



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS COMPLAINT DENIED:
June 21, 2023

CBCA 7357

UNITEDHEALTHCARE INSURANCE COMPANY, INC.

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Stephen J. McBrady, Charles Baek, and Payal Nanavati of Crowell & Moring LLP, Washington, DC, counsel for Appellant.

Nicole M. Lohr and James Muetzel, Office of the General Counsel, Office of Personnel Management, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **GOODMAN**, and **KULLBERG**.

RUSSELL, Board Judge.

Appellant, UnitedHealthcare Insurance Company, Inc. (UHC), appeals the decision by respondent, Office of Personnel Management (OPM), denying UHC's claim to be reimbursed \$3,838,510.70 plus interest for benefit payments that UHC made for medical care provided to the child of a Federal employee. UHC alleges that OPM breached the contract and the duty to engage in good faith and fair dealing when OPM failed to provide UHC with accurate enrollment information resulting in UHC paying claims for the employee whom UHC alleges was not eligible to be enrolled in UHC's FEHB plan.

OPM has moved to dismiss this appeal pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. OPM alleges that UHC is barred from bringing this appeal because (1) UHC failed to present its good faith and fair dealing claim to the contracting officer; and (2) disputes challenging a federal employee's health benefits eligibility must be brought pursuant to the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. §§ 8901-8914 (2018). For the reasons stated below, we deny OPM's motion.

Background

I. Regulatory Background

UHC has a contract with OPM to provide health benefit plans to federal employees under a community-rated contract. Complaint ¶ 8. An employee who becomes eligible for healthcare benefits may elect to enroll or not to enroll for such benefits within sixty days after becoming eligible. 5 CFR 890.301(a)(2022). Eligible employees may also enroll or change their enrollment during the "open season" held each year from the Monday of the second full workweek in November through the Monday of the second full workweek in December. 5 CFR 890.301(f)(1).

The enrollment of an employee continues while the employee is on leave without pay ("LWOP" or "non-pay status") for up to 365 days. 5 CFR 890.303(e)(1). After exhausting 365 days of continued coverage under a non-pay status, the enrollment terminates at midnight on the last day of the last pay period in pay status. *Id.* at 890.304(a)(1)(v). Once the termination conditions have been met, the employing office generates a Change in Health Benefits Enrollment form, SF-2810. Complaint ¶ 15. This form serves as a notice that the carrier should process the termination of an enrollee. *Id.*

Enrollment terminations, following a non-pay status or otherwise, are typically subject to an automatic thirty-one day extension of coverage. *See* 5 CFR 890.401(a)(1). Except as otherwise provided, an eligible employee must enroll in a healthcare plan within sixty days after a change in employment status, including a return to pay status from leave without pay. 5 CFR 890.301(h).

II. UHC's Complaint

On January 1, 2019, the employee who is the subject of this dispute enrolled in UHC's health benefit plan. Complaint ¶ 30. On February 2, 2019, the employee reached 365 days on leave without pay (or non-pay status). *Id.* ¶ 31. On February 10, 2019, the content of a SF-2810 form was transmitted to UHC via a weekly electronic feed from OPM which notified UHC of the termination status of the employee. *Id.* ¶ 32. The information indicated that the employee's enrollment was terminated effective February 2, 2019. *Id.*

On April 24, 2019, UHC requested clarification from the employee's payroll office on the employee's benefits enrollment status via the Centralized Enrollment Clearinghouse System (referred to as CLER).¹ *Id.* ¶ 34. On June 27, 2019, the employee's agency confirmed that the employee was on leave without pay/non-pay status with insurance coverage continuing. *Id.* ¶ 34.

On July 8, 2019, the employee returned to her agency as an employee and had sixty days from that date (to September 6, 2019) to enroll in a healthcare plan but did not do so. *Id.* ¶ 35. On July 30, 2019, UHC requested that CLER records be updated to reflect the information provided on June 27, 2019 that the employee's coverage continued. *Id.* ¶ 36. However, as of September 2019, the employee's agency had not updated CLER with this information. *Id.* ¶ 37. Also, during the 2020 open enrollment season (from November 11, 2019 to December 9, 2019), the employee did not elect healthcare coverage. *Id.* ¶ 38.

In or around January 2020, UHC approved a heart transplant procedure for the employee's dependent child. *Id.* ¶ 41. On February 27, 2020, the employee's agency, via CLER, instructed UHC to terminate the employee's non-pay coverage effective February 2, 2019. *Id.* ¶ 42. On March 12, 2020, the employee's dependent child underwent the approved heart transplant. *Id.* ¶ 43.

In or around April 2020, UHC reached out to the employee's agency to determine whether the employee's enrollment termination, effective February 2, 2019, was in error. *Id.* ¶ 45. The agency stated that the employee "never re-enrolled when she returned [to the agency]" and that the employee "had not paid premiums for over a year." *Id.* The agency explained:

Our senior specialist is reaching out to Treasury/OPM asking if there is anything we can legally do for this employee.

The regulations don't allow us to reinstate the FEHB coverage for this employee, since [the employee's] coverage was terminated based upon 5 CFR 890.304(v), 365 days of LWOP status.

¹ CLER is an Internet-based system that receives electronic enrollment data from federal agencies and FEHB carriers to facilitate reconciliation and reporting. Agencies, FEHB carriers, OPM, and the National Finance Center can access this system to, depending on their security access, conduct inquiries, update contact information, initiate reconciliation corrections, and generate reports.

Per 5 CFR 890.301(h)(1)(ii), the employee must enroll within 60 days of returning to pay status, which in [the employee's] case was March 3, 2019. . . . The [employee] did not submit a SF-2809 electing to enroll in FEHB . . . nor did she make an Open Season election.^[2]

She can submit a request for reconsideration, late election, If she submits a reconsideration request, we can expedite the review of the request. But, I do not see anywhere allowing an agency to enroll an employee in the FEHB program.

Id. ¶ 45.

However, notwithstanding this earlier assessment of the employee's non-enrollment status, on April 25, 2020, the agency indicated that it would proceed with processing enrollment for the employee stating that, "[o]nce we receive the Form 2809[,] we will review it and proceed." *Id.* ¶ 46. On May 6, 2020, UHC received a completed Form 2809 for the employee with an effective date of January 19, 2020. *Id.* ¶ 47.

On September 4, 2020, UHC processed payment for the employee's medical and pharmacy claims for the heart transplant procedure. *Id.* ¶ 51. From April 2021 to June 2021, UHC sent communications to OPM requesting that OPM reimburse UHC \$3,838,510.70 for this procedure. *Id.* ¶ 52. UHC alleged that, at the time of the medical procedure in March 2020 and UHC's pre-authorization for that procedure in January 2020, CLER did not have accurate information on the employee's health benefits enrollment.

In its subsequent certified claim to OPM, UHC alleged that the Government failed to perform its contractual and regulatory duties to provide UHC with accurate and timely enrollment information regarding the employee's enrollment status which led UHC to authorize and pay the employees' claims for benefits. OPM denied UHC's claim stating,

UHC's claim that the Government breached its obligation under the Contract are [sic] misplaced, as they center on the enrollment decision of the

² The SF 2809 is the Health Benefits Election Form. The form has multiple parts that an employee must fill out including: Part A, Enrollee and Family Information; Part B, FEHB Plan [the Employee Is] Currently Enrolled in, if applicable; Part C, FEHB Plan [the Employee Is] Enrolling in or Changing To; Part D, Event that Permits [the Employee] to Enroll, Change, or Cancel; and Part E, Election Not to Enroll (which the employee can check). The form also has a part to be filled out by the agency to include the date the form is received, and the effective date of the action.

[employing agency] to allow the Employee's enrollment retroactive to January 19, 2020. UHC has no right to dispute the employing agency's enrollment decisions. The employing office has administrative authority to make enrollment decisions under 5 CFR 890.103(a). Further, UHC is required by the Contract to abide by the Government's decisions on enrollment.

Appeal File, Exhibit 1.³

This appeal followed. In its complaint, UHC alleges that OPM breached the parties' contract by failing to provide UHC with accurate information for the employee despite UHC's repeated requests for enrollment reconciliation for the employee through CLER. Complaint ¶ 64. UHC alleges that the breach caused it to pay \$3,838,510.70 in claims for healthcare services provided to the employee's dependent child although the employee was not eligible to be enrolled in the FEHB plan. *Id.* Additionally, UHC alleges that the Government breached the duty of good faith and fair dealing by (1) as with the breach of contract claim, failing to provide UHC with accurate enrollment information for the employee, despite UHC's repeated requests for enrollment reconciliation for the employee through CLER; and (2) misleading UHC as to the propriety of the employee's enrollment. *Id.* ¶¶ 68-69.

Discussion

I. OPM's Motion to Dismiss for Lack of Jurisdiction

"A tribunal usually considers a motion to dismiss on jurisdictional grounds before any other motion because without jurisdiction, the tribunal cannot examine the additional matters placed before it." *Flux Resources, LLC v. Department of Energy*, CBCA 6208, 19-1 BCA ¶ 37,338, at 181,588. The appellant bears "the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Selrico Services, Inc. v. Department of Justice*, CBCA 3084, 13 BCA ¶ 35,268, at 173,132 (quoting *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070).

"Each 'claim' brought under the CDA must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim." *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,005 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). Accordingly, the Board "only [has] jurisdiction if a claim is the subject of a contracting officer's final decision." *Alares Construction, Inc. v. Department of Veterans Affairs*, CBCA 6149, et al., 22-1 BCA

³ All exhibits are found in the appeal file, unless otherwise noted.

¶ 38,225, at 185,649. “For this reason, the Board may not consider ‘new’ claims a contractor failed to present to the contracting officer.” *Lee’s Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). “A claim is new when it ‘present[s] a materially different factual or legal theory’ of relief.” *Id.* (quoting *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)). “Materially different claims ‘will necessitate a focus on a different or unrelated set of operative facts.’” *Id.* (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

OPM asserts that the Board lacks jurisdiction over UHC’s good faith and fair dealing claim because UHC failed to present the claim to the contracting officer before filing this appeal. OPM also argues that the Board lacks jurisdiction over this claim and UHC’s breach of contract claim because, under 5 U.S.C. § 8912, district courts of the United States and the United States Court of Federal Claims have concurrent jurisdiction over FEHB enrollment disputes and all other claims under the FEHBA. OPM asserts that UHC’s dispute is essentially one challenging the employee’s eligibility to enroll in UHC’s FEHB plan, a determination within the purview of OPM and the employee’s agency—not the Board. We find that the Board has jurisdiction over both of UHC’s breach claims.

A. UHC’s Claim Based on “Breach of the Duty of Good Faith and Fair Dealing”

As an initial matter, we find that we have jurisdiction to consider UHC’s claim based on the Government’s alleged breach of the duty of good faith and fair dealing. “[T]he implied duty of good faith and fair dealing, which attaches to every government contract, ‘requires a [contracting] party to refrain from interfering with another party’s performance or from acting to destroy another party’s reasonable expectations regarding the fruits of the contract.’” *Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*, CBCA 7318, 22-1 BCA ¶ 38,156, at 185,313 (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1334-35 (Fed. Cir. 2014)).

In determining whether UHC’s two breach claims—one based on breach of contract and the other based on breach of the duty of good faith and fair dealing which OPM argues was not presented to the contracting officer—involve the “same set of operative facts,” we need to “identif[y] whether the facts necessary to establish the elements of [the two] legal theories underlying each ‘claim’ are essentially the same or interrelated.” *Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926, 21-1 BCA ¶ 37,918, at 184,157. Here, both breach claims relate to the Government’s alleged failure to provide UHC with accurate enrollment information regarding the employee and, thus, will turn on similar factual determinations. Accordingly, we find that we have jurisdiction over UHC’s claim based on the Government’s alleged breach of the duty of good faith and fair dealing.

B. UHC's Breach of Contract Claim

The Board disagrees with OPM's argument that the Board lacks jurisdiction over UHC's breach of contract claim. The contract itself expressly states that the CDA governs disputes arising from the contract. *See, e.g., Texas Health Choice, L.C. v. Office of Personnel Management*, 400 F.3d 895, 897 (Fed. Cir. 2005) ("As a services contract with the United States government, [FEHBA contracts are] governed by the CDA."). Further, as explained by the District of Columbia Circuit in *Mutual of Omaha Insurance Co. v. National Association of Government Employees, Inc.*:

A section of [the Federal Employees Health Benefits Act] does provide that "[t]he district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter." 5 U.S.C. § 8912 (1994) . . . But an action founded on contract is not "founded on this chapter." *Cf.* 28 U.S.C. § 1346(a)(2) (1994) (depriving district courts of jurisdiction over claims against the United States "*founded upon any express or implied contract*" with the United States that is subject to the Contract Disputes Act) (emphasis added).

. . . .

What matters is the source of the right at stake. As we said in *Ingersoll-Rand [Co. v. United States]*, 780 F.2d 74, 76 (D.C. Cir. 1985), "determining whether an action is founded upon a contract . . . 'depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate).'" [*Id.*] (quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982)).

145 F.3d 389, 394 (D.C. Cir. 1998).

Accordingly, the issue that we address is whether UHC's claim is one founded under its contract with OPM. The contract requires that OPM, other agencies, Tribal Employers, or the FEHB Clearinghouse furnish the names and social security numbers of enrollees to carriers "at such times and in such form and detail as will enable the [c]arrier to maintain a currently accurate record of all [e]nrollees." Exhibit 2 at I-2. Although regulations provide agencies with the authority to make retroactive corrections of administrative errors as to an employee's enrollment, 5 CFR 890.103(a), the contract additionally provides:

Clerical error (whether by OPM, any other agency, Tribal Employer, the FEHB Clearinghouse, or the Carrier) in keeping records pertaining to coverage

under this contract, delays in making entries thereon, or failure to make or account for any deduction of enrollment charges, shall not invalidate coverage otherwise validly in force or continue coverage otherwise validly terminated. If any person finds relevant facts pertaining to a person covered under this contract to be misstated, and if the misstatement affects the existence, amount, or extent of coverage, the actual facts shall determine whether coverage is in force under the terms of this contract.

Id. at I-2 to I-3.

In its complaint, UHC alleges that the Government breached the contract when the Government failed to perform its contractual duty to provide accurate enrollment information for the employee, resulting in UHC incurring damages. We find that UHC has stated a cognizable claim under the contract because it alleges that the Government violated its duty to maintain accurate records for an FEHB-eligible employee—a requirement under the contract. Accordingly, because UHC’s claim is based on provisions of its contract with OPM, and the Board has jurisdiction over the claim under the CDA, OPM’s motion to dismiss for lack of subject matter jurisdiction is denied. *See Texas Health Choice, L.C.*, 400 F.3d at 900 (health management organization providing services to federal and Texas employees under an FEHBA contract could appeal OPM contracting officer’s deemed denial of the organization’s claim to the appropriate board of contract appeals or the Court of Federal Claim but not the district court.)

II. Motion to Dismiss for Failure to State a Claim

Having found that the Board has jurisdiction to consider UHC’s breach claims, we turn to the issue of whether the appeal should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure and Board Rule 8(e) which states that “[a] party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief.” (48 CFR 6101.8(e) (2021)). “[T]he granting of a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy.” *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174, 846 (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000)). To survive such a motion, “[t]he contractor must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor.” *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, at 181,569. Factual allegations need only be sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 235–236 (3d ed. 2004)).

OPM asserts that UHC's claims are premised on FEHB enrollment and eligibility determinations over which the employing agency and OPM have authority. According to OPM, UHC can only obtain relief if a determination is made that the employee was not eligible to participate in UHC's health plan, and without such a determination (which is not within the Board's purview to make), UHC cannot obtain the relief that it is requesting.

At this point, at least based on the pending motion before us, we cannot find that the Government's retroactive determination under the FEHBA on the employee's healthcare enrollment eligibility, which UHC is not contesting here, would be a bar to any legal remedy under the CDA. Under OPM regulations, employees must challenge denial of eligibility initially with their employing agency. 5 CFR 890.104, .107. OPM makes final determinations on employee eligibility for FEHB coverage. *Id.* at 890.102(e). An employee may seek judicial review of OPM's determinations denying benefits coverage through an action brought against OPM. *Id.* at 890.107. However, while OPM and the employing agency have decision-making authority over FEHB enrollment and eligibility determinations, carriers like UHC may seek relief for alleged contract breach through the CDA.

We do note two points—one regarding certain facts alleged in the complaint, and the second regarding a provision of the contract itself—the materiality of which will require further development and explanation in the course of the proceedings. As to the complaint, UHC states that, on at least two occasions, it was informed of the employee's non-enrollment status right up to the time that the agency made the decision, in April 2020, to retroactively enroll the employee in the benefits plan. In February 2019, OPM notified UHC of the employee's benefits termination status. Complaint ¶ 32. This notice was provided prior to UHC's approval of the heart transplant surgery for the employee's child in January 2020 and the subsequent surgery in March 2020. On February 27, 2020, prior to the surgery, the employee's agency, via CLER, instructed UHC to terminate the employee's non-pay coverage effective February 2, 2019. *Id.* ¶ 42. How this particular information, seemingly accurate at the time provided, along with the agency's uncontested decision to retroactively approve the employee's healthcare eligibility, 5 CFR 890.103(a), bear on UHC's claim based on provision of allegedly inaccurate information will presumably be addressed by the parties in further proceedings in this appeal.

We are also aware that the contract has an order of precedence clause stating:

Any inconsistency in the contract shall be resolved by giving precedence in the following descending order: The Federal Employees Health Benefits Act, the regulations in Part 890, title 5, Code of Federal Regulations, the regulations in chapters 1 and 16, title 48, Code of Federal Regulations, and this contract.

Exhibit 2 at I-2.

To the extent that there is a conflict between the contract at issue, the statute, and OPM's regulations which would be material to the Board's determination in this appeal, we are not going to resolve it on OPM's motion to dismiss. Again, we expect the parties to address the "order of precedence" provision during the merits proceedings of this appeal. Here, we limit our determination on OPM's motion to whether UHC has stated facts supporting a cognizable claim under the CDA. We find that the company has met this burden. See *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 184 (2005) ("At this stage of the proceedings, '[t]he issue is not whether [the appellant] will ultimately prevail but whether the [the appellant] is entitled to offer evidence to support the claims.'") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Decision

OPM's motion to dismiss is **DENIED**.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

I concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

GOODMAN, Board Judge, neither concurring nor dissenting.

Appellant states:

Nowhere in the Complaint does UnitedHealth challenge the Government's retroactive enrollment decision or seek an administrative remedy under the [Administrative Procedure Act].

Appellant's Response to Respondent's Motion at 3.

It is not clear to me if this statement is (1) an admission by appellant that the Government's retroactive enrollment decision was valid, or (2) an assertion that since the validity of the retroactive enrollment decision was not challenged in the complaint, the appellant believes that issue is not relevant to the resolution of this appeal. Lacking clarity

of appellant's intent as to the meaning of this statement, I neither concur in nor dissent from the majority opinion.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge