had any earnings from employment or self-employment during the period covered by the report, he would not be entitled to compensation for any portion of the period covered by the report even though during a portion of that period he was in the hospital or for other reasons had no earnings."

The Board also stated that "with respect to the periods for which he did not file a CA-8 or other reports, he was nevertheless subject to the forfeiture provision; the Bureau instructed him that he was to file a report whenever he had any outside earnings and the statute provides that if a claimant fails to make a report required by the Bureau with respect to his earnings, the forfeiture should apply 'with respect to any period for which such report was required to be made.'"

ALBERT KLINE
Assistant Director for FEC

Dated: March 1, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 137

SUBJECT:5 U.S.C. 8101(1) [Section 40(b), FECA] PARTICIPANTS IN PROGRAMS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT OF 1970

PROMEMO

On January 5, 1971, P.L. 91-648 was approved by Congress. This law is cited as the "Intergovernmental Personnel Act of 1970." The purpose of the Act, in pertinent part is:

> **"To reinforce the federal system by strengthening the personnel resources of State and local governments, ...to authorize federal assistance in training State and local employees,...to facilitate the temporary assignment of personnel between the Federal Government and State and local governments, and for other purposes."**

Attention is directed to the attached excerpt of P.L. 91-648. Section 3373(d)(1) and section 3374(d) provide for compensation coverage under 5 U.S.C. 8101 et seq. for Federal as well as State and local government employees who are assigned to this program.

The election provisions contained in section 3373(d)(1) and section 3374(d) must be applied in the adjudication of claims arising out of this program. When duel entitlement between FECA and State or local government benefits exists, the election must be made within one year after the injury or death, unless extended for reasonable cause. When made, the election is irrevocable unless otherwise provided by law.

ALBERT KLINE
Assistant Director for FEC

Attachments

Dated: March 1, 1971

Distribution: List No. 7

<u>Excerpt of P.L. 91-648</u>

<u>3373(d)(1)</u> An employee so assigned and on leave without pay who dies or suffers disability as a result of personal injury sustained while in the performance of his duty during an assignment under this subchapter shall be treated, for the purpose of subchapter I of chapter 81 of this title, as though he were an employee as defined by section 8101 of this title who had sustained the injury in the performance of duty. When an employee (or his dependents in case of death) entitled by reason of injury or death to benefits under subchapter I of chapter 81 of this title is also entitled to benefits from a State or local government for the same injury or death, he (or his dependents in case of death) shall elect which benefits he will receive. The election shall be made within one year after the injury or death, or such further time as the Secretary of Labor may allow for reasonable cause shown. When made, the election is irrevocable unless otherwise provided by law.

<u>3374(d)</u> A State or local government employee who is given an appointment in an executive agency for the period of the assignment or who is on detail to an executive agency and who suffers disability or dies as a result of personal injury sustained while in the performance of his duty during the assignment shall be treated, for the purpose of subchapter I of chapter 81 of this title, as though he were an employee as defined by section 8101 of this title who had sustained the injury in the performance of duty. When an employee (or his dependents in case of death) entitled by reason of injury or death to benefits under subchapter I of chapter 81 of this title is also entitled to benefits from a State or local government for the same injury or death, he (or his dependents in case of death) shall elect which benefits he will receive. The election shall be made within 1 year after the injury or death, or such further time as the Secretary of Labor may allow for

reasonable cause shown. When made, the election is irrevocable unless otherwise provided by law.

FECA PROGRAM MEMORANDUM - NO. 138

SUBJECT:5 U.S.C. 8102(a) [Section 1(a), FECA] PERFORMANCE OF DUTY STATUS OF SEAMEN WHO LEAVE THEIR SHIP WITHOUT PROPER PERMISSION

The purpose of this memorandum is to bring to your attention a decision of the ECAB on the "performance of duty" question of a seaman who has left his ship without proper permission before the end of his tour of duty. The decision was issued February 2, 1971, in the case of Socorro Chimelis, claiming as widow of Angel Chimelis, Docket No. 70-126, and the finding was that the decedent was in the performance of duty at the time of his death.

The decedent was employed aboard a ship that was docked at a foreign port. There were no witnesses to his death but information obtained indicated that it was caused by drowning and occurred between midnight and 2:00 a.m. on February 4, 1968. His duty hours on February 3, 1968, had been from 6:30 a.m. to 10:00 a.m., 10:30 a.m. to 1:30 p.m., and 3:30 p.m. to 6:30 p.m., and they would have been the same on February 4, 1968. He left the ship without proper permission before the end of his 3:30 p.m. to 6:30 p.m. tour of duty on February 3, 1968, and had not returned to the ship prior to the time of his death. It was the position of the ship's captain that the decedent had entered an AWOL status when he departed the ship without permission, and that status would not have terminated until his return to the ship.

The points made by the Appeals Board are as follows:

> **1. Under the maritime law governing the services of seamen, a seaman remains "in the service of the ship" even when the vessel is in a foreign port and he is on shore away from this vessel.**
>
> **2. With respect to the effect of a seaman's absence without leave, the regulations of the employing establishment provide that an employee will be carried in a nonpay status "for the period of unauthorized absence." The captain of the ship may, at his discretion, impose additional penalty in accordance with prescribed procedures.**
>
> **3. The death occurred at a time when he had the right to be ashore without the necessity of securing explicit permission. It did not arise out of actions which occurred while he should have been on duty, nor has it been shown that his death had any relation to what he did on shore during the hours of his tour of duty.**

The reasoning of the Board appears to be that there is no evidence that there would have been any penalty on the decedent beyond his forfeiture of pay during this unauthorized absence from 3:30 p.m. to 6:30 p.m. on February 3, 1968; that after 6:30 p.m. on that date he had the right to be ashore and he was in the same situation as the other crew members who were ashore as to being available and subject to call for service on the ship in case of an emergency; and that his death occurred while he was still in this same situation and had no relationship to any activity of his during the period of his unauthorized absence.

As it notes, that Board has based its decision on the circumstances in this case and caution should be used in applying this decision to seemingly similar circumstances.

ALBERT KLINE
Assistant Director for FEC

Dated: March 3, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 139

SUBJECT: 5 U.S.C. 8107 [Section 5(a), FECA]
LOSS OF HEARING DETERMINATIONS

References:

FECA Program Memorandum No. 29, dated January 7, 1963.
FECA Program Memorandum No. 105, dated October 31, 1969.

In accepted loss of hearing cases, where there are slight discrepancies between audiograms and the higher rating is found to be justified, the award of compensation should be based on the higher rating. A slight discrepancy is considered to be one where there is approximately ten percent difference in ratings. Where the higher rating in cases of slight inconsistencies cannot be justified or where the audiograms of record are significantly inconsistent, the claimant and the case file should be referred to a certified otolaryngologist not previously involved in the case to resolve the discrepancy. The otolaryngologist should be authorized to use the services of a local speech and hearing center of his choice, but the Bureau should not specify the use of any particular tests or testing device. The otolaryngologist should be requested to include in his report his findings as to the percentage of hearing impairment based on current Bureau policy as outlined in Program Memorandum No. 105, dated October 31, 1969.

Calculation of the percentage of hearing impairment should not ordinarily be based solely on reports of psychogalvanic skin resistance audiometry or cortical audiometry in any case because the accuracy of both methods is in question. If, however, the consulting otolaryngologist uses either of these methods in his testing and recommends them as the most accurate and reasonable method of determining the percentage of hearing impairment in an individual case then the results of these tests may be considered in the calculation.

ALBERT KLINE
Assistant Director for FEC

(See Program Memorandum No. 162.)

Dated: April 9, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 140

SUBJECT: 5 U.S.C. 8101(1) [Section 40(b), FECA]
SUSQUEHANNA RIVER BASIN COMMISSION

Public Law 91-575, the Susquehanna River basin Compact, approved December 24, 1970, created a commission to control and develop the water resources of the Susquehanna River Basin. The Commission consists of representatives of the Federal Government and the States sharing the watershed.

Section 2(m) of the Compact provides:

> **"The officers and employees of the commission (other than the United States member, alternate United States member, and advisers, and personnel employed by the United States member under direct Federal appropriation) shall not be deemed to be, for any purpose, officers or employees of the United States or to become entitled at any time by reason of employment by the commission to any compensation or benefit payable or made available by the United States solely and directly to its officers or employees."**

Accordingly, compensation benefits will be extended only to the United States member, and to his alternate, his advisers, and his employees paid under direct Federal appropriation.

ALBERT KLINE
Assistant Director for FEC

Dated: July 26, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 141

SUBJECT:5 U.S.C. 8105 (Section 3, FECA), 5 U.S.C. 8106 (Section 4, FECA), 5 U.S.C. 8114 (Section 12, FECA) COMPUTATION OF DISABILITY COMPENSATION

References:FECA Program Memorandum No. 124, dated June 16, 1970

PROMEMO

BEC Bulletin No. 43-71, dated August 9, 1971.

This Program Memorandum describes the results of the recent decision handed down by the FECA in the Wood case (Docket No. 71-67). An appropriate notation should be made on each of the above references calling attention to this Memorandum.

In Program Memorandum No. 124, it was stated that in paying compensation on a daily basis, the employee would be paid compensation only for his regularly scheduled work days. In the Wood decision the ECAB noted that the use of the actual daily wage for periods of disability not exceeding 90 calendar days was to expedite payment of compensation for a short period of disability when the "average annual earnings" are not readily determinable for "monthly pay purposes." They also noted the impropriety and inequity of basing compensation on the fraction of the calendar week rather than the fraction of the workweek in paying on a weekly basis.

The Bureau has decided that compensation will be paid on a weekly basis in all cases where the "average annual earnings" are readily determinable and/or where the injury causes (1) permanent total or partial disability; (2) temporary partial disability and/or (3) temporary total disability where the period of compensable disability exceeds, or is expected to exceed 90 calendar days. The daily basis for computing compensation will be used in those cases involving a short period of disability only when the "average annual earnings" are not readily determinable and when none of the conditions outlined in (1) through (3) exists. When there is doubt as to whether there will be permanent effects of the injury or that the temporary total disability will exceed 90 calendar days, and the "average annual earnings" are not readily determinable, payment should be made on the basis of the daily pay rate and appropriate inquiries made to develop the weekly pay rate.

To prevent the inequities found by the Board, compensation will be paid on the basis of the workweek (regularly scheduled work days within the calendar week of work) rather than the calendar week (calendar days in the regular workweek, including the off-duty days) for (1) the week in which pay loss begins, if less than a whole workweek; (2) any individual work days of pay loss not consisting of a full workweek; and (3) the week in which the employee returns to work, if less than a whole workweek.

ALBERT KLINE
Assistant Director for
Federal Employees' Compensation

Dated: August 9, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 142

SUBJECT:5 U.S.C. 8102(a) [Section 1(a), FECA] DUTY STATUS OF EMPLOYEES WHILE TRAVELING TO AND FROM WORK AND HOME

PROMEMO

Some city letter carriers of the United States Postal Service have contracts or transportation agreements with their individual Post Office to supply a vehicle for use in performing their duties. This has raised the question of whether such employees have the coverage of the FECA while traveling to and from work and home in their vehicles as are rural carriers who supply personal vehicles which they use to deliver mail.

Depending upon the needs of the individual post office, city letter carriers may supply their own vehicles for mail delivery and for transporting other postal employees on official business. They do this by obtaining a contract through competitive bidding which is open to the public, or by entering into a voluntary formal agreement (known as "City Carrier Transportation (Driveout) Agreement") with the Postal Service. The "Driveout" agreement provides the employee with payment at established rates for items such as mileage; distance between routes; relays carried; passengers transported; and parcels exceeding a certain weight.

The Bureau has determined that a postal employee who uses his personal vehicle in the performance of his duties, with the knowledge and consent of his employer, is in the performance of duty while traveling in his vehicle to and from work and home regardless of the type of contract under which the vehicle was provided.

This determination does not include employees who contract to supply their personal vehicles for postal business but who do not use the vehicles to perform their duties. To qualify for coverage the employee must use his personal vehicle to perform his duties. The distinction here is that the employee who supplies a vehicle to the United States Postal Service but does not use it in the discharge of his duties, is taking his vehicle to work pursuant to a supply contract and not because of his employment.

Program Memorandum No. 104 pertaining to rural carriers who use their own vehicles gave as a qualification for coverage that the carrier must have been required by the employer to furnish a vehicle for the handling of mail. This qualification while still valid, is not necessary so long as the employer knew and approved of the rural carriers' use of their personal vehicles in the performance of their duties.

The basic test of coverage in each case of reported injury sustained by a postal employee, or any Federal employee, while he was traveling to or from home and work in his personal vehicle, will be whether the employer knew about and consented to the employee's use of his personal vehicle to perform his duties. However, the facts pertaining to the use of the privately owned vehicle must be developed. In addition to the basic test of coverage, each case must meet the other requirements that generally apply to travel injury--such as traveling the most direct route, etc.,--to establish that the employee was in the performance of duty.

ALBERT KLINE
Assistant Director for FEC

Dated: August 31, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 143

PROMEMO

SUBJECT:5 U.S.C. 8102 {Section 1, FECA] DUTY STATUS OF EMPLOYEES WHO RECEIVE A TRANSPORTATION ALLOWANCE FOR TRAVEL BETWEEN HOME AND PLACE OF EMPLOYMENT

The purpose of this memorandum is to call your attention to the case of Daniel E. Hodum and Tennessee Valley Authority (Docket No. 70-151). In the Hodum case the ECAB found that, because of circumstances relating to the payment of a transportation allowance to the employee for travel between his home and his work, the employee was in the performance of duty at the time of his fatal accident, while driving his car from home to work.

The employee, a mechanic, worked for TVA located at Muscle Shoals, Alabama, about 60 miles from his home in Walnut, Mississippi. He worked 8 hours a day, 5 days per week, from 7:15 a.m. to 4:00 p.m. His individual employment contract with TVA provided that Muscle Shoals would be his official station and that he would be paid at the rate of $4.80 per hour.

There was also a general agreement between the TVA and the Tennessee Valley Trades and Labor Council governing the employee's employment. A member union of the Council, the International Association of Machinists and Aerospace Workers, represented the employee and other employees in his job classification. This union had an agreement with TVA that its members would receive a transportation allowance of $2 a day in addition to the regular wage "for each day in which they are required to and actually report for work on projects outside the city limits of the town in which the nearest local union, affiliated with the District Lodge having jurisdiction is located." The location of Muscle Shoals meets this description and the employee was paid the transportation allowance for each day he reported to work at Muscle Shoals. Every employee in the employee's job classification who worked at Muscle Shoals receive the same amount regardless of the distance traveled to the job site or the time spent in travel to the job site.

On August 9, 1968, while the employee was driving his car along the normal route from his home to work his car collided with a truck at approximately 5:30 or 6:00 a.m. at a point about 50 miles from his duty station at Muscle Shoals. He was killed instantly. The Appeals Board ruled that the employee's death occurred in the performance of duty, even though he had a fixed place of employment and fixed hours of work.

In its ruling the Board relied on Sections 16.20 and 16.30 of Larson's Workmen's Compensation Law which discuss travel as being within the course of employment when payment is made for the time and expense of travel. The Board found that the intent of the transportation allowance was to reimburse the employee and other employees to whom it was paid for the expense and the time spent in traveling to and from the worksite; that the allowance was not generally dependent upon the actual number of miles traveled by the individual employee or the amount of time spent in travel; and that regardless of the manner in which the right to and amount of a travel allowance was determined, the purpose was essentially to reimburse the employees for their expenses and time spent in traveling to the job site when it exceeds a certain distance.

As noted in the Board's order, they have based their reasoning and decision on the facts and circumstances in the instant case. Therefore, the decision in its entirety should be thoroughly studied and its principles should be carefully considered before it is applied to cases which appear to contain similar circumstances.

ALBERT KLINE
Acting Deputy Director for OFEC

PROMEMO

Dated: October 26, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 144

SUBJECT:5 U.S.C. 8103 [Section 9, FECA] REIMBURSEMENT OF MEDICAL AND INCIDENTAL EXPENSES INCURRED FOR INJECTION TREATMENT FOR EMPLOYMENT-RELATED HERNIA

The purpose of this memorandum is to call your attention to the decisions of the Employees' Compensation Appeals Board dated June 9, 1970, (Docket No. 70-92) and September 20, 1971, (Docket No. 71-118) in the case of Fred Williams.

In this case the employee obtained non-surgical treatment for his left inguinal hernia consisting of injection therapy administered by an osteopathic physician. His claim for reimbursement of the expense of this treatment and related expenses was rejected by the former Bureau of Employees' Compensation for the reason that "The Bureau does not recognize hernia injection therapy treatment and other hernia treatment which does not include surgery."

The Appeals Board's decision issued June 9, 1970, referred to 5 U.S.C. 8103 which provides that the United States shall furnish an injured employee with "...the services, appliances, and supplies prescribed or recommended by a qualified physician...likely to cure, give relief, reduct the degree or period of disability, or aid in lessening the amount of the monthly compensation." The Board found nothing in the record to indicate that injection therapy was improper treatment for a hernia and pointed out that such treatment had been given by an osteopathic physician who is a "physician" within the meaning of the Act. Accordingly, the case was remanded to the Bureau of the purpose of obtaining additional information to justify medically its findings that the injection treatments were not proper treatment for hernia. Because this treatment was given by a physician, the burden was upon the Bureau to support its position.

Following remand, the Bureau obtained medical evidence showing a high relapse rate among persons who had hernias repaired by injection; that injection was not an accepted method of treatment for hernias in the claimant's area; and that, among osteopaths, injection treatment was not usual or even recognized as a proper form of treatment for hernia. The claim for reimbursement of medical expenses was again rejected. The reason for the second rejection was that the treatment was not authorized and was not an acceptable form of medical treatment.

In the Order dated September 20, 1971, the Appeals Board found "that the Bureau has established that the treatment which appellant underwent was not proper medical care because it was not 'likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation' within the meaning of the Federal Employees' Compensation Act." The Board pointed out however that "even though the treatment was improper, appellant would be entitled to reimbursement if it had been authorized by the Bureau or the employing establishment." However, it had not been authorized by either the Bureau or the employing establishment and he was therefore not entitled to reimbursement.

As a matter of general policy authorization for injection treatment for hernia will not be made. If a physician administers or requests authority to administer such treatment, the medical evidence must be developed to determine whether the treatment constitutes proper medical care within the meaning of 5 U.S.C. 8103.

ALBERT KLINE
Acting Deputy Director, OFEC

Dated: November 4, 1971

Distribution List No. 7

FECA PROGRAM MEMORANDUM - NO. 145

SUBJECT:5 U.S.C. 8101(1) [Section 40, FECA] NUTRITIONAL AIDES WORKING FOR THE COOPERATIVE EXTENSION SERVICE OF THE U.S. DEPARTMENT OF AGRICULTURE

The Cooperative Extension Service of the U.S. Department of Agriculture employs persons to work as nutritional aides under its Expanded Food and Nutrition Programs. This program is designed to assist low income families receiving food stamps and distributed foods. Nutritional aides work with the housewives and youth of such families educating them in the efficient use of these stamps and food to enhance the family diet. This is accomplished by practical demonstrations in the home or through group activities.

There are approximately 10,000 nutritional aides employed nationally by the Land Grant colleges or universities that have the Cooperative Extension Service. The aides are carried as employees on the rolls of the college or university. They are not sworn into Federal service and do not earn leave or retirement benefits. The State Director of the Cooperative Extension Service, who is Federally appointed, selects individuals for employment as nutritional aides. Federal employees on the Director's staff supervise the aides and have full control of their activities as well as the right to terminate their employment. The personal services performed by the nutritional aides are similar to those performed by Federal employees. They receive their wages from Federally appropriated funds.

It has been determined that nutritional aides are considered Federal employees within the meaning of 5 U.S.C. 8101(1), and are entitled to benefits of the FECA or injury sustained in the performance of their assigned duties.

A considerable number of the aides are part-time employees while others work on an intermittent or WAE basis. In reported injuries or deaths of aides who work less than full time, the pay rate for compensation purposes will be determined in accordance with the applicable provisions of 5 U.S.C. 8114.

ALBERT KLINE

PROMEMO

Acting Deputy Director
Office of Federal Employees' Compensation

Dated: November 8, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 146

SUBJECT:5 U.S.C. 8102 [Section 1, FECA], 5 U.S.C. 8114 [Section 12, FECA] TRAVEL ALLOWANCE FOR EMPLOYEES ASSIGNED TO DUTY ON (1) THE CALIFORNIA OFFSHORE ISLANDS AND (2) THE U.S. ATOMIC ENERGY COMMISSION NEVADA TEST SITE

Public Law 88-538 approved August 31, 1964, authorized payment of an allowance in addition to basic pay for certain Federal employees assigned to duty on the California Offshore Islands. This law was amended by Public Law 89-383, approved March 31, 1966, to pay the same benefits to certain employees working at the Nevada Test Site of the Atomic Energy Commission.

The lack of proper housing facilities--particularly for family living--within a reasonable distance of these worksites forced the employees to live in areas remote from their employment and commute long distance to and from work. The resulting inconveniences, including increased expenses and time spent in traveling to and from work, made employment at these worksites unattractive and created recruitment and retention problems for the Government. In order to counteract these inconveniences, the cited legislation was passed permitting employees at the two worksites to receive an allowance not to exceed $10 per day in addition to their wages.

In effect, the allowance pays the employees for the expense and the time consumed by travel. Injuries or deaths which result from such trips between the home and the worksite will be considered to have occurred while in the performance of duty, providing there is no factor--such as a significant deviation from the most direct route--which would take the employee out of the course of employment. (See also Program Memorandum No. 143.)

This applies whether the trips are made by privately owned vehicle, public transportation, or some other mode of transportation.

In the case of employment injury or death to an employee receiving the allowance authorized by Public Law 88-538 and 89-383, the allowance will be included in the pay rate for compensation purposes.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: November 8, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 147

SUBJECT:5 U.S.C. 8114 [Section 12, FECA], and 5 U.S.C. 8115 [Section 13, FECA] COMPUTATION OF PAY AND DETERMINATION OF WAGE-EARNING CAPACITY

The purpose of this memorandum is to bring to your attention a decision of the ECAB issued in the case of Irwin E. Goldman on August 4, 1971 (Docket No. 71-76). The issue was whether the claimant's pay rate for compensation purposes was limited to the amount he received for his regular part-time work at the employing establishment.

The claimant was employed as a postal clerk, regularly working 4 hours a day, 5 days a week for about 5 years prior to the date of his injury. He was paid $3.27 per hour or $65.40 per week. Concurrently, he worked full-time as a salesman-production manager for a private firm at a weekly salary of $145. His pay rate was determined under 5 U.S.C. 8114(d)(1) at $65.40 per week on the basis that he had worked in the employment in which he was injured during substantially the whole year prior to his injury.

The Appeals Board agreed that the earnings in the second job could not be considered in determining the pay rate since the employments were not similar. They did find, however, that the pay rate should have been determined under subsection (3) of 5 U.S.C. 8114(d) rather than subsection (1), and that considering the provisions of subsection (3), this claimant, as a full-time worker, had the capacity to earn wages as a full-time postal clerk. In its decision, the Board made the following points:

(1) That although subsection (1) of 5 U.S.C. 8114(d) is ordinarily followed in determining average annual earnings where an employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury, it is not mandatory to apply this subsection because subsection (3) of 5 U.S.C. 8114(d) provides an alternate method if either of the methods in subsection (1) or (2) cannot be applied reasonably or fairly.

(2) That the application of subsection (1) to this claimant was not reasonable or fair because, although working part-time at the job in which he was injured, he was clearly a full-time worker because of his additional employment elsewhere; and

(3) That, considering the relevant factors of subsection (3), particularly the fact that the claimant was a full-time worker, he had the capacity to earn wages as a full-time postal clerk.

If, when injured, a part-time Federal employee is also concurrently employed in private industry his wage rate for compensation purposes may be determined under subsection (3) of 5 U.S.C. 8114(d) regardless of whether he was employed substantially a whole year in his Government employment or the position would have provided employment for substantially a whole year. The general approach is whether, under the particular circumstances of the case, the application of subsections (1) and (2) would provide a realistic wage rate. As pointed out by the Board, the provisions of subsection (1) did not so provide in the Goldman case,

because his full-time private employment coupled with his part-time Federal employment clearly showed that he had the capacity to work full-time as a postal clerk, the position in which he was working when injured. In other words, a part-time Federal worker who, by concurrent employment elsewhere, has demonstrated a capacity to work full-time in his Government employment should not be given a part-time pay rate.

In its decision of August 4, 1971, the Board also noted that during part of the time that the claimant was totally disabled from his Government job, he was able to work part-time in his job in private industry. They stated that since his earnings in the concurrent employment could not be considered in determining his pay rate, such earnings could not be considered in determining the wage-earning capacity. In their memorandum of October 13, 1971, denying petition for reconsideration in this same case, the Board stated that their decision does not change the principles previously established for determining loss of wage-earning capacity.

Thus, in the light of the Board's decision and memorandum it is clear that earnings subsequent to the injury from concurrent employment cannot be considered in awarding compensation for either total or partial disability. Further, if partial disability caused by the injury prevents an employee, who at the time of injury had concurrent dissimilar employment, from returning to the work in which he was injured, his wage-earning capacity must be determined on some basis other than earnings in the concurrent employment. If for pay rate purposes, the employee has been made a full-time worker, the pay rate of another full-time job may be used in determining the wage-earning capacity.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: November 29, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 148

SUBJECT:5 U.S.C. 8102(a) [Section 1(a), FECA] PERFORMANCE OF DUTY STATUS ON OR ADJACENT TO EMPLOYMENT PREMISES

The purpose of this memorandum is to call to your attention the Appeals Board decision in the case of Wilmar Lewis Prescott (ECAB Docket No. 70-140). In that case the claimant was injured while driving from the parking lot of the employing establishment on to the right-of-way of the adjoining highway.

The installation where the claimant worked was owned by the Navy Department but was operated as an ordnance plant by a private corporation under a contract with the Navy. About 8,000 persons worked for the private employer and about 340, including the claimant, worked for the Naval Plant Representative office. The plant was situated on a State highway. A chain link fence separated the parking lot from the traveled portion of the highway over the highway right-of-way through the gate to the parking lot. Although the driveway was part of the State highway right-of-way, it was used exclusively for ingress and egress to and

from the plant.

The claimant was leaving work in his car which had been parked in the parking lot. He had driven his car on to the driveway outside the gate of the parking lot but not on to the traveled portion of the highway, when a co-worker in another car struck the rear of the claimant's car causing him to be injured. The co-worker's car was partly inside and partly outside the parking lot gate at the time of impact.

The Employees' Compensation Appeals Board found in its decision and order of June 3, 1971, "...that the injury occurred on the premises and in the performance of duty and therefore is compensable." Several references were made by the Board to its own prior decisions; early U.S. Supreme Court decisions; court decisions under various State workmen's compensation laws; and to Larson's Workmen's Compensation Law in justification of its findings. These authorities uphold a basic principle that the "premises" of the employer, as that term is used in workmen's compensation, are not necessarily confined to the property owned by the employer. They may be broader or narrower than actual property boundaries. Definition of the employer's premises is more dependent upon the relationship of the property to the employment than on legal ownership. Thus, "premises" may include all of the property owned by the employer as well as areas over which the employer has no ownership or control.

The Board pointed out that the judicial history showed that injuries occurring in driveways, alleys, or walks which cross public ways and lead to the employer's plant have been held compensable. Such routes to and from the place of employment, even though they may not be owned, leased or controlled by the employer, may be considered the employer's premises under workmen's compensation law if the employer uses them for business purposes and provides for their use by employees in going to and from their work.

Based on the principles and precedent cases cited, the Board determined that the driveway between the public highway and the parking lot was part of the employment premises because the area where the injury occurred "was used exclusively for the employer's purposes," "was immediately adjacent to the employer's plant and connected with it, and in principle it was as though upon the actual premises of the employer," and "in such proximity and relation as to be in practical effect a part of the employer's premises."

The Board noted that the record did not show who maintained the driveway between the plant and the public highway but apparently did not consider it necessary to obtain this information because other factors were sufficient to show that the driveway was the employer's premises. However, when developing cases of this type, the claims examiners should always ascertain, when possible, who is responsible for maintaining the area where the injury occurred.

The district offices should apply the principles and precedents described by the Board in the Prescott case whenever a question arises as to whether the employee was on the employment premises at the time of injury. The fact that the employer did not own, lease, maintain or exercise any form of control over the place where the injury occurred will not of itself be a basis for finding that the injury did not happen on the employment "premises."

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: November 22, 1971

Distribution: List No. 7

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 149

SUBJECT:5 U.S.C. 8102(a) [Section 1(a), FECA] INJURY IN PERFORMANCE OF DUTY BASED ON ADMINISTRATIVE ACTION OF EMPLOYING ESTABLISHMENT

The purpose of this memorandum is to bring to your attention a decision of the ECAB in the case of Raymond H. Schulz, Jr., Docket No. 71-111, dated October 7, 1971. The claim was based on the allegation that the requirement of the employing establishment for a fitness-for-duty examination resulted in a disabling mental breakdown. It was rejected on the basis that the circumstances leading up to the requirement for the examination were due to self-generated causes and any disability resulting therefrom would not constitute an injury in the performance of duty within the meaning of the Compensation Act.

The Appeals Board pointed out the well-established principle of compensation law that where the employment aggravates a preexisting emotional condition and causes disability, the disability is compensable. They mentioned that for an injury to come within the purview of the FECA, it does not have to relate directly to the employee's work duties. They found that the requirement to undergo a physical examination is a factor of employment which may constitute an injury in the performance of duty the same as (1) making a blood donation at work; (2) receiving an inoculation; or (3) injury sustained during coffee break or on the industrial premises while going to and from work.

In considering some of their former decisions cited by the OFEC in rejecting the claim, the Board noted that the circumstances in those cases were significantly different from those present in the Schulz case. They first pointed out that there was no rationalized medical evidence to support the contention that the employment had aggravated an emotional condition in any of the cases cited. They also noted that in these cases, instead of the employee's disability being caused or aggravated by the administrative actions, the emotional condition or the misconduct of the employee was the reason for these actions and there was no change in the disability following the administrative actions. In the Schulz case they found that an evaluation of his work by his superior showed that there was no evidence of serious disability prior to the required examination and his only unusual behavior of any significance occurring outside the employment was after the receipt of notice of the required examination.

The Board concluded that the requirement that the claimant undergo a physical examination and the circumstances under which this requirement was imposed upon him were factors of the employment, and that if these factors aggravated his emotional condition so as to cause his disability, the disability is compensable.

Thus, administrative actions of the employing establishment are factors of the employment which may constitute injury while in the performance of duty. In cases where the employee's conduct or preexisting disability lead to an administrative action compensability will be determined on the question of whether the administrative action has caused or aggravated the disability for which claim is filed.

ALBERT KLINE
Acting Deputy Director for OFEC

PROMEMO

Dated: December 9, 1971

Distribution: List No. 7

FECA PROGRAM MEMORANDUM - NO. 150

SUBJECT: 5 U.S.C. 81339(c) [Section 10 (I), FECA],
5 U.S.C. 8129 [Section 38, FECA]
ANNULMENT OF REMARRIAGE, RECOVERY OF LUMP SUM PAYMENT, AND REINSTATEMENT OF COMPENSATION

It has been determined that the effect of the reinstatement of compensation to a widow or widower following the termination of a remarriage by annulment is to create an overpayment of the 24 months lump sum payment awarded upon the remarriage. This is so whether the remarriage is declared either void or voidable. In such situations request should be made for return of the lump sum payment. If this amount cannot be returned then it becomes a charge against further entitlement. Continuing payments, however, need not be withheld until the overpayment is returned. Equitable arrangements for payment of benefits and absorption of the overpayment should be made. If indicated, waiver of recovery under 5 U.S.C. 8129 should be considered.

During the period of remarriage (date of remarriage to date remarriage is found to be voidable) the compensation of beneficiaries, other than widow or widower, will be at the rate they would have received had they been the only beneficiaries--in this connection see Program Memorandum No. 125. With the effective date of the widow or widower's reinstatement of benefits, the compensation of other beneficiaries will be appropriately reduced.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: December 22, 1971
Distribution: List No. 1

----------NOTES----------

(1)The term "pension" is defined in Title 38 of the U.S. Code as "a monthly payment made by the Administrator to a veteran because of service, age, or non-service connected disability, or to a widow or child of a veteran because of the non-service connected death of the veteran."

FECA PROGRAM MEMORANDUM - NO. 151

PROMEMO

(Supplemented by Program Memorandum No. 215)

SUBJECT:5 U.S.C. 8101(11); 5 U.S.C. 8110(a)(2); and 5 U.S.C. 8133(b)(2)
EQUALITY IN THE DISBURSEMENT OF COMPENSATION BENEFITS TO WIDOWS, WIDOWERS, HUSBANDS AND WIVES

Public Law 92-187, approved December 15, 1971, added the following new subsections to 5 U.S.C. 7152:

"(b) Regulations prescribed under any provision of this title, or under any other provision of law, granting benefits to employees, shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children.

"(c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family."

Subsection (c) of 5 U.S.C. 7152 in effect amends all those portions of the Federal Employees' Compensation Act which differentiate the benefit entitlement of widowers and husbands as opposed to widow and wives of Federal employees. The effective date of application is December 15, 1971. There is no retroactive effect on cases involving injury or death before that date.

Thus, the definition of widow and widower in 5 U.S.C. 8101(6) and (11), except for the reference to the sex, will be identical and the widower will be entitled to compensation under the same conditions as a widow. P.L. 92-187 effectively removed the self-support clause with reference to widowers and the widower will continue to be entitled to compensation until he dies or remarries the same as a widow as outlined in 5 U.S.C. 8133(b)(1). Likewise the definition of a wife as a dependent for purposes of augmented compensation in 5 U.S.C. 8110 will apply equally to a husband. The change in definition of widower will also effect any other section of the law where benefits to a widower is mentioned, such as 5 U.S.C. 8109, concerning the order of precedence for payment of unpaid schedule awards where the employee's death was due to causes other than the employment injury.

ALBERT KLINE
Acting Deputy Director

Distribution List No. 1

Dated: January 19, 1972

FECA PROGRAM MEMORANDUM - NO. 152

SUBJECT: 5 U.S.C. 8101(1) [Section 40, FECA];
5 U.S.C. 8116(a)(b) [Section 7, FECA];
5 U.S.C. 8191-93
MEMBERS OF THE UNITED STATES PARK POLICE (INTERIOR)

PROMEMO

MEMBERS OF THE EXECUTIVE PROTECTIVE SERVICE, AND SECRET SERVICE AGENTS (TREASURY)

Although members of the U.S. Park Police and Executive Protective Service (formerly the White House Police) are Federal employees, they are not entitled to the benefits of the FECA (5 U.S.C. 8101 et seq.) because they are eligible to receive benefits under the District of Columbia Policemen and Firemen's Retirement and Disability Act. Following a study of Congressional intent, and the provisions of Section 4-538 of the District of Columbia Code it has been determined that the exclusive remedy for these employees is under the D.C. Policemen and Firemen's Retirement and Disability Act. Since their exclusive remedy is under the D.C. Act, there is no dual entitlement, and the election requirements of 5 U.S.C. 8116(a) and (b) are not applicable. (PARAGRAPH DELETED PER OFEC BULLETIN NO. 16-73)

Also, as Federal employees, they are barred from receiving the non-Federal law enforcement benefits extended by P.L. 90-291 (5 U.S.C. 8191-93). (PARAGRAPH DELETED--SEE FEC PROGRAM MEMORANDUM 163)

United States Secret Service agents do not have an initial eligibility to benefits under the D.C. Policemen and Firemen's Retirement and Disability Act. Thus, their entitlement is under 5 U.S.C. 8101 et seq. <u>However</u>, agents who have actively performed duties other than clerical for ten years or more, directly related to the protection of the President, may elect to transfer all funds to their credit in the U.S. Civil Service Retirement and Disability Fund to the District of Columbia, and then are entitled to coverage under the D. C. Policemen and Firemen's Retirement and Disability Act. Once an election has been made in favor of the D. C. Disability Fund, coverage under the FECA will cease. In adjudicating any claim for injury or death to a Secret Service agent, it will be necessary to ascertain whether the individual had transferred to the D. C. Act.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: February 8, 1972

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 153

SUBJECT: 5 U.S.C. 8103(a) [Section 9(a), FECA]
DESIGNATED PHYSICIANS AND HOSPITALS

The FECA specifies that services, appliances and supplies for injuries sustained while in the performance of duty shall be furnished by or on the order of U. S. medical officers and hospitals, or when this is not practicable by or on the order of designated or approved private physicians and hospitals. It has been determined that the OFEC will designate or approve all duly qualified private physicians [as defined in 5 U.S.C. 8101(2)] and hospitals.

PROMEMO

An injured employee must obtain from his official superior or from OFEC authorization for examination and treatment of his injury. If there are no U. S. medical officers or hospitals available or if their use is not practicable, he will be given the right to initial selection of a local qualified private physician or hospital of his choice. The official superior is restricted to issuing authorization for injury sustained by accident. Authorization for examination and/or treatment in disease cases may only be issued by or with the approval of OFEC.

In emergency situations of injury by accident the employee should contact the nearest qualified physician or hospital. If there are no U. S. medical officers or hospitals in the area or their use is not practicable, he will have the option of continuing with the private physician or hospital providing emergency care, or selecting another local qualified private physician or hospital for any further care needed.

A change of physician or hospital after the employee's initial choice will only be permitted with OFEC's approval and after consideration of the reasons proposed for the change.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: February 28, 1972

(See Addendum on Reverse [Below])

Encl. to FEC Bulletin No. 6-75

ADDENDUM:

The 1974 Amendment made to 5 USC 8103 by PL 93-416 permits the injured employee to make an initial selection of a physician or hospital of his/her choice. Thus, the information contained above, as it refers to restriction on the use of private physicians is obsolete. However, the restriction concerning issuance of authorization to injury cases only and the information contained in the final paragraph above, remain in effect.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 12, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 154

(See Program Memorandum No. 162.)

SUBJECT: 5 U.S.C. 8107 [Section 5(a), FECA]

PROMEMO

LOSS OF HEARING DETERMINATIONS

REFERENCE: FECA Program Memorandum No. 29, dated January 7, 1963

This memorandum modifies the loss of hearing policy contained in Program Memorandum No. 29.

Noise induced hearing loss has two phases. The first is known as temporary threshold shift (TTS). This term means that when the human ear is exposed to sound loud enough to affect it, hearing will return to its previous normal level after the exposure to noise has ceased. This shift is temporary, with no permanent damage resulting. Most experts consider that return to the pre-existing hearing level will occur within 24 hours after removal from the noise environment. If hearing does not return to its previous level, permanent damage has ensued, and this second phase of damage is the permanent threshold shift (PTS). A temporary threshold shift, therefore, can be superimposed on permanent damage.

An individual with a permanent threshold shift is generally considered more susceptible to further permanent damage than one without prior damage. If it is necessary for such a person to continue working in a high noise level above 85 decibels, he must wear ear protectors. It is claimed that these plugs and protectors, when perfectly fitted, attenuate or reduce noise reaching the middle (*inner) ear by 20-30 decibels.

Where an individual continues to be exposed to noise levels above 85 decibels, an award must be based on an audiogram taken after he has been removed from a noisy environment for at least 24 (*16 to 24) hours. Under this procedure, awards will not be of a tentative nature, and specialists will not be asked to estimate the effect of removal from the noisy environment.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: March 2, 1972

Distribution: List No. 1

*** CHANGES PER FEC BULLETIN #41-72**

FECA PROGRAM MEMORANDUM - NO. 155

SUBJECT: 5 U.S.C. 8114 AND 8129 [Section 12 and 38 FECA]
ONE-TIME PAYMENT TO U.S. POSTAL SERVICE WORKERS

Under Article IX of a National Agreement with represented unions on July 20, 1971, the U.S. Postal Service agreed to make a one-time payment of $300 to all represented workers who were continuously employed from January 20, 1971 through July 20, 1971. Those employed on a part-time or temporary basis and those

who began work after January 20, 1971, were paid a proportionately reduced amount, if they worked less than 1,004 hours during the six-month period. Employees who entered into full-time military service subsequent to January 20, 1971 and before July 20, 1971, were given a one-time payment based upon the portion of 1,004 hours they actually worked during the period from January 20, 1971 to the date of entry into military service. Postal Service Order 71-22 of August 19, 1971, extended identical benefits under the same provisions to employees not covered by the National Agreement.

It has been determined that the one-time payments represent retroactive salary and, where appropriate, are to be permanently included in the pay rate for compensation purposes under 5 U.S.C. 8114. Similarly, this payment must be taken into account as retroactive salary in determining entitlement to compensation for temporary total or temporary partial disability during the period January 20, 1971 to July 20, 1971, inclusive. If an overpayment of compensation results from the consideration of these payments in both the pay rate and as salary received from January 20, 1971 to July 20, 1971, recovery of the overpayment will be waived under the provisions of 5 U.S.C. 8129(b), since the employee was without fault and adjustment or recovery would defeat the purpose of the Act.

ALBERT KLINE
Acting Deputy Director, OFEC

Distribution List No. 1

Date: April 13, 1972

FECA PROGRAM MEMORANDUM - NO. 156

SUBJECT: 5 U.S.C. 8101(6) [Sec. 10(H), FECA]
5 U.S.C. 8109 [Sec. 5(d), FECA]
5 U.S.C. 8110 [Sec. 6, FECA]
5 U.S.C. 8133 [Sec. 10, FECA]
COMMON LAW MARRIAGE

The validity of a marriage is determined by the law of the jurisdiction where the marriage took place. This presents no problem where proof is obtained that a valid, ceremonial marriage was performed.

The status of common law marriage varies from one state to another, and states change the criteria or the very legality of such relationships from one time to another. In states where common law marriage is valid, the claimant's declaration of a spouse may be accepted on the basis of his or her own statement. However, where terminating benefits to a widow because of a common law remarriage, it must be established that the parties have met all criteria for marriage in the state where the marriage took place. The burden of proof in such situations is upon the OFEC.

In the case of Marolyn M. Videto (ECAB 72-37), the Appeals Board noted that common law marriages in the State of Florida prior to January 1968 were valid where the parties had the legal capacity to marry and

mutually agreed to become husband and wife by words of present assent. Under Florida law, cohabitation and repute are not sufficient to establish the existence of a common law marriage. In the Videto case, there was cohabitation and the widow represented herself to the community as a married woman in order to avoid gossip. However, she stated that there was never any written or verbal agreement pertaining to marriage.

The Board found that the Bureau failed to meet its burden of establishing that the parties agreed to live together as husband and wife in the State of Florida, either by direct evidence or by circumstantial evidence from which an agreement might be shown. Such an agreement was essential to a valid common law marriage in that state at the time involved.

Thus, in those situations where the question of common law marriage is at issue and there is evidence (either direct or circumstantial) that the parties agreed to live together as husband and wife, the applicable law should be obtained from the state attorney general or other official. The actual circumstances of a suspected common law marriage relationship must be determined within the framework of pertinent state legislation.

ALBERT KLINE
Acting Deputy Director for OFEC

Dated: May 30, 1972

Distribution List No. 1

FECA PROGRAM MEMORANDUM - NO. 157

SUBJECT: 5 USC 8101 et seq., [FECA and Related Provisions}
42 USC 1651 [DBA]
42 USC 1701 [WHA]
5 USC 150K [NFA]
33 USC 901 [LSA]
50 USC App. [MPA]
50 USC App. [WCA]

(Superseded by FECA Bulletin No. 84-50.)

BENEFITS ARISING FROM HOSTILITIES

(Superseded by Attachment to FECA Bulletin No. 91-14.)

REFERENCE: BEC Bulletin No. 14-65, dated April 6, 1965
LS/HW Program Memorandum No. 27, dated July 6, 1966
OFEC Bulletin No. 73-72, dated October 30, 1972

In accordance with the amendment to Chapter I, Subchapter A of Title 20 of the CFR, the function of the War Hazards Compensation Act was transferred to OFEC effective October 24, 1972. This Program

Memorandum, therefore, revises information contained in BEC Bulletin No. 14-65, dated April 6, 1965, and LS/HW Program Memorandum No. 27, dated July 6, 1966. All applications for reimbursement or claims for direct payment under the provisions of the WHA will be processed in the National Office, OFEC.

This memorandum briefly describes the benefits to which employees (and/or certain qualified dependents or beneficiaries) are entitled due to injury, disability, death, or detention caused by the action of a hostile force, if the employees are employed by: the U.S. Government; contractors to U.S. Government agencies; or nonappropriated found instrumentalities at an overseas location.

In the event an employee, as mentioned above, is caused by his employment to be overseas, and as a result thereof he sustains injury, disability, death, or is found to be missing, due to a war-risk hazard, the actions of a hostile force, etc., he or certain qualified dependents or beneficiaries may be entitled to benefits under one of several laws which comprise a war hazard compensation program. These laws are administered by the Office of Federal Employees' Compensation and the Office of Workmen's Compensation Programs.

Civilian employees of the U.S. Government are provided compensation and medical benefits for injury or death sustained while in the performance of official duty, whether the injury or death occurred in the United States or elsewhere in the world. If an employee covered under the Federal Employees' Compensation Act (FECA) sustains injury or death due to a war-risk hazard or as a result of capture, detention or other missing status due to the action of a hostile force or person, he shall be entitled to the benefits of the FECA whether or not he was engaged in the course of his employment when such injury or death occurred.

In the event a civilian Federal employee is determined to be: in a missing status; interned in a foreign country; captured by a hostile force; besieged by a hostile force; or detained in a foreign country against his will; the employing establishment is authorized under the Missing Persons Act, to continue to credit to his account his full pay, including allowances and special pay. The employing establishment can continue to protect the financial interest of a covered employee in a variety of ways, such as by paying his commercial insurance premiums or by making allotments from the pay accounts of such employee to his dependents. Time requirements for the filing of income tax returns are liberalized for persons covered under this law. In addition, by PL 92-279, signed April 28, 1972, the Internal Revenue Code was amended to exclude from gross income the entire amount of their pay during any period when civilian Federal employees are prisoners of war, missing in action, or in a detained status during the Vietnam conflict. Only Federal employees who are citizens, nationals, or permanent residents of the United States are covered under the Missing Persons Act. Part-time or intermittent employees or native labor casually hired on an hourly or per diem basis are excluded. The Federal department or agency employing the person covered has the authority to make all determinations necessary in the administration of this Act.

Employees of contractors to the U.S. Government are covered by two laws:

1. The Defense Base Act (DBA) extends the benefits of the Longshoremen's and Harbor Worker's Compensation Act to those employees carrying out U.S. Government contracts (types of employment are defined under Section 1 of the DBA). Under this law, benefits are provided by the employer through his insurance carrier, or by the employer directly, by virtue of his being authorized as a self-insurer. Benefits include compensation and medical treatment for injury or death arising out of and in the course of employment, whether or not the injury or death was caused by a war-risk hazard.

2. The War Hazards Compensation Act (WHA) provides for reimbursement by OFEC of benefits by a self-insured employer or by an insurance carrier under the DBA, when it can be shown that the injury or death was occasioned by a war-risk hazard under the conditions defined under Section 201(b) of the WHA. This Act also provides that an employee (or his qualified dependents) may file claim directly with OFEC for compensation benefits for injury or death due to a war-risk hazard, or if no compensation is payable under

the DBA. An employee covered under WHA who is captured or detained by a hostile force, is entitled to 100 percent of his average weekly wage for the entire period of his detention. Up to 70 percent of this money may be dispensed to his qualified dependents during his detention, while the remaining amount is credited to his account to be paid to him upon his release. Note, however, that in computing detention benefits, the average weekly wage of the employee shall not exceed that of a Federal employee performing the same type of work in the same or nearest location to the employee's place of employment. Benefits under this Act are the same as those provide under DBA and are payable from the FECA compensation fund. Benefits under this Act, however, do not apply (1) to any person whose residence is at or in the vicinity of the place of his employment and who was not living there solely by virtue of the exigencies of his employment, unless the person was injured or was captured while he was engaged in the actual course of his employment; (2) prisoners of war held or utilized by the United States.

The Nonappropriated Fund Instrumentalities Act provides the same benefits as the Longshoremen's and Harbor Workers' Compensation Act to civilian employees, including non U.S. citizens of nonappropriated fund instrumentalities such as the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Store Ashore, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces. These employees shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the FECA, except that such employees are covered under the provisions of the WHA if it can be shown that injury, death, or detention was due to a war-risk hazard as defined in that Act. In case of disability or death of an employee who is not a citizen or permanent resident of the United States or a Territory, employed outside the continental limits of the United States by any nonappropriated fund instrumentality, compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense, or regulations prescribed by the Secretary of the Treasury, as the case may be, and for this classification of employee, no benefits are provided under the DBA.

This summary is intended only as a familiarization with some of the provisions of the above-mentioned laws. For complete information, reference should be made to the laws themselves, the OFEC and OWCP Regulations and Procedure Manuals, Program Memorandums, etc.

As a general rule, duplicate payments are prohibited. Therefore, payments may not be made for the same period of time from more than one of the above laws to any one person for any one incident. Additional benefits may be available to certain individuals from other sources such as Civil Service Commission, Veterans Administration, Social Security Administration, and Foreign Claims Settlement Commission; however, these benefits will not be elaborated upon in this memorandum, and are only mentioned herein for the information of all Claims Examiners (OFEC and OWCP) and Deputy Commissioners.

The War Claims Act is not discussed since its provisions do not apply to events after World War II and the Korean Conflict.

ALBERT KLINE
Acting Deputy Director, OFEC

Dated: November 8, 1972

Distribution List No. 1

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 158

SUBJECT: 5 USC 8140(a)
PERFORMANCE OF DUTY STATUS FOR ROTC CADETS ENGAGED IN VOLUNTARY FIELD ACTIVITIES

Title 5 USC 8104(a) provides compensation coverage to members of, or applicants for membership in, the Reserve Officer's Training Corps of the Army, Navy, or Air Force for injuries or death "...incurred in line of duty while engaged in a flight or in flight instruction...or while performing authorized travel to or from, or while attending, field training or a practice cruise..."

When an ROTC cadet was injured by a prematurely detonated explosive while participating in a voluntary, one-day, pre-regular summer camp field training exercise, the military held that the exercise was not in line of duty because of its voluntary nature.

Military "line of duty" determinations are not binding upon the Office of Federal Employees' Compensation in consideration of "performance of duty" for compensation purposes. The Office of the Solicitor, U.S. Department of Labor, has opined that "performance of duty" determinations under 5 USC 8140 are within the exclusive jurisdiction of the OFEC.

Following study of legislative history, Congressional intent (i.e. that Congress meant to cover any field training as distinguished from classroom or campus activity) and considering the remedial nature of compensation law, it has been determined that activities mentioned under 5 USC 8140(a) constitute performance of duty for compensation purposes, whether performed voluntarily or under military order.

ALBERT KLINE
Acting Deputy Director, Office of
Federal Employees' Compensation

November 9, 1972

Distribution List No. 1

FECA PROGRAM MEMORANDUM - NO. 159

SUBJECT: 5 USC 8103(a) [Section 9(a), FECA]
PAYMENT OF MOVING EXPENSES WHEN PHYSICIAN RECOMMENDS CHANGE OF CLIMATE FOR EMPLOYMENT-RELATED CONDITIONS

PROMEMO

In the case of Paul Henning and Department of the Interior, Bureau of Indian Affairs, the attending physician told the claimant "that he ought to move to a different environment where the weather will be continuously warm" for relief of the symptoms in his right arm. The physician suggested Palm Springs, California, Puerto Rico, or the Virgin Islands. The claimant moved from his home in Albuquerque, New Mexico, to McAllen Texas. He claimed reimbursement for the costs of moving his family and household effects on the grounds that he had moved to a more favorable climate for medical reasons. The OFEC concluded that it did not have the authority, as a matter of law, to pay for such expenses and rejected the claim.

The Employees' Compensation Appeals Board held that this conclusion was incorrect and referred to 5 USC 8103 which requires that the United States "...furnish to an employee who is injured while in the performance of duty...services... prescribed or recommended by a qualified physician...likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation". The Appeals Board found "that where a physician recommends that an injured employee move to another climate to alleviate symptoms of his employment-related condition, moving for such purpose and appropriate expenses incidental thereto constitute 'services...prescribed or recommended by a qualified physician' within the meaning of that provision. The right of an injured employee to receive such services under workmen's compensation law under such circumstances is well-established" (21 ECAB 372). The case was remanded for a determination of whether the expenses of the move to Texas were "services...prescribed or recommended by a qualified physician" and whether the expenses were "necessary and reasonable" within the meaning of 5 USC 8103(a).

After further development of the circumstances of the claimant's move, he and his case record were referred to an impartial medical specialist for opinion on whether the move to McAllen, Texas would be medically indicated for the residuals of the employment injury. The specialist felt there was only "minimum justification" for a change of geographical location and saw no indication that the claimant had experienced any beneficial effects from a year of living in McAllen Texas. The OFEC concluded that the move from Albuquerque, New Mexico to McAllen, Texas was a service recommended by a qualified physician; however, it was not likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of compensation within the meaning of Section 8103(a). The claim for payment of moving expenses was again rejected. This decision was upheld by the Appeals Board on the finding that the rationalized opinions of the impartial specialist and the OFEC Medical Director constituted the weight of the medical evidence, as opposed to the opinion of the attending physician, who had supplied no rationale showing that the move to McAllen, Texas was likely to accomplish the desired result (Docket No. 73-13).

A claim for moving expenses based on medical advice to move to a different environment or another climate because of employment-related conditions, may be valid if it can be shown that the expenses are "necessary and reasonable" within the meaning of 5 USC 8103(a). The circumstances of the move, or proposed move, should be carefully and fully developed. After that has been done, the case should be transferred to the National Office with an appropriate memorandum for a decision on the claim. If entitlement to moving expenses is medically justified under 5 USC 8103(a), it will be necessary to determine the limits of such expenses. Therefore, all final decisions in these cases will be made in the National Office until further notice.

ALBERT KLINE
Acting Deputy Director
Office of Federal Employees' Compensation

PROMEMO

Dated: November 27, 1972

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 160

SUBJECT: 5 U.S.C. 8101(1) [Section 40, FECA]
COOPERATIVE EMPLOYEES WORKING FOR THE U.S. DEPARTMENT OF AGRICULTURE CONSUMER AND MARKETING SERVICE

The Consumer and Marketing Service of the U.S. Department of Agriculture enters into agreements with state, country and municipal agencies, whereby employees of the state or local body perform Federal inspections or gradings of agricultural commodities, under Federal supervision, pursuant to 7 U.S.C. 1622(h).

It has been determined that, where a state or local employee performs such inspection or grading, he is in performance of duty as a Federal employee for compensation purposes while undertaking all activities and travel in connection therewith. In this category of cases, it will always be necessary to obtain a copy of the agreement between the U.S. Department of Agriculture and the state or local body employing the inspector, and full details of the supervision given the employee and the type of inspection (i.e. State or Federal) involved. Where a given inspection simultaneously satisfies both Federal and local requirements, this will not bar the finding that a Federal service is being rendered under the U.S. Code.

Where state or local benefits have been paid and the injury is found to be compensable, the agency paying the non-Federal benefits will be reimbursed from the FEC benefits payable and any balance of compensation due will be paid to the employee or to his eligible survivors.

ALBERT KLINE
Acting Deputy Director, Office of
Federal Employees' Compensation

Dated: December 6, 1972

Distribution List No. 1

FECA PROGRAM MEMORANDUM - NO. 161

SUBJECT: 5 U.S.C. 8106(a); 5 U.S.C. 8114; 5 U.S.C. 8115

PROMEMO

LOSS OF WAGE-EARNING CAPACITY BECAUSE OF DISCHARGE FROM MILITARY RESERVE

In the case of Adelbert E. Broderick and Department of the Army, claim was made for compensation for loss of wage-earning capacity after the employee was medically discharged from the Active Air Force Reserve because of an employment-related heart condition. He claimed loss of wage-earning capacity resulting from the loss of drill pay, subsistence and quarters allowances and future rights to retirement pay because of his inability to complete 20 years of military service.

Before July 1967 the employee worked for the Department of the Air Force. In order to keep that position he was required to be a member of the Active Air Force Reserve. He had reenlisted in the reserve on June 1, 1966 for a period of 6 years.

In 1967 the employee's place of employment was closed. To avoid a discharge because of reduction-in-force, he transferred to the Department of the Army. The Army did not require him to be a member of any military reserve in order to keep his position.

On August 30, 1968, the employee suffered an employment-related myocardial infarction. He returned to work on January 6, 1969. He was later found to be medically disqualified for military service because of his myocardial infarction and was discharged from the Air Force Reserve.

The OFEC rejected the claim for compensation for loss of wage-earning capacity. It found that the employee's civilian employment at the time of injury was not dependent upon his military reserve status and his civilian pay was the only pay which could be used for compensation purposes. Since he had returned to work without a loss of pay he did not have an employment-related loss of wage-earning capacity within the meaning of the FECA.

At a hearing, the employee contended that the relationship of the military obligation to his employment carried over to his new job since the Air Force would not relieve him of his military obligation resulting from his 6 year enlistment. It was again determined that the employee had no loss of wage-earning capacity and the previous rejection was affirmed.

The Employee's Compensation Appeals Board reviewed the decision and found that the Office had properly determined that the pay for compensation purposes was limited to the wages received for civilian employment. The Board also found that at the time of injury there was no requirement that the employee be a member of the active Reserve in order to keep his job with the Army. (Docket

No. 72-143; issued September 8, 1972).

Thus, in cases such as this, the claimant's pay rate for compensation purposes is limited to the wages received in the civilian employment held when injured, and compensation would be payable based on injury-related loss of wages in that position.

ALBERT KLINE
Acting Deputy Director, Office of
Federal Employees' Compensation

Dated: January 22, 1973

PROMEMO

Distribution List No. 1

FECA PROGRAM MEMORANDUM - NO. 162

(See Program Memoranda Nos. 217 and 272)

SUBJECT: 5 U.S.C. 8107
LOSS OF HEARING DETERMINATIONS

REFERENCES: FECA PROGRAM MEMORANDUM No. 8
FECA PROGRAM MEMORANDUM No. 29
FECA PROGRAM MEMORANDUM No. 105
FECA PROGRAM MEMORANDUM No. 139
FECA PROGRAM MEMORANDUM No. 154

In occupational hearing loss cases we have been following a slightly modified version of the standards given in the AMA Guides using the frequencies of 1,000, 2,000 and 4,000 cycles per second (cps) to determine the extent of employment-related hearing loss. A Department of Labor task force was established in November, 1972 to study and evaluate the OFEC standards used in these determinations. As a result of this study we are adopting the frequencies of 1,000, 2,000 and 3,000 cps to determine the extent of occupational hearing loss. These frequencies have been established by the National Institute for Occupational Safety and Health (NIOSH), of the U.S. Department of Health, Education, and Welfare as the most accurate indicators of the ability to hear and interpret speech. Effective with the date of this program memorandum, the NIOSH standards will be the only criteria for measuring hearing impairment.

The NIOSH standards were adopted after consultation between the OFEC Medical Director and the Acting Chief, Noise Section, Physical Agents Branch, NIOSH. The use of 4,000 cps was ruled out because hearing ability at that level is considered unnecessary to understand speech. The frequency of 500 cps will not be used because neuro-sensory loss is rarely found at that level.

The NIOSH studies did not include a method for calculating the percentage of binaural loss of hearing. Therefore, we will continue to make this calculation using the method in the AMA Guide by which the percentage hearing loss in the better ear is given 5 times the weight of the worse ear. The result is added to the percentage hearing loss of the worse ear and the sum divided by six.

These new standards will be used in all pending and future claims of occupational hearing loss. They will also be used in all cases in which a claimant has asked for review of a previous award (by the Division of Hearings and Review) even though the award was based on the former standards. If such review shows that the percentage of employment-related hearing loss is lower under the new standards we will not recompute the award. The claimant will be notified there has been no increase in his hearing impairment, based on standards currently applicable, hence no reason for paying additional compensation. He will also be given the necessary advice about his right to appeal the decision.

A cross reference to this program memorandum should be noted on Program Memorandum No. 105.

ALBERT KLINE
Acting Deputy Director, OFEC

Dated: February 7, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 163

(Supplemented by Programs Memoranda Nos. 270 and 275)

SUBJECT: 5 U.S.C. 8101(1)
5 U.S.C. 8191-93
MEMBERS OF THE U.S. PARK POLICE (INTERIOR), EXECUTIVE PROTECTIVE SERVICE, AND CERTAIN SECRET SERVICE AGENTS (TREASURY) AS LAW ENFORCEMENT OFFICERS

This memorandum supersedes Program Memorandum No. 152 insofar as it relates to coverage under the LEO Program (5 U.S.C. 8191-93).

In the case of James David Finch (Docket No. 72-147), the Employees' Compensation Appeals Board recently decided that members of the U.S. Park Police are not employees within the meaning of 5 U.S.C. 8101(1), and therefore are covered as law enforcement officers under 5 U.S.C. 8191.

It has also been administratively determined to extend coverage under 5 U.S.C. 8191 to members of the Executive Protective Service and to those members of the U.S. Secret Service covered by the D.C. Policemen and Firemen's Retirement and Disability Act.

The criteria applying to all non-Federal law enforcement officers will apply in determining entitlement to benefits for members of those three organizations.

ALBERT KLINE
Acting Deputy Director
Office of Federal Employees' Compensation

Dated: April 4, 1973

Distribution: List No. 1

Enclosure to OFEC Bulletin No. 16-73

FECA PROGRAM MEMORANDUM - NO. 164

(Expanded by FECA Program Memorandum No. 268)

PROMEMO

SUBJECT: 5 U.S.C. 8104(4)
PAY RATE FOR CLAIMANTS WHO ARE EMPLOYED IN PRIVATE INDUSTRY WHEN DISABILITY BEGINS

For periods of disability on or after October 1, 1960, the pay rate for compensation purposes is (1) the pay at time of injury, (2) the pay at the time disability begins, or (3) the pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full time employment with the United States, whichever is greater.

It has been determined that the pay at the time disability begins need not be a pay rate in Federal government. For example, an employee sustains a no lost time injury while working for the Federal Government. He later leaves Federal employment, and first becomes disabled while working in private industry. The pay rate in private industry should be used as the basis for computation of benefits, if this pay rate is greater than that in effect at the time of injury.

ALBERT KLINE
Acting Deputy Director
Office of Federal Employees' Compensation

Dated: April 4, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 165

SUBJECT: 5 U.S.C. 8102(a)
UPWARD MOBILITY PROGRAMS - PERFORMANCE OF DUTY

Upward Mobility Program are conducted by various Federal agencies under the authority of 5 U.S.C. 4101 et seq. (formerly known as the Government Employees' Training Act) and Executive Order 11348 of April 20, 1967. The employing agency selects employees to attend college classes for credit, approves the courses they take, and authorizes employee continuation in the program. Tuition, books and fees are paid by the employer, as are indicated travel expenses.

Although an employee may earn an Associate or Bachelor degree through his participation in the program, this is incidental to the purposes of such training which is defined as improving service to the public, increasing efficiency and economy, building and retaining a force of skilled and efficient employees, and installing and using the best modern practices and techniques in the conduct of the Government's business.

Employees are permitted to take a maximum of one-half of their classroom instruction on official duty time.

The amount of released duty time allowed takes into account travel time and activities such as registration. If it is not possible to apply the one-half released time principle per semester, it may be averaged across several semesters.

It has been determined that employees attending classes and traveling to and from classes pursuant to an Upward Mobility Program, are in performance of duty for compensation purposes, whether or not the injury occurs on the Federal premises or during official working hours. Claims arising from classroom activities or travel to and from classes will be adjudicated in the OFEC District Offices, under existing procedures and general criteria applying to all FEC cases. Should a claim arise under other circumstances in connection with an Upward Mobility Program (i.e. off-duty, not in the classroom nor traveling to or from classes) the circumstances should be fully developed and documented, then forwarded to the National Office for adjudication.

ALBERT KLINE
Deputy Director, OFEC

Dated: August 17, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 166

(See Program Memorandum No. 180)

SUBJECT: 5 U.S.C. 8107; 5 U.S.C. 8108; 5 U.S.C. 8116
PAYMENT OF A SCHEDULED AWARD WHERE VA SERVICE-CONNECTED BENEFITS ARE INCREASED

NOTE: This Program Memorandum modifies (2) of the second sentence of the second paragraph and the second sentences of the third paragraph of Program Memorandum No. 69. An appropriate notation should be placed on that memorandum.

The OFEC has required an election of benefits in those instances where a scheduled award was payable for a disability which resulted in an increase in VA benefits. This requirement was based both on 5 U.S.C. 8108, which requires reduction of the award by the amount payable "for an earlier injury," and on 5 U.S.C. 8116, which prohibits the payment of dual benefits.

The Employees' Compensation Appeals Board, in the case of Frances Marie Kral (Docket No. 72-129), has interpreted the phrase "for an earlier injury" in 5 U.S.C. 8108 to mean only an injury occurring in Federal civilian employment. Thus, a scheduled award may not be reduced because of an increase in VA connected benefits, just as it may not be reduced for any other injury previously occurring off duty, or for any pre-existing condition which was not compensated under the F.E.C.A.

An election is still required under 5 U.S.C. 8116--but it is between; (a) the full FEC schedule award plus all VA benefits prior to any increase, and (b) all VA benefits for service-connected disability from the date of the increase. Of course, where the VA has not increased its benefit due to the effects of the compensable injury,

no election is required. Also, no election is required where the VA payments are for a non-service connected condition.

ALBERT KLINE
Deputy Director, OFEC

Dated: September 14, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 167

SUBJECT: CPI INCREASES IN CIVILIAN WAR BENEFITS CASES

There has been no increase in benefits paid in Civilian War Benefits (CWB) cases since December 1, 1962. The Secretary of Labor, in a memorandum to the Director dated August 28, 1973, authorized administrative action to increase the benefits provided by the CWB Program.

Pursuant to this authority, compensation benefits will be increased by 42.6 percent, representing the advance in the Consumer Price Index from December, 1962 through the current base month of March, 1973. The increase will be effective June 1, 1973. The maximum monthly payment of $127.50 will no longer apply.

Future CPI increases will apply to CWB cases in accordance with the formula appearing in 5 USC 8146a.

This memorandum affects a very small number of cases currently within the jurisdiction of the National Office.

A cross reference to this Program Memorandum should be noted on Program Memorandum No. 28.

ALBERT KLINE
Deputy Director, Office of
Federal Employees' Compensation

Dated: September 26, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 168

PROMEMO

SUBJECT: 5 USC 8102(a)
FEDERAL EMPLOYEES ON LOAN TO LOCAL CIVIL DEFENSE UNITS

Ordinarily, members of the U. S. Civil Defense Corps are not considered employees of the United States. They are exempted from employee status, and consequently from compensation benefits, by Section 401(c) of the Federal Civil Defense Act of 1950.

Some civil defense volunteers are also Federal employees. When a Federal establishment provides administrative leave to such an employee to participate as a member of a local Civil Defense Unit by serving the community in times of disaster (e.g., flood, hurricane, earthquake), it has been determined that he is a Federal employee on loan to the Civil Defense Unit. Injuries sustained while performing Civil Defense work under these conditions are to be considered as incurred in performance of duty for compensation purposes. The pay rate of the employee's regular Federal job as computed under the provisions of 5 USC 8114 will be used in determining the amount of compensation.

ALBERT KLINE
Deputy Director, OFEC

Dated: September 28, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 169

SUBJECT:5 U.S.C. 8110, 5 U.S.C 8133, AND 5 U.S.C. 8116,
EDUCATIONAL BENEFITS PAYABLE BY VA AND OFEC BASED ON SAME DISABILITY OR DEATH

References: FECA Program Memorandum No. 123
BEC Bulletin No. 53-68

The VA has recently advised in the case of Clarence E. Leonard, File No. X-1086529, that a retroactive election to receive OFEC educational benefits in preference to VA educational benefits, (both benefits paid concurrently for a prior period), would not result in an overpayment by the VA requiring offset or recovery. Their decision in that case was based on a determination that they had made an administrative error.

Thus, when an election is made to receive OFEC educational benefits covering a retroactive period, the District Office will make inquiry to the appropriate VA Regional Office to determine whether offset or recovery is required. The decision made by the VA will be followed on a case by case basis.

If VA benefits are elected, it is still necessary to advise the VA Regional Office of the amount of the OFEC payment to be deducted from future VA payments; however, there will be no transfer of funds (see paragraph 11. d. and 12 of BEC Bulletin No. 53-68).

In the subject case, the attorney represented the claimant from March 1967 through May 3, 1971. He originally requested a fee of $5,341.51, which was one-third of the amount which the claimant eventually recovered. The attorney was advised that no fee could be paid unless approved by the OFEC, and that approval would be commensurate with the actual necessary work performed, the circumstances of the employee and the capacity in which the attorney served. The attorney was also advised that the OFEC could not recognize any contract for an agreed sum or a contingent contract.

The attorney first reported that he had devoted 33 hours to the case; however, he later alleged he had spent over 80 hours on the case. He pointed out that he had not kept accurate time records because he had originally accepted the case on a contingency basis. He subsequently listed activities beyond those described in his original report.

The Board stated that the 40 hours approved by the OFEC, was not supported by the facts, and found that the attorney had spent 80 hours on the matter. It was pointed out that there was no adequate contradiction in the record to refute the claimed 80 hours. They also said that the OFEC was not bound to authorize the normal per hour amount usually charged by an attorney for his services, since fees in workmen's compensation have been lower than those in other field of law.

The general criteria to be considered in determining a representative's fee is defined in the Federal Procedure Manual, Part 1, Chapter 1-1600, Section 6. In applying the relative criteria, and in the light of the Board's comments, it must be stressed that findings made in the determination of a fee must be supported by the evidence and outlined in the case record.

ALBERT KLINE
Deputy Director, OFEC

Dated: November 30, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 170

SUBJECT: 5 USC 8127
ATTORNEY'S FEES

The purpose of this memorandum is to bring to your attention the decision of the Employees' Compensation Appeals Board in the case of Andrew D. Finch, Docket No. 73-120. This decision and the footnoted decisions on pages 3 and 4 (of Docket No. 73-120) should be carefully studied.

In the subject case, the attorney represented the claimant from March 1967 through May 3, 1971. He originally requested a fee of $5,341.51, which was one-third of the amount which the claimant eventually recovered. The attorney was advised that no fee could be paid unless approved by the OFEC, and that approval would be commensurate with the actual necessary work performed, the circumstances of the employee and the capacity in which the attorney served. The attorney was also advised that the OFEC could not recognize any contract for an agreed sum or a contingent contract.

The attorney first reported that he had devoted 33 hours to the case; however, he later alleged he had spent over 80 hours on the case. He pointed out that he had not kept accurate time records because he had originally accepted the case on a contingency basis. He subsequently listed activities beyond those described in his original report.

The OFEC determined that to be fair to both parties, they would divide the 80 hours by one-half and authorized a fee based on a total of 40 hours, using an hourly rate of $50 making the sum of $2,000 payable as a fee.

The Board stated that the 40 hours approved by the OFEC, was not supported by the facts, and found that the attorney had spent 80 hours on the matter. It was pointed out that there was not adequate contradiction in the record to refute the claimed 80 hours. They also said that the OFEC was not bound to authorize the normal per hour amount usually charged by an attorney for his services, since fees in workmen's compensation have been lower than those in other field of law.

The general criteria to be considered in determining a representative's fee is defined in the Federal Procedure Manual, Part 1, Chapter 1-1600, Section 6. In applying the relative criteria, and in the light of the Board's comments, it must be stressed that findings made in the determination of a fee must be supported by the evidence and outlined in the case record.

ALBERT KLINE
Deputy Director, OFEC

Dated: November 30, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 171

(See Program Memorandum Nos. 201, 212, and 220)

SUBJECT: 5 USC 8112 and 8133(e)
SALARY LIMIT FOR COMPUTING MAXIMUM COMPENSATION

Compensation may not exceed seventy-five percent of the maximum rate of basic pay for GS-15. Under Executive Order No. 11739 approved October 3, 1973, the maximum rate of pay for GS-15 reached $36,741 per annum. This figure is based upon comparability with the private sector of the economy.

The provisions of 5 USC 5308, however, prohibit payment of salary in excess of level V of the Executive Schedule, which is now $36,000 per annum.

It has been determined that the maximum rate of basic pay is the amount actually paid to the highest step of a GS-15 as limited by 5 USC 5308 at the salary for level V of the Executive Schedule. The higher figure does not reflect the actual salary, but is merely a statement of what the salary would be if based solely upon comparability and not otherwise restricted.

Accordingly, the maximum compensation is seventy-five percent of the maximum basic salary actually paid to a GS-15 employee.

ALBERT KLINE
Deputy Director, OFEC

Dated: December 20, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 172

SUBJECT: 5 USC 8116(a)
PAYMENT UNDER 5 USC 8101 ET SEQ. AND THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED

It has been determined that Black Lung benefits clearly are not salary or pay. It has also been determined that "remuneration" as used in 5 USC 8116 is synonymous with pay or salary or a reward for services to the United States. It follows, therefore, that there is no prohibition against concurrent payment of FECA benefits and Black Lung benefits under Title IV, Part B of the Federal Coal Mine Health and Safety Act of 1969, as amended.

Claims for Black Lung benefits filed on and after January 1, 1974 come under Title IV, Part C of the Federal Coal Mine Health and Safety Act of 1969, as amended. Section 422(g) of Part C provides for reduction of Black Lung benefits by the amount of "...any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis."

Accordingly, when the OFEC approves a compensation claim for pneumoconiosis, or Black Lung, the Division of Coal Mine Workers' Compensation will be advised of the amount of benefits paid under the FECA. Under ordinary circumstances, the FEC entitlement will be paid in full and any necessary adjustments will made through the Black Lung program.

ALBERT KLINE
Deputy Director, OFEC

Dated: December 21, 1973

PROMEMO

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 173

SUBJECT: 5 USC 8114
PAY RATE FOR COMPENSATION PURPOSES FOR EMPLOYEES OF THE MILITARY RESERVE

Civilian employees of the military reserve have heretofore been paid compensation based only on their earnings from civilian employment. It has now been determined that, where membership in the military reserve is a condition of employment for the civilian job held by the claimant, his reserve training pay should be included in the pay rate for compensation purposes.

In all cases where compensation is payable to a civilian employee of the military reserve, the official superior must be contacted to determine if membership in the reserve is a condition of employment. If so, the claimant's reserve training pay should be added to his earnings in his Federal civilian employment to determine the pay rate for compensation purposes.

ALBERT KLINE
Deputy Director, OFEC

Dated: December 21, 1973

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 174

SUBJECT: 5 USC 8103(a) ACUPUNCTURE

Acupuncture is a form of treatment which attempts, through the insertion of needles, to provide relief from chronic pain, loss of hearing, and is used by some surgeons as an anesthesia for surgical procedures. Acupuncture is a very old form of Chinese therapy, which is currently under study by the American Medical Association and the National Institutes of Health, neither of which have, to date, approved this method of treatment.

Authorization for this type of treatment will be given <u>only</u> upon recommendation of a duly qualified attending physician who should continue to oversee the medical care, including the acupuncture, and submit periodic reports. The reports should show whether there has been any medical improvement or symptomatic

relief.

If it appears that the treatment is prolonged and/or the results are questionable, the continuation of the treatment should be brought to the attention of the District Medical Director who will advise whether the treatment should be continued.

ALBERT KLINE
Acting Director, OFEC

Dated: March 5, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 175

SUBJECT: 5 U.S.C. 8101(1), 5 U.S.C. 8116, 5 U.S.C. 8133,
RIGHT OF ELECTION - VA BENEFITS vs. FECA
COMPENSATION TO BENEFICIARIES OF MILITARY
RESERVISTS

It has recently been determined that the irrevocable election provisions of 5 U.S.C. 8116(b) do not apply to those cases where FECA benefits are being paid because of injury or death which occurred on active duty with the military reserve.

The irrevocability of election provided by 5 U.S.C. 8116(b) properly relates only to instances of entitlement to FECA benefits based on the injury or death of an "employee". The definition of employee contained in 5 U.S.C. 8101(1) does not include a person injured or killed in military service, thus the beneficiaries in military reservist cases have the right, without time limitation, to elect VA benefits. However, once the election is made to receive VA benefits, the beneficiary cannot later elect FECA benefits - see 38 U.S.C. 416.

ALBERT KLINE
Acting Director, Division of
Federal Employees' Compensation

Dated: March 20, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 176

PROMEMO

SUBJECT:5 USC 8101(1) FEDERAL AND STATE YOUTH CONSERVATION CORPS PROGRAMS

STATE

Public Law 92-597, approved October 27, 1972, created State Youth Conservation Corps Programs. Unlike the Federal program authorized by PL-91-378, State YCC members work exclusively for the benefit of State-owned lands and waters and under the total direction and control of State employees who also have the sole power to discharge members.

It has been determined that members of the State YCC are not Federal employees for purposes of 5 USC 8101, et seq. When adjudicating YCC claims, care should be exercised in determining the member's Federal or State status. When necessary, this determination can be made by ascertaining the law under which the member was enrolled.

ALBERT KLINE
Acting Director, Division of
Federal Employees' Compensation

Dated: April 15, 1974

Distribution List No: 1

FECA PROGRAM MEMORANDUM - NO. 177

SUBJECT: 5 USC 8116 CONCURRENT PAYMENT OF COMPENSATION AND BENEFITS OF THE TENNESSEE VALLEY AUTHORITY RETIREMENT SYSTEM

Title 5 USC 8116 contains certain limitations on the right to receive compensation. These limitations apply solely to situations where there is concurrent entitlement to compensation and to some other Federal benefit(s).

It has been determined that the Tennessee Valley Authority Retirement System is a private pension plan and therefore, the limitations imposed by 5 USC 8116 do not apply.

The TVA Retirement System holds that under certain circumstances, all or part of its benefits are not payable concurrently with compensation under the FECA. However, requests for offset of compensation to repay any TVA retirement benefits deemed an overpayment by that agency, will be honored only upon written authority of the compensation beneficiary affected. Without the claimant's written permission, no

compensation due him will be disbursed to the TVA Retirement System.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: June 21, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 178

SUBJECT: 5 USC 8137; 5 USC 8116(a) CONCURRENT RECEIPT OF CIVIL SERVICE ANNUITY AND LUMP SUM DEATH AWARDS UNDER VIETNAMESE LAW

in cases of death due to a job-related injury or illness, it is local law and custom in Vietnam to pay its nationals a lump sum of one year's salary plus one month's salary. It is the general policy of OWCP, under the provisions of 5 USC 8137, to pay such cases on the basis of local law. A question has arisen as to whether the widow of a Vietnamese citizen may receive such a lump sum payment under 5 USC 8137 concurrently with a Civil Service annuity.

It has been determined that the payment of a lump sum award under Vietnamese law (under the provisions of 5 USC 8137) and the receipt of benefits under the Civil Service Retirement Act is not prohibited by 5 USC 8116(a). Having adopted this local law in applying 5 USC 8137, the nature of the payment must be governed by local law for the purpose of determining whether benefits under the U.S. Civil Service Retirement Act are prohibited under 5 USC 8116(a).

Death awards are never paid in installments under Vietnamese law. Therefore, it cannot be said that such payment represents a "commutation of installment payments," covering a period during which the widow would be ineligible to receive remuneration of any kind from the United States. Accordingly, there is no concurrent payment of the type contemplated at 5 USC 8116(a), where the widow is receiving benefits under the Civil Service Retirement Act.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: September 18, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 179

SUBJECT: 5 USC 8107
SCHEDULED AWARDS IN HEARING LOSS CASES

Frequently in hearing loss cases, there will be several audiograms in the file, which have been made within a time span of approximately two years and which come from different specialists. The question arises as to which audiogram to use in determining the amount of hearing loss for scheduled award purposes.

In the case of John C. Messick, ECAB Docket No. 74-100, the Board held that, where these factors are present, all audiograms should be evaluated to determine the percentage loss shown by each. An audiogram, even the latest in the file, should not arbitrarily be selected as representative of the percentage of hearing loss, where more than one specialist has submitted current audiograms. If there is a conflict in the percentage of hearing loss shown, rationale should be given for choosing one audiogram over the others -- or the claimant should be referred for another hearing evaluation in order to resolve the conflict.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 3, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 180

SUBJECT: 5 U.S.C. 8107; 5 U.S.C. 8108; 5 U.S.C. 8116
ELECTION OF SCHEDULED AWARD WHERE VA SERVICE-CONNECTED BENEFITS ARE INCREASED

NOTE: This Program Memorandum supplements Program Memoranda Nos. 69 and 166. Appropriate notations should be placed on these memoranda.

When a claimant is requested to make an election between an FECA scheduled award and increased VA service connected benefits, it is, at that time, premature to anticipate and properly determine the amount of any loss of wage-earning capacity that will exist upon expiration of the award. Since, under these

circumstances, the claimant cannot initially make an informed election, an election should be requested between FECA and VA benefits for service-connected disability only for the duration of the scheduled award.

Upon expiration of the award, any loss of wage-earning capacity should be determined, and the claimant requested to make a second and irrevocable election between FECA compensation for loss of wage-earning capacity and VA benefits.

Thus, an election between FECA and VA benefits is not irrevocably applied to all future benefits where an informed election could not be made regarding such future benefits.

ALBERT KLINE
Associate Director
for Federal Employees' Compensation

Dated: October 21, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 181

SUBJECT: 5 U.S.C. 8107
SCHEDULED AWARDS FOR BILATERAL HEARING LOSS

Reference: FECA Program Memorandum No. 134, February 3, 1971

Title 5 U.S.C. 8107(c)(13)(A) provides for 52 weeks of compensation for the complete loss of hearing in one ear; 5 U.S.C. 8107(c)(13)(B) provides for 200 weeks compensation for complete loss of hearing in both ears; and 5 U.S.C. 8107(c)(20) provides that where bilateral loss of hearing is involved compensation is computed on the loss as affecting both ears.

On occasion, the allowances for loss of hearing in each ear, if computed separately, may be greater than the combined value of bilateral hearing loss. In such cases, the employee should be given the benefit of the more favorable allowance, as prescribed in the awards for hands and feet in FECA Program Memorandum No. 134. Thus, in such cases, the claimant should be compensated in accordance with the scheduled allowances for the sum of the loss of hearing of each ear.

An appropriate memorandum is to be placed in the file which will make reference to this program memorandum and explain why the award was based on the loss of hearing of each ear separately rather than on binaural hearing loss.

ALBERT KLINE

PROMEMO

Associate Director for
Federal Employees' Compensation

Dated: November 26, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 182

SUBJECT: FEDERAL EMPLOYEES' HEALTH BENEFITS PROGRAM - REVIEW OF DECISION

From time to time, issues arise concerning changes in enrollments in the Federal Employees' Health Benefits Program. Actions taken by the OWCP are sometimes challenged. The question arises as to the remedies open to the claimant.

In the case of Thomas Y. Dempsey, ECAB Docket No. 74-129, the Board held that the statute establishing the Health Benefits Program provides that the regulations to carry out the Program shall be issued by the Civil Service Commission. The Commission's regulations (5 CFR Part 890) provide, in section 890.103, that an employee or an annuitant may appeal a refusal of an employing office to change an enrollment, and that such appeal shall be made to the Bureau of Retirement and Insurance of the Commission. An appeal from a decision of that Bureau may be taken to the Board of Appeals and Review of the Commission. "Employing office" is defined in section 890.101(5) of the regulations as including "the office which has authority to approve annuity or workmen's compensation".

The jurisdiction of the ECAB is limited to final decisions of the OWCP arising under the FECA. The ECAB does not have jurisdiction to review a decision relating to the Federal Employees' Health Benefits Program since the Commission, which is the administering agency, has provided for appeals procedures with respect to decisions related to changes in health benefits enrollments.

After a decision is made by the OWCP on a question of Health Benefits, a claimant may appeal the decision to the Bureau of Retirement and Insurance of the Civil Service Commission.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: November 26, 1974

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 183

PROMEMO

SUBJECT: 5 USC 8101(1)
WORKER-PATIENTS IN FEDERAL HOSPITALS AND INSTITUTIONS

It has generally been the position of OWCP that patient-workers in Federal hospitals or institutions were not employees for compensation purposes, because they were not completely free to enter into an employment relationship with the Federal Government.

In the case of Souder v. Brennan, 367 F. Supp. 808 (D. D. C. 1973), however, the court held that patient-workers in non-Federal hospitals, homes, and institutions for the mentally retarded and mentally ill are "employees" covered by the Fair Labor Standards Act (FLSA). This decision was based on the economic reality test. The reality is that many patient-workers perform work for which they are in no way handicapped and from which the institution derives full economic benefit. The FLSA was amended by P.L. 93-259, effective May 1, 1974, to make it applicable to public agencies of the United States as employers.

Considering the combined effects of Souder v. Brennan and the 1974 Amendments to the FLSA, patient-workers in Federal hospitals and institutions may be employees for compensation purposes, when injured on or after May 1, 1974. All such cases should be fully developed and then forwarded to the National Office for a decision on the question of "employee".

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 7, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 184

SUBJECT: 5 USC 8133
GRATUITY PAYMENTS TO SURVIVING DEPENDENTS OF FOREIGN SERVICES EMPLOYEES -- PUBLIC LAW 93-475, APPROVED OCTOBER 26, 1974

There is quoted on the reverse side [below] of this Program Memorandum Section 10 of Public Law 93-475, which provides death gratuities for certain Foreign Service personnel.

Gratuities equal to one year's salary at the time of death are paid to surviving dependents of Foreign Service

employees who die as the result of an injury sustained in the performance of duty outside the United States, excluding diseases proximately caused by the employment. Payments are made only to survivors who are entitled to compensation under 5 USC 8133, without regard to whether the survivor elects to waive compensation.

These payments are considered as gifts and are payable in addition to compensation or benefits from any other source.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: December 11, 1974

Distribution: List No. 1

DEATH GRATUITIES FOR CERTAIN FOREIGN SERVICE PERSONNEL

Sec. 10. The Act entitled "An Act to provide certain basic authority for the Department of State", approved August 1, 1956 is amended by inserting immediately before section 15 the following new section:

"SEC. 14. (a) Subject to the provisions of this section and under such regulations as the Secretary of State may prescribe, the Secretary is authorized to provide for payment of a gratuity to the surviving dependents of any Foreign Service employee who dies as a result of injuries sustained in the performance of duty outside the United States in an amount equal to one year's salary at the time of death. Appropriations for this purpose are authorized to be made to the account for salaries and expenses of the employing agency. Any death gratuity payment made under this section shall be held to have been a gift and shall be in addition to any other benefit payable from any source.

"(b) A death gratuity payment shall be made under this section only if the survivor entitled to payment under subsection (c) is entitled to elect monthly compensation under section 8133 of title 5, United States Code, because the death resulted from an injury (excluding a disease proximately caused by the employment) sustained in the performance of duty, without regard to whether such survivor elects to waive compensation under such section 8133.

"(c) A death gratuity payment under this section shall be made as follows:

> **"(1) First, to the widow or widower.**
>
> **"(2) Second, to the child, or children in equal shares, if there is no widow or widower.**
>
> **"(3) third, to the dependent parent, or dependent parents in equal shares, if there is no widow, widower, or child.**

If there is no survivor entitled to payment under this subsection, no payment shall be made.

"(d) As used in this section --

"(1) the term 'Foreign Service employee' means a chief of mission, Foreign Service officer, Foreign Service information officer, Foreign Service Reserve officer of limited or unlimited tenure, or a Foreign Service staff officer or employee;

"(2) each of the term 'widow', 'widowers', 'child', and 'parent' shall have the same meaning given each such term by section 8101 of title 5, United States Code; and

"(3) the term 'United States' means the several States and the District of Columbia.

"(e) The provisions of this section shall apply with respect to deaths occurring on and after January 1, 1973."

FECA PROGRAM MEMORANDUM - NO. 185

SUBJECT: 5 U.S.C. 8101(1)
MEMBERS OF THE NATIONAL DEFENSE EXECUTIVE RESERVE

Various Government Departments maintain a National Defense Executive Reserve (NDER) in accordance with Executive Order 11179, under authority of Section 710(e) of the Defense Production Act. The NDER program provides a reserve of highly qualified individuals from industry, organized labor, professional groups, the academic community, and to some extent, from within the Government, to serve in executive positions in the Federal service in time of emergency.

Members participate in orientation conferences and training activities from time to time, and are paid travel expenses required by their attendance. When called to active service, they become Federal employees and normally will serve on a salary basis under pay schedules then in effect, or under other pay arrangements as may be authorized. It is conceivable, however, that certain individual Executive Reservists may, in time of emergency, perform essential public tasks as part of their regular employment, business, or profession, or as part of a community effort by citizens without actual employment by the Government.

It has been determined that Executive Reservists are Federal employees for compensation purposes while attending training and orientation activities and during related travel, and while in performance of duty as Federal employees during time of emergency. Should a claim arise for an Executive Reservist under other circumstances, all pertinent details should be obtained and the case should be forwarded to the National Office for a decision.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: December 16, 1974

PROMEMO

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 186

SUBJECT: 5 U.S.C. 8102(a)
DELETERIOUS EFFECTS OF MEDICAL SERVICES FURNISHED BY THE EMPLOYING AGENCY

Note: This Program Memorandum supplements Program Memorandum No. 42. An appropriate notation should be placed on that memorandum.

It has been determined that benefits of the Federal Employees' Compensation Act apply to any deleterious result of medical services furnished by the employing agency for non-work related illnesses or injuries. Untoward effects may be unavoidable, or they may occur through error or agency failure to report examination results to the employee or to his physician in time to alter the progress of the disease for the better.

A deleterious effect may result form an act of commission (e.g. inadvertently administering the wrong drug) or omission (e.g. failure to inform an employee of positive findings on a screening X-ray or test).

Following appropriate development of the facts, all cases of this nature should be referred to the District Medical Director for opinion on whether the condition claimed was causally related to the agency medical services provided, or was adversely affected by the failure to promptly alert the employee or his physician.

ALBERT KLINE
Associate Director
for Federal Employees' Compensation

Dated: December 23, 1974

Distribution List No: 1

FECA PROGRAM MEMORANDUM - NO. 187

SUBJECT: 5 U.S.C. 8122(c)
TIME REQUIREMENTS FOR FILING DEATH CLAIM AFTER SEPTEMBER 7, 1974

TITLE 5 U.S.C. 8122(c), as amended by P.L. 93-416, states as follows:

"The timely filing of a disability claim because of injury will satisfy the time requirements

for a death claim based on the same injury".

Section 28 of P.L. 93-416 states that this amendment "shall take effect on the date of enactment (i.e. September 7, 1974) and be applicable to any injury or death occurring on or after such effective date". (emphasis supplied)

We have interpreted this to mean that a timely filed disability claim for an injury which occurred prior to September 7, 1974, will satisfy the time requirements for a death claim based on the same injury if the death occurs on or after September 7, 1974.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 17, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 188

SUBJECT: 5 USC 8118 AND 5 USC 8101 (4)
PAY RATE FOR COMPENSATION PURPOSES AFTER PERIOD OF CONTINUATION OF PAY

There may be instances where an employee will sustain a traumatic disabling injury and begin to receive the continuation of pay provided for in 5 USC 8118, during which 45 day period his salary is increased. If the disability exceeds 45 days and the employee makes a claim for compensation to begin after the 45th day, the question arises as to the correct rate of pay for compensation purposes--the pay rate at time of injury, or the increased pay rate.

It has been determined that the provisions of 5 USC 8118 will have no effect on the determination of the monthly pay to be used for compensation purposes as determined under 5 USC 8101 (4). Just as in the case of an employee who, following injury, chooses to use sick or annual leave (either before or after the 1974 Amendments to the FECA) any in-grade or other pay raises while in continuation of pay status are not to be taken into account. Thus, the pay rate for <u>compensation</u> purposes will be determined as of the time the employee <u>begins</u> the 45 day period.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 22, 1975

PROMEMO

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 189

SUBJECT: 5 USC 8101(1)
COMPREHENSIVE EMPLOYMENT AND TRAINING ACT OF 1973

Public Law 93-203, the Comprehensive Employment and Training Act of 1973 (CETA), provides job training and employment opportunities for economically disadvantaged, unemployed and underemployed persons by establishing a flexible and decentralized system of Federal, State and local programs.

Individuals who are working or training under a CETA program in a Federal agency, under the technical direction and supervision of a Federal employee, are employees for compensation purposes as defined at 5 USC 8101(1). CETA enrollees not working or training in a Federal agency come under State workers' compensation laws.

Enrollees are employed at prevailing wages. Where the enrollee was a minor, or employed in a learner's capacity, consideration should be given to increasing the pay rate when appropriate under 5 USC 8113(a). Since claimants in this category will frequently be from disadvantaged segments of society, every effort should be made to assist them in filing claims, properly completing forms and obtaining supporting documentation.

It should be noted that Section IV of CETA establishes the Job Corps within the Department of Labor. Criteria for processing claims for Job Corps enrollees remains unchanged.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 22, 1975

Revised: June 25, 1975

Distribution: List No. 1

ADDENDUM:

By virtue of Public Law 82-397, non-appropriated fund employees are not considered to be Federal employees. However, it has been determined that CETA enrollees who are working or training in a Federal agency or instrumentality are employees for compensation purposes, even though they are under the direction and supervision of a non-appropriated fund employee. The determining factor is not the "employee" status of the supervisor, but rather is the fact that the CETA enrollees are working at a Federal

facility and for the benefit of the Federal Government.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Revised: December 18, 1979

Distribution: List No. 1

(All Claims Examiners and Supervisors (except Index and Files), Systems Managers and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 190

SUBJECT: 5 USC 8133(f) $200 REIMBURSEMENT FOR TERMINATION OF DECEDENT'S EMPLOYMENT STATUS

A $200 payment is made under 5 USC 8133(f) to the personal representative of an employee who died in performance of duty on and after September 7, 1974. This payment is to reimburse the cost of terminating the decedent's status as an employee of the United States, and is separate and apart from any entitlement to funeral expenses under 5 USC 8134.

The $200 payment is applicable by law only to cases of deceased employees within the meaning of 5 USC 8101(1). This means that the payment will not be made in the case of death of Reserve Officers Training Corps (ROTC) cadets, Civil Air Patrol (CAP) volunteers, members of the National Teacher Corps, non-Federal law enforcement officers (LEO), nor in any other category of workers where benefits of the Federal Employees' Compensation Act are extended by separate legislation.

Peace Corp Volunteers, Volunteers in Service to America (VISTA) and Job Corps enrollees come under the FECA by reason of separate legislation, but were also found to be employees of the United States as defined at 5 USC 8101(1) -- see Program Memoranda Nos. 95, 96, and 97. These latter groups, and any other worker found to be an employee under 5 USC 8101(1) notwithstanding separate legislation, are entitled to payment of the $200 termination of employment expense.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 22, 1975

PROMEMO

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 191

SUBJECT: 5 USC 8101(5); 5 USC 8118
CONTINUATION OF PAY AS A RESULT OF INJURIES INVOLVING DAMAGE TO OR DESTRUCTION OF PROSTHETIC DEVICES

The 1974 Amendments to the FECA added to the definition of "injury" for compensation purposes, damage to medical braces, artificial limbs, and other prosthetic devices, "and such time lost while such device or appliance is being replaced or repaired..."

The question arose as to whether this particular amendment provided for the payment of disability compensation for wage loss from the date of "injury" with the immediate counting of waiting days, or whether it provided for continuation of pay as provided under 5 USC 8118.

It has been determined that damage to or destruction of an artificial limb or other prosthetic device because of a traumatic incident is, by virtue of the definition of the term injury in 5 USC 8101(5), a "traumatic injury" within the meaning of 5 USC 8118. Accordingly, the provisions of 5 USC 8118 apply in such situations in the same manner as they would apply in the case of a disabling traumatic injury to the body itself. Thus, pay or leave would be continued for up to 45 days for time lost while the device or appliance is being replaced or repaired. The three day waiting period would not be counted until the 45 day continuation of pay period ceased.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 25, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 192

SUBJECT:5 USC 8102 EMERGENCY ACTIVITIES SPONSORED BY THE FEDERAL EMPLOYING ESTABLISHMENT

PROMEMO

In certain instances, employees form teams at management request, solely to respond to emergency situations which the employing establishment is responsible for handling. For example, employees may be trained in first aid procedures, firefighting, damage control and the like, in order to protect agency personnel and property. Management asks or urges employees to volunteer for such activities and takes an active part in meetings, drills, and training. The establishment also pays for off-premise training during off-duty hours, and finances purchase of protective clothing and equipment. Moreover, when responding to an actual emergency, the employee would normally be in regular pay status.

Where the above-cited criteria are present, it is clear that the intended beneficiary of the team activities is the employing establishment. Thus, approved training, drills, meetings (even while off Government premises or during off-duty hours) as well as the actual operations of the team in case of an emergency on Government property, are considered to be within the individual employee's performance of duty. This is true even though the activities of the team members are not related to their usual official duties. Therefore, any employee who is injured while engaged in such activities is considered to be injured in the performance of duty.

The pay rate for compensation purposes is the pay rate of the regular Federal employment held at the time of injury.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 25, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 193

SUBJECT: 5 USC 8103(a)
MEDICAL EXPENSES INCIDENT TO SECURING MEDICAL SERVICES

The Federal Employees' Compensation Act provides, at 5 USC 8103(a), that employees may be furnished necessary and reasonable transportation and expenses incident to the securing of medical services, appliances and supplies.

The rules of paying transportation expenses under this provision are well established. No guidelines, however, have been issued for handling claims for incidental expenses, such as babysitting, pet care, home security and other charges which an injured employee may incur as the result of securing medical services, appliances and supplies.

It has been determined that such incidental medical expenses shall be paid to the extent that the charges are necessary and reasonable, as determined on an individual case basis. For example, where a household

consists of the claimant, a child and a semi-invalid parent and it is necessary for the claimant to pay for care of the child and parent while hospitalized for treatment of the injury, reasonable family care expenses would be paid. Where additional expenses are claimed such as a kennel for the family dog, reasonable kennel charges would be paid only if it is determined that other arrangements could not be made, such as the person taking care of the family also caring for the pet.

A distinction must be made between medical expenses incidental to securing treatment and those incurred following treatment. Incidental medical expenses are allowable only when incurred as a result of securing medical services, appliances, and supplies. Expenses otherwise incurred, such as housekeeping expenses, while convalescing at home, are not required in obtaining medical services and therefore would not be payable. The services of a licensed or practical nurse, however, required during home convalescence would be an allowable medical service.

Another situation which might arise is that of a spouse who has a babysitter for the children during visits to the injured employee in the hospital. Since the spouse's visits are not necessary to the securing of medical treatment, the babysitter's fee would not be reimbursable.

However, reasonable babysitting charges would be payable where necessary when a spouse is needed to take an employee to and from the hospital, doctor or medical appliance dispensary. Under these circumstances, the costs would be necessary to the securing of medical services, appliances or supplies. The record in such instances must show that the employee could not perform the necessary travel himself.

In each case, the record must contain a memorandum discussing the pertinent considerations regarding the necessity of the incidental expenses and the reasonableness of the amount claimed.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 25, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 194

SUBJECT: 5 USC 8101(1)(A); 8113(a)
STUDENT-EMPLOYEES OF THE D.C. PUBLIC SCHOOLS

The District of Columbia Public Schools have instituted an on-the-job training program open to all students seventeen years of age and older. The students will work in trainee positions in the school system, and in other departmental agencies of the District at the prevailing minimum wage, for 8 hours per day, three days per week. The two remaining days will be spent in academic pursuits.

Students will work in clerical fields, as typists, filing clerks, key-punch and duplicating machine operators, and as nurses' aides, teacher aides, warehousemen, and in semi-skilled positions such as cooks, and radio, television, typewriter and electronic repairmen. They will be supervised by the District of Columbia employee who supervises the particular function in the office to which they are assigned. In addition to benefiting the student by providing a means of involvement in real-world job situations, the program provides additional workers in areas which lack needed personnel.

Students will not be assigned to their own schools. They will report to their school on the days of the work assignments and will be transported to the work and back to their school at the end of the day.

The students are Federal employees for compensation purposes while working and while being transported by the District of Columbia government between their reporting school and their work assignment. Regular positions within the school system are to be allocated for those students who excel in the training program.

Considering that the students are employed in a learner's capacity and will frequently be minors at the time of injury, the provisions of 5 USC 8113(a) apply.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: April 1, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 195

SUBJECT: 5 USC 8101(1)
NATIONAL FOREST SERVICE VOLUNTEERS

Under Public Law 92-300, the "Volunteers in the National Forest Act of 1972", the Secretary of Agriculture is authorized to recruit, train and accept the services of unpaid individual volunteers for use in interpretive functions, visitor services, conservation measures and development, or in other activities in and related to areas administered by the Department of Agriculture through the National Forest Service.

The law provides that volunteers are Federal employees for compensation purposes, as defined in 5 USC 8101(1).

Since these volunteers receive no pay or salary, the pay rate for compensation purposes must be determined under the provisions of 5 USC 8114(d)(4).

Some volunteers may be minors, and in such cases the provisions of 5 USC 8113 will apply where there is prolonged or permanent disability.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: May 1, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 196

SUBJECT: 5 USC 8101(4), 8104(b) AND 8146a
PAY RATE FOR PERSONS UNDERGOING VOCATIONAL REHABILITATION TRAINING

As a result of the 1974 Amendments to the FECA, compensation is paid at the rate for total disability if the claimant is undergoing vocational rehabilitation training under 5 USC 8104. In such cases, the payments are not based on an increase in disability for work.

In the case of Johnny A. Muro, (19 ECAB 104) the Board held that an increase in disability for work due to an employment injury is a recurrence of disability within the meaning of 5 USC 8101(4), and a recurrent pay rate is applicable if an increase in disability for work begins more than six months after the injured employee resumes regular full time employment with the United States (see Program Memorandum No. 114).

It has been determined that an increase in compensation to the rate for total disability under 5 USC 8104(b) is not a recurrence of disability within the meaning of 5 USC 8101(4). This is so because an increase under 5 USC 8104(b) is not based upon an increase in disability for work. Accordingly, a recurrent pay will not be used in such cases. However, subsequent CPI increases should be added if otherwise appropriate (i.e., if disability occurred more than one year before the effective date of the CPI increase).

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: July 22, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 197

PROMEMO

Rescinded, along with Program Memorandum No. 125, by FECA Bulletin No. 86-2.

FECA PROGRAM MEMORANDUM - NO. 198

SUBJECT: 5 USC 8140(b)
LINE OF DUTY DETERMINATIONS IN U.S. AIR FORCE ROTC CASES

The various military services make "line of duty" determinations in cases involving ROTC cadets. While the OWCP is not bound by these determinations, they are persuasive and entitled to great weight and consideration in determining entitlement to FECA benefits.

Heretofore, the military services have provided a formal determination in each ROTC case. Air Force regulations have been revised however, to allow the Commanding Officer, in the case of a simple injury, to merely concur with the Medical Officer that the injury occurred in line of duty.

The Air Force defines a "simple injury" as follows: (sprains, contusions, minor breaks) which are not likely to result in disability or future claims against the Government and which occurred while on the job or while participating in properly sponsored sport activity.

Accordingly, in cases of simple injuries involving U.S. Air Force cadets, a statement by the Commanding Officer that the injury occurred in line of duty will satisfy the requirement of 5 USC 8140(b). However, in cases of severe injury other than "simple injury", or for any injury occurring under questionable circumstances, the Air Force will be requested to furnish a formal determination.

There is no change in procedures in the other military services.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: August 5, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 199

SUBJECT: 5 USC 8102
COVERAGE OF INTERNAL REVENUE SERVICE SPECIAL AGENTS

PROMEMO

ENGAGED IN PISTOL PRACTICE AND COMPETITIONS WHILE OFF-DUTY

The Internal Revenue Service (IRS) employs Special Agents, who are in law enforcement positions, which necessitates issuance of weapons to these Agents. The Internal Revenue Manual encourages these Agents to maintain their proficiency with firearms. The IRS provides ammunition for practice sessions which take place on the employee's own time, not during official duty time. The IRS also encourages participation in pistol shooting competition.

The OWCP has determined that IRS employees will be considered to be in performance of duty for compensation purposes while engaged in off-duty practice, where the IRS makes arrangements to provide a firing range and furnishes ammunition. Compensation coverage will be extended to off-duty firearms competition where the District Director or Regional Commissioner determines that the participation is in the interest of the United States and where the employee's travel expenses are authorized to be paid by the Federal Government.

Cases will be adjudicated individually under these guidelines, as they arise.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: August 5, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 200

SUBJECT:5 U.S.C. 8116 - BENEFITS PAYABLE CONCURRENTLY BY OWCP AND VA FOR THE SAME DISABILITY OR DEATH

REFERENCE: FECA Program Memorandum No. 123, June 8, 1970

Under the FECA, compensation to a widow or widower is terminated upon remarriage under age 60. Compensation payable on behalf of a child or children in such case continues and is increased accordingly. If the widow or widower's remarriage is terminated by death or by divorce, FECA compensation is not restored. Public Law 91-376, dated August 12, 1970, which amended the U.S. Code pertaining to veterans benefits, however, authorizes effective January 1, 1971, the payment or reinstatement of Death Compensation or Dependency and Indemnity Compensation by the Veterans Administration to widows of veterans where the widow's subsequent remarriage has been terminated by death or divorce.

A question arises in those cases where the widow had elected FECA compensation in lieu of VA benefits for herself and minor child or children. The question is whether OWCP should terminate FECA compensation being paid to a veteran's minor child or children if the VA awards death benefits under Subchapter V, Chapter II, 38 USC or dependency and indemnity compensation under Chapter 13, 38 USC to the remarried widow and includes an additional allowances for the veteran's minor child or children in the widow's custody.

It has been determined that the OWCP will not terminate the child or children's compensation in such cases where a proper election has been made under 5 U.S.C. 8116 to receive FECA compensation in lieu of VA benefits. If the VA subsequently decides to pay benefits on behalf of the child or children an action which may constitute a duplicate payment for the same death, such payment does not negate the prior election. In such cases, the VA becomes responsible for any overpayment created by their payment on behalf of the child.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: September 19, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 201

(See Program Memoranda Nos. 212 and 220)

SUBJECT: 5 USC 5318, 8112 AND 8133(e)
SALARY LIMIT FOR COMPUTING MAXIMUM COMPENSATION

NOTE: This Program Memorandum supplements Program Memorandum No. 171, approved December 12, 1973, which will be referred to for injuries sustained prior to October 12, 1975. An appropriate notation should be placed on that memorandum.

Compensation may not exceed seventy-five percent of the maximum rate of basic pay for GS-15. Executive Order No. 11883, approved October 6, 1975, increased the maximum rate of pay of GS-15 to $40,705 per annum.

The provisions of 5 USC 5308, however, prohibited payment of salary in excess of level V of the Executive Schedule. This was changed by Public Law 94-82, approved August 9, 1975, which added section 5318 to chapter 53 of 5 USC. This new section increased the maximum allowable salary in the Executive Schedule to $37,800 per annum.

Accordingly the maximum compensation is seventy-five percent of the maximum basic salary actually paid to a GS-15 employee.

REGINALD J. JOHNSON
Acting Associate Director for
Employees' Compensation Programs

Dated: November 26, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 202

SUBJECT: 5 USC 8104; 5 USC 8111(b)
TRANSPORTATION EXPENSES OF BENEFICIARIES UNDERGOING VOCATIONAL REHABILITATION

In the past, where there has been an approved vocational rehabilitation plan, we have maintained that transportation to and from school is not considered a separate reimbursable item, inasmuch as the maintenance allowance provided under 5 USC 8111(b) is intended to include, among other items, actual transportation costs. However, cases have arisen where the approved rehabilitation plan requires the claimant to reside at the place of training because of the distance from his or her residence.

It has been decided that in such cases the cost of providing transportation to individuals undergoing vocational rehabilitation may be paid from the compensation fund under the provisions of 5 USC 8104. This policy applies only to transportation expenses incurred where the training requires the employee to reside away from his/her home city, and is limited to a basic going from home to school and return plus the same trip between semesters.

All approved plans which include training in residence away from the employee's home city must be approved by the Chief, Branch of Rehabilitation.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: December 19, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 203

PROMEMO

SUBJECT:5 USC 8105(5), CAUSAL RELATIONSHIP WHETHER AN INTERVENING CAUSE SUCH AS AN OFF-DUTY INJURY IS COMPETENT TO BREAK THE CHAIN OF CAUSATION.

The purpose of this memorandum is to call your attention to the Appeals Board Decision in the case of Charles R. Hollowell, 8 ECAB 352. In this precedent case the employee sustained employment injuries in 1944, 1950 and July 1951. Injury-related disability was originally diagnosed as a strain of the lumbar sacral muscles. Following the work injury in 1950, the employee first began to have sciatic pain suggestive of disc involvement. On August 20, 1951, he stopped work because of the back condition and hypertension.

While at home the employee suffered three minor incidents involving the back when he stepped on a toy, when he leaned over the tub while cleaning it after a bath and when he tried to rise from where he sat down to rest after cutting grass. He experienced episodes of severe pain following these insults to the back. OWCP (formerly BEC) disallowed compensation for the period claimed August 20, 1951 to August 22, 1952 inclusive, on the grounds that disability for work during this period was due to an injury the employee sustained while at home.

When setting aside the OWCP's decision the Board stated, "It is clear that the Bureau accepted as intervening causes of disability the three minor incidents occurring while appellant was at home. There is no evidence in the record which even suggests that the incidents were competent to cause the disabling condition; there is on the contrary Dr. Kirk's statement that one of the incidents (bending over a tub) would only have elicited the response it did where prior injury had occurred. To constitute the kind of intervening cause which will break the chain of causation of an earlier injury, the second incident must be competent to cause the disabling condition without reference to the earlier injury, and moreover, there must be evidence to sustain a finding that such second incident did cause the condition. If, therefore, the result of the second incident could not have developed without the presence of damage from the primary employment-related incident, that primary incident is not exonerated. Liability under the Federal Employees' Compensation Act continues as long as the disability is in any part caused by the employment-related incident."

District offices should apply the principles and precedent described by the Board in the Hollowell case whenever a question arises as to whether an intervening cause outside of employment is competent to break the chain of causation of an earlier injury at work. Generally, the question to be determined is whether the original injury contributed to the final result or would the final result have been the same if there had been no previous injury. If the intervening cause is wholly responsible for the final result then no liability may be assigned to the initial injury in Federal employment.

The occurrence of trauma outside of employment does not relieve the government of its responsibility to the employee for an ongoing employment-related disability.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: December 22, 1975

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 204

PROMEMO

SUBJECT: 5 USC 8105(a); 8107(c)(21)
PAYMENT OF A DISFIGUREMENT AWARD CONCURRENTLY WITH TEMPORARY TOTAL DISABILITY

Disfigurement is included in the list of scheduled disabilities in 5 USC 8107. Section 8107(a)(3) provides that awards under the schedule are payable "in addition to compensation for temporary total or temporary partial disability." Section 8107(b)(1) states that an employee is entitled to compensation for temporary total disability after the award, if he or she is totally disabled as provided at Section 8105.

Unlike other scheduled awards, where any entitlement to compensation for "total" or "partial disability" with wage loss is interrupted for the duration of the award, disfigurement awards are paid in a lump sum. Therefore, it is appropriate to pay a disfigurement award while the claimant continues to receive compensation for "temporary total disability" or "temporary partial disability" with wage loss.

The only exception to this is where the claimant is receiving compensation for "permanent total disability" for the reasons given in Program Memorandum No. 86.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 9, 1976

Distribution: List No. 1

Enclosure to FECA Bulletin No. 6-76

FECA PROGRAM MEMORANDUM - NO. 205

SUBJECT: 5 USC 8101(1)(A)
TRUST EMPLOYEES OF THE SMITHSONIAN INSTITUTION

The Smithsonian Institution is a wholly-owned instrumentality of the United States Government. It was established with a trust fund bequeathed to the Government by Mr. Smithson, a British subject. The trust has been increased over the years by additional bequests, and by gifts and appropriations. However, funds belonging to the Smithsonian Institution are entirely controlled by the Regents of the Institution. All Regents are appointed by officials of the United States Government. The trust employees of the Smithsonian are

hired and discharged, and their work is totally controlled, by the Regents and other officials of the Smithsonian Institution. The pay scale for these trust employees is roughly comparable to the GS scale used for regular Federal employees, although their retirement plan is not under the Civil Service system.

It has been determined that trust employees of the Smithsonian Institution are Federal employees within the meaning of 5 USC 8101(1)(A).

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: February 13, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 206

(See FECA Program Memoranda Nos. 235 and 248)

SUBJECT: 5 USC 8130
GARNISHMENT OF COMPENSATION FOR CHILD SUPPORT OR ALIMONY PAYMENTS

Federal employees' paychecks were exempt from garnishment until January 1, 1975, when the Social Services Amendments of 1974 became effective. This statute permits the garnishment of Federal employees' paychecks, including military personnel, for the purpose of child support and alimony payments.

The Social Services Amendments of 1974, Public Law 93-647, 88 Stat. 2237-2360 inter alia, added, Section 459 (42 U.S.C. 659) to the Social Security Act, as follows:

> **Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments. (emphasis added)**

It has been determined that benefits paid under the FECA are not subject to garnishment actions pursuant to the above section. Compensation payments are excluded on the grounds that the money paid is not remuneration for employment, but rather is paid because of an injury sustained by the employee.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

PROMEMO

Dated: April 22, 1976

Distribution: List No. 1

Enclosure to FECA Bulletin No. 16-76

FECA PROGRAM MEMORANDUM - NO. 207

SUBJECT: 5 USC 8101 - COVERAGE OF HANDICAPPED INDIVIDUALS PARTICIPATING IN A PROGRAM OF UNPAID FEDERAL WORK EXPERIENCE UNDER THE REHABILITATION ACT OF 1973, PUBLIC LAW 93-112

Section 501(e) of the Rehabilitation Act of 1973, authorized a program to provide work experience and related training designed to assist handicapped persons in acquiring skills and training which would enable them to compete for positions in the Nation's work force -- both public and private. State vocational rehabilitation agencies set up work experience programs by contracting with employers in the community to provide this training. The state rehabilitation agencies have entered into work experience agreements with private, as well as state and local government employers. Similar arrangements are made through written agreement with Federal agencies.

Trainees assigned to a Federal agency perform duties in accordance with those specified in the agreement. Trainees are supervised by the Federal agency staff and final authority to discontinue a trainee's participation rests with the host agency. The work performed is of such a nature as to further the purposes and functions of the host Federal agency and is performed on Federal premises. Trainees in this program receive no salary, but usually receive remuneration in the form of maintenance payments from the state rehabilitation agency.

It has been determined that participants in this program who are assigned to a Federal agency for training and work experience under the Rehabilitation Act of 1973, are Federal employees under the provisions of 5 USC 8101(1)(B). When a report of injury is received, it is important to obtain a copy of the written agreement between the Federal agency and the state rehabilitation agency. The agreement will describe the Federal duties to be performed, hours of employment and type of training. When adjudicating these claims, care should be exercised in determining the trainee's Federal or state status.

The pay rate for compensation purposes should be determined in accordance with 5 USC 8114(d)(4). Some trainees may be minors, and in such cases the provisions of 5 USC 8113 relating to a learner's pay rate will apply where there is prolonged or permanent disability.

REGINALD J. JOHNSON
Acting Associate Director for
Federal Employees' Compensation

Dated: May 18, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 208

SUBJECT: 5 USC 8103 MEDICAL EXPENSES FOR FAMILY MEMBER WHO CONTRACTS CLAIMANT'S EMPLOYMENT-RELATED DISABILITY
5 USC 8121 CLAIM PREPARATION EXPENSES

In the case of Eric Lloyd Clarke, Docket No. 75-164, the Employees' Compensation Appeals Board issued a decision dated February 24, 1975, that clarifies two issues.

The claimant contracted amoebic dysentery in causal relationship to his Federal employment while on temporary duty in Asia. As a result of his employment-related condition his wife developed an infection.

The Board determined that there is no authority under the Federal Employees' Compensation Act to pay for the medical expenses of a family member who contracts the employment-related disease from a Federal employee. The claimant is not entitled to reimbursement for his wife's medical expense. The Act provides only for the medical care of an employee.

The claimant also requested reimbursement for expenses in presenting his claim. The Board decided that there is no provision in the Compensation Act to pay for expenses incurred in preparing a claim.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: September 3, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 209

SUBJECT: 5 USC 8103
HEART, KIDNEY AND OTHER MAJOR ORGAN TRANSPLANTS

PROMEMO

Recent inquiries have made it necessary to establish a policy concerning heart, kidney and other major organ transplants.

At the present time most major organ transplants are still considered experimental rather than therapeutic and the results of such transplants are still questionable. The Veterans Administration had advised this Office that they do not authorize such transplants, with the exception of kidney transplants. Their position was established after considering the opinion of an authoritative advisory group.

5 USC 8103 provides for the furnishing of medical services or supplies recommended by a qualified physician that are "likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation." Medical science has not yet established that major organ transplants, with the exception of kidney transplants, accomplish any of the goals of 5 USC 8103. Therefore, heart transplants and any other major organ transplants, with the exception of kidney transplants, will not be authorized by this Office.

Kidney transplants do have a recognized therapeutic value. Such transplants have benefited many individuals and may be the appropriate course of treatment in certain cases. The rights of potential donors under the FECA, especially in the event of unfortunate sequelae, are presently under study.

It is anticipated that further research will make the transplantation of other major organs, such as the heart, less experimental and more therapeutic.

Until further notice, all approved claims with requests for major organ transplants, including kidney transplants, will be immediately transferred to the National Office for a final determination on the merits of the requests.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: September 14, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 210

SUBJECT: 5 USC 8101(1) - COOPERATORS AND THEIR EMPLOYEES PERFORMING COOPERATIVE WORK UNDER SUPERVISION OF THE FOREST SERVICE

Public Law 94-148, enacted December 12, 1975, authorized the Secretary of Agriculture to enter into cooperative agreements which benefit Forest Service programs and to advance or reimburse funds to cooperators for work performed, and for other purposes. The Forest Service is authorized to enter into

agreements with public or private agencies, organizations, institutions or persons to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems. The statute also allows the Forest Service to engage in cooperative manpower and job training and development programs to perform forestry protection, including fire protection and thinning of trees. The cooperators and their employees may perform cooperative work under supervision of the Forest Service in emergencies.

It has been determined that cooperators and their employees performing specified cooperative work under supervision of the Forest Service in emergencies, or otherwise as mutually agreed to, are Federal employees under the provisions of 5 USC 8101(1).

This group of workers does not receive wages from the Forest Service. The pay rate for compensation purposes of an injured individual should be determined in accordance with the applicable provisions of 5 USC 8114.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: September 15, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 211

(See FECA Program Memoranda Nos. 225 and 266;
also FECA Transmittal No. 88-20, which supersedes)

SUBJECT: 5 USC 8127(b)
FEES FOR REPRESENTATIVES SERVICES

The case of Hazel R. Covington was reviewed by the Employees' Compensation Appeals Board on three occasions -- Docket Numbers 74-22, 75-192 and 76-104 -- and establishes precedent to be applied in the procedure for approval of fees.

The Board, on April 23, 1974, concluded that it was improper for OWCP to approve any fee while the attorneys held the funds collected in Violation of 18 USC 292, 5 USC 8127(b) and 20 CFR 10.145. In this decision, the Board stated:

> **Until such time as the appellants choose to cleanse their hands and return to the claimant the full amount they collected, or in the alternative place such amount in escrow with an agreement that the escrow agent shall hold and distribute the funds in accordance with any final order of the Office or of this Board in the event another appeal is taken, it will continue to be improper for the Office to approve any fee.**

The Appeals Board also found that OWCP's decision to approve a fee did not set forth the basis for

establishing a fee in this amount. OWCP did not explain the rationale for reducing the number of hours spent by the attorneys from 330 claimed by them to 49-1/2 hours found by OWCP.

Making a findings of fact upon the issues is a necessary part of decision making under the FECA.

District Offices should apply the principles and precedent described by the Board in the Covington decision. In particular, the adjudicator must prepare a memorandum for the case record, discussing the criteria considered in the determination of a representative's fee. OWCP must issue a findings of fact in all instances, clearly explaining the basis for arriving at the amount of fee approved. This findings of fact must contain rationale for
any reduction in hours or exclusion of other items such as expenses. If the claimant contests the amount of fee requested as excessive or unreasonable, OWCP must provide rationale for the amount of fee allowed.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 212

(See FECA Program Memorandum No. 220.)

SUBJECT: 5 U.S.C. 5308, 8112 AND 8133(e)
SALARY LIMIT FOR COMPUTING MAXIMUM COMPENSATION

NOTE:This Program Memorandum supplements Program Memoranda Nos. 171 and 201, which will be referred to for injuries sustained prior to October 10, 1976. Appropriate notations must be made on both Nos. 171 and 201.

Compensation may not exceed seventy-five percent of the maximum rate of basic pay for GS-15. Executive Order 11941, approved October 1, 1976, increased the maximum rate of pay of GS-15 to $43,923 per annum.

The provisions of 5 U.S.C. 5308, however, prohibits payment of salary in excess of Level V of the Executive Schedule. Level V has been increased by Executive Order 11941 to $39,600 per annum.

Accordingly, beginning October 10, 1976, the maximum compensation is seventy-five percent of the $39,600 maximum basic salary actually paid to a GS-15 employee.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 19, 1976

PROMEMO

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 213

SUBJECT:5 USC 8101(1); 5 USC 8139, FECA COVERAGE OF MEMBERS OF THE DISTRICT OF COLUMBIA COUNCIL

The District of Columbia Council consists of elected officials who perform legislative functions in the District of Columbia.

It has been determined that Council members are covered by the provisions of the FECA, even though they are elected officials of the District of Columbia Government. While the FECA does not define the word "employee" as to District of Columbia employees, the Act, under 5 USC 8101(1) defines "employee" to encompass "a civil officer or employee" in any branch of the United States Government. It has been concluded that Congress likewise intended to cover all District of Columbia civil officers and employees under the FECA, in the absence of a specific exclusion, irrespective of whether the individual is hired, appointed or elected.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 28, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 214

SUBJECT: 5 USC 8135(a)
LUMP-SUM PAYMENTS DETERMINED ACCORDING TO UNITED STATES LIFE TABLES

In accordance with the 1974 Amendments to the FECA, lump-sum payments are to be determined according to the most current United States Life Tables as developed and updated from time to time by the United States Department of Health, Education, and Welfare (HEW). Since HEW regularly compiles several life tables for various segments of the population and since the legislation did not specify the particular table to be used, it has been decided that FECA lump-sum payments will be based on life tables covering total United

States population. Accordingly HEW, at our request, has prepared a special life table and an accompanying set of actuarial values, computed at 4 percent true discount (compounded annually), based on total United States population, 1969-71.

The complete tables are retained by the Branch of Workers' Compensation Statistics in the Office of Administrative Management of the Employment Standards Administration which has the responsibility for the official computation of lump-sum payments. Any question concerning these life table and actuarial values or any questions concerning the methodology or discount factors applicable to a specific case to be commuted under 5 USC 8135(a) should be referred to the National Office for submission to the Branch of Workers' Compensation Statistics.

The instructions contained in OFEC Bulletin No. 39-72, concerning the processing of lump-sum applications under 5 USC 8135 remain in effect.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: November 8, 1976

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 215

SUBJECT:5 USC 8101(11); 5 USC 8109; 5 USC 8110(a)(2); 5 USC 8133(b)(1)
EQUALITY IN THE DISBURSEMENT OF COMPENSATION BENEFITS TO WIDOWS, WIDOWERS, HUSBANDS AND WIVES

NOTE: This Program Memorandum supplements FECA Program Memorandum No. 151. An appropriate notation should be placed on that memorandum.

Re-examination of Public Law 92-187, enacted December 15, 1971, leads us now to conclude that the principles of equality in the disbursement of compensation benefits to male and female Federal employees for their respective spouses as provided in Public Law 92-187, were intended to be effected retroactively. Accordingly, Program Memorandum No. 151, which gave an effective date of December 15, 1971 is hereby amended to find the law is applicable to all cases regardless of the date of injury of death. (Note the 1949 Amendments for the effective date of augmented compensation). The prior memorandum should be retained for the purpose of an explanation of the law and understanding case actions taken in accordance with the earlier policy established by that decision.

ALBERT KLINE

Associate Director for
Federal Employees' Compensation

Dated: December 30, 1976

Distribution: List No. 1

Encl. to FECA Bulletin No. 38-76

FECA PROGRAM MEMORANDUM - NO. 216

SUBJECT: 5 USC 8101(1)(C)
MENOMINEE RESTORATION ACT

Reference: FECA Program Memorandum No. 18, dated May 12, 1961

The Menominee Termination Act of June 17, 1954 removed Federal supervision over the Menominee Indian Tribe and its property, and all U.S. Statutes affecting the tribe because its Indian status ceased to apply. FECA coverage was effectively terminated as of midnight April 30, 1961.

The Menominee Restoration Act of December 22, 1973 repealed the Menominee Termination Act, restoring the Federal programs and services previously provided under Federal treaty, statute or otherwise. Menominee land was returned in trust to the United States on April 22, 1975, as provided in the Restoration Act. Therefore, in accordance with 5 USC 8101(1)(C) and the Menominee Restoration Act (25 USC 903-903f), injuries or illnesses occurring on or after April 22, 1975 to employees on the Menominee Indian Reservation in tribal timber or logging operations come under the provisions of the Federal Employees' Compensation Act.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: January 25, 1977

Distribution: List No. 1

Encl. to FECA Bulletin No. 3-77

FECA PROGRAM MEMORANDUM - NO. 217

PROMEMO

SUBJECT: 5 USC 8107(c)(13)
LOSS OF HEARING DETERMINATIONS

Reference: FECA Program Memorandum No. 162

In the process of an overall review of OWCP policy, standards and procedures, it has been noted that one element in the current hearing loss determination procedure appears to be inconsistent with OWCP's long standing policy of making evaluations of permanent disability in accordance with authoritative medical standards, where such standards exist. This element concerns the formula used in calculating the percentage of hearing loss.

The current formula, which was implemented in the Division of Federal Employees' Compensation on February 7, 1973, establishes the percentage of monaural hearing loss in each ear by deducting a fence from each measured decibel loss in the 1,000, 2000 and 3,000 cycles per second (cps) frequencies, and then taking the average of the sum of the decibel loss. Prior to 1973, in applying this portion of the formula, OWCP followed the procedure of the AMA Guides to the Evaluation of Permanent Impairment by deducting the "fence" from the average of the sum of the measured decibel loss of the three frequencies. More simply stated, OWCP discontinued deducting the "fence" from the average and changed to computing the average after deducting the "fence."

This change came about as a part of a policy change based upon a 1972 National Institute of Occupational Safety and Health (NIOSH) report, "Occupational Exposure to Noise." However, the policy change dealt with the NIOSH findings concerning the frequency levels to be used in testing for hearing impairment, and not with the formula for determining the percentage of hearing loss. In fact, NOISH continued to follow the formula developed by the American Academy of Ophthalmology and Otolaryngology (AAOO) and adopted by the American Medical Association.

In an attempt to evaluate the OWCP's use of the new formula, the Division of Federal Employees' Compensation's Medical Director consulted with NIOSH. In a statement in a letter to the Medical Director dated August 9, 1974, the Acting Chief, Noise Section Physical Agents Branch, NIOSH, replied, "...for compensation uses, it is hard to declare either formula as better." It should be noted that either formula is mathematically sound. The most important consideration, however, is the authoritative basis for each formula. Several recent reports and studies have considered this factor. Hearings by the Subcommittee on Manpower and Housing of the House Committee on Government Operations questioned OWCP's use of a formula different from that used by other agencies which administer similar programs. The GAO noted the discrepancy between OWCP's method of averaging after deducting the "fence" and the accepted methods of the AMA, of NIOSH, and of the National Academy of Sciences' Committee of Hearing Bioacoustics and Biomechanics (CHABA), all three of which call for deducting the "fence" from the average of measured frequencies. Recent studies by the Department of Labor's Office of Internal Audit and the Employment Standards Administration's Division of Planning, Policy Analysis and Review have also noted this discrepancy. And finally, in his memorandums of August 26, 1976, and November 23, 1976, the OWCP Medical Director agreed that the method of averaging prior to the subtraction of the "fence" should be adopted.

Taking into consideration the great amount of interest which has been directed toward this particular area of the OWCP hearing loss determination procedures, the number of cases which are affected, and the weight of opinion represented by authoritative medical sources which utilize the alternative formula, it has been decided to rescind the averaging part of the current procedure, and return to using a formula which deducts

the "fence" from the average of the measured frequencies. The revised averaging formula is outlined in Chapter 3-600 of the Federal Procedure Manual, Part 3, Medical, and applies to all cases adjudicated by district offices on and after the date of this Program Memorandum. Cases handled by the Branch of Hearings and Review will be reviewed using the averaging formula in use on the date of the original award.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: March 7, 1977

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 218

SUBJECT: 5 USC 8122
WAIVER OF ONE YEAR TIME LIMITATIONS WHEN INJURY OCCURRED PRIOR TO SEPTEMBER 7, 1974

In the case of Ubaldo C. Baca, docket number 76-292, issued December 3, 1976, the ECAB found that the medical evidence did not establish that the appellant was mentally incompetent between May 1969, when he first attributed his mental condition to the employment, and March 1973, when he filed claim. The Board also noted that he was hospitalized five times and was under continuous psychiatric care and medication in that period. In conclusion, the Board found that "... it demonstrates that he was in such mental condition that he should not be subjected to the usual tests of a reasonable man for determining whether waiver of the one year period of limitations is justified." The OWCP decision was reversed and the time limitation was waived.

In similar cases, careful consideration should be given to any exceptional or unusual circumstances in determining whether the one year time limitation should be waived.

ALBERT KLINE
Association Director for
Federal Employees' Compensation

Dated: March 2, 1977

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 219

PROMEMO

(Superseded by FECA Program Memorandum No. 270.)

SUBJECT: 5 USC 8101(1)
MEMBERS OF THE SECRET SERVICE, EXECUTIVE PROTECTIVE SERVICE AND PARK POLICE

NOTE: This FECA Program Memorandum supplements FECA Program Memoranda 152 and 163. Appropriate notations should be made on those FECA Program Memoranda.

Members of the Secret Service, covered by the D.C. Policemen and Firemen's Retirement and Disability Act, the Executive Protective Service and U.S. Park Police are considered covered as law enforcement officers under 5 USC 8191.

It has been further determined that such personnel are covered by the provisions of 5 USC 8191(3) while they perform all official duties. Any duty hours of these employees would be considered to be in the lawful prevention of, or attempt to prevent, the commission of a Federal crime.

It is to be noted that United States Secret Service Agents are covered by the provisions of 5 USC 8101 until they elect coverage under the D.C. Policemen and Firemen's Retirement and Disability Act. When such coverage is elected, the provisions of 5 USC 8191, et seq. would then apply.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: March 3, 1977

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 220

SUBJECT: 2 USC 351 ET SEQ., 5 USC 5308, 8112, 8133(e)
SALARY LIMIT FOR COMPUTING COMPENSATION

NOTE:This Program Memorandum supplements Program Memoranda Nos. 171, 201, and 212, which will be referred to for injuries sustained prior to February 20, 1977. Appropriate notations must be made on Nos. 171, 201, and 212.

Compensation may not exceed seventy-five percent of the maximum rate of basic GS-15. Under Section 5308 of title 5, United States Code, and Executive Order 11941, the established rate of pay of level V of the Executive Schedule acts as a ceiling for rates of pay that may be paid to General Schedule employees. The Executive level V of the Executive Schedule was increased from $39,600 and $47,500 per annum. The level V

increase to $47,500 per annum allowed the maximum rate of basic GS-15 to go to its highest level, $43,923 per annum. The provisions of 2 U.S.C. 351 et seq. also provided for salary increases in the Executive, Legislative, and Judicial branches of the Federal government, including Senators, Congressmen, Federal judges, agency heads, and several other officials in the various branches.

Accordingly, the salary on which maximum compensation is computed is increased from $39,600 to $43,923 per annum. This new maximum, is effective the first day of the first pay period on or after February 20, 1977. The first day of the first pay period affecting General Schedule employees was February 27, 1977, thus the maximum compensation increase has applicability on or after that date.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: March 10, 1977

Distribution: List No. 1

Encl. to FECA Bulletin No. 11-77

FECA PROGRAM MEMORANDUM - NO. 221

SUBJECT: 5 U.S.C. 8147(b)
CHARGEBACK REPORTING PERIOD

Heretofore, the FECA provided for furnishing employing agencies with chargeback statements before August 15 of each year, covering the fiscal year recently completed. Public Law 94-273, the Fiscal Year Adjustment Act, approved April 21, 1976, changed the fiscal year to encompass the period October 1 through September 30.

However, section 42 of this law amended 5 U.S.C. 8147(b) to (1) provide for reports covering the period July 1 through June 30, and (2) require agencies or instrumentalities not dependent on annual appropriations to deposit the required payment in the Compensation Fund during the first 15 days of October each year.

Thus, chargeback reporting will continue to cover the period July 1 through June 30, although the official fiscal year has been changed to cover the period October 1 through September 30.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: March 29, 1977

Distribution: List No. 1

Encl. to FECA Bulletin No. 14-77

FECA PROGRAM MEMORANDUM - NO. 222

SUBJECT: 5 USC 8101(1); 5 USC 8191-93
LAW ENFORCEMENT OFFICERS NOT EMPLOYED BY THE UNITED STATES

On October 7, 1976, P.L. 94-458 was enacted. This law, among other things, authorized the Secretary of the Interior to designate certain officers or employees of the Department of the Interior"... who shall maintain law and order and protect persons and property within areas of the National Park System." In addition, the Secretary of Interior is authorized to designate officers and employees of any other Federal Agency or law enforcement personnel of any State or political subdivision to act as special policemen in areas of the National Park System.

Section 10(d)(3) of P.L. 94-458 provides that for purpose of providing workers' compensation coverage, a law enforcement officer any State or political subdivision, when acting as a special policeman, shall be deemed to be a civil service employee of the United States Government within the meaning of the term "employee" as defined by 5 USC 8101(1) et seq.

Since law enforcement officers designated as special policemen by the Secretary of the Interior are considered employees within the meaning of 5 USC 8101(1), they will be entitled to benefits under 5 USC 8101 et seq. Their entitlement does not come under the provisions of 5 USC 8191-33.

Since some personnel covered by this legislation may ordinarily be employed as state or local law enforcement officers, the "similar employment" provision of 5 USC 8114(d)(3) should be considered before applying the 150 times proviso in determining the pay rate for compensation purposes.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: March 29, 1977

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 223

PROMEMO

SUBJECT: 5 USC 8107; 5 USC 8116(a)
DETERMINATION OF THE DATE OF MAXIMUM IMPROVEMENT IN SCHEDULE AWARD CASES

In fixing the date of maximum improvement in schedule award cases, it is sometimes found that the claimant has reached maximum improvement a long time prior to the issuance of the schedule award. This has the effect, on many occasions, of converting large periods of compensation for temporary total disability into periods covered by schedule award payments.

The Employees' Compensation Appeals Board, in the case of Marie J. Born, Docket No. 76-166, stated that in order to prevent adverse effects, the Office in making "a determination setting the date of maximum improvement for schedule award purposes should not fix it some distant time in the past on a date that was prior to the time when the employee was able to return to work on a regular basis, unless the evidence clearly and convincingly establishes that maximum improvement had in fact been reached by the date and unless the employee's rights under section 8116(a) can be fully protected".

In explaining this decision the Board stated that the burden of setting the date of maximum improvement is greater on the Office in such a situation because of the adverse effect on the claimant when determining the date of maximum improvement. Thus, extreme care must be taken in such cases to assure that the record contains persuasive proof of the date of maximum improvement.

As far as the reference to section 8116(a) is concerned, it must be assured that the claimant is aware of the right to receive disability retirement benefits from the Civil Service Commission during the period covered by the schedule award.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: April 8, 1977

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 224

SUBJECT: 5 USC 8115
DETERMINATION OF WAGE-EARNING CAPACITY

In the case of James J. Barbarino, Docket No. 76-123, the Employees' Compensation Appeals Board issued a decision dated February 19, 1976, that clarified the date that may be chosen for making the wage rate

comparison in loss of wage earning capacity determinations. The Board states: "There is no requirement that, in determining wage-earning capacity for a period of disability, the comparison of wage rates must be made as of the date when the disability began. Any convenient date may be chosen for making the wage comparison, as long as the two wage rates are in effect on the date used for the comparison."

It is not required in LWEC determinations that the wage rate comparison date be the same as the date partial disability began. The wage rate comparison date can be any reasonable date on which the pay rates used are concurrently in effect.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: April 15, 1977

Enclosure to FECA Bulletin NO. 24-77

FECA PROGRAM MEMORANDUM - NO. 225

(See Program Memorandum No. 266;
see also FECA Transmittal No. 88-20, which supersedes)

SUBJECT: 5 USC 8127(b)
FEES FOR REPRESENTATIVES SERVICES
THE PROPRIETY OF REPRESENTATIVES COLLECTING FEES AND
PLACING THEM IN ESCROW ACCOUNTS PRIOR TO OWCP APPROVAL

NOTE:Program Memorandum No. 211 provides background information concerning this question. An appropriate notation should be placed on that Memorandum.

It has come to our attention that certain representatives have made it a practice to collect a fee and then place it in an escrow account pending the adjudication of their application for approval.

After careful analysis of the appropriate statutory provisions (5 USC 8127(b), 18 USC 292), the OWCP regulations with respect to the FECA (20 CFR 10.145) and the ECAB decision relating to the Hazel Covington case, 25 ECAB 215, April 23, 1974, it has been determined that a representative acts illegally when he or she seeks and receives payment of a legal free prior to approval by the OWCP. The suggestion in the original Covington decision for the use of an escrow account was not intended as a vehicle to establish a procedure suitable for routine use where a representative collects a fee prior to OWCP approval. It was designed to meet the peculiar circumstances of that particular case.

The use of an escrow account in connection with FECA claims cannot be utilized as a basis for collecting a fee prior to OWCP approval and is contrary to the FECA and OWCP regulations. The use of this practice to collect fees prior to approval by OWCP may, therefore, lead to appropriate sanctions for such continued activity. Moreover, in order for a representative to obtain fee approval in FECA cases involving fees previously collected, it will be necessary that any such fees so collected be returned to the claimants. No fee may be approved while a representative is in possession of such improperly collected fee. In the event a representative refuses to return such a fee, a compensation order shall be issued, with copy to the claimant,

denying his or her application.

GAYLORD A. WILLIAMS
Acting Associate Director for
Federal Employees' Compensation

Dated: May 13, 1977

FECA PROGRAM MEMORANDUM - NO. 226

SUBJECT: **5 USC 8101 (1) (A)**
Cadet Midshipmen at the U.S. Merchant Marine Academy,
Kings Point, New York

The United States Merchant Marine Academy at Kings Point, New York is maintained by the Secretary of Commerce under authority of section 216(b) of the Merchant Marine Act of 1936, as amended (46 USC 1126). While cadets appointed to the Merchant Marine Academy are appointed by the Secretary of Navy as Reserve midshipmen in the United States Navy and may be commissioned as Reserve Ensigns in the United States Navy upon graduation, the Academy is not under the jurisdiction of the Armed Forces.

Cadet midshipmen of the Merchant Marine Academy, therefore, are determined to be employees of the United States under 5 USC
8101(1)(A), and accordingly are covered for benefits under the Federal Employees' Compensation Act during their entire attendance at the Academy.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 3, 1977

FECA PROGRAM MEMORANDUM - NO. 227

SUBJECT: **5 USC 8101**
Ship's Service Department Employees at the U.S. Merchant Marine Academy, Kings Point, New York

PROMEMO

Employees of the Ship's Service Department at the U.S. Merchant Marine Academy, Kings Point, New York, are not civil officers or employees of the United States under 5 USC 8101.

There employees are not classified under the U.S. Civil Service Act, but are employed by independent contractors who lease allotted spaces on the premises of the Academy for purposes of presenting and selling their merchandise to cadet midshipman and other authorized personnel of the Academy. The total cost of the remunerations to the employees is paid by nonappropriated funds generated by the Ship's Service Department, with the exception of health benefits insurance to which the employees contribute a portion of the cost.

Neither the Department of the Navy or the Department of Commerce (Merchant Marine Academy) makes any contribution to employee salaries or benefits. The Merchant Marine Academy regulates the operation of the ships stores only as to the physical location of the stores on the premises, the nominal rental fees, and the hours of operation. These regulations are effected through contract agreement to which the Academy, the Ship's Service Department, and the Employees' Union are parties.

Workers' compensation benefits for the employees of the Ship's Service Department are under the jurisdiction of the State of New York.

ALBERT KLINE
Associate Director for
Federal Employees Compensation

Dated: October 3, 1977

FECA PROGRAM MEMORANDUM - NO. 228

SUBJECT: **5 USC 8102**
Injuries in the FAA Second Career Program

NOTE:This program memorandum supplements Program Memorandum No. 107. An appropriate notation should be placed on that Program Memorandum.

It has been determined that an individual who is participating in the FAA's Second Career Program as the result of a compensable injury or illness, is considered in performance of duty while engaging in activities of the Program and while on a direct route of travel to the from the training site. Training activity in the Second Career Program is analagous to work activity on a Federal job, for compensation purposes, whether the training be conducted in a classroom setting or in the form of on-the-job training.

The relationship to Federal employment is on the basis of a chain of causation, in that the Second Career Program is a necessary and reasonable activity that would not have been undertaken, were it not for the compensable injury.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: October 7, 1977

FECA PROGRAM MEMORANDUM - NO. 229

SUBJECT: **5 USC 8123(a)**
Impartial Medical Specialist

The Employees' Compensation Appeals Board has issued opinions in the cases of Charles Feldman, Docket No. 77-26; and April Ann Erickson, Docket No. 77-56, that clarify the use of impartial medical specialists in cases where medical opinions conflict. In these cases the opinion offered by an impartial specialist did not clarify the issues and the office referred the case to another specialist for an opinion.

The Board stated in the Feldman case:

> **"Where the Office secures an opinion from an impartial medical specialist to resolve a conflict in the medical opinion, as required by section 8123(a), it is improper for it to send the record to a second impartial specialist merely because one of its medical advisers disagrees with the conclusion reached by the impartial specialist, or decides in retrospect that the specialist did not have the proper qualifications or speciality to render an opinion in the case. Such action is open to the suspicion that the Office shopped around for the purpose of securing a medical opinion favorable to its view."**

In the Erickson case the Board stated:

> **"In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and opinion from such specialist requires clarification or elaboration, the Office may not regard the opinion as of no particular significance, particularly where it is favorable to the claimant. Under such circumstances, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in his original report."**

The Office should, avoid the appearance of shopping around for an opinion in a case. In all instances were the Office requested impartial specialist's report is ambiguous, or does not address the question to be resolved, the specialist should be requested to clarify or expand the opinion.

ALBERT KLINE
Associate Director for
Federal Employees Compensation

Dated: November 1, 1977

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 230

(See FECA Program Memorandum No. 264)

SUBJECT: **5 USC 8101; 5 USC 8103**
Entitlement of Organ Transplant Donors to FECA Benefits

NOTE:This program Memorandum supplements Program Memorandum No. 209. An appropriate notation should be place on that memorandum.

Questions have arisen concerning the entitlement to FECA benefits of persons who donate organs as medical treatment for an employee's compensable illness or injury.

An organ donor is not an "employee" within the meaning of 5 U.S.C. 8101(1). Therefore, the donor would not be entitled to compensation for wage loss or permanent impairment under 5 U.S.C. 8105-8107. Moreover, no FECA benefits are payable to the donor for any medical problems or complications resulting from the transplant.

It has been further determined that compensation for the donor's lost wages may not be paid under the provisions of 5 U.S.C. 8103. Only those medical and related expenses of the donor which the Secretary finds necessary to secure medical treatment for the employee, are allowable. Thus, the donor is not entitled to reimbursement for such items as telephone expenses while hospitalized. Such expenses are deemed to be personal and not related to the treatment being furnished the employee.

ALBERT KLINE
Associate Director for Federal
Employees' Compensation

Dated: November 14, 1977

FECA PROGRAM MEMORANDUM - NO. 231

SUBJECT: **5 USC 8101(1)(A)**
Merchant Seamen

NOTE:This Program Memorandum supplements and should be read with Program Memorandum No. 67. An appropriate notation should be made on that FECA Program Memorandum.

Program Memorandum No. 67 found that seamen procured to work on Federally-owned vessels pursuant to a General Agency Agreement with the Maritime Administration were employees of the United States.

After additional investigation, it has been further found that seamen who sign ship's articles come under the

laws of admiralty and are therefore excluded from coverage of the Federal Employees' Compensation Act. Accordingly, in applying Program Memorandum No. 67, it must be determined whether the injured person was working under ship's articles at the time of injury. If so, the claim should be disallowed, for the reason that the individual was not a Federal employee.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: November 30, 1977

FECA PROGRAM MEMORANDUM - NO. 232

SUBJECT: **5 USC 552a**
The Privacy Act of 1974

The Privacy Act of 1974 was enacted by Congress in order to safeguard individual privacy from the misuse of Federal records and to provide that individuals be granted access to Federal records concerning them. The various Federal agencies now have authority under the Act to release OWCP/FECA controlled records without prior OWCP approval.

The regulations of the agency having possession of the records will govern access to them. Section 70a.1(b)(3) of the Federal Register, February 1, 1977, page 6107 states:

> **For systems of records contained within government-wide systems of records under the control of the Department of Labor, the regulations of the agency in possession of such records shall govern the procedure for requesting access to, or amendment of the records, including initial determinations on such requests, while the Department of Labor regulations shall govern al other aspects of safeguarding these records established by the Privacy Act.**

Before amending any OWCP records, however, an agency should first contact the OWCP National Office.

The FECA regulations regarding the Privacy Act, 20 CFR 10.10 and 10.11, are being revised to reflect this change in policy regarding access to OWCP/FECA records.

ALBERT KLINE
Associate Director for
Federal Employees' Compensation

Dated: December 13, 1977

FECA PROGRAM MEMORANDUM - NO. 233

PROMEMO

(Rescinded -- See ECAB Docket No. 92-832, FECA Bulletin No. 83-23.)

FECA PROGRAM MEMORANDUM - NO. 234

SUBJECT: **5 USC 8192**
Deduction of FECA compensation from State and Local benefits payable to Law Enforcement Officers and their dependants [sic].

It has been found that some state and local governments have enacted laws or regulations under which the amount of compensation payable to law enforcement officers (LEO) and their survivors under the Federal Employees' Compensation Act is deducted from the state and local benefits payable because of a job-related injury or death. These laws or regulations were passed in an apparent attempt to force the OWCP to compensate the injured officers or their survivors and thereby relieve the state and local government of their financial obligation to these beneficiaries. However, this was not the intent of Congress in enacting Subchapter III of the FECA, and the practice will not be recognized by the OWCP.

The purpose of Subchapter III of the FECA is to insure that injured officers and their survivors are entitled to a benefit at least equivalent to that they would be entitled under the FECA had the injury or death occured as a result of Federal employment. It is meant to supplement the state or local benefits payable in such cases and not as a financial windfall to the state or local government.

In any LEO case in which a state or local government attempts to reduce a benefit because of entitlement under the FECA, the responsible agency should be informed that Federal compensation will not be paid in order to make up for the reduction in the state and local benefit. Full credit will be taken by the OWCP for any benefit payable by a state or local government whether or not the benefit is actually paid.

JOHN D. McLELLAN, JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: March 2, 1978

FECA PROGRAM MEMORANDUM - NO. 235

(See FECA Program Memorandum No. 248.)

SUBJECT: **5 USC 8130**
Garnishment of Compensation for Child Support or Alimony Payments

PROMEMO

NOTE: This Program Memorandum modifies the last paragraph of Program Memorandum No. 206. An appropriate notation should be placed on that memorandum.

Federal pay checks were exempted from garnishment until January 1, 1975, when the Social Services Amendments of 1974 became effective. This statute permitted the garnishment of Federal pay checks for the purpose of child support and/or alimony payments. However, the OWCP took the position that workers' compensation payments were exempt from garnishment since such payments were not considered to be "remuneration for employment" within the meaning of Section 459 of the Social Security Act.

Title V of the Tax Reduction and Simplification Act of 1977 (PL 95-30) was signed by the President on May 23, 1977, and became effective on June 1, 1977. These amendments added Section 462 to the Social Security Act, defining what moneys are deemed to be "based upon remuneration for employment." An effect of Title V, PL 95-30, is to make disability payments under the FECA subject to garnishment for child support and alimony purposes if:

(1) A writ of attachment is served in accordance with state law,

(2) Workers' compensation payments are garnishable for purposes of child support and/or alimony under the law of the State in which the writ is issued.

Compensation payments for a death accepted under the FECA are not subject to garnishment.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: March 13, 1978

FECA PROGRAM MEMORANDUM - NO. 236

SUBJECT: 5 USC 8101(1)(B)
Student Teachers in the D.C. Public Schools

The District of Columbia Public Schools, like many other school systems throughout the country, participates in a student teacher program with colleges and universities.

The program provides a means of practical experience and learning opportunities for college students who have completed the major portion of their academic and professional preparation for a career in teaching. The school system depends on student teachers to help with the main objective of providing an education for public school pupils. When a student teacher is absent, he or she must notify the school in sufficient time for alternate plans to be made. Moreover, a student teacher is allowed to teach a class if the regular teacher is absent and a qualified substitute cannot be secured.

Student teachers are placed in schools that will offer the maximum learning experience, with due consideration to the school system's staffing needs. Day-to-day supervision is furnished by the regular teacher. Any change or termination of the student teacher's assignment is made after joint discussion between the regular teacher, the principal and a representative of the cooperating university. Student teacher services are accepted by the D.C. Public Schools under authority of Section 31-802, District of Columbia Code.

Because student teachers in the D.C. Public Schools render a personal service to the United States similar to the service of a civil employee of the United States, without pay, and their services are authorized by statute, it has been determined that they are employees for compensation purposes, within the purview of 5 USC 8101 (1)(B). The pay rate for compensation purposes is determined in accordance with 5 USC 8114(d). Continuation of Pay is not applicable to student teachers, who serve without pay.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: March 17, 1978

FECA PROGRAM MEMORANDUM - NO. 237

SUBJECT: **5 USC 8127(a)**
Authorization for Release of Information under the Privacy Act

The Code of Federal Regulations, Title 29, Subtitle A, Section 70a.5, sets forth the requirements for identification of individuals making requests for information under the Privacy Act. One of the requirements is that a representative furnish a notarized letter of consent from the individual to whom the record pertains. Section 70a.5(d) provides that the disclosure officer may waive the identification requirements when he or she deems such action to be appropriate and may substitute other reasonable means of identification.

It has been determined that, under usual circumstances, a claimant's signature need not be notarized in order to release information to the representative. If the claimant's signature matches that on documents in the case file, and it appears that the representative has been authorized by the claimant, the requirement for notarization of the signature may be waived.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: March 23, 1978

FECA PROGRAM MEMORANDUM - NO. 238

PROMEMO

SUBJECT:5 U.S.C. 8116; 5 U.S.C. 8107; Dual Benefits--FECA and the Foreign Service Disability System

NOTE:This FECA Program Memorandum supplements Program Memorandum No. 14. Appropriate notation should be placed on that Memorandum

The 1966 amendments to the FECA, incorporated language into Section 7(a) of the Act specifying that an employee eligible for or in the receipt of benefits under "any other Federal Act or program providing retirement benefits for employees" would not have his or her right to receive compensation for scheduled disabilities impaired. Additionally Section 9(a) of the Act was amended by allowing medical treatment, etc., whether or not the employee was entitled to or received benefits from programs providing retirement benefits for employees.

These amendments had the effect of placing employees receiving benefits under the Civil Service Retirement Act and the Foreign Service Retirement and Disability System (FRSD) on the same footing for the above noted FECA benefits. Thus, employees receiving benefits under the FSRD may receive concurrent medical benefits and compensation for scheduled awards under the FECA. There is no need for such employee to make an election in order to receive medical services or a schedule award.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: March 31, 1978

FECA PROGRAM MEMORANDUM - NO. 239

SUBJECT: 5 USC 8146a; 5 USC 8101(18)
Consumer Price Index

The Bureau of Labor Statistics (BLS) has made major revisions to the Consumer Price Index (CPI) and, beginning January 1978, will publish two revised official indexes. BLS will continue to publish the current unrevised index for six months. Therefore, three indexes will be available from January through June 1978 and, thereafter, only the two revised versions. The three indexes are (1) the current unrevised CPI of Urban Wage Earners and Clerical Workers - U.S. city average - all items, (2) the revised version of #1 above and, (3) an All Urban Consumer's index covering a broader base of employed and retired persons.

Title 5, USC 8101(18) defines price index as "...the Consumer Price Index (all items - United States city average) published monthly by the Bureau of Labor Statistics." Because of this requirement of the law, beginning January 1, 1978, the OWCP will track CPI increases on index #2 above - the revised CPI for

Urban Wage Earners and Clerical Workers.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: April 13, 1978

FECA PROGRAM MEMORANDUM - NO. 240

SUBJECT: **5 USC 8101(1);**
Employees Participating in the President's Executive Interchange Program

Under the President's Executive Interchange Program, executives from the Federal and the private sectors are selected as interchange executives and placed in positions offering challenge and responsibility in the other sector. The participants are paid by the host organization. The Federal employees are considered to be in a leave without pay status for the exchange period. However, life insurance and health benefits continue for 365 days and retirement credit is granted for up to six months in each calendar year. Business interchange executives entering the Federal government sector are on leave of absence from their private employment and works under the Civil Service Commission's Excepted Service Schedule. The sponsoring agency or business pays the relocation expenses of its own employees.

It has been determined that both Federal and private business sponsored participants in the President's Executive Interchange Program are employees within the meaning of 5 usc 8101(1) and are entitled to the protection afforded by the Federal Employees' Compensation Act. The Federal participant maintains an employer/employee relationship with the Federal government, while the business sponsored interchange executive received a limited duration appointment from the Civil Service Commission under its Excepted Service Schedule and is paid by the host Federal agency.

The interchange executives may be entitled to both FECA and State Workers' Compensation protection. When State or local benefits have been paid,, the agency paying the non-Federal benefits will be reimbursed from the FECA benefits payable and any balance of compensation due will be paid to the employee or eligible survivors.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: April 13, 1978

FECA PROGRAM MEMORANDUM - NO. 241

PROMEMO

SUBJECT: **5 USC 8102(a)**
Performance of Duty - Recreational Injuries

Certain injuries sustained by Federal employees while engaged in recreational activities may come within the scope of their employment. The principles to e applied in determining recreational injury cases are stated in Section 22.00 of Larson's Workmen's Compensation Law:

> **"Recreational or social activities are within the course of employment when**
>
> **(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or**
>
> **(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or**
>
> **(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."**

The Employees' Compensation Appeals Board has decided two precedent setting cases applying these principles - the cases of Stephen H. Greenleigh, 23 ECAB 53, and Vincent N. Childs (Etta D. Childs, widow) 25 ECAB 81. In the Greenleigh case the Board stated:

> **"Larson, in discussing the principles and cases upon which the three tests are based, states that these are 'three independent links *** by which recreation can be tied to the employment, and if one is found, the absence of the others is not fatal." With respect to the time and place of the recreational activity, Larson comments 'When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon as one has placed the activity physically in contact with the employment environment, and even further when one has associated the time of the activity somehow with the employment.' Where this is the situation, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing work connection and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might." Such a situation, where the recreation activity is 'physically in contact with the employment environment' and the time of the activity is associated with employment, is contrasted by Larson with one where 'the recreational activity takes place on some distant vacant lot, several hours after the day's work has ceased;' in the latter situation, there is a presumption that activity is not associated with the employment and such presumption can be overcome only by evidence of 'some independently convincing association with the employment.'**

In the Childs case the employee's death occurred on the premises, but while he was engaged in a prohibited activity. The Board upheld the Office's denial of benefits in the case stating that the claimant's widow "...failed to establish that the activity in which the employee was engaged at the time of his death was a regular incident of the employment..."

As indicated above, the fact the recreation was engaged in on the premises is insufficient, in and of itself, to

bring the activity within the course of employment. In addition, there must be some tangible benefit to the employer, sponsorship, or the exercise of considerable control over the recreational activity.

It is important, then, that <u>all</u> the principles reiterated above be applied in the determination of recreational injury cases.

JOHN D. McLELLAN JR.
Acting Associate Director for
Federal Employees' Compensation

Dated: July 5, 1978

FECA PROGRAM MEMORANDUM - NO. 242

SUBJECT: 5 U.S.C. 8116
Concurrent Receipt of FECA Benefits and Non-Federal Retirement Annuities

NOTE: Also see Program Memorandum No. 262

There are some employees, an example of which are certain National Guard technicians, who, at some point in the past, were converted from non-Federal employees to Federal employment status. At that time these individuals were given the option to either remain with their respective non-Federal retirement programs, or to come under the coverage of the Office of Personnel Management (OPM) Retirement System.

It has been determined that such non-Federal retirement systems stand in lieu of the OPM Retirement System, and, as such, they are to be treated in the same manner as OPM benefits for compensation purposes. An election is reqired between these benefits and compensation under the Federal Employees' Compensation Act (FECA), except during periods of entitlement to schedule awards. An election to receive one of the non-Federal annuities rather than compensation would have no effect on entitlement to medical benefits under the FECA. If FECA benefits are elected, any reimbursement due the non-Federal retirement system will be offset by compensation payable. If such non-Federal annuity is elected, it wil be necessary for either the claimant or the non-Federal retirement system to refund any compensation overpaid.

It must be stressed that this election requireent would only apply to a few, specific employees--that is, those who at some time in the past have elected to continue to be covered by a non-federal retirement system rather than that of the OPM. A claimant would be entitled to receive benefits from any non-Federal retirement system for services rendered that were not related to Federal employment.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: July 14, 1978

Revised: October 28, 1980

FECA PROGRAM MEMORANDUM - NO. 243

SUBJECT: 5 USC 8101(5); 5 USC 8102(a)
Causal Relationship-Recognizable Causal Agents

The Employees' Compensation Appeals Board has reiterated a principle of causal relationship that should be applied in the adjudication of all claims for compensation resulting from disease.

In the case of John W. Pope, Docket No. 77-602, the Board pointed out that in the past it had "...enunciated the following principle... Only where the conditions of the employment include recognizable causal agents, which medical science recognizes as efficient producers of disease, can causal relation between disease and employment be made to appear." It is the claimant's responsibility to show that causative factors within the employment existed and were competent to cause or materially aggravate a disease. The Board went on to add, "Medical opinion that an employee's condition 'might be in some way connected with his work' has been characterized by the Board as 'speculative' and insufficient to meet the claimant's burden to [sic] proof." Speculation and conjecture are not sufficient to prove causal relationship.

Causation can not be inferred merely by the co-existence of employment and the appearance of a disease. The evidence of record must show that some intervening element of the work environment itself acted adversely to afflict the employee. It is not sufficient to show that the employee perceived an adverse condition. Speculation or delusion is not enough to show the existence of the condition; it must be shown to have actually existed. This particularly important in cases of emotional stress.

In the case of Lillian Cutler, Docket No. 76-234, the Board stated, "There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation." The fact that an employee develops an emotional or metabolic condition and believes there are causative factors within the employment is not enough. In such cases, it is the employee's burden to show that the employment, rather than the employee's own inherent emotional or metabolic structure caused the disease. There is no presumption that all conditions which have some tenuous connection with the employment are compensable.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: August 31, 1978

FECA PROGRAM MEMORANDUM - NO. 244

SUBJECT: **5 USC 8142**
Causal Relationship in Peace Corps Cases

In the past, some Peace Corps cases have been adjudicated under the incorrect assumption that causal relationship, as a factor of entitlement, was waived by section 5(d)(2) of the Peace Corps Act. This section states that "...any injury suffered by a volunteer during any time when he is located abroad shall be deemed to have been sustained while in the performance of his duty and any disease contracted during such time shall be deemed to have been proximately caused by his employment. . . ."

Causal relationship, as a factor of entitlement to compensation in Peace Corps cases, was not waived by The Peace Corps Act. This would be contrary to the basic concepts of workers' compensation. The Peace Corps Act did not extend compensation to cover conditions that pre-existed a volunteer's Peace Corps service, nor did it extend coverage to metabolic conditions that merely manifest themselves during a period of service. It is very basic in compensation that a condition that merely appears during a period of employment does not create an inference of relationship between the two. Causal relationship between the two must also exist. This requirement has never been waived under the FECA in any case, including Peace Corps cases.

A condition which clearly pre-existed, or has no causal relationship to, the overseas experience is not considered to have been contracted during the volunteer status. Aggravation of a pre-existing condition would be compensable.

The key word in the Peace Corps Act is "contracted". Contracted, in medicine (and as used in the Peace Corps Act), means to acquire, incur, expose, contact, or catch. It does not mean to merely become manifest or become apparent.

The term contracted was included in the Peace Corps Act in order to insure that volunteers would be compensated for latent disease to which they might be exposed while in service, but which do not become apparent until after their service is terminated. The Peace Corps Act, in fact, gave volunteers no greater coverage than other employees have under the FECA regarding this point. It simply clarified their coverage rights.

All Peace Corps cases will be adjudicated under these principles.

JOHN D. McLELLAN JR
Associate Director for
Federal Employees Compensation

Dated: September 19, 1978

FECA PROGRAM MEMORANDUM - NO. 245

SUBJECT: **5 USC 8101(4), 5 USC 8107, 5 USC 8114; Pay Rates for Schedule Award Purposes**

The Employees' Compensation Appeals Board has held that in all situations, including those involving a schedule award, compensation is to be based on the pay rate at the time of injury, or the rate at the time disability for work begins, or the rate at the time of recurrence at disability as described in 5 USC 8101(4), whichever is greater. Nothing in the Act or regulations authorizes basing the pay rate on the salary received on the date of maximum improvement.

Thus, in situations where the injury results in a permanent impairment of a scheduled member of the body but no periods of disability for work, the schedule award is to be based on the pay rate on the date of injury. On the other hand, where there is a disability for work, the pay rate for schedule award purposes shall be computed on the basis of the highest rate of pay which satisfies the requirements of 5 USC 8101 (4). (See the ECAB Decision in the matter of Clarence D. Glenn, Docket No. 78-109).

JOHN D. McLELLAN, JR.
Associate Director for
Federal Employees' Compensation

Dated: October 6, 1978

FECA PROGRAM MEMORANDUM - NO. 246

SUBJECT: **5 USC 8101(1); 5 USC 8114**
Young Adult Conservation Corps (YACC)

Public Law 95-93, which provides for the establishment of the Young Adult Conservation Corps, specifies in Section 805(a)(2) that:

> **For purposes of subchapter 1 of chapter 81 of title 5 of the United States Code, relating to compensation to Federal employees for work injuries, Corps members shall be deemed civil employees of the United States within the meaning of the term "employee" as defined in section 8101 of title 5, United States Code, and provisions of that subchapter shall apply, except that the term "performance of duty" shall not include any act of a Corps member while absent from the member's assigned post of duty, except while participating in an activity (including an activity while on pass or during travel to or from such post of duty) authorized by or under the direction and supervision of the Secretary.**

The regulations issued under the Act also include enrollees in state grant programs under the FECA.

Residential enrollees are generally considered to be Federal employees from the time each begins Government authorized travel to the assigned YACC camp, to the time each completes Government authorized travel after termination.

Enrollees are generally considered to be covered by the provisions of the Act for any injury causally related to the employment and sustained or contracted within the premises of the camp. The Act does not provide coverage while the enrollee is on leave or pass, except while participating in an activity authorized by, or under the supervision of the YACC program staff.

Nonresidential enrollees, after official enrollment, are considered to be in performance of duty from the time they arrive daily at the designated area from which activities are assigned, until they leave the area or activity.

The camp/project director shall be considered to be the Official Superior. Any Federal supervisor may also be considered an Official Superior. The statute requires that enrollees receive at least the minimum wage prescribed by the Fair Labor Standards Act. Computation of the pay rate for compensation purposes should be in accordance with the procedures outlined in 5 USC 8114. It should be noted that no youth is to be enrolled in the YACC for a period exceeding 12 months.

Enrollees are not entitled to continuation of pay because their FECA coverage is by separate legislation.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: October 20, 1978

FECA PROGRAM MEMORANDUM - NO. 247

(Revised October 15, 1981)

SUBJECT: **5 U.S.C. 8146a**
Applicability of Cost-of-Living Adjustments in Schedule Award Cases Where There Is No Prior Disability for Work

In the case of Franklin L. Armfield, 29 ECAB 500, a schedule award began on the date of maximum medical improvement, October 29, 1975. The date of last exposure to excessive noise which caused the employee's employment-related hearing loss was October 7, 1971, and the employment was terminated on December 6, 1971. There had been no disability for work due to the job-related injury prior to the commencement of the schedule award. The question before the Employees' Compensation Appeals Board was whether the employee was entitled to those cost-of-living increases which became effective after the noise exposure at work had ended but before the beginning of the period covered by the award.

Section 8146a of the FECA provides that "compensation payable on account of disability or death which occurred more than 1 year" before the effective date of a cost-of-living increase shall be increased by the percent of the increase. The Board studied the legislative history and concluded that this phrase means compensation payable for an employment-related condition where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.

Turning to the issue of when disability occurs in such cases, the Board stated that the term "disability" as

used in 5 U.S.C. 8107 means "physical impairment" and commented that "a determination cannot be made regarding the nature of his disability, or whether he has a 'disability,' until the date of maximum improvement." Based on this reasoning, the Board found that entitlement to compensation does not occur until the date of maximum improvement.

Therefore, in cases of a schedule award where there is no prior injury-related disability for work, there is no eligibility for any cost-of-living increase that became effective prior to the beginning of the schedule award, which is the date of entitlement to compensation. Only those cost-of-living increases falling due more than one year after the beginning of the schedule award should be paid.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: November 6, 1978

Distribution: List No. 1
(All Claims Examiners, Supervisors, Systemms Managers, and Tekchnical Advisers)

FECA PROGRAM MEMORANDUM - NO. 248

SUBJECT: 5 USC 8130
Garnishment of Compensation for Child Support or Alimony Payments

NOTE:This Program Memorandum modifies the conditions of garnishment given in Program Memorandum No. 235. An appropriate notation should be placed on that memorandum.

Federal pay checks were exempted from garnishment until January 1, 1975, when the Social Services Amendments of 1974 became effective. This statute permitted the garnishment of Federal pay checks for the purpose of child support and/or alimony payments. However, the OWCP took the position that workers' compensation payments were exempt from garnishment since such payments were not considered to be "remuneration for employment" within the meaning of Section 459 of the Social Security Act.

Title V of the Tax Reduction and Simplification Act of 1977 (PL 95-30) was signed by the President on May 23, 1977, and became effective on June 1, 1977. These amendments added Section 462 to the Social Security Act, defining what moneys are deemed to be "based upon remuneration for employment."

An effect of Title V, PL 95-30, is to make disability payments under the FECA subject to garnishment for child support and alimony purposes. This is so regardless of (1) whether a writ of attachment is served in accordance with state law, or (2) whether workers' compensation payments are garnishable for purposes of child support and/or alimony under the law of the state in which the writ is issued. However, the time allowed for replying to a writ is 30 days, or longer if specified in state law.

Compensation payments for death accepted under the FECA are not subject to garnishment.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: November 8, 1978

FECA PROGRAM MEMORANDUM - NO. 249

(See Program Memorandum No. 267.)

SUBJECT: 5 USC 8101 (1);
FEDERAL EMPLOYEES WORKING UNDER THE
OLDER AMERICAN COMMUNITY SERVICE EMPLOYMENT ACT
(PL 94-135)

Section 904 of the Older American Community Service Employment Act (OACSEA) provides that:

> **Eligible individuals who are employed in any project funded under this title shall not be considered to be Federal employees as a result of such employment and shall not be subject to the provisions of part III of title 5, United States Code.**

It has been determined that Section 904 does not prohibit Federal Employees' Compensation Act (FECA) coverage for participants injured while working for Federal agencies. The employment status of these workers will be determined under the usual guidelines for determining employee-employer relationship. If it is determined that, at the time of injury, an injured employee was an employee within the meaning of 5 USC 8101(1), coverage will be extended, and the case will be adjudicated accordingly, but they are not entitled to continuation of pay.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: November 9, 1978

Distribution: List No. 1

ADDENDUM: Coverage includes workers in the Green Thumb program.

FECA PROGRAM MEMORANDUM - NO. 250

SUBJECT: 5 USC 8122
TIME FOR MAKING CLAIM; RECKONING OF TIME LIMITS

In the case of Nicholas Slaton, 12 ECAB 143, the Employees' Compensation Appeals Board discussed the question of when the 30 day time limit expires in order to petition for reconsideration of a prior order of the Board. It held that with respect to a decision issued on September 28, 1960, the time for filing a petition for reconsideration expired on October 28, 1960 at the close of the business day.

In the case of Robert E. Kennedy, 20 ECAB 349, the issue was whether the claimant's request for appeal had been filed within "one year from the date of the issuance of the final decision of the Director." The decision was issued on December 22, 1967, and the request for review was received by the Board on Monday, December 23, 1968. The Board, in finding that the appeal was timely field, stated, "the year within which the Appeal could be filed from the December 22, 1967 Order would ordinarily have ended on December 22, 1968. However, since that date was a Sunday, the time for filing an appeal did not expire until December 23, 1968."

More recently, in the cases of Dolores D. Villaroman, 27 ECAB 691, and George H. Byer, ECAB Docket No. 77-308, the Board considered reckoning of the expiration of the mandatory five-year time period for making a claim. It found that in the Villaroman case, time began to run on October 14, 1949, and expired on October 14, 1954. In the Byer case, the Board stated that, in order to avoid the necessity of determining the precise hour when an injury occurs, the time limitations should be regarded as beginning to run at the end of day of injury. Mr. Byer was injured at 11:30 p.m. on December 28, 1969 and the time limitation for filing notice of injury in the case expired on December 28, 1974, at the close of business.

Thus, time limitations begin to run and end at the close of business. Where the expiration occurs on a non-business day, it is extended to include the next business day.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: January 29, 1979

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 251

SUBJECT: 5 USC 8121
SURVIVAL OF A CLAIM FOR DISABILITY COMPENSATION

The Employees' Compensation Appeals Board in the decision found at 4 ECAB 662, presented the rationale for the fact that where an injured employee files a valid claim for disability compensation during his or her lifetime, such claim survives to the employee's estate. Therefore, the legal representative of the deceased

employee's estate may perfect the claim for disability benefits. The legal representative may not only perfect the original claim but may expand the claim to include periods of disability other than that specifically claimed by the employee in his or her original claim.

In pursuing such claim, the legal representative of the estate must meet the statutory time limitation requirements of the Act and carries the requisite evidentiary burden of establishing employment-related disability during the periods claimed.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Distribution: List No. 1

March 23, 1979

FECA PROGRAM MEMORANDUM - NO. 252

SUBJECT: 5 U.S.C. 8118(a)
NOTICE OTHER THAN CA-1 ACCEPTABLE FOR TIMELY FILING IN CONTINUATION OF PAY CASES

The Employees' Compensation Appeals Board Motion to Remand, Docket No. 78-129, was granted on the pleading that a written notice of injury other than Form CA-1 is acceptable for tolling the time limitation for continuation of pay (COP). Under 5 U.S.C. 8118(a), notice is required on a form approved by the Secretary. Therefore, it was found that the claimant's use of CA-2 and CA-4 was acceptable for COP purposes, as both forms are approved by the Secretary.

Consequently, a written notice properly given on an approved form, as specified in Sec. 8118(a) of the Federal Employees' Compensation Act, is acceptable for continuation of pay to a claimant.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: April 5, 1979

Distribution List No. 1

FECA PROGRAM MEMORANDUM - NO. 253

PROMEMO

SUBJECT: 5 USC 8107(c)(13)
LOSS OF HEARING DETERMINATIONS

In the adjudication of claims for compensation based on a loss hearing, an 85 decibel level was established by OWCP a potentially hazardous to hearing. Such level is considered as a general guide. There is no requirement that the claimant show exposure to injurious noise in excess of 85 decibels as a condition to claim approval. Acoustic trauma may, on occasion of sufficiently prolonged exposure, result from decibel levels below 85. Consequently, in rejecting a claim for loss of hearing, it is not sufficient to show that a claimant was not exposed to noise in excess of 85 decibels. (See ECAB Docket No. 78-765).

Where an acoustic trauma type hearing loss develops, the noise levels to which the employee was exposed and the duration of exposure must be evaluated and a determination made as to the relationship existing between the loss and the exposure. If it is found that the two are related, an appropriate award must be made.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: April 16, 1979

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 254

SUBJECT: 5 U.S.C. 8101(1)
COVERAGE OF EMPLOYEES IN THE SECOND CAREER PROGRAM OF THE FEDERAL AVIATION ADMINISTRATION (FAA)

NOTE: This Program Memorandum supplements FECA Program Memorandum No. 228. An appropriate notation should be made on that Program Memorandum.

FECA Program Memorandum No. 228 takes the position that only those employees are covered who were enrolled in the FAA's Second Career Program because of a previous work-related injury.

It has been determined that an individual who is participating in the FAA's Second Career Program, for reasons other than a compensable injury, is a civil employee of the United States within the meaning of 5

U.S.C. 8101(1). Therefore, if such an employee sustains an injury while performing an assigned training activity, it is to be considered as an injury in the performance of duty.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: June 4, 1979

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 255

SUBJECT: 5 U.S.C. 8118(b)
FIRST RETURN TO WORK FOR CONTINUATION OF PAY (COP) PURPOSES

In discussing recurrence of disability at 20 CFR 10.208(b), the regulations governing administration of the Federal Employees' Compensation Act state that unused COP may be used during a recurrence, but "only during a 6-month period beginning from the date the employee first returned to work following the initial disability".

The phrase, "first returned to work" means the first return to any work, including part-time work. Thus, the 6-month period would start to run from the date the employee returned to any work, including part-time work.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: July 2, 1979

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 256

Rescinded by FECA Bulletin No. 82-7, dated May 10, 1992.

PROMEMO

FECA PROGRAM MEMORANDUM - NO. 257

SUBJECT: 5 U.S.C. 8107, 5 U.S.C. 8116
CONCURRENT PAYMENT OF A SCHEDULED AWARD WITH ANNUITY BENEFITS UNDER THE CIA RETIREMENT AND DISABILITY SYSTEM

A scheduled award may be paid while a beneficiary is receiving an annuity under the Civil Service Retirement Act only if the injury occurred on or after the date prescribed in the 1960 amendments to the FECA, September 13, 1957. However, it has been determined that this restriction does not apply to those employees of the Central Intelligences Agency (CIA) who are in receipt of benefits under the CIA Retirement and Disability System. This latter system was included within the language of the Federal Employees' Compensation Act Amendments of 1966, Section 16(a), by the phrase "or another retirement system for employees of the Government". The amendment contained no restriction as to the date of injury. The date of the concurrent benefits must be subsequent to October 1, 1966.

Therefore, the payment of a scheduled award, made on account of injury which predated September 1957, may be made to an employee for a period subsequent to October 1, 1966, who is concurrently receiving an annuity under the CIA Retirement and Disability System.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: December 10, 1979

Distribution: List No. 1
(All Claims Examiners, Supervisors (except Index and Files), Systems Managers and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 258

SUBJECT: 5 U.S.C. 8118
CHARGING SCHEDULED NON-WORKDAYS AGAINST THE 45-DAY CONTINUATION OF PAY (COP) PERIOD

Various questions have been raised regarding policies for charging regularly scheduled non-workdays (e.g., Saturdays, Sundays, and Holidays) against the 45-day continuation of pay (COP) period.

It has been determined that, due to the varied possibilities which may occur, decisions must be based strictly on the medical evidence of record. If the medical evidence shows that an employee was disabled on a non-workday, that day should be charged against COP, and if the medical evidence shows no disability for such day, no charge should be made.

Thus, in a case where an employee has been off work and returns to employment on Monday, that preceding weekend is charged against COP if the time was part of the recuperative period. Generally, the physicians report on the CA-17 may be taken at face value. However, if any questions arise, the employing agency may contact the physician solely to clarify the matter if it wishes to assure the accuracy of its initial determination.

In those cases where a claimant must take part of each workday off because the residual disability restricts employment to less than the regular workday, the time off is charged as a full day against COP. Since the restriction is indicative of continuing disability, a charge should also be made for regular days off, such as weekends and holidays. However, where the absence on the workday is not due to a work restriction, but due to the fact that the claimant is undergoing treatment for the accepted work injury, no charge should be made to COP for regularly scheduled days off. The mere fact that the claimant continues to undergo treatment does not mean that there is a restriction limiting the claimant to less than a full day's work.

Where a disability becomes manifest for the first time on a regular scheduled day off, such as a Saturday, the 45-day COP period starts to run on Saturday and that day is charged to COP.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: January 22, 1980

Distribution: List No. 1 - (All Claims Examiners, Supervisors (except Index and Files), Systems Managers and
Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 259

Superseded by FECA Program Memorandum No. 269.

FECA PROGRAM MEMORANDUM - NO. 260

Rescinded by FECA Bulletin No. 83-8.

FECA PROGRAM MEMORANDUM - NO. 261

PROMEMO

SUBJECT: 5 USC 8105, 8106, AND 8107
JURY DUTY PAY WHILE IN RECEIPT OF COMPENSATION

When a Federal employee is called for jury duty, the employee is granted Court Leave. Regular pay continues and any payment received from the court for rendering jury service is turned over by the employee to the employing agency. This is established by statute and by various Comptroller General decisions.

It has been determined that when an individual in receipt of compensation for temporary-total disability receives pay for service on a jury, the pay must be turned over to OWCP for deposit to the Compensation Fund. The performance of jury duty will have no direct hearing upon compensation benefits, although the ability to serve on a jury may be indicative of an earning capacity, which should be developed where indicated. Jury duty pay may be retained by a disabled beneficiary on compensation, where benefits are being paid at a reduced rate to reflect an earning capacity. Jury duty pay may also be retained where the individual is receiving payment under terms of a schedule award, because such awards are made for the impairment without regard to the ability to earn wages.

Allowances or reimbursements to a juror for travel, meals, and other expenses incurred for jury duty, are retained by the juror and are not to be returned over to the Compensation Fund.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: May 5, 1980

Distribution: List No. 1
(All Claims Examiners, Supervisors, (except Index and Files), Systems Managers, and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 262

SUBJECT: 5 U.S.C. 8116
CONCURRENT RECEIPT OF FECA BENEFITS AND NON-FEDERAL RETIREMENT ANNUITIES

NOTE:This Program Memorandum supplements Program Memorandum No. 242. An appropriate notation should be placed on that memorandum.

Subsequent to the issuance of the above-referenced FECA Program Memorandum No. 242, a question arose

as to whether the policy concerning election of benefits should be applied retroactively. Prior to the OWCP decision of July 14, 1978, requiring an election of benefits, the affected employees had a vested interest in both FECA and non-federal retirement benefits. A retroactive application of the election policy would be manifestly unjust to those persons whose entitlements were decided before the change in policy. Therefore, it has been determined that an election is required only in those cases of dual entitlement adjudicated on or after the effective date of the change in policy - July 14, 1978. Cases decided prior to that date will not require an election.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: May 7, 1980

Revised: November 10, 1980

Distribution: List No. 1
(All FECA Claims Examiner, Supervisors, Systems Managers, and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 263

SUBJECT: 5 U.S.C. 8101(1); 5 U.S.C. 8114
SOIL CONSERVATION SERVICE AGREEMENTS WITH LOCAL SOIL AND WATER CONSERVATION DISTRICTS

Certain employees of local soil and water conservation districts have their services donated to the Soil Conservation Service of the Department of Agriculture in order to aid that agency in fulfilling certain responsibilities under the law. The conservation districts and the Service have mutual interests in the furtherance of the Federal Programs administered by the Service, and the districts may provide available resources, such as personnel and equipment, which they may desire to make available for the use of the Service when that organization has need of them.

It has been determined that the soil and water conservation district employees are civil employees of the United States for the purposes of the Federal Employees' Compensation Act. Such coverage is analogous to the job-site protection afforded the Office of Economic Opportunity (OEO) and certain CETA participants detailed to Federal projects. They are not entitled to continuation of pay.

The pay rate for compensation purposes of such employees shall be determined in accordance with the applicable portion of 5 U.S.C. 8114.

Where state or local benefits have been paid and the injury is found to be compensable, the agency paying

the non-Federal benefits will be reimbursed from the Federal employees' compensation benefits payable, and any balance of compensation due will be paid to the employee or eligible survivors.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: June 12, 1980

Revised: October 7, 1980

Distribution: List No. 1
(All Claims Examiners, Supervisors, Systems Managers, and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 264

SUBJECT: 5 U.S.C. 8103
COVERAGE FOR ORGAN TRANSPLANTS

NOTE: This Program Memorandum modifies policy concerning coverage for major organ transplants and thereby supersedes Program Memorandum No. 209. An appropriate notation should be placed on that memorandum.

5 U.S.C. 8103 provides for "services...that are likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation". The Medical Care Sector exercises extensive controls on the use of major organ transplant procedures in human subjects. Organ transplants are done only when there is reasonable expectation that the procedure is at least as good as, or better than, the available alternatives, and under circumstances designed to protect the patient's rights and safety. Thus, the present use of organ transplants is therapeutic in value and accomplishes the goals of 5 U.S.C. 8103.

Therefore, organ transplants will be considered acceptable treatment and compensable upon the recommending physician's written statement of justification of the transplant (with District Medical Adviser's concurrence), which documents that the patient has progressive organ failure or life threatening malfunction not responsive to medical management. Claims with respects for major organ transplants will no longer be transferred to the National Office, but will be handled by the appropriate District Office. Further, advance authorization of surgery will not be required in cases of transplants.

If prior authorization should be sought, the District Office should determine if the proposed transplant is related to the accepted condition and meets the above test, and if so, notify the provider that OWCP will accept responsibility.

JOHN D. McLELLAN, JR.

Associate Director for
Federal Employees' Compensation

Dated: July 29, 1980

Distribution: **List No. 1**
(All Claims Examiners and Supervisors (except Index and Files), Systems Managers and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 265

SUBJECT: 5 U.S.C. 8103
MEDICAL POLICY - OBJECTIVE MEDICAL EVIDENCE OTHER THAN PHYSICAL EXAMINATION

This Program Memorandum sets forth medical policy as related to tests such as lab, x-ray, electrocardiogram (EKG), electroencephalogram (EEG), electromyogram (EMG), pathology, physiologic tests, including exercise and pulmonary function tests, and others.

1. To be acceptable medical evidence, a test should:

a. Be performed by or under the supervision of a person licensed to perform the test in the jurisdiction in which the test was done; and

b. Be documented by a report containing the patient's name, date of the test, the objective data obtained from the test, and the signature of the person responsible for the performance of the test.

2. Where appropriate, the test report should include interpretation by a physician licensed to practice in the jurisdiction in which the test was performed. Tests for which such interpretation is necessary include, but are not limited to, x-ray, EKG, EEG, EMG, cardiac and pulmonary stress tests, pulmonary function tests, biopsy or surgical specimen pathology reports, ultrasound, visual field, oculophles thysmography, echocardiograms, and CAT scans. Laboratory tests giving blood, serum, urine, and spinal fluid contents do not require interpretation by the physician responsible for the performance of the test.

3. Tests requiring voluntary cooperation by the patient, such as visual, hearing, and pulmonary function tests should be accompanied by a comment from the person administering the test on the extent of patient cooperation to estimate the reliability of the test results.

4. Repeat tests may be requested as a matter of practice for those tests requiring laboratory cooperation by the patient, such as visual and hearing tests, repeat tests should also be requested if the result is not within the range of values possible for the test. If not certain, the claims examiner can check with the District Medical Director (DMD) for confirmation. When the results of two or

more different tests have values which appear to be an unlikely combination, the claims examiner should consult the DMD for an opinion on the need for repeat tests. Other tests should not be repeated if the above standards are met, except as needed to determine continuing eligibility.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: September 25, 1980

Distribution: List No. 1
(All Claims Examiners, Supervisors, Systems Managers, and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 266

SUBJECT: 5 U.S.C. 8127(b)
FEES FOR REPRESENTATIVE'S SERVICES - USE OF ESCROW ACCOUNTS

NOTE: This Program Memorandum supplements FECA Program Memorandum No. 225. An appropriate notation should be made on that Memorandum.

The Employees' Compensation Appeals Board has ruled that in the collection of representatives' fees the use of an escrow account is not contrary to the Federal Employees' Compensation Act (FECA). In the case of Keith L. Beaver, Docket No. 77-577, the Board stated that "...utilization of escrow for the deposit of a client's funds, prior to approval by the Office of attorneys' fees, is not a valid reason for the Office to refuse to act on, or to deny, an application for approval of an attorney's fee." Therefore, the Office will no longer follow a policy of refusing to consider a representative's fee request in a case where a representative has required a claimant to deposit money in escrow for the purpose of subsequently collecting the fee.

In a case where a fee approval is requested, and it is found that the representative has required an escrow deposit by the claimant, it must be determined prior to fee approval that a true escrow agreement exists. In the above-cited case, the Board, taking its definition from Black's Law Dictionary, 4th Ed., stated, "...an escrow deposit of funds...is one made by the claimant-client into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition and then by him delivered to the grantee, promisee or obligee under the provisions of the escrow agreement." The "contingency or performance of a condition" is defined as approval of the fee by the Office.

Only a true escrow agreement will meet the conditions of the above definition. No other arrangement such as an attorney's client trust account will be recognized. It is incumbent upon the representative to show that any agreement is a true escrow. Therefore, in any case where the representative and claimant have entered into an agreement whereby the claimant's funds have been deposited into an account prior to approval of the representative's fee by the Office, the representative must present a copy of the alleged escrow agreement as

a part of the fee approval request. If the agreement is found to be a true escrow, the fee approval request must be considered.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: October 24, 1980

Distribution: List No. 1
(All Claims Examiners, Supervisors,
Systems Mangers and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 267

SUBJECT: 5 U.S.C. 8116
ELECTION BETWEEN CIVIL SERVICE RETIREMENT AND FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS

Program Memorandum No. 249 states that it has been determined that injured enrollees in the Older American Community Service Employment Act (OACSEA) are entitled to benefits of the Federal Employees' Compensation Act (FECA), provided they qualified as employees under the usual criteria imposed in such cases. This determination was made with the full realization that Section 904(a) of the Act holds that enrollees shall not be considered as Federal employees as a result of such employment, and shall not be subject to the provisions of Part III of Title 5.

Certain of the enrollees in the OACSEA program are former Federal employees who have retired and are receiving Civil Service retirement benefits. Those OACSEA retirees who qualify as employees under the FECA are not considered to be employees for the purposes of the Civil Service Retirement system by the Office of Personnel Management (OPM) due to the statutory language discussed above. However, it is the decision of the Office of Workers' Compensation Programs (OWCP) that the provisions of 5 U.S.C. 8116 does [sic] apply when an otherwise eligible enrollee is receiving benefits under the Civil Service Retirement System. Thus, an election of benefits must be obtained when a covered enrollee who is receiving a Civil Service annuity is eligible for monetary benefits, other than those under 5 U.S.C. 8107, of the FECA.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: October 16, 1980

PROMEMO

Distribution: **List No. 1**
(All Claims Examiner, Supervisors, Systems Mangers and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 268

SUBJECT: 5 U.S.C. 8101(4)
PAY RATE FOR CLAIMANTS WHO ARE EMPLOYED IN PRIVATE INDUSTRY WHEN DISABILITY BEGINS OR RECURS

NOTE:This Program Memorandum expands FECA Program Memorandum No. 164. An appropriate notation should be placed on that Memorandum.

For periods of disability on or after October 1, 1960, the pay rate is defined at 5 U.S.C. 8101(4) as (1) the pay at time of injury; (2) the pay at the time disability begins; or (3) the pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

The definition does not require that the pay rate be earned in Federal employment. If the individual is working in private industry at the time disability begins, or at the time of a recurrence beginning more than 6 months after return to regular full-time employment with the United States, non-Federal pay may be used in determining the pay rate for compensation purposes. If the private employment at the time is intermittent, temporary, or part-time, the provisions of 5 U.S.C. 8114 should be applied and the resultant pay rate would be used for compensation purposes if greater than the most recent applicable pay rate in the case. Careful consideration should be given to the requirement that the claimant must return to Federal employment after the original work stoppage, and that the recurrence is 6 or more months after that return-to-work date.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: December 16, 1980

Distribution: **List No. 1**
(All Claims Examiners, Supervisors, Systems Managers, and Technical Advisers)

FECA PROGRAM MEMORANDUM - NO. 269

(REVISED)

SUBJECT: EVALUATING LUNG IMPAIRMENT FOR SCHEDULE AWARD PURPOSES

PROMEMO

NOTE: This Program Memorandum supersedes FECA Program Memorandum No. 259, and revises FECA Program Memorandum No. 269, dated August 28, 1981.

In Docket No. 79-06, issued March 26, 1979, the Employees' Compensation Appeals Board (ECAB) considered an appeal of a schedule award of 10 percent loss of use of the right lung and 10 percent loss of use of the left lung. The District Medical Officer had reviewed the medical evidence and found that the claimant had Class 2 respiratory impairment, which resulted in 20 percent impairment of the whole man -- the maximum percentage of Class 2. The Medical Officer then determined that the claimant had 10 percent impairment of each lung. The ECAB remanded the case for an explanation of how the 20 percent impairment of the whole man constitutes 10 percent of each.

Therefore, all schedule awards will be evaluated by first establishing the class of respiratory impairment, following the AMA Guides as far as applicable. Since FECA regulations only refer to one lung, the percentage of whole man impairment for the particular class of impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Awards will be based on the loss of use of both lungs.

In cases of anatomical loss by traumatic injury or surgery, an evaluation will also be based on loss of lung tissue (by weight or volume), and an award made on the basis of such an evaluation if it would result in an award higher than the one based on the loss of respiratory function. Anatomical evaluations will be made with regard to only the injured lung and will be based on a 156-week maximum award for each lung. Anatomical loss awards can be made for both lungs if the injury caused loss in both, but each lung must be evaluated separately.

Other than loss of lung tissue by traumatic injury or surgery, loss of use of lungs shall be interpreted to mean loss of respiratory function.

Example 1. An individual with Class 1 respiratory impairment would be interpreted as having zero percent impairment of the whole man. This individual would be considered to have no ratable loss and would not be entitled to compensation for loss of use of the lungs under the schedule award provisions of the Act. The rationale for this was contained in the AMA Guides, 1st Edition, which stated:

> **Since there is a wide variation in the results of testa [sic] of ventilatory function among normal individuals, no percentage of impairment of the whole man is said to exist until the functional impairment has progressed to such a state as to meet the criteria set forth in Class 2. Therefore, patients with findings which meet the criteria set forth in Class 1 should be assigned a rating of 0% impairment of the whole man, even though there are demonstrable anatomic abnormalities of the respiratory system.**

Example 2. An individual with Class 3 respiratory impairment would be interpreted as having up to a 45 percent impairment of the whole man. That person would be entitled to 30 to 45 percent of 312 weeks, or 93.6 to 140.4 weeks of compensation.

/s/John D. McLellan Jr.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Revised: July 6, 1987

Distribution: List No. 1
(All Claims Examiners, Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 270

(Modified by FECA Program Memorandum No. 275)

SUBJECT: 5 U.S.C. 8101 (1); 5 U.S.C. 8191
MEMBERS OF THE SECRET SERVICE, EXECUTIVE PROTECTIVE SERVICE AND U.S. PARK SERVICE

NOTE: This FECA Program Memorandum supplements FECA Program Memoranda Nos. 152 and 163, and supersedes FECA Program Memorandum No. 219. Appropriate notations should be made on those FECA Program Memoranda.

The Executive Protective Service, the U. S. Park Police, and those members of the Secret Service who are covered by the D. C. Policemen and Firemen's Retirement and Disability Act are considered law enforcement officers under 5 USC 8191.

It has been determined that such personnel must be actively engaged in one of the specific activities described in 5 USC 8191 (1), (2) or (3) to qualify for coverage as non-Federal law enforcement officers. Since this extension of the Federal Employees' Compensation Act limits coverage to specific activities involving crimes against the United States, the general performance of duty criteria applying to those covered as employees under 5 USC 8101 (1) are irrelevant under 5 USC 8191-93. For example, injuries occurring in any of the numerous tangential activities of law enforcement, such as reporting for work, changing clothing, etc., would not normally come under 5 USC 8191, even though the laws enforced in the job deal solely with crimes against the United States.

It is to be noted that U. S. Secret Service Agents are covered by the provisions of 5 USC 8101 until they elect coverage under the D. C. Policemen and Firemen's Retirement and Disability Act. When such coverage is elected, the provisions of 5 USC 8191 et seq. would apply.

JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

Dated: June 30, 1982

Distribution: List No. 1
(All Claims Examiners, Supervisors, Systems Managers, Technical Advisers, and

Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 271

(Modified by FECA Program Memorandum No. 276)

SUBJECT: 5 U.S.C 8101(1)
COVERAGE OF EMPLOYEES OF THE UNITED STATES HOLOCAUST MEMORIAL COUNCIL

The United States Holocaust Memorial Council was established by Congress in 1980. Its purpose is to provide for annual Days of Remembrance to commemorate the Holocaust; to plan, construct, and operate a living memorial museum dedicated to the victims of the Holocaust; and to develop a plan to carry on other related activities.

The Council has 65 members who are remunerated on a per diem basis for time spent on Council business. Expenses are also reimbursed. In addition, the Council has regular employees who are reimbursed from appropriate funds and employees who are reimbursed from funds donated by non-Federal sources. These donated fund employees will be engaged in fund raising and in operating the museum. Finally, the Council plans to use volunteer services in carrying out its mandate.

After study, it has been determined that the Council is a Government instrumentality whose members and regular employees are covered by the provisions of the Act. Donated fund employees are also considered employees under 5 U.S.C. 8101(1)(A). These employees perform functions similar to those of regular employees and are subject to the supervision of regular employees of the Council.

Persons rendering volunteer services to the Council are not covered by the FECA, as there is no statutory authorization for the acceptance or use of volunteer services, or for the payment of their travel or other expenses. Therefore, they are not employees within the meaning of 5 U.S.C. 8101(1)(B).

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: September 30, 1985

Distribution: List No. 1

FECA PROGRAM MEMORANDUM - NO. 272

SUBJECT: 5 U.S.C. 8107
LOSS OF HEARING DETERMINATIONS

PROMEMO

REFERENCES: FECA Program Memorandum No. 162
FECA Program Memorandum No. 217

It is important that the hearing loss provisions of all OWCP programs be consistent with each other. In a recent review of overall OWCP hearing loss policy it was noted that the Division of Longshore and Harbor Workers Compensation (DLHWC) now utilizes the 500 cycles per second (CPS) frequency in determining the extent of work-related hearing loss. The use of the 500 cps frequency, in addition to the 1000, 2000 and 3000 frequencies, was mandated by Congress when the Longshore and Harbor Workers Act was amended via Public Law 98-426, effective date September 28, 1984. Congress added the 500 cps frequency by adopting the American Medical Association's formula.

The AMA's formula calculates the hearing loss for one ear (monaural) by testing for hearing loss at the 500, 1000, 2000 and 3000 frequency levels. The losses at each frequency are added up and averaged and, using ANSI-ISO standards, the "fence" of 25 decibels is deducted from the average loss. The result is multiplied by 1.5 to arrive at monaural hearing loss. To determine the loss for both ears (binaural), the loss in each ear is calculated using the formula for monaural loss. The lesser loss is multiplied by 5, then added to the greater loss. The total is divided by 6 to arrive at the binaural loss.

DFEC's current formula, in effect since 1973, utilizes the levels of 1000, 2000 and 3000 cps. In 1977 while continuing to use the same frequencies, OWCP changed the method of applying the fence by applying the fence to the average of the three frequencies rather than to each frequency.

In order for OWCP programs to be consistent in their hearing loss procedures, DFEC will add the 500 cps level to its formula. Therefore, in the future the losses shown at the 500, 1000, 2000 and 3000 frequency levels will be averaged, the "fence" deducted, and the result multiplied by 1.5 to arrive at the claimant's hearing loss for each ear. The loss in the ear which tested for better hearing will continue to be given five times the weight of the loss in the worse ear in determining the binaural hearing loss for schedule award purposes.

This revised procedure will apply to all decisions made on or after the date of this memorandum. In cases where the claimant has applied for review, either by reconsideration or by the Branch of Hearings and Review, the case will be reviewed using the formula in use at the time of the original decision if there has been no further noise exposure. In cases of additional exposure, and therefore additional injury, the new formula will be applied. In cases where the new formula is applied upon review and the scheduled loss is less than the original loss, an overpayment will not be computed.

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: February 24, 1986

Distribution: List No. 1
(Claims Examiners, All Supervisors, District Medical Advisors, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 273

PROMEMO

SUBJECT: 5 U.S.C. 8146
FECA CLAIMS FILED BY TRANSFERRED
EMPLOYEES OF THE PANAMA CANAL COMPANY/GOVERNMENT

Prior to October 1, 1979, the Panama Canal Company, a corporate agency and instrumentality of the United States, was charged with the operation of the Panama Canal. The Canal Zone Government, an independent agency of the United States, was responsible for the civil government of the Zone, including the administration of the FECA for employees of the Panama Canal Company/Government. When the Panama Canal Treaties of 1977 became effective on October 1, 1979, the Canal Zone Government and the Panama Canal Company were abolished. A new agency, called the Panama Canal Commission, was created and assumed responsibility for operation of the Panama Canal until the termination of the treaties on December 31, 1999. The Commission's duties include the administration of the FECA for Commission employees.

Many of the functions performed by the former Company/Government were not assumed by the Commission, but were instead transferred to the Department of Defense and other Federal agencies in the Canal Zone. Among those functions were commissaries, educational institutions and medical facilities. As the result, many former employees of the Panama Canal Company/Government became employees of other U.S. Government agencies. The Panama Canal Act of 1979 (22 U.S.C. 3601 et seq.) addresses terms and conditions of employment for transferred employees. 22 U.S.C. 3671 provides that former Company/Government employees transferred to Federal agencies or the Commission will enjoy the same terms and conditions of employment they had with the Company/Government. Among those terms and conditions are workers' compensation benefits under the FECA. Thus, an employee who sustained an injury while employed by the Company/Government and later transferred to the Panama Canal Commission or a Federal agency would continue to be entitled to compensation under the FECA for recurrences and ongoing medical treatment.

5 U.S.C. 8146 (as amended by the Panama Canal Act) together with Executive Order 12215 and the delegations made by the Secretary of Defense and the Commission's Administrator provide that recurrence and ongoing medical treatment claims filed by present Commission employees, who were injured while working for the Company/Government, are to be adjudicated and paid by the Panama Canal Commission. Recurrence and ongoing medical treatment claims filed by former Company/Government employees transferred to other U.S. agencies fall under the transferred function provisions of 5 U.S.C. 8147(b). This section of the FECA states in part:

> **If an agency or instrumentality (or part or function thereof) is transferred to another agency or instrumentality, the cost of compensation benefits and other expenses paid from the Fund on account of the injury or death of employees of the transferred agency or instrumentality (or part or function) shall be included in costs of the receiving agency or instrumentality.**

Thus, adjudication and payment of recurrences or ongoing medical treatment claims of former Company/Government employees who were transferred under 22 U.S.C. 3671 to other U.S. agencies in the Canal Zone are the responsibility of OWCP and not the Panama Canal Commission. These claims are handled by the Branch of Special Claims in Washington, D.C. The cost of the benefits paid should be

charged to the agency to which the employee was transferred.

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: May 5, 1986

Distribution: List No. 1
(Claims Examiners, All Supervisors, District Medical Advisors, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 274

SUBJECT: 5 U.S.C. 8101 (1)
COVERAGE OF AFRICAN DEVELOPMENT FOUNDATION PERSONNEL

The African Development Foundation (ADF) was created in 1980. While it is a non-profit corporation, it was created and funded by the Congress and mandated to assist people in African countries in developmental endeavors. Specific functions are specified in the enabling legislation.

The statute establishes a Board of Directors for the Foundation. Members of the Board are appointed by the President with the advice and consent of the Senate. Members receive no remuneration for their services, but are authorized to be reimbursed $100 a day, plus transportation expenses while engaged in duties on its behalf. These individuals are engaged in the performance of the Federal functions set out in the Act and are subject to the general supervision of the President. It has been determined therefore, that Directors are "officers" within the meaning of 5 U.S.C. 8101 (1)(A).

Members of the ADF Advisory Council are appointed by the Board of Directors from among individuals knowledgeable about development activities in Africa. They receive no remuneration, but may be allowed travel and other expenses. the Board meets with the council at least once a year. Council members are considered employees of the United States for the purposes of 5 U.S.C. 8101 (1)(A). They are engaged in the performance of a Federal function under the authority of law and are under the general supervision of Board members.

Employees of the ADF, limited by legislation to 75, are also covered by the provisions of the Act.

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: May 30, 1986

PROMEMO

Distribution: **List No. 1**
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 275

(REVISED)

SUBJECT: 5 U.S.C. 8101(1); 5 U.S.C. 8191
MEMBERS OF THE U.S. SECRET SERVICE AND THE U.S. PARK POLICE

NOTE: This FECA Program Memorandum supplements FECA Program Memoranda Nos. 152 and 163, and modifies FECA Program Memoranda Nos. 219 and 270. Appropriate notations should be made on those FECA Program Memoranda.

Members of the Non-Uniformed Division of the U.S. Secret Service, the Uniformed Division (formerly called the Executive Protective Service) of the U.S. Secret Service, and the U.S. Park Police are considered civil employees under 5 U.S.C. 8101, unless they are covered under the D.C. Policemen's and Firemen's Retirement and Disability Act. Coverage under the D.C. Act is mandatory for all members of the Uniformed Division and U.S. Park Police who were hired prior to January 1, 1984. Some members of the Non-Uniformed Division hired prior to January 1, 1984 are also in lieu of participation in the Civil Service retirement and disability program. For a Secret Service or Park Service member covered by the D.C. Act, the only entitlement to FECA benefits is as a law enforcement officer under 5 U.S.C. 8191. All employees hired on or after January 1, 1984 fall under the revised Civil Service retirement plan, and are therefore covered under 5 U.S.C. 8101 for injuries occurring on or after January 1, 1987.

Program Memorandum No. 270 states that members of the U.S. Secret Service and the U.S. Park Police, if covered under the D.C. Act, must be actively engaged in one of the specific activities described in 5 U.S.C. 8191 (1), (2) or (3) to qualify for coverage as non-Federal law enforcement officers. Previously such personnel were covered during all on-duty time, regardless of the activity at the time of injury. Many Non-Uniformed Secret Service members transferred to the D.C. system believing that they would receive supplemental coverage under 5 U.S.C. 8191 for any work-related injury. When the more stringent criteria were applied, a Non-Uniformed Division member could in some instances be left without FECA coverage. The member could also be without D.C. benefits, as he would receive wage loss compensation only if permanently and totally disabled, and medical benefits only if he resides within the D.C. metropolitan area.

Based on the factors described above, it has been determined that Non-Uniformed members of the U.S. Secret Service covered under 5 U.S.C. 8191 are covered during the performance of all official duties, and are considered to be engaged in the types of activities specified in 5 U.S.C. 8191 (1), (2), and (3) during all on-duty time. Insofar as it applies to the Non-Uniformed Division, this policy represents a return to the position described in Program Memorandum No. 219. The return to this position is made with the qualification that benefits available under the D.C. Act are to be utilized. Thus, if the disability is permanent and total, or the injury results in death, compensation is to be reduced as provided by 5 U.S.C. 8192 to reflect benefits paid or payable under the D.C. Act. If disability is less than permanent and total, compensation for wage loss will be paid only if the employer is unable to provide suitable work for the partially disabled employee.

Coverage for members of the U.S. Park Police and the Uniformed Division of the U.S. Secret Service remains as described in Program Memorandum No. 270. These employees, if covered by the D.C. Act, must be actively engaged in specific activities involving crimes against the United States to qualify for coverage under 5 U.S.C. 8191.

The policy established by this Memorandum is retroactive to June 30, 1982, the effective date of Program Memorandum No. 270. Upon application by a Non-Uniformed Division member whose claim was denied, any claim previously adjudicated in accordance with Program Memorandum No. 270 will be readjudicated under this Memorandum.

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: June 26, 1986

Revised: January 30, 1987

Distribution: List No. 1
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 276

SUBJECT: 5 U.S.C. 8101(1)
COVERAGE OF VOLUNTEER EMPLOYEES OF THE UNITED STATES HOLOCAUST MEMORIAL COUNCIL

NOTE: This Program Memorandum modifies Program Memorandum No. 271. An appropriate notation should be placed on that Memorandum.

Program Memorandum No. 271 extended FECA coverage to regular, and donated fund, employees under 5 U.S.C. 8101(1)(A), but denied coverage of Council volunteer employees under 5 U.S.C. 8101(1)(B), because it had been determined that there was no statutory authorization for the Council to accept or use volunteer services.

Upon further review it has been determined that, based on a broad reading of 36 U.S.C. 1404(c), read in conjunction with language included in the omnibus appropriations bill for FY 1987 (Pub. L. 99-591), Title I, section 101(h), October 30, 1986, 100 Stat. 3341-283), Congress intended that the Council have the authority to accept volunteer services.

Therefore, volunteer employees of the Council are employees within the meaning of 5 U.S.C. 8101(1)(B).

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: November 30, 1987

Distribution: **List No. 1**
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 277

SUBJECT: **5 U.S.C. 8116; 5 U.S.C. 8132**
OPM ANNUITY PAYMENTS DURING THE PERIOD FOR WHICH COMPENSATION BENEFITS HAVE BEEN REFUNDED AS A RESULT OF A THIRD PARTY SETTLEMENT

REFERENCES: **FECA Program Memorandum No. 90**
FECA Program Memorandum No. 130

Consistent with the above-referenced Program Memoranda, where the Office receives a refund from a third party settlement resulting in a credit balance, the claimant is considered to have never been in receipt of compensation. This holds even if the Office does not receive a dollar-for-dollar refund of its prior disbursements because the claimant retains an attorney's fee allowance. In this situation the claimant is not prohibited from receiving an annuity from OPM retroactively for the entire period during which compensation was previously paid, as well as during the period of the third party credit offset. When the credit has been exhausted, the claimant should be given the opportunity to elect between the two benefits.

Where the claimant has received compensation for wage loss but the third party settlement is insufficient to cover the entire amount of the Office's past disbursements, it is necessary to determine the period covered by the third party refund. In this situation, the gross amount of the balance available for recovery from the settlement should be compared to the past disbursements in the case (compensation, medical and rehabilitation costs). The point in time at which the disbursements equal the balance available will be the "cutoff date" through which the claimant will be considered to have not been in receipt of compensation. Here again, the claimant is not prohibited from receiving an annuity from OPM retroactively for the period during which compensation was previously paid but was subsequently refunded to the Office. In this situation an election is necessary only for the period after the "cutoff date."

In either of the above situations, if the claimant is eligible for OPM benefits during a period for which compensation was previously paid but was subsequently refunded following the third party settlement, OPM should be advised that the claimant was "not in receipt of compensation" for the period covered by the refund. OPM should also be advised whether the claimant's health benefits and/or optional life insurance premiums were paid during the period involved.

THOMAS M. MARKEY
Associate Director for
Federal Employees' Compensation

Dated: March 30, 1989

Distribution: **List No. 1**
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 278

SUBJECT: **5 U.S.C. 8114**
EXTRA DUTY PAY FOR CUSTOMS INSPECTORS

REFERENCES: **This FECA Program Memorandum supplements FECA Program Memorandum No. 68, and that issuance should be annotated accordingly.**

In 1968, it was determined that Immigration Officers and Inspectors were eligible for extra duty pay received between the hours of 5:00 PM and 8:00 AM and for all work performed on Sundays and holidays. This policy has been extended to include Customs Inspectors, who must sometimes work extra unscheduled hours regardless of whether they had previously worked a given number of hours during that day. Such work has been deemed not to constitute overtime, and wages received for it may be included as an increment in the pay rate.

THOMAS M. MARKEY
Director for
Federal Employees' Compensation

Dated: June 20, 1990

Distribution: **List No. 1**
(Claims Examiners, All Supervisors, District Medical Advisers, Systems Managers, Technical Assistants and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 279

SUBJECT: 5 U.S.C. 8103(a)
PAYMENT OF MOVING EXPENSES WHEN PHYSICIAN RECOMMENDS CHANGE OF CLIMATE FOR EMPLOYMENT-RELATED CONDITIONS

NOTE: This FECA Program Memorandum supplements and partially supersedes FECA Program Memorandum No. 159, which should be annotated accordingly.

Under 5 U.S.C. 8103(a), the Office may pay or reimburse the expenses incurred by a claimant who moves for medical reasons if such a move is "likely to cure, give relief, [or] reduce the degree or the period of disability...."

Until now, the National Office has retained the authority for adjudicating such requests. Henceforth, however, district office staff will be responsible for determining whether the relocation meets the criteria set forth in 5 U.S.C. 8103(a). They will also be responsible for evaluating requests for payment or reimbursement of certain routine expenses connected with relocation, including lodging, meals, and mileage while en route to the new location.

Requests for payment or reimbursement of other kinds of expenses, including transportation of household goods, a house-hunting trip or temporary quarters allowance, the costs of buying and selling a house or breaking a lease, and storage of household goods, should continue to be referred to the National Office.

THOMAS M. MARKEY
Director for
Federal Employees' Compensation

Dated: July 11, 1990

Distribution: List No. 2
Claims Examiners, All Supervisors, District Medical Advisors, Fiscal Personnel, Systems Managers, Technical Assistants, and Rehabilitation Specialists)

FECA PROGRAM MEMORANDUM - NO. 280

SUBJECT: 5 U.S.C. 8114
REVISION TO 5 U.S.C. 5545(c)(2)

NOTE: This FECA Program Memorandum supplements FECA Program Memorandum No. 106, which should be annotated accordingly.

Public Law 101-173, enacted on November 27, 1989, amended section 5 U.S.C. 5545(c)(2), which governs payment of administratively uncontrollable overtime (AUO). Effective the first applicable pay period beginning after September 30, 1990, this section is amended to read as follows:

> **(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled**

overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

Therefore, an employee who is injured on or after October 1, 1990 is entitled to AUO pay as a percentage of his or her basic pay, rather than the pay of a GS-10, step 1 employee as described in Program Memorandum 106.

THOMAS M. MARKEY
Director for
Federal Employees' Compensation

Dated: February 11, 1991

Distribution: **List No. 2**
(Claims Examiners, All Supervisors, District Medical Advisors, Fiscal Personnel, Systems Managers, Technical Assistants, and Rehabilitation Specialists)

ADDENDUM: This determination includes pay rates based on date disability began and date of recurrence, as well as those based on date of injury.

FECA PROGRAM MEMORANDUM - NO. 281

SUBJECT: **5 U.S.C. 8114**
Extra Duty Pay for Customs Inspectors

NOTE:This issuance supplements FECA Program Memorandum No. 278, which should be annotated accordingly.

In 1989, it was determined that Customs Inspectors were eligible for extra duty pay received between the hours of 5:00 PM and 8:00 AM and for all work performed on Sundays and holidays. However, the section of the law addressing extra pay for these employees [19 U.S.C. 267(a)] was recently amended by Public Law 103-66 to state unequivocally that such additional pay should be considered overtime pay. Therefore, in cases involving Customs Inspectors injured after January 1, 1994, this increment of pay can no longer be included in the pay rate.

District offices with specific cases requiring adjustment on the basis of this change have been notified of the cases involved.

THOMAS M. MARKEY
Director for
Federal Employees' Compensation

Dated:

Distribution:List No. 1
(Claims Examiners, All Supervisors, District Medical Advisors, Systems Managers, Technical Assistants, Rehabilitation Specialists, and Staff Nurses)

PROMEMO