



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR RECONSIDERATION DENIED: January 25, 2024

CBCA 7357

UNITEDHEALTHCARE INSURANCE COMPANY, INC.,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Stephen J. McBrady, Charles Baek, Payal Nanavati, and Issac D. Schabes 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.

Respondent, United States Office of Personnel Management (OPM), seeks reconsideration of the Board's decision of June 21, 2023, denying OPM's motion to dismiss. *UnitedHealthcare Insurance Co. v. Office of Personnel Management*, CBCA 7357, 23-1 BCA ¶ 38,375. In this appeal, UnitedHealthcare Insurance Company, Inc. (UHC) alleges that OPM breached its contract and the duty to engage in good faith and fair dealing when OPM failed to provide UHC with accurate enrollment information, which resulted in UHC paying claims for an employee whom UHC alleges was not eligible to be enrolled in UHC's Federal Employees Health Benefits (FEHB) plan. OPM requests reconsideration on essentially the same grounds that it argued in its initial motion, specifically, that UHC's appeal is essentially one challenging a federal employee's health benefits enrollment

eligibility pursuant to the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. §§ 8901–8914 (2018), and the Board does not have jurisdiction over such matters. Because, as noted in the Board’s initial decision and reiterated herein, UHC has brought a timely-filed appeal pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101–7109, we deny OPM’s motion.

### Discussion

Decisions by the United States Court of Appeals for the Federal Circuit and this Board have established that there are three primary grounds that justify reconsideration: (1) an intervening change in the law; (2) the availability of new evidence that could not have been discovered earlier; and (3) the need to correct clear error or prevent injustice. *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (Fed. Cir. 2010); *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5698-R, 20-1 BCA ¶ 37,513, at 182,217. It is not the purpose of reconsideration to give litigants “a second bite at the apple.” *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014). As in its initial motion, OPM argues in its motion for reconsideration that UHC’s challenge is essentially one under the FEHBA, which would preclude this Board’s jurisdiction.

However, in its decision on OPM’s motion to dismiss, the Board found that this appeal fell under its jurisdiction based on UHC’s claim that OPM failed to comply with contractual obligations. *UnitedHealthcare Insurance Co.*, 23-1 BCA at 186,418-19. OPM’s motion for reconsideration does not suggest that UHC would be precluded from a remedy if this appeal was upheld on the basis UHC asserts. Instead, OPM asks the Board to ignore UHC’s clearly-stated basis for the appeal under the CDA and to interpret the appeal exclusively as an FEHBA challenge. In support, OPM argues that the title of UHC’s certified claim to OPM – Medical Expenses for an Individual Ineligible for Federal Employee Health Insurance Benefits Program Coverage – makes clear that UHC’s challenge is to OPM’s eligibility determination. In making this assertion, OPM ignores the opening paragraph of UHC’s certified claim, which makes clear exactly what UHC is challenging. UHC states in its opening paragraph:

UnitedHealthcare Insurance Company, Inc. (“UnitedHealth” or the “Carrier”) submits this certified claim (“Claim”) under Contract No. CS 2945 (rate code LV) (the “Contract”) with the United States Office of Personnel Management (“OPM” or the “Government”) for community-rated health maintenance organization carriers for the Federal Employees Health Benefits (“FEHB”) program under 5 U.S.C. Chapter 89. This Claim is submitted pursuant to the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, and the Disputes clause of the Contract, [Federal Acquisition Regulation] 52.233-1. As described in greater detail below, the Government failed to perform its contractual and regulatory

duties to provide UnitedHealth with accurate enrollment information, which caused UnitedHealth to pay claims for healthcare services provided to the dependent child of an individual who was not eligible to be enrolled in an FEHB plan. As a result of the Government's failure to perform its contractual duty, UnitedHealth incurred \$3,838,510.70 in claim payments paid in error, and the Government is liable for the damages.

Appeal File, Exhibit 13 (Certified Claim) at 1; *see id.* at 10-11.

In its complaint before the Board, UHC made allegations similar to those in its certified claim. Complaint ¶¶ 1-2, 57-65. OPM would have the Board infer an alternative intent to UHC's complaint (that it is an FEHBA matter) and ignore what UHC's certified claim and complaint in this appeal state (that it is a CDA matter based on OPM's alleged failure to maintain accurate information as required by the parties' contract).

In its motion for reconsideration, OPM also argues that if UHC is not contesting the Government's enrollment determination in this appeal, then UHC's claims before the Board of breach of contract and the duty of good faith and fair dealing are fundamentally different from the claim presented to the contracting officer and should be dismissed for lack of jurisdiction. However, notwithstanding UHC's assertion in both its certified claim and this appeal that OPM's enrollment eligibility determination was factually wrong, UHC ties any remedy to which it might be entitled to OPM's alleged failure to perform its contractual duties to maintain accurate enrollment information, rather than to OPM's determination that the employee at issue was eligible for healthcare benefits. UHC could feasibly prove the former without asking the Board to disturb the latter.

OPM also asserts that the relief sought by UHC – reimbursement of the employee health benefit amount paid by UHC – shows that UHC is really challenging OPM's eligibility determination for the employee at issue. Specifically, according to OPM, UHC cannot recover unless there is a determination that the eligibility determination at issue here was incorrect. That is not the case. UHC's complaint is based on breach of contract and breach of the duty of good faith and fair dealing. To recover for the former, UHC "must allege and establish (1) a valid contract between [it and OPM], (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *TAS Group, Inc. v. Department of Justice*, CBCA 52, 08-1 BCA ¶ 33,866, at 167,618 (quoting *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989)). As for the latter, the duty "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (emphasis omitted) (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)).

Here, we look at whether UHC is entitled to the amount sought or any amount based on factual findings related to OPM's alleged failure to perform its contractual duties as alleged in UHC's complaint, not OPM's actions under the FEHBA.

In order for OPM to have prevailed on its motion for reconsideration, it was required to identify some new evidence or clear error that would have some material bearing on the matters already considered in the Board's decision on OPM's motion to dismiss. OPM failed to do so, instead repeating the very same arguments presented in its initial motion to dismiss. As already indicated, this is not a basis for reconsideration.

Decision

OPM's motion for reconsideration is **DENIED**.

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

We concur:

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge

*H. Chuck Kullberg*

H. CHUCK KULLBERG

Board Judge