UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 21, 2025

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.

Emily Warner, Nicole M. Lohr, Matthew J. Ruane, and Beth M. Stratton, Office of the General Counsel, Office of Personnel Management, Washington, DC, counsel for Respondent.

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

VOLK, Board Judge.

Appellant, UnitedHealthcare Insurance Company, Inc. (UnitedHealth), contracts with respondent, the Office of Personnel Management (OPM), to offer health insurance plans to federal employees through the Federal Employees Health Benefits (FEHB) program. In 2020, UnitedHealth paid claims totaling $3,838,510.70 for a heart transplant procedure for the dependent son of a federal employee who had enrolled in a UnitedHealth FEHB plan. After the procedure, but before paying the claims, UnitedHealth processed a retroactive disenrollment of the employee from its insurance plan. The Government then retroactively reenrolled the employee, and UnitedHealth paid the claims.

UnitedHealth seeks to recover the $3,838,510.70 that it paid for the procedure, claiming that OPM breached the parties' FEHB contract. UnitedHealth originally asserted that the retroactive reenrollment was improper, but it is no longer pursuing that theory. Instead, it now argues that the Government breached the contract by providing erroneous information regarding the employee's FEHB eligibility status in 2019, the year before the procedure. Although the parties agree that the employee would have been eligible to enroll in UnitedHealth's plan for 2020, the year during which the transplant procedure occurred, UnitedHealth avers that, absent the Government's error in 2019, it would have disenrolled the employee sooner and there is a "reasonable possibility" that the employee subsequently would have selected a different insurance plan.

The parties have cross-moved for summary judgment. We grant OPM's motion.

Background

I. Enrollment in UnitedHealth's Plan

In 2015, OPM and UnitedHealth entered into contract no. CS 2945. Under that contract, including modifications thereto, UnitedHealth offered its "Choice Plus Advanced" health insurance plan to federal employees under the FEHB program at all times relevant to this appeal. An Internal Revenue Service (IRS) employee, whom the parties refer to as "CM," enrolled her family in that plan during the open season preceding the 2019 plan year. At that time, she was on leave without pay (LWOP).

By February 2, 2019, CM had been on leave without pay from the IRS for 365 days. By regulation, an employee who has been on leave without pay for 365 days becomes ineligible for FEHB coverage. 5 CFR 890.303(e) (2019). On February 6, 2019, the IRS executed a Standard Form 2810 (SF-2810), Notice of Change in Health Benefits Enrollment, indicating that CM's enrollment was to terminate effective February 2, 2019. UnitedHealth received the information contained in this SF-2810 via a weekly electronic transmission from OPM on February 10, 2019. Complaint ¶ 32; Oral Argument Transcript at 8. OPM asserts that UnitedHealth was required to disenroll CM from its plan upon receiving this information. Respondent's Motion for Summary Judgment at 9; *see also* Complaint ¶ 17 ("The SF-2810 form serves as a notice that the carrier should process the termination of an enrollee.").

UnitedHealth did not disenroll CM from its plan, or take any other immediate action, upon receiving the SF-2810 in February 2019. Consequently, a discrepancy began appearing in quarterly reconciliation reports produced by an FEHB electronic system known as the Centralized Enrollment Reconciliation Clearinghouse System (CLER). FEHB carriers,

including UnitedHealth, submit their enrollment information in CLER each quarter. If the carrier's enrollment information does not match that of the Government's payroll office[1] for an enrollee, CLER generates an error code for that enrollee in its quarterly report. For CM, a March 4, 2019, quarterly CLER report generated the following discrepancy: "160 - Enrollee on Carrier Record But No Payroll Office Record Found." Exhibit 51a.[2]

CLER includes fields in which both the Government's payroll office and the insurance carrier can enter narrative comments. On April 24, 2019, a UnitedHealth representative wrote in the "Carrier Comments" field for CM's record: "Please confirm enrollment or provide a termination date." Exhibit 51a. There was no immediate response from the IRS's payroll office.

On June 3, 2019, the next quarterly CLER report continued to report the same error code for CM, indicating that CM was enrolled according to UnitedHealth's data but not according to the payroll office's data. Later that month, on June 27, 2019, a government representative wrote in the "Payroll Office Comments" field of CLER: "Employee is on LWOP/Non-Pay and the insurance coverage continues. The premiums have been billed for all pay periods." Exhibit 51a. OPM concedes that the payroll office's June 27, 2019, statement that "insurance coverage continues" was erroneous. Oral Argument Transcript at 31-32.

On July 30, 2019, a UnitedHealth representative wrote in CLER's carrier comments section: "According to payroll contact, member is on LWOP and is paying premiums. Please update CLER records." Exhibit 51a. However, earlier that month, on July 8, 2019, CM had returned to pay status with the IRS.

When an employee returns to pay status after losing FEHB coverage due to being on LWOP for 365 days, the employee has sixty days to enroll in an FEHB plan or make an enrollment change. 5 CFR 890.301(h)(1). CM, having never been disenrolled from UnitedHealth's plan,[3] did not make any FEHB enrollment election or change during the sixty-day period following her July 8, 2019, return to duty. However, on July 15, 2019,

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[1] The Department of Agriculture's National Finance Center serves as the IRS's payroll office.

[2] All exhibits are found in the appeal file, unless otherwise noted.

[3] "UnitedHealth had not terminated CM's enrollment and she remained enrolled in its health plan when she returned to duty status." Appellant's Response to Respondent's Statement of Facts ¶ 52 .

within a week of her return to duty, CM called UnitedHealth's customer service department to verify coverage for herself and her children. Exhibit 6c. Over the following months, CM made several more calls to UnitedHealth's customer service department, during which "the issue of her insurance coverage was not raised." Respondent's Response to Appellant's Statement of Facts ¶ 35; Exhibit 6c.

Meanwhile, the quarterly CLER discrepancy reports generated on September 4, 2019, and December 2, 2019, continued to produce the same "160" error code described above. Exhibit 51a. UnitedHealth and the IRS's payroll office had access to this information, but CM did not.

The annual FEHB open season ran from November 11, 2019, through December 9, 2019. During this period, all FEHB participants were allowed to make FEHB enrollment changes for the upcoming plan year. CM did not make any FEHB enrollment changes during this open season. She remained enrolled in UnitedHealth's plan.

II. Heart Transplant Procedure

On January 15, 2020, UnitedHealth became aware that CM's dependent son was a candidate for a heart transplant procedure. On January 29, 2020, UnitedHealth received a request for, and granted, prior authorization for the heart transplant procedure.

On February 27, 2020, a government representative wrote in CLER's "Payroll Office Comments" field: "Employee Terminated Coverage effective 2/02/19." Exhibit 51a. On March 3, 2020, the quarterly CLER discrepancy report again returned error code "160" for CM. *Id*.

On March 12, 2020, CM's son underwent the pre-authorized heart transplant procedure. The procedure resulted in UnitedHealth receiving medical and pharmacy claims totaling $3,838,510.70.

III. Retroactive Disenrollment and Reenrollment

On March 31, 2020, in CLER's carrier comments field, a UnitedHealth representative wrote: "Termed effective 3/5/2019." Exhibit 51a. This meant that UnitedHealth was retroactively terminating CM's enrollment in its plan, with an effective date in March of the previous year.

On April 23, 2020, a UnitedHealth representative sent an email to a representative of the IRS's payroll office. Apparently unaware that the medical procedure had already

occurred, the UnitedHealth representative stated, "Your employee [CM's] record is termed and her son is in need of a transplant. She was termed due to [CLER] and I need to determine the cause and get her reinstated." Exhibit 16 at 8.

IRS personnel contacted CM. On May 6, 2020, CM signed, and the IRS certified, a Health Benefits Election Form, SF-2809, to reenroll CM in the same UnitedHealth plan in which she had previously been enrolled. In a "Remarks" section, the SF-2809 stated that this was an open season enrollment with a retroactive effective date of January 19, 2020. Exhibit 17 at 2. UnitedHealth processed the reenrollment. On September 4, 2020, it paid $3,838,510.70 in claims for the March 12, 2020, transplant procedure.

IV. UnitedHealth's Certified Claim Letter

In October 2021, UnitedHealth submitted a certified claim letter to OPM asserting that the Government had breached the parties' FEHB contract and demanding reimbursement of the $3,838,510.70 that UnitedHealth had paid. In an October 20, 2021, transmittal email, a UnitedHealth representative stated, "This claim relates to United's position that the re-enrollment of an employee of the Internal Revenue Services in May of 2020 was improper due to such individual not being eligible for enrollment." In the claim letter, UnitedHealth alleged that the May 6, 2020, SF-2809 "reenrollment application . . . misrepresented CM's eligibility for enrollment in the Plan." Exhibit 13 at 11 ("The application included inappropriate 'event codes' that inaccurately described CM's eligibility for enrollment and a retroactive effective date."). The letter claimed that the "Government's unlawful enrollment caused UnitedHealth to pay $3,838,510.70 in claims for healthcare services provided to the dependent child of an individual who was not eligible to be enrolled in [the] Plan." *Id.*

OPM denied the claim. It asserted that the retroactive enrollment was within the Government's authority and that UnitedHealth had no basis to challenge the Government's enrollment decisions. OPM also asserted that UnitedHealth would have been "obligated to pay the benefit claim for the Employee's son's medical care in any case" because, if CM had been disenrolled, she "would have been eligible to reenroll upon returning to duty status in 2019 and during the 2019 Open Season, and likely would have taken the first opportunity to reenroll had she known that her enrollment was effectively terminated." Exhibit 1 at 10.

V. Board Proceedings

UnitedHealth timely appealed to the Board. Consistent with its October 2021 claim letter, UnitedHealth filed a complaint alleging that the Government breached its duty 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 a [FEHB] plan." Complaint ¶ 1.

OPM moved to dismiss the appeal, arguing that FEHB eligibility determinations are not reviewable under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101–7109 (2018). UnitedHealth responded by arguing that it is not challenging the Government's decision to retroactively reenroll CM in UnitedHealth's plan. We denied the motion, noting our expectation that further proceedings would address, among other things, how "the agency's uncontested decision to retroactively approve the employee's healthcare eligibility" bears on UnitedHealth's claim. *UnitedHealthcare Insurance Co.*, CBCA 7357, 23-1 BCA ¶ 38,375, at 186,419, *reconsideration denied*, 24-1 BCA ¶ 38,505.

After completing discovery, the parties cross-moved for summary judgment. In summary judgment briefing, UnitedHealth maintains that it is not contesting the retroactive reenrollment decision. *E.g.*, Appellant's Motion for Summary Judgment at 11 ("UnitedHealth maintains that it is not contesting the Government's retroactive enrollment decision." (emphasis omitted)); *see also* Oral Argument Transcript at 58-61. Instead, it argues that the Government's erroneous "coverage continues" statement in its June 2019 CLER message, along with a failure to correct that message until February 2020, constituted the breach of contract that caused UnitedHealth's claimed damages. According to UnitedHealth, if not for the Government's erroneous CLER message, UnitedHealth would have disenrolled CM from its plan before she returned to duty with IRS in July 2019, and there is a "reasonable possibility" that she would not have reenrolled in UnitedHealth's plan before the transplant procedure. Appellant's Supplemental Brief at 3 ("[T]he Government's failure to timely provide accurate enrollment information caused UnitedHealth's damages because there is a reasonable possibility CM would not have reenrolled with UnitedHealth if she had received, as she was entitled to, two opportunities to enroll [in a different FEHB plan]." (emphasis omitted)).

After oral argument on the parties' summary judgment motions, we requested that UnitedHealth review its October 2021 certified claim letter and assess whether that letter adequately described the basis for the claim that UnitedHealth is now advancing before the Board. We asked UnitedHealth to either advise the Board if it intended to submit an additional claim letter or, alternatively, explain how we should reconcile its continuing statements that it is not contesting the retroactive enrollment with statements in its claim letter asserting that its alleged damages were caused by an unlawful enrollment.

In response, UnitedHealth denies that its current arguments before the Board amount to a different claim than that set forth in the October 2021 claim letter. UnitedHealth asserts:

> The Claim provided the [contracting officer] with adequate notice of UnitedHealth's two alternative theories regarding how the Government's failure to timely provide accurate enrollment information caused Appellant's damages: (1) there is a reasonable possibility CM would have elected a different plan in 2019 (thus eliminating the need for any retroactive enrollment in 2020); and (2) the Government's retroactive enrollment decision was unlawful. In this appeal, Appellant is only pursuing its former theory of causation, not the latter.

Appellant's Supplemental Brief at 3 (internal citation and emphasis omitted).

Discussion

I. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Rule 8(f) (48 CFR 6101.8(f) (2024)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material if it might affect the outcome. *Anderson*, 477 U.S. at 248. A dispute is genuine if a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. UnitedHealth Abandoned Its Unlawful-Retroactive-Reenrollment Claim

"A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 884 (Fed. Cir. 2017) (quoting *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000)). As described above, UnitedHealth asserted in its claim letter and its complaint that OPM breached the parties' contract by unlawfully retroactively reenrolling CM. UnitedHealth then chose a position in this appeal that removed that issue from the case, abandoning its contention that OPM breached the contract through an unlawful reenrollment. *E.g.*, Appellant's Supplemental Brief at 3. Accordingly, OPM is entitled to summary judgment on UnitedHealth's claim—or the portion of its claim—asserting that OPM breached the contract through an unlawful reenrollment. *See Milo & Gabby LLC*, 693 F. App'x at 884. However, as discussed below, the parties disagree as to whether the scope of UnitedHealth's claim in this appeal is limited to its abandoned unlawful-retroactive-reenrollment theory.

III. The Parties' Disagreement Regarding the Scope of UnitedHealth's Claim

We have jurisdiction over the claim UnitedHealth presented to the contracting officer in October 2021, but the parties disagree as to the scope of that claim. OPM argues that UnitedHealth's new theory of causation—the "reasonable possibility CM would have elected a different plan in 2019" theory—amounts to a new claim that has not been presented to the contracting officer, as required by the CDA. UnitedHealth insists that its current arguments are part of the same claim that it presented in its October 2021 letter.

Before appealing to the Board under the CDA, a contractor must submit its claim to the Government's contracting officer for a decision. 41 U.S.C. §§ 7103(a)(1), 7104(a); *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). "[T]he Board may not consider 'new' claims a contractor failed to present to the contracting officer." *Lee's Ford Dock, Inc.*, 865 F.3d at 1369; *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) ("An action brought . . . under the CDA must be 'based on the same claim previously presented to and denied by the contracting officer.'"). "A claim is new when it 'present[s] a materially different factual or legal theory' of relief." *Lee's Ford Dock, Inc.*, 865 F.3d at 1369 (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)).

UnitedHealth asserts that its October 2021 claim letter presented two causation theories—the theory that it is no longer pursuing and its current "reasonable possibility" theory—or, alternatively, that its current arguments merely add factual details or legal augmentation, without creating a different claim. UnitedHealth does not identify any specific language in its claim letter articulating its current causation theory, and the text of that letter does not support its contention that the letter presented two alternative causation theories. The letter asserted that the Government's "unlawful enrollment" caused UnitedHealth's alleged damages. Exhibit 13 at 11 ("The Government's unlawful enrollment caused UnitedHealth to pay $3,838,510.70 in claims for healthcare services provided to the dependent child of an individual who was not eligible to be enrolled in [the] Plan."). No alternative causation theory was presented.

Although the claim letter did not articulate UnitedHealth's current theory of causation, the claim letter did include the factual allegations on which UnitedHealth now relies. Within a section of the letter asserting that the Government failed to perform its contractual duty to provide accurate enrollment information, UnitedHealth described both the erroneous June 2019 CLER message and the May 2020 reenrollment application. Exhibit 13 at 4, 8.

Notwithstanding the factual overlap, we are skeptical that UnitedHealth's current theory of causation is part of the same claim that it presented in its October 2021 claim letter. Regardless, in this appeal, OPM is entitled to summary judgment under either party's view as to the scope of the claim before the Board, and we decline to decide the parties' dispute regarding the scope of UnitedHealth's claim here.[4] If UnitedHealth's current theory amounts to a new claim, such that the only claim properly before the Board is the unlawful-retroactive-reenrollment theory, OPM is entitled to summary judgment on that claim because UnitedHealth abandoned it, as discussed above. Alternatively, assuming UnitedHealth's position is correct and its current arguments are part of the same claim that it presented in its October 2021 letter, OPM is still entitled to summary judgment because, as discussed below, UnitedHealth has not presented an adequate theory, or sufficient evidence, of causation to warrant a hearing.

IV. UnitedHealth's Theory and Evidence of Causation Are Inadequate

A. UnitedHealth's Burden to Establish the Non-breach World

To recover for breach of contract, UnitedHealth must prove: "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). The last element includes the requirement that UnitedHealth establish a causal connection between the alleged breach and its claimed damages. *See San Carlos Irrigation & Drainage District v. United States (San Carlos Irrigation II)*, 111 F.3d 1557, 1563 (Fed. Cir. 1997).

Causation is a question of fact. *Bluebonnet Savings Bank, F.S.B. v. United States*, 266 F.3d 1348, 1356 (Fed. Cir. 2001). Although UnitedHealth need not prove causation at this stage of the proceedings, to survive summary judgment, it must present evidence on which a reasonable factfinder could find that the alleged breach caused the claimed loss under the governing law. *See Anderson*, 477 U.S. at 255-56.

Under the governing law, as reiterated by the Court of Appeals for the Federal Circuit on several occasions, the necessary causation showing requires a comparison between the breach world—*i.e.*, the events that actually occurred—and the non-breach, or "but for," world—a hypothetical world in which there was no breach. *Community Health Choice, Inc. v. United States*, 970 F.3d 1364, 1381 (Fed. Cir. 2020) ("[O]ur cases make clear that the

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[4] Although we ordinarily resolve questions regarding our jurisdiction under the CDA first, we are not obligated to do so in every instance. *See Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012).

plaintiff seeking to recover damages must prove causation by comparing a hypothetical 'but for' world to a plaintiff's actual costs." (cleaned up)); *Oliva v. United States*, 961 F.3d 1359, 1363 (Fed. Cir. 2020); *Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330, 1349-50 (Fed. Cir. 2012); *Energy Northwest v. United States*, 641 F.3d 1300, 1305 (Fed. Cir. 2011); *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008). "It is only by comparing this hypothetical 'but-for' scenario with the parties' actual conduct that [one] can determine what costs were actually caused by the breach, as opposed to costs that would have been incurred anyway." *Energy Northwest*, 641 F.3d at 1305. The burden is on UnitedHealth to demonstrate that the non-breach world would not have included its claimed loss. *See Community Health Choice, Inc.*, 970 F.3d at 1381; *Energy Northwest*, 641 F.3d at 1305 ("[A] plaintiff seeking damages must submit a hypothetical model establishing what its costs would have been in the absence of breach.").

Causation may then be judged under a "but for" test or, in some cases, a "substantial factor" test. *See Citizens Federal Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007). Under the "but for" test, the non-breaching party "must show that but for the breach, the damages alleged would not have been suffered." *San Carlos Irrigation II*, 111 F.3d at 1563. Under the "substantial factor" test, the non-breaching party must show that "the breach was a substantial factor in causing the damages." *Citizens Federal Bank*, 474 F.3d at 1318.[5] Neither test requires that the breach be the "sole factor or sole cause" of the loss. *California Federal Bank v. United States*, 395 F.3d 1263, 1268 (Fed. Cir. 2005). Although the Federal Circuit has described the "but for" test as preferred and "more traditional," *Yankee Atomic*, 536 F.3d at 1272, it has afforded trial forums substantial discretion to select an appropriate standard. *Citizens Federal Bank*, 474 F.3d at 1318 (Fed. Cir. 2007) ("[T]he selection of an appropriate causation standard depends upon the facts of the particular case and lies largely within the trial court's discretion.").

UnitedHealth relies on the "substantial factor" test in its supplemental brief. *E.g.*, Appellant's Supplemental Brief at 3 ("Prevailing on this theory [that "there is a reasonable possibility CM would have elected a different plan in 2019"] would . . . satisfy the 'substantial factor' standard."). Previously, it presented its causation arguments under a "but

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[5] Decisions within the Federal Circuit typically state or imply that the "substantial factor" test is more lenient than the "but for" test, although decisions from other circuits may treat the "substantial factor" test as the stricter standard. *See* Daniel P. O'Gorman, *Contracts, Causation, and Clarity,* 78 U. Pitt. L. Rev. 273, 289-98 (2017). The Court of Federal Claims has stated that a "breach is a 'substantial factor' causing [a loss] if it directly and primarily caused the injuries." *American Savings Bank, F.A. v. United States*, 62 Fed. Cl. 6, 26 (2004), *aff'd*, 519 F.3d 1316 (Fed. Cir. 2008).

for" rubric. *E.g.*, Appellant's Summary Judgment Response and Reply at 14 ("[T]he result would have changed, demonstrating but-for causation between the breaches and damages.").

We need not decide which test we would ultimately apply in this appeal. A showing regarding the non-breach world is required under either test, as the Federal Circuit's decision in *Yankee Atomic* makes clear. 536 F.3d at 1273. In *Yankee Atomic*, the Federal Circuit permitted the use of a "substantial factor" test but decided that the trial court had not applied that test correctly. *Id.* The Federal Circuit determined that the trial court "erred in overlooking the [plaintiffs'] burden to prove causation," finding that the plaintiffs had not presented adequate evidence to allow the trial court to "perform the necessary comparison between the breach and non-breach worlds." *Id.* Thus, under either the "but for" test or a "substantial factor" test, demonstrating a non-breach world that does not include the loss at issue is required.

B. Lack of an Adequate Theory or Evidence of the Non-breach World

UnitedHealth has not presented an adequate theory, or sufficient evidence, of the non-breach world to warrant a hearing. To recover in this case, UnitedHealth must demonstrate that in the non-breach world it would not have paid the $3,838,510.70 in claims. That hinges on whether CM would have been enrolled in UnitedHealth's plan as of March 12, 2020, the date of the heart transplant procedure. Accordingly, the non-breach world that UnitedHealth must ultimately establish is one in which CM is not enrolled in UnitedHealth's plan on March 12, 2020.

UnitedHealth has not presented evidence that would allow a reasonable factfinder to conclude that CM would not have been enrolled in UnitedHealth's plan on March 12, 2020, in the non-breach world. In its summary judgment briefs, UnitedHealth does not assert that it can, or even plans to, make that showing. In its most recent brief, UnitedHealth indicates that its causation theory is that "there is a reasonable possibility CM would not have reenrolled with UnitedHealth" if she had been disenrolled earlier. Appellant's Supplemental Brief at 3 (emphasis omitted). A "reasonable possibility" will not suffice. *See Myerle v. United States*, 33 Ct. Cl. 1, 27 (1897) ("[T]he cause must produce the effect inevitably and naturally, not possibly nor even probably."); *see also California Federal Bank*, 395 F.3d at 1268 ("[T]he causal connection . . . must be 'definitely established.'"). Although the standard is only a preponderance of the evidence, *see California Federal Bank*, 395 F.3d at 1268, it is nonetheless incumbent on UnitedHealth to prove that CM would not have been enrolled in its plan on March 12, 2020, absent the alleged breach, not merely to establish the existence of that possibility.

UnitedHealth asserts that, absent the alleged breach, it would have disenrolled CM from its plan earlier, apparently before she returned to duty with the IRS in July 2019.[6] After such a disenrollment, UnitedHealth explains, various things might have happened next. Appellant's Summary Judgment Response and Reply at 14. One possibility is that CM might have found other health insurance, outside of the FEHB Program. But another possibility, as UnitedHealth acknowledges, is that she could have subsequently reenrolled in an FEHB plan, including the same UnitedHealth plan that she had previously selected. UnitedHealth does not argue that one possibility is more likely than another. *See, e.g.*, *id.* at 15 ("In each of the above scenarios, CM would have had the opportunity to enroll in a health care plan under the FEHB, the Affordable Care Act, or any number of other methods for obtaining health care coverage (*e.g.*, through a spouse's employment). The Government's contract breach precluded those opportunities."). The distinction between a scenario in which CM finds other insurance, versus a scenario in which she reenrolls in the same UnitedHealth plan, is critical to UnitedHealth's case, given that there are admittedly no damages under the latter scenario. Oral Argument Transcript at 22.

At oral argument, UnitedHealth conceded that it has not presented evidence that CM would not have reenrolled in UnitedHealth's plan after a hypothetical pre-procedure disenrollment:

> Board Judge: [I]n the . . . non-breach hypothetical world . . . what is UnitedHealthcare's position as far as what that world looks like? Does it just end with she would have been disenrolled in 2019, and then any number of things could have happened? Or does UnitedHealthcare have evidence on which it could go further and say what more likely than not would have happened after the disenrollment?
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> Appellant's Counsel: So, Your Honor, it's a good question. And I certainly standing here don't have insight into the mind of CM and what she would or wouldn't have done. But we, neither party I think has put forth evidence in this appeal that would provide

[6] UnitedHealth does not specify exactly when the disenrollment would have occurred in the non-breach world, but its arguments indicate that the disenrollment would have occurred before CM's July 2019 return to duty. *E.g.*, Appellant's Supplemental Brief at 3-4 (asserting that, if not for the alleged breach, CM could have made an FEHB election upon returning to duty on July 8, 2019).

> evidence [of] what she would have done in this hypothetical scenario.

Oral Argument Transcript at 24 (cleaned up).

OPM disagrees with the assertion that neither party presented evidence of what CM would have done in the non-breach world. *Id.* at 39-40. Indeed, there is considerable evidence that CM wished to be enrolled in UnitedHealth's plan, suggesting that an earlier disenrollment would have led to a reenrollment in the same plan. OPM's strongest evidence in this regard is that CM took no action during the open season in late 2019, when all FEHB participants had an opportunity to change insurance plans. At that time, CM remained enrolled in UnitedHealth's plan, so her decision not to make any enrollment change was indicative of a desire to remain enrolled in UnitedHealth's plan for the 2020 plan year.[7] Other evidence also supports OPM's position. For instance, when CM returned to duty with the IRS in July 2019, although she made no FEHB enrollment election or change, she called UnitedHealth's customer service department to verify coverage for herself and her family. Exhibit 6c.

When asked at oral argument about OPM's proffered evidence that CM wished to be enrolled in UnitedHealth's plan, UnitedHealth again acknowledged that it has not presented any evidence to the contrary:

> Board Judge: [OPM] asserted, with some support in the record, that there is evidence here that CM desired this United Healthcare insurance plan . . . [and] that she didn't do anything during open season, among maybe some other things, is evidence that what would have happened in . . . the hypothetical non-breach world is . . . she would have reenrolled before the transplant procedure.

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[7] Even if one imagines a non-breach world in which the disenrollment occurred after the end of the late-2019 open season, it does not necessarily follow that CM would have been forced to forgo FEHB coverage for the 2020 plan year. *See* 5 CFR 890.301(c) (2019) ("Belated enrollment. When an employing office determines that an employee was unable, for cause beyond his or her control, to enroll or change the enrollment within the time limits prescribed by this section, the employee may enroll or change the enrollment within 60 days after the employing office advises the employee of its determination."); *see also id.* 890.301(f)(5); Appellant's Response to Respondent's Statement of Facts ¶ 31.

[I]s there evidence to the contrary?

Appellant's Counsel: So . . . we haven't put forth evidence to the contrary. But I think the assumption that the Government's making is unsupported. . . . [T]he reason that CM maintained status quo is because she was never notified. . . . Had she been notified we don't know what she would have done.

Oral Argument Transcript at 63-65 (cleaned up).[8]

It is not OPM's burden to prove that CM would have reenrolled in UnitedHealth's plan. Rather, as discussed above, for UnitedHealth to meet its burden to establish a non-breach world that does not include its claimed loss, UnitedHealth must establish that CM would not have been enrolled in its plan on March 12, 2020, absent the breach. UnitedHealth has not presented any evidence that could support such a showing.[9]

In weighing OPM's summary judgment motion, we are mindful that the "evidence of [UnitedHealth] is to be believed, and all justifiable inferences are to be drawn in [UnitedHealth's] favor." *Anderson*, 477 U.S. at 255. In this appeal, however, UnitedHealth has offered no evidence to support its theory that UnitedHealth would have avoided the payments at issue as a result of CM selecting a different insurance plan, and no such inference would be justified on the record presented by the parties. OPM is, therefore, entitled to summary judgment. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984) ("A non-movant runs the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim."). Because UnitedHealth has not presented evidence on which a reasonable factfinder could conclude that UnitedHealth would not have incurred the costs at issue in the non-breach world, we grant summary judgment for OPM.

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[8] UnitedHealth elected not to seek testimony or other evidence directly from CM during discovery. *See* Oral Argument Transcript at 24-25.

[9] Even if the burden were not on UnitedHealth, OPM would still prevail on summary judgment in these circumstances. OPM has identified sufficient evidence to support its position, while UnitedHealth has identified no evidence to the contrary. Thus, there is no "evidentiary conflict on the record" to resolve through a hearing. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (1987) ("[T]he party opposing summary judgment must show an evidentiary conflict on the record.").

Decision

OPM's motion for summary judgment is granted. UnitedHealth's motion for summary judgment is denied. The appeal is **DENIED**.

Daniel B. Volk
DANIEL B. VOLK
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge