

**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.

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.