U.S. Office of Personnel Management Compensation Claim Decision Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: Department of the Air Force

Kuwait City, Kuwait

Claim: Separate maintenance allowance

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0031

/s/ Judith A. Davis for

Robert D. Hendler Classification and Pay Claims Program Manager Merit System Audit and Compliance

3/27/2013

Date

The claimant requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of separate maintenance allowance (SMA) for the period from February 2010 to February 2011, when he was a Federal civilian employee of the Department of the Air Force (AF) in Kuwait City, Kuwait. The claim was transferred to OPM by the U.S. Civilian Board of Contract Appeals (CBCA) to which the claimant had erroneously sent his request. We received the claim on July 31, 2012, and the agency administrative report (AAR) on August 29, 2012. For the reasons discussed herein, the claim is denied.

The claimant's position in Kuwait was designated by the agency as a "12 month unaccompanied tour." Upon arriving in Kuwait, he asked the agency for SMA based on his wife not having accompanied him to the duty station due to "medical reasons and her duty position," the reasons stated on his Standard Form (SF) 1190, Foreign Allowances Application.

The Overseas Differentials and Allowances Act, as amended and codified in Section 5921 – 5928 of title 5, United States Code (U.S.C.), provides that, under regulations prescribed by the President, a separate maintenance allowance may be paid to Federal employees in foreign areas. Section 5924(3) of title 5, U.S.C., states that SMA may be granted to assist an employee who is compelled or authorized, because of dangerous, notably unhealthy, or excessively adverse living conditions at the employee's post of assignment in a foreign area, or for the convenience of the Government, or who requests such an allowance because of special needs or hardship involving the employee or the employee's spouse or dependents, to meet the additional expenses of maintaining, elsewhere than at the post, the employee's spouse or dependents, or both.

By Executive Order, the President delegated this authority to the Secretary of State, who issues the Department of State Standardized Regulations (DSSR) governing overseas allowances and differentials. The DSSR further delegates the authority to grant SMA to the heads of Federal agencies. Section 262 of the DSSR states:

SMA may be granted to an employee whenever the head of agency determines that the employee is compelled to maintain any or all members of family elsewhere than at the foreign post of assignment...

The claimant indicates in his claim that he left his spouse in the United States for 'compelling' medical-related reasons, stating: "My wife is a 70% disabled veteran and has a medical illness that prevents her from traveling and with the limited health care in Kuwait; she was medically excused by her physician."

The AF denied the claimant's SMA request by letter dated February 3, 2011, citing DSSR section 262, which prescribes the circumstances justifying approval of SMA; "i.e., SMA may be authorized where an employee is compelled by the circumstances of the assignment to maintain separate households for a family member." The agency states:

The tour to Kuwait is normally accompanied and standard tour length is 24 months. You accepted an unaccompanied tour to Kuwait for only 12 months. That implies there was no "compelling" reason to leave the family behind. Rather it was a conscious decision to do so.

The agency further supports its denial of the claimant's request in the AAR to OPM, citing the Department of Defense Joint Travel Regulations (JTR). The AF restates that it was the claimant's decision to accept a one-year unaccompanied tour to Kuwait while his family remained in the United States for the entire tour. The agency also cites the JTR, Volume 2, Appendix Q, stating that "...dependent travel to Kuwait City, Kuwait is not prohibited and the standard tour of duty for an employee who is/will be accompanied by dependents is 24 month." They state they were unable to "locate any mention of [claimant's] wife or of a doctor's statement about her medical condition" in their files, but consider this "irrelevant for making the decision on providing the requested allowance."

In a December 19, 2012, email provided in response to our request for clarification of their SMA policy, the AF further explains that, in situations involving SMA, the agency applies the DSSR exclusively as no separate written AF policy exists for SMA. The agency also confirms that no precedence exists whereby an employee was granted SMA for a 12 month unaccompanied tour in a situation similar to the claimant's. Furthermore, the AF states:

The employees going to Kuwait are given the option to bring their families for a two year tour or come alone for a 12 month tour. [The claimant] chose the latter.

* * * * *

Granting SMA for [the claimant] would create a precedence requiring all employees on an unaccompanied tour in Kuwait to be granted SMA routinely although there is no restriction imposed on employees with regard to taking their family to Kuwait. We believe this would not be in the spirit of the DSSR rules governing grant of SMA.

The AF's December 19, 2012, email further states "[t]here was also no evidence of any medical complications that would have required [the claimant's] wife to stay in CONUS because she could not be properly treated in Kuwait or any other hardship for that matter" and "[the claimant's] SMA claim was not submitted until the unaccompanied tour was almost over." Had the claimant initially requested SMA and submitted evidence documenting any hardships, the agency states his request would have been considered but "likely denied."

The language applying to SMA in 5 U.S.C. § 5924 is permissive rather than mandatory, and the language in the DSSR is similarly permissive. By the use of the permissive term "may" as opposed to the mandatory terms "will," "shall," or "must" in relation to SMA, agencies are granted discretionary authority in allowing or disallowing SMA in individual cases. Under statutes that vest a degree of discretion in administrative agencies, our review is generally

¹ The record includes a December 22, 2010, letter from a physician stating the claimant's wife was "not able to travel with her husband to Kuwait because of suffering from vertigo this summer" (although the tour began in February 2010), in addition to a February 29, 2012, memorandum from a social worker (rather than a physician) stating she was not "medically stable" from January 2010 to January 2011. Both document dates succeed the claimant's February 2010 departure date to Kuwait. The record includes no evidence of suitable hardship-related documentation accompanying the claimant's SMA request to the agency, nor any documentation establishing the type of care required by his wife's medical condition(s) was unavailable in Kuwait.

confined to deciding whether an agency's action must be viewed as arbitrary, capricious, or so at variance with the established facts as to render its conclusion unreasonable.

The claimant asked the agency for SMA based on his wife not having accompanied him to the duty station due to "medical reasons and her duty position." This type of situation is covered under DSSR section 262.1(Voluntary SMA (VSMA) – For Special Needs or Hardship of the Employee), which states:

An agency may authorize VSMA when an employee requests VSMA for special needs or hardship prior to or after arrival at post for reasons including but not limited to career, health, educational or family considerations for family members...

The agency states the claimant was not compelled by the circumstances of the assignment to leave his spouse in the United States as he opted for a 12-month unaccompanied tour in lieu of a two-year accompanied tour. The agency also states they have no documentation indicating the claimant had raised the issue of his wife's medical condition for their consideration when he accepted the position and he did not submit his SMA claim until his tour was almost over. The term "compelled" as it is used in DSSR section 262 encompasses those situations defined in section 262(1) (Involuntary SMA (ISMA) – For the Convenience of the Government) where the agency determines the need to exclude family members from accompanying an employee to the area:

An agency may authorize ISMA when adverse, dangerous, or notably unhealthful conditions warrant the exclusion of members of family from the area or when the agency determines a need to exclude members of family from accompanying an employee to the area.

Thus, DSSR section 262 does not prohibit the granting of SMA in connection with unaccompanied tours, but agencies may exercise their discretionary authority to deny SMA in those situations.

In support of his request, the claimant states the agency failed to provide him with information on SMA until his in-processing in Germany prior to his departure for Kuwait. Since the box on his travel orders indicating that SMA entitlement was fully explained was unchecked, he states the AF neglected to adequately brief him on SMA. Regardless, the claimant states the agency inferred he was entitled to SMA; e.g., by providing him with a fact sheet on SMA and with allowance rate calculations that included annual SMA benefits of \$15,300 (although we note the calculations include a footnote that rates are subject to change at any time).

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot estop the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant may have inferred by the agency's actions that he would be eligible for SMA does not confer eligibility not otherwise permitted by statute or its implementing regulations.

The claimant also requests SMA on "the grounds that there is no set standard approval/denial policy." The claims jurisdiction authority of OPM is limited to consideration of statutory and regulatory liability. OPM adjudicates compensation claims by determining whether controlling statute, regulations, policy, and other written guidance were correctly applied to the facts of the case. Therefore, the claimant's allegations regarding the agency's policies and practices have neither merit nor applicability to our claim determination and will not be considered or addressed further.

The statutory and regulatory languages are permissive and give agency heads considerable discretion in determining whether to grant SMA to agency employees. Thus, an agency may deny SMA payments when it finds that the circumstances justify such action, and the agency's action will not be questioned unless it is determined that the agency's action was arbitrary, capricious, or unreasonable. Under 5 CFR 178.105, the burden is upon the claimant to establish the liability of the United States and the claimant's right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). In this case, the agency has stated they do not grant SMA in connection with 12-month unaccompanied tours in Kuwait since the option of a two-year accompanied tour is available. Where an agency decision is within their discretionary authority and consistent with their previous practice in similar situations as in the present case, it cannot be considered arbitrary, capricious, or unreasonable. Therefore, there is no basis on which to reverse the decision.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.