

18 December 2023

REF: SHA/26089

**APPEAL AGAINST NHS ENGLAND DECISION TO
RECOVER AN OVERPAYMENT FROM ALPHA
PHARMACY ("THE APPELLANT")**

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Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

1 Outcome:

- 1.1 I have had regard to the Payment Disputes Directions which provide me with three options:
 - 1.1.1 dismiss the appeal and confirm the decision of NHS England; or
 - 1.1.2 substitute for the decision any decision that NHS England could have taken when it took the decision; or
 - 1.1.3 quash the decision, with or without remitting the matter to NHS England for it to take the decision again subject to directions as NHS Resolution considers appropriate.
- 1.2 I dismiss the appeal and confirm the decision of NHS England to recover the overpayment of £5,969.18.
- 1.3 I note that neither party has submitted a claim for interest with regard to this dispute so I determine that no interest is payable on the sums to be paid from one party to another.

A copy of this decision is being sent to:

Alpha Pharmacy
NHS BSA on behalf of NHS England

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our privacy statement at <https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/>



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1 INTRODUCTION

- 1.1 The Appellant appealed the decision of NHS England to recover an overpayment relating to the New Medicine Service as part of the Pharmacy Quality Scheme.
- 1.2 The Secretary of State for Health and Social Care, pursuant to the National Health Service Litigation Authority (Pharmaceutical Remuneration – Payment Disputes) (England) Directions 2022 (the “Payment Disputes Directions”), has directed that NHS Resolution determines this type of appeal on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 DECISION

NHS Business Services Authority (“NHS BSA”), acting on behalf of NHS England, sent a decision to the Appellant on 21 September 2023 in respect of Alpha Pharmacy (ODS code FDL55). The decision stated:

- 2.1 “The Pharmacy Provider Assurance Team (PAT), part of the NHS Business Services Authority (NHSBSA), have been undertaking a Post Payment Verification (PPV) exercise on the Pharmacy Quality Scheme (PQS) 2022,2023. We have contacted you previously, as part of this exercise, as your pharmacy has been identified as not submitting the minimum requirement of 20 NMS between 1 April 2022 and 5 April 2023.
- 2.2 **To date, your pharmacy has not provided evidence to demonstrate that 20 NMS claims were submitted by FDL55 in the required timeframe to be eligible to claim for a PQS payment.**
- 2.3 Attached is a timeline of correspondence with your pharmacy to date which was passed to the NHS England local Pharmaceutical Services Regulatory Committee (PSRC) to consider whether further action was necessary.
- 2.4 The NHS England Pharmaceutical Services Regulatory Committee has now reviewed this information and noted that:
 - 2.4.1 FDL55- Alpha Pharmacy - submitted the PQS Declaration 22/23 intending to submit **20** NMS Claims, however, submitted **18** NMS claims.

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- 2.4.2 Alpha Pharmacy- was contacted on 5 separate occasions by the NHSBSA Provider Assurance Team to request evidence to substantiate the claim or agree to the recovery but did not receive a response or sufficient evidence.
- 2.5 **Having reviewed the information provided by the NHSBSA PAT, the NHS England Pharmaceutical Services Regulatory Committee has decided that an overpayment in relation to your PQS Declaration Payment 22/23 has occurred and has instructed recovery of this overpayment to be progressed in accordance with Regulation 94 (1) (a) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.**
- 2.6 The below table outlines the recovery amount.

ODS code	Recovery amount
FDL55	£5,969.18

Action Required

- 2.7 Please respond to this correspondence at **Pharmacysupport@nhsbsa.nhs.uk** to confirm your agreement for the overpayment to be recovered pursuant to Regulation 94(1) (a) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. **Please send this confirmation by 21st October 2023.** Where you agree an overpayment has been made the amount over paid will be recovered by deduction from a future NHSBSA payment to you.
- 2.8 Once the NHSBSA has received confirmation to recover the overpayment you will be notified of when this will take place. A record of this process will be kept on your NHS England contractor file.
- 2.9 **Please be aware that failing to contact us by 21st October 2023 to agree that there has been an overpayment DOES NOT mean that the overpayment cannot be recovered.** Instead, where you do not agree that an overpayment has been made you have a right of appeal to the Secretary of State against NHS England's decision. Should you choose to appeal then send a concise and reasoned statement of the grounds for your appeal **within 30 days of the date of this letter** to nhsr.appeals@nhs.net or NHS Resolution, Primary Care Appeals, 10 South Colonnade, Canary Wharf, London, E14 4PU
- 2.10 If there is no appeal within 30 days from the date of this letter, NHS England has requested that the NHSBSA Provider Assurance Team commence overpayment recoveries under Regulation 94(1) (b) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, on the basis that the final outcome of our investigation is that there has been an overpayment. The NHSBSA will notify you of when the overpayment recovery will take place.
- 2.11 A record of this process will be kept on your NHS England contractor file.
- 2.12 For more information or for clarification of any of the details in the letter, please contact by email at **pharmacysupport@nhsbsa.nhs.uk**
- 2.13 If you would prefer to speak to us via telephone/Microsoft Teams, please email **pharmacysupport@nhsbsa.nhs.uk** to provide your contact details and a member of the team will get in touch as soon as possible.
- 2.14 Your co-operation is very much appreciated."

3 THE DISPUTE

In an email dated 5 October 2023 addressed to NHS Resolution, the Appellant appealed against NHS England's decision. The grounds of appeal are:

- 3.1 "I would like to appeal the Post Payment Verification (PPV) exercise on the Pharmacy Quality Scheme (PQS) 2022,2023.I had made a genuine error in forgetting to submit an NMS claim for the month of May 2022 - I should have submitted a claim for 3 NMS for this month which would have meant I would have met the 20 NMS claims that I needed in order to receive this payment. This was a genuine human error on my part as I was dealing with [redacted] which meant I had other things on our mind - I did not even realise that this had been missed out until I received this repayment email, and was too late to submit a reclaim for the month of May 2022. I did try to explain this to the NHSBSA but they were adamant there was nothing they can do as they have to adhere to the guidelines. I have been a pharmacist for over 40 years and this is the first time I have made a genuine error on my part. I hope you can understand my situation and consider overriding this repayment."

4 SUMMARY OF REPRESENTATIONS

This is a summary of representations received on the appeal.

- 4.1 The NHS BSA stated:

- 4.1.1 "Thank you for your letter dated 12 October 2023 and the opportunity to provide representations on the appeal.

Background

- 4.1.2 The Pharmacy Quality Scheme (PQS) forms part of the Community Pharmacy Contractual Framework (CPCF). It supports delivery of the NHS Long Term Plan and rewards community pharmacy contractors that deliver quality criteria in three quality dimensions: clinical effectiveness, patient safety, and patient experience.
- 4.1.3 Contractors participating in the PQS 2022/2023 were required to declare their performance against five quality domains on a day of their choosing during the declaration window; to be completed via the NHSBSA Manage Your Service (MYS) Portal. The declaration window was open between 09:00 on 6 February 2023 and closed at 23:59 on 3 March 2023. Due to the late start of the PQS in Year 4 of the 5-year CPCF, contractors had until the end of 31 March 2023 to complete some elements of the PQS. Where this was the case, they were asked to declare that the requirements of the criterion would be met by the end of 31 March 2023.
- 4.1.4 On the day of declaration, pharmacy contractors needed to have met all of the following gateway criteria:
- 4.1.4.1 Advanced Services - New Medicine Service (NMS)
- 4.1.4.2 Patient Safety report
- 4.1.5 To be eligible to take part in the PQS, and therefore eligible for a PQS payment, when the scheme was launched for 2022/23, pharmacy contractors must have achieved the gateway criteria by the end of 31 March 2023. Please see page 7, section 2.1.3 of the Pharmacy Quality Scheme guidance, where it states:
- 4.1.6 *"Only contractors who have completed 20 NMS between 1 April 2022 and end of 31 March 2023, i.e., NMS completed before the end of the financial year and have claimed for these by 5 April 2023 will be eligible for a PQS payment.*

- 4.1.7 *Any claims for NMS submitted to the NHSBSA after 5 April 2023 will not be considered for the PQS gateway”.*
- 4.1.8 The aim of the Advanced Services – New Medicine Service (NMS) gateway criterion is to ensure that all pharmacies taking part in the scheme meet all the terms of service requirements and are choosing to actively provide clinical support to patients by providing NMS.
- 4.1.9 For the PQS 2022/23, only contractors who submitted claims for payment for 20 completed NMS to the NHSBSA were eligible for a PQS payment. This was to ensure that only contractors that actively provided the service to patients were eligible to take part in the PQS. Claims for payment are submitted by contractors via digital submission made via MYS. Pharmacy contractors were advised to regularly check the NMS payment claims that they had submitted in the lead-up to 5 April 2023 deadline to ensure that they had delivered and claimed for the 20 completed NMS by 5 April 2023 to meet this gateway requirement. Any pharmacies that failed to claim payment for 20 NMS by 5 April 2023 did not meet this gateway requirement. The NMS submission data was freely available on the NHSBSA’s website to support contractors with their PQS submissions.

Post Payment Verification

- 4.1.10 The NHSBSA Pharmaceutical Provider Assurance Team (PAT), on behalf of NHS England, were requested to conduct a Post Payment Verification (PPV) exercise to ensure that pharmacy contractors had claimed correctly for the 2022/23 PQS.
- 4.1.11 Once the deadline of 5 April 2023 for all NMS payment claims to be submitted had passed, the PAT identified all the contractors that had claimed for PQS where the records held by the NHSBSA suggested that they had not submitted the minimum requirement of 20 NMS claims. Communications were sent via email to these contractors detailing that NHSBSA records indicated that the contractors had failed to submit the minimum number of NMS claims to meet the gateway requirements. The emails also provided them with the opportunity to either send evidence that they had met the NMS gateway criterion by submitting their NMS claims before 5 April 2023, or agree to the recovery of their PQS payment as they had not met the gateway criterion.
- 4.1.12 Where a contractor did not send evidence to demonstrate that the minimum 20 NMS claims were submitted or did not agree to the outlined recovery, they were referred to the Pharmaceutical Services Regulation Committee (PSRC) for review. Contractors who did not respond to any of the PAT’s requests via email or telephone were also escalated to the PSRC for review.
- 4.1.13 Alpha Pharmacy (FDL55) was contacted via email to the premises-specific shared NHSmail account (pharmacy.fdl55@nhs.net) of the pharmacy on four occasions to request evidence that the NMS gateway criterion was met. NHS England have directed the PAT to use premises-specific shared NHSmail address for all communication to contractors as there is a regulatory requirement for contractors to ensure that they have such an address and are able to access it - The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 Schedule 4 paragraph 23C. NHS England guidance reminds staff of the need to regularly check the premises specific NHSmail account and respond accordingly to emails that have been received. Please see the guidance at <https://www.england.nhs.uk/wp-content/uploads/2020/12/B0274-guidance-on-thenhscharges-pharmaceutical-and-local-pharmaceutical-services-regulations-2020.pdf> chapter 12.2 pages 58-60.

- 4.1.14 An email reply was received from Alpha Pharmacy on July 31 2023. The pharmacy stated, *"According to our records 21 nms have been completed between this period- we may have forgotten to claim in May 2022 for 3 NMS"*. A PDF copy of the pharmacy's NMS Quarterly Submission report, dated 28 July 2023, was also attached. The provided evidence (Figure 1, below) illustrates how many NMS the pharmacy completed between 1 April 2022 and 5 April 2023. However, the report does not provide evidence that the completed NMS were then submitted for payment within the required timeframe.
- 4.1.15 The Appellant states in their email that 3 NMS should have been submitted in May 2022, however, the pharmacy did not submit the payment claims for these NMS.
- 4.1.16 Page 7 of the PQS 22/23 guidance states *"Only contractors who have completed 20 NMS between 1 April 2022 and end of 31 March 2023, i.e., NMS completed before the end of the financial year and have claimed for these by 5 April 2023 will be eligible for a PQS payment."*
- 4.1.17 The guidance goes on to state *"Any claims for NMS submitted to the NHSBSA after 5 April 2023 will not be considered for the PQS gateway."* The evidence provided, therefore, does not support that the completed NMS were submitted for payment before 5 April 2023, as required.
- 4.1.18 [Figure 1 provided]
- 4.1.19 An email was therefore sent to pharmacy.fdl55@nhs.net on 31 July 2023 to advise that the evidence provided did not support that the claims were submitted for payment within the required time period.
- 4.1.20 Alpha Pharmacy responded on 7 August 2023 to confirm their records show 21 NMS were completed between 1 April 2022 and 31 March 2023. An additional report (Figure 2, below), which was submitted on 7 August 2023, was also attached to the email.
- 4.1.21 [Figure 2 provided]
- 4.1.22 Again, the additional evidence provided does not show that the completed NMS were then submitted for payment via MYS between 1 April 2022 and 5 April 2023.
- 4.1.23 It should be noted that it is the contractor's responsibility to submit their NMS claims for payment to the NHS Business Services Authority, and not just record the number of NMS completed on their internal system.
- 4.1.24 The PAT has not been asked by NHS England to verify the internal records of NMS completion recorded by Alpha Pharmacy, or other contractors, only to verify that a minimum of 20 NMS have been claimed for payment by the contractor between 1 April 2022 and 5 April 2023. The evidence provided by the Appellant is not disputed, the PAT accepts that these are internal records of NMS activity, however, the reports do not evidence that the completed NMS were then submitted for payment, as required.
- 4.1.25 This was reiterated in an email sent to Alpha Pharmacy on 8 August 2023. In addition to this, the NHSBSA provided a copy of the MYS submitted claim data (Figure 3, below) for Alpha Pharmacy between 1 April 2022 and 5 April 2023. This supports the NHSBSA's findings that Alpha Pharmacy only submitted 18 NMS within the required time period, not the minimum requirement of 20 NMS. It also aligns with the pharmacy's statement that they did not submit claims for 3 NMS in May 2022, as mentioned in their initial email.

4.1.26 [Figure 3 provided]

4.1.27 A final email was sent to pharmacy.fdl55@nhs.net on 22 August 2023 requesting that the pharmacy provide evidence to show the minimum requirement of 20 NMS were submitted for payment between 1 April 2022 and 5 April 2023, or agree to the recovery of the overpayment by 6 September 2023. The email also advised, if no further evidence was provided by this date and no agreement was made, a timeline of the correspondence with Alpha Pharmacy would be provided to the PSRC with the recommendation that an overpayment had been received and the overpayment should be recovered pursuant to Regulation 94(1)(a).

4.1.28 Alpha Pharmacy were unable to provide any further evidence to substantiate their claims before 6 September 2023 deadline, nor did they confirm agreement for a recovery. Therefore, the details of the case were passed to the PSRC to review. A decision was sought as to whether the pharmacy had provided sufficient evidence to determine the minimum requirement of 20 NMS were submitted for payment between 1 April 2022 and 5 April 2023 by Alpha Pharmacy.

Pharmaceutical Services Regulation Committee (PSRC) Decision

4.1.29 The case of Alpha Pharmacy was escalated to PSRC for review on 19 September 2023 as no evidence to demonstrate the pharmacy had met the minimum NMS Gateway requirement, or agreement to recovery, had been received by the 6 September 2023 deadline. A timeline of correspondence showing all contact the PAT had with the pharmacy was also provided to the PSRC for review. This timeline has been provided to you in addition to this representation.

4.1.30 This timeline clearly illustrates that Alpha Pharmacy did not provide evidence to demonstrate it had submitted for payment the claims for 20 NMS within the required dates or agreed to a recovery of the overpayment made regarding the PQS 22/23. This was despite repeated requests made by the PAT to the contractor to provide such evidence to show the NMS had been submitted for payment.

4.1.31 The PSRC determined that the pharmacy was not entitled to the PQS 2022/23 payment it had received.

4.1.32 Having made this decision, the PSRC then ruled that, as Alpha Pharmacy was not entitled to the payment, the overpayment should be reclaimed pursuant to Regulation 94 (1) (a) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

4.1.33 In making this decision, the PSRC relied on the information that the PAT provided following its extensive investigation and the repeated requests to the contractor for evidence to support that they did complete and submit claims for payment for 20 NMS between 1 April 2022 and 5 April 2023 and meet the requirements set out in the guidance.

In Response to the contractor's appeal

4.1.34 The appellant states:

4.1.35 *"I had made a genuine error in forgetting to submit an NMS claim for the month of May 2022- I should have submitted a claim for 3 NMS for this month which would have meant I would have met the 20 NMS claims that I needed in order to receive this payment."*

- 4.1.36 From the evidence provided by Alpha Pharmacy and their above statement, it is clear that the pharmacy did not submit the claims for 3 completed NMS in the month of May 2022.
- 4.1.37 Therefore, it had only submitted a total of 18 NMS between the required time of 1 April 2022 and 5 April 2023.
- 4.1.38 As Alpha Pharmacy did not achieve the minimum requirement for the PQS 22/23 NMS gateway criterion, they were not entitled to receive a PQS 2022/23 payment and have therefore received an overpayment which is required to be reclaimed pursuant to Regulation 94 (1) (a) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 4.1.39 The appellant goes on to state *“This was a genuine human error on my part as I was dealing with [redacted] which meant I had other things on our mind- I did not even realise that this had been missed out until I received this repayment email and was too late to submit a reclaim for the month of May 2022. I did try to explain this to the NHSBSA but they were adamant there was nothing they can do as they have to adhere to the guidelines. I have been a pharmacist for over 40 years, and this is the first time I have made a genuine error on my part. I hope you can understand my situation and consider overriding this repayment.”*
- 4.1.40 Although the NHSBSA PAT are sympathetic to the Appellant's circumstances, to remain fair and consistent with the PQS Guidance, the PAT cannot consider any NMS claims submitted for payment after 5 April 2023 from Alpha Pharmacy, or any other contractor. Claims for payment are submitted by contractors via digital submission made via MYS. Figure 3, above, shows the MYS data for NMS claims made by Alpha Pharmacy between the 1 April 2022 and 5 April 2023. This data confirms that the pharmacy had only submitted 18 NMS for payment before 5 April 2023, and the 3 claims they intended to claim for in May 2022, were not submitted.
- 4.1.41 Page 8 of the PQS 22/23 Guidance states *“Contractors are therefore advised to regularly check the NMS that have been undertaken, and the associated payment claims that they have submitted in the lead up to the 5 April 2023 deadline to ensure that they have delivered and claimed for the 20 NMS by 5 April 2023 to meet this gateway requirement for PQS. Any pharmacies that fail to have claimed for 20 NMS by 5 April 2023 will not have met this gateway requirement.”* As previously stated, the NMS submission data was freely available on the NHSBSA's website to support contractors with their PQS submissions. Therefore, Alpha Pharmacy had ample opportunities to check their total NMS claims for the period to ensure the criterion was met before the deadline.
- 4.1.42 PSRC ruled that Alpha Pharmacy was not entitled to the payment and that the overpayment should be reclaimed pursuant to Regulation 94 (1) (a) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. The PSRC decision letter was sent to Alpha Pharmacy on 21 September 2023.
- 4.1.43 The Appellant has not provided any evidence to suggest that the required 20 claims for NMS were submitted for payment nor provided any evidence to suggest that the decision taken by the PSRC that the contractor did not meet the gateway requirements of the PQS as set out in the Drug Tariff was incorrect.
- 4.1.44 NHS England maintains that Alpha Pharmacy was therefore not compliant with the PQS service specification by not fulfilling the requirement set out by NHS

England in the Drug Tariff determination to claim a minimum of 20 NMS between 1 April 2022 and 5 April 2023.

- 4.1.45 NHS England and the NHS Business Services Authority understand it has been a difficult time for the pharmacy sector and are appreciative of the work that pharmacies have undertaken to support their patients. However, to remain fair and consistent to those contractors that met the requirements of the PQS, and to those that have agreed to recovery because they also did not submit payment claims for 20 NMS within the required dates, NHS England and the NHS Business Services Authority request that NHS Resolution reject the appeal made by Alpha Pharmacy and approve the decision of the PSRC.

Key points for consideration

- 4.1.46 NHS England respectfully asks that NHS Resolution consider the following key points when making its determination on the appeal:

4.1.46.1 The Pharmacy Quality Scheme service specification is very clear that only those contractors that submitted payment claims for 20 NMS between 1 April 2022 – 5 April 2023 were eligible for a PQS payment.

4.1.46.2 NHS England, PSNC and the NHSBSA published multiple announcements regarding the required criterion. Every month prior to 5 April 2023, the NHSBSA published data enabling a pharmacy to see how many NMS they had currently submitted claims for. The contractor therefore had the opportunity to complete and claim for the missing NMS to achieve the gateway criterion.

4.1.46.3 NHS England has no power to make payments to pharmacy contractors outside of the statutory framework set out in the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, the service specification and the Drug Tariff.

4.1.46.4 The NHSBSA records for this contractor show they had submitted claims for 18 NMS in the required period of 1 April 2022 – 5 April 2023. The NHSBSA then provided numerous opportunities for the contractor to provide evidence to demonstrate that they had met the requirements set out in the service specification i.e. that they had submitted the required 20 claims. This they failed to do. Only those contractors where no, or insufficient, evidence of meeting these requirements were referred to the regional PSRC.

4.1.46.5 The PSRC was presented with a timeline of correspondence, showing all contact between the Provider Assurance Team and the pharmacy.

4.1.46.6 The PSRC fully considered all information that it had presented to it when making its determination for the overpayment under regulation 94.

4.1.46.7 The appeal from Alpha Pharmacy does not include any evidence that the required 20 claims for NMS were submitted for payment. Subsequent emails from the Appellant have only identified quarterly submissions which do not evidence that the completed NMS were submitted for payment, as required.

4.1.46.8 The Appellant has not provided any other evidence to suggest that the decision taken by the PSRC that the contractor did not meet the gateway requirements of the PQS as set out in the Drug Tariff was incorrect. Having made the decision that the gateway requirements of

the PQS were not met, it also follows that the PSRC decision that an overpayment has been made is also in line with the Drug Tariff.

4.1.46.9 The decision to make an overpayment recovery is in line with regulations and there is nothing in the appeal to suggest otherwise.

4.1.47 Having considered these matters, NHS England respectfully suggests that NHS Resolution conclude that the decision made by the PSRC, in respect of the £5,969.18 overpayment recovery from Alpha Pharmacy (FDL55), was fair and in accordance with the regulations."

5 OBSERVATIONS

No observations were received by NHS Resolution in response to the representations received on appeal.

6 CONSIDERATION

6.1 Direction 2 of the Payment Disputes Directions directs me to determine a dispute in respect of the recovery of an overpayment from an NHS pharmacist under Regulation 94(1) of the NHS (Pharmaceutical and Local Pharmaceutical Services Regulations) 2013 (the "Regulations") which is in the nature of an appeal against a decision of NHS England that there has been an overpayment.

6.2 Direction 4 of the Payment Disputes Directions requires me to determine the appeal by dismissing it if:

6.2.1 NHS England has advised that an appeal must be brought within 30 days of the date the Appellant was notified of NHS England's decision and the appeal was not brought within that timescale; or

6.2.2 I am of the opinion that notification of the appeal contains no valid grounds of appeal (for example because it amounts to a challenge to the legality or reasonableness of the Payment Disputes Directions, the Regulations or the Drug Tariff).

6.3 I consider that I am not required to dismiss the appeal pursuant to Direction 4 as:

6.3.1 the NHS BSA advised the Appellant of a 30 days' timescale for appeal and the appeal was received within that timescale; and

6.3.2 the grounds of the appeal are valid.

6.4 Direction 6 of the Payment Disputes Directions states that I may determine the appeal without hearing any oral representations but if an appellant asks to make oral representations a hearing must be arranged unless I am satisfied that:

6.4.1 a hearing is unnecessary; or

6.4.2 I must dismiss the appeal by virtue of Direction 4.

6.5 The Appellant has not requested a hearing. On the basis of the information before me I have considered that it is unnecessary to hold an oral hearing.

6.6 I have before me the papers considered by the NHS BSA. I also have before me the responses to NHS Resolution's own statutory consultations.

6.7 The Appellant seeks to appeal against the decision of NHS England that an overpayment has occurred and to recover the sum of £5,969.18.

6.8 The NHS BSA, has provided a copy of the “Pharmacy Quality Scheme Guidance 2022/23” (“the Guidance”) and that the contents and application of this have not been disputed by the Appellant. I note the references to the Drug Tariff in the NHS BSA’s comments on this appeal. I have reviewed the March 2023 version of the Drug Tariff and I am satisfied that it contains the same requirements and dates as the Guidance.

6.9 I note that the criteria are set out in section 2 “Gateway Criteria”:

2. Gateway Criteria

By the end of 31 March 2023, pharmacy contractors must meet all gateway criteria to qualify for a PQS 2022/23 payment outlined in sections:

- 2.1 Advanced Services – New Medicine Service (NMS)
- 2.2 Patient Safety report

To be eligible to take part in the PQS and be eligible for a PQS payment, pharmacy contractors must declare in their declaration that they will achieve the gateway criteria by the end of 31 March 2023.

The declaration must be made between 09:00 on 6 February 2023 and 23:59 on 3 March 2023.

6.10 Section 2.1 “Advanced Services – New Medicine Service (NMS)” states:

2.1.3 Gateway criterion

Only contractors who have completed 20 NMS between 1 April 2022 and end of 31 March 2023, i.e., NMS completed before the end of the financial year and have claimed for these by 5 April 2023 will be eligible for a PQS payment.

Any claims for NMS submitted to the NHSBSA after 5 April 2023 will not be considered for the PQS gateway.

Contractors are therefore advised to regularly check the NMS that have been undertaken, and the associated payment claims that they have submitted in the lead up to the 5 April 2023 deadline to ensure that they have delivered and claimed for the 20 NMS by 5 April 2023 to meet this gateway requirement for PQS. Any pharmacies that fail to have claimed for 20 NMS by 5 April 2023 will not have met this gateway requirement.

2.1.4 Reporting

Contractors must have delivered a minimum of 20 NMS between 1 April 2022 and the end of 31 March 2023. Contractors will not be required to make a declaration for this gateway criterion as the automatic verification assessment of whether a contractor has met the NMS gateway criterion will be confirmed against the NHSBSA’s payment data for NMS.

6.11 Guidance about “Payments and declarations” can be found in section 13 of the Guidance as provided by the NHS BSA which states:

Pharmacy contractors must claim payment during the declaration period, which is between 09:00 on Monday 6 February 2023 and 23:59 on Friday 3 March 2023 through the NHSBSA’s MYS application.¹⁸⁴ Contractors must have evidence to demonstrate meeting the gateway criteria and the quality criteria they have claimed for by the end of 31 March 2023.

...

The PQS is a voluntary scheme that is open to all contractors who wish to take part. To date, participation in the scheme has been consistently high, with the vast majority of contractors submitting a declaration of meeting at least some of the quality requirements. Submitting a declaration is an essential part of the scheme and it enables the efficient management of the payment process. The submission of a declaration for completing any of the quality requirements of the scheme, both accurately and within the timescales outlined in the Drug Tariff, is a significant part of demonstrating that the quality requirements have been met. Consequently, any contractor who fails to successfully submit their declaration during the declaration period will not be eligible for a PQS payment.

...

13.2 Aspiration payment

The aspiration payment for each domain, is paid to the contractor on the understanding that the contractor will have made a declaration within the declaration period and that they will have completed the PQS 2022/23 before 23:59 on 31 March 2023. If the contractor fails to complete the gateway criteria, they would not be eligible for the PQS 2022/23. If an aspiration payment is claimed but the contractor then fails to submit their declaration within the declaration period of meeting the PQS 2022/23 before 23:59 on 3 March 2023 then they would not be eligible for the PQS 2022/23. In both instances the aspiration payment will be reclaimed from the contractor.

...

The aspiration payment will be paid to contractors on 1 December 2022.

The aspiration payment will be reconciled with the payment for the PQS 2022/23 on 3 April 2023. Part VIIA of the Drug Tariff for PQS has worked examples of how the aspiration payment will work in practice.

In making a declaration for an aspiration payment, contractors are thereby accepting that a reconciliation will take place; and that their final PQS payment will be adjusted to either recover an overpayment or to receive a further payment based on the declaration made between 6 February to 3 March 2023.

13.3 Declarations: Manage Your Service

...

Unless a contractor makes a valid claim by submitting the declaration via the NHSBSA's MYS application during the appropriate declaration period, (for either or both the aspiration payment and the PQS payment) they will not receive the relevant payment.

13.4 Declaration process

Contractors can make their PQS declaration at any time during the declaration window, between 09:00 on 6 February 2023 and 23:59 on 3 March 2023.

...

No PQS declaration submissions will be accepted after 23:59 on 3 March 2023. Contractors are advised to complete their submissions early in the declaration window to ensure that they meet the specified declaration timescales.

6.12 Under section 14. "Validation of Claims" it states:

In cases where NHS England and NHS Improvement consider that a claim has been made for a PQS payment for which the contractor is not eligible, it will be treated as an overpayment. In such cases, contractors will be contacted by the NHSBSA and notified of the overpayment recovery process. Any overpayment recovery would not prejudice any action that NHS England and NHS Improvement may also seek to take under the performance related sanctions and market exit powers within The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

6.13 The Pharmacy Quality Scheme (“PQS”) forms part of the Community Pharmacy Contractual Framework (“CPCF”). Further, there is no dispute between parties that the Appellant signed up to partake in the PQS.

6.14 I have been provided with the emails and reminders that were sent to the Appellant as well as confirmation of the email address that was used and that delivery receipts have also been provided. There is no dispute between the parties that these were sent electronically and to a premises specific email account or a linked email address as set out in the Guidance as well as the Regulations.

6.15 The NHS BSA initially emailed the Appellant on 10 July 2023 to inform it that *“Your pharmacy has been identified as not submitting the minimum of 20 NMS between 1st April 2022 – 5th April 2023 and will therefore be part of the overpayment recovery process.”*

6.16 I note an email reply from the Appellant to the NHS BSA dated 31 July 2023 which stated *“According to our records 21 nms have been completed between this period- we may have forgotten to claim in May 2022 for 3 NMS”*. A PDF copy of the pharmacy’s NMS Quarterly Submission report, dated 28 July 2023, was also attached.

6.17 The NHS BSA responded to the Appellant, by email dated 31 July 2023, stating *“Section 2.1.3 of the Pharmacy Quality Scheme guidance states:*

“Only contractors who have completed 20 NMS between 1 April 2022 and end of 31 March 2023, i.e., NMS completed before the end of the financial year and have claimed for these by 5 April 2023 will be eligible for a PQS payment.”

20 NMS were not claimed for between the 1st April – 31st March 2023, the evidence you have provided is dated from the 1st April 2023, which is outside the required date range in the Drug Tariff & PQS guidance 22-23.

Therefore, having considered the evidence that has been provided. We would still look to recover the full PQS payment from FDL55 as per the Drug Tariff 22-23 written by NHS England.”

6.18 The Appellant sent a further email to the NHS BSA dated 7 August 2023, which stated *“Our records still show that 21 nms have been completed between these dates - please find attached evidence.”* A PDF copy of the pharmacy’s NMS Quarterly Submission report, dated 7 August 2023, was also attached.

6.19 On 8 August 2023, the NHS BSA responded to the Appellant. The email stated *“Unfortunately, we cannot accept the attached report as evidence for the NMS Submission as it has not been entered on the MYS Portal. We can only accept NMS Submissions that have been entered on the MYS System.*

Please see attached the FP34 Submissions on the MYS System for FDL55, which we have received from the MYS Team, these show that FDL55 only submitted 18 NMS from the time April 22 – Mar 23. Contractors who have missed any NMS Submission , should email the MYS Team to inform them of any missed submission, I have checked the data base and no emails were sent to the MYS Team regarding any missed submissions.”

- 6.20 I note a further email was sent to the Appellant on 22 August 2023 in relation to the overpayment, but that there was no response from the Appellant. The NHS BSA therefore proceeded to issue its decision dated 21 September 2023.
- 6.21 I note that there is no dispute from the Appellant that it was not aware of the deadline for submitting its claims, i.e. by 5 April 2023. Further, there is no dispute that claims for payment were to be submitted using the NHS BSA's MYS application.
- 6.22 The evidence provided by the Appellant to the NHS BSA, dated 28 July 2023 and 7 August 2023, both titled "NMS – Data Reporting to CCG" appear to be reports from an internal reporting system, which shows for "No. of completed NMS" that there are 21. I note the comments from the NHS BSA that these reports do not provide evidence that the completed NMS were then submitted for payment via MYS within the required timeframe.
- 6.23 The NHS BSA provided a screenshot to the Appellant of the FP34 Submissions on the MYS System, in its email of 8 August 2023, which shows a total of 18 NMS submissions within the required timeframe. This was also provided in its representations on appeal and has not been disputed by the Appellant.
- 6.24 In its appeal, the Appellant states that it *"made a genuine error in forgetting to submit an NMS claim for the month of May 2022 - I should have submitted a claim for 3 NMS for this month which would have meant I would have met the 20 NMS claims that I needed in order to receive this payment."*
- 6.25 There is no dispute from the Appellant that they did not submit the information required, as set out in the PQS, within the relevant time period.
- 6.26 Whilst I am sympathetic to the Appellant's circumstances, the PQS service specification and the Drug Tariff were clear with regard to the submission of claims within the relevant period of 1 April 2022 to 5 April 2023. I note that there is no provision within the service specification or the Drug Tariff for the late submission of claims outside of this period.

7 DECISION

- 7.1 I have had regard to the Payment Disputes Directions which provide me with three options:
- 7.1.1 dismiss the appeal and confirm the decision of NHS England; or
 - 7.1.2 substitute for the decision any decision that NHS England could have taken when it took the decision; or
 - 7.1.3 quash the decision, with or without remitting the matter to NHS England for it to take the decision again subject to such directions as NHS Resolution considers appropriate.
- 7.2 I dismiss the appeal and confirm the decision of NHS England to recover the overpayment of £5,969.18.
- 7.3 I note that neither party has submitted a claim for interest with regard to this dispute so I determine that no interest is payable on the sums to be paid from one party to another.

**Head of Appeals
NHS Resolution**