8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

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

21 October 2024

REF: SHA/26250

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

1 **Outcome**:

1.1 I dismiss the appeal and confirm the decision of NHS England to recover the overpayment of £2,640 in relation to self-isolating patients and £480 in relation to claims made for CEV patients.

1.2 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:

Eightlands Pharmacy Limited
NHS BSA on behalf of NHS England

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

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

REF: SHA/26250

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

1 INTRODUCTION

1.1 The Appellant appealed the decision of NHS England to recover an overpayment relating to the Medicines Delivery Service.

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

The NHS Business Services Authority ("NHS BSA"), acting on behalf of NHS England, sent a decision to the Appellant on 20 June 2024 in respect of Eightlands Pharmacy Limited (ODS code FRH16). The decision stated:

2.1 "The Pharmacy Provider Assurance Team, part of NHS Business Services Authority (NHSBSA), have been requested by NHS England (NHSE) to undertake a Post Payment Verification (PPV) exercise to provide assurance that pharmacy contractors have claimed correctly for the Medicines Delivery Service.

2.2 This service was originally commissioned across the country from 8th April 2020 and ran until 31st July 2020. In the months of April 2021 to July 2021 the Medicines Delivery Service (MDS) was limited to those patients who had been notified by Test and Trace to self-isolate. The Service was only available to people during their 10-day self-isolation period and who have provided their Test and Trace Account ID when requesting the service. Eligibility for Clinically Extremely Vulnerable (CEV) patients for the MDS ceased on the 31st March 2021 and therefore claims for deliveries to these patients after this date no longer qualified for a MDS payment.

2.3 Please find further information in this link to the service announcement - https://www.england.nhs.uk/coronavirus/documents/home-delivery-of-medicines-and-appliances-during-the-covid-19-outbreak-march-2021/

2.4 As part of the verification exercise, your pharmacy has been contacted by the Provider Assurance Team to request that you review all of your Medicines Delivery Service records between the months of April 2021 to July 2021.

2.5 **To date your pharmacy has not provided evidence to demonstrate that the Medicines Delivery Service claims made during this time met the requirements set out in the service specification, i.e. that these claims for deliveries were to self-isolating patients. Therefore, the PAT are unable to verify that these claims were for deliveries to eligible patients. This is despite several attempts made by the NHSBSA Pharmacy Provider Assurance Team.**

2.6 The evidence is requested in accordance with Schedule 4 Part 4 paragraph 35 (4) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. The NHSBSA Provider Assurance team have been authorised in writing by NHS England to request this information on their behalf.

2.7 Attached is a timeline of correspondence with your pharmacy to date which was passed to the NHS England local Pharmaceutical Services Regulations Committee (PSRC) to consider whether further action was necessary.

2.8 The NHS England Pharmaceutical Services Regulations Committee has now reviewed this information and noted that:

2.8.1 FRH16 – EIGHTLANDS LIMITED claimed **440 Self - isolating and 80 CEV** deliveries for the Medicines Delivery Service in the months of April 2021 to July 2021.

2.8.2 The NHSBSA Provider Assurance Team did not receive any evidence which demonstrated that the Medicines Delivery Service claims made between the months of April 2021 to July 2021 were to patients who had been notified by Test and Trace to self-isolate and who had provided their Test and Trace Account ID when requesting the service, and therefore could not verify that these claims met the requirements set out in the service specification.

2.8.3 EIGHTLANDS LIMITED was contacted on five separate occasions by the NHSBSA Provider Assurance Team to request evidence to demonstrate that that the Medicines Delivery Service claims made during this time met the requirements set out in the service specification.

2.9 Having reviewed the information provided by the NHSBSA Provider Assurance Team, the NHS England Pharmaceutical Services Regulations Committee has decided that an overpayment in relation to your April 2021 to July 2021 Medicines Delivery Service claims has occurred and has instructed recovery of this overpayment to be progressed in accordance with Regulation 94 (1) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

2.10 The tables below outline the monthly Medicines Delivery Service claims reimbursed to your pharmacy – **EIGHTLANDS LIMITED** – **FRH16** in the months of April 2021 to July 2021 for Self-isolating and CEV patients, along with the associated recovery values:

2.11 **Self-isolating claims.**

2.12 The table below shows MDS claims reimbursed to your pharmacy between April 2021 and July 2021 for Self-isolating patients.

	April 2021	May 2021	June 2021	July 2021	Total
Self-isolating claims paid	160	180	60	40	440

2.13 440 Self-isolating claims paid x £6.00 **= £2,640.00 CEV claims.**

2.14 The table below shows MDS claims reimbursed to your pharmacy between April 2021 and July 2021 for CEV patients.

	April 2021	May 2021	June 2021	July 2021	Total
CEV claims paid	40	40	N/A	N/A	80

2.15 Subsequently this has resulted in the following overpayment:

2.16 80 CEV claims paid x £6.00 **= £480.00.**

2.17 **Total recovery for April 2021 – July 2021**:

2.18 440 Self-isolating claims paid x £6.00 **= £2,640.00**

2.19 80 CEV claims paid x £6.00 **= £480.00.**

2.20 **Total value to be recovered = £3,120.00 deduction**.

2.21 **Action Required**

2.22 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 20th July 2024.**

2.23 Where you agree an overpayment has been made the amount over paid will be recovered by deduction from a future NHSBSA payment to you.

2.24 If you have any concerns regarding the deduction or would like to discuss an alternative approach to recovering the overpayment, please contact us by 20th July 2024.

2.25 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.

2.26 **Please be aware that failing to contact us by 20th July 2024 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:

2.26.1 NHS Resolution, Primary Care Appeals, 10 South Colonnade, Canary Wharf, London, E14 4PU

2.27 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.

2.28 The NHSBSA will notify you of when the overpayment recovery will take place.

2.29 A record of this process will be kept on your NHS England contractor file.

2.30 For more information or for clarification of any of the details in the letter, please contact us by email at pharmacysupport@nhsbsa.nhs.uk.

2.31 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.

2.32 The proposed and future actions detailed in this letter are stipulated without prejudice."

2.33 The NHS BSA provided a copy of a timeline detailing its correspondence with the Appellant.

3 THE DISPUTE

In an email dated 28 June 2024 addressed to NHS Resolution, the Appellant appealed against NHS England's decision. The grounds of appeal are:

3.1 "From the email the original request was made on 06/12/2023 which is also noted in the timeline record.

3.2 There are 2 parts to the PPV

3.2.1 Over claim 80 CEV claims paid x £6.00 **= £480.00** for April 2021 and May 2021 which was after the CEV service ended. This is an over claim as our area was not commissioned at this time to supply the service.

3.2.2 440 Self-isolating claims paid x £6.00 **= £2,640.00** This claim we believe is genuine and is claimed correctly and was a commissioned service for the months of April to July 2021. The provision was only to patients that supplied Test and Tread [sic] codes to the pharmacy. The records were kept for 2 years. There is no time frame in the specification, however, it is expected that claims records are kept for 2 years for PPV. This is also eluded to in the timeline on 09/01/2024 by [LE]. The earliest date of destruction for the records would be 2 years from July 2021 which would be July 2023. The request for records came on the 06/12/2023 which is 2.5 years after the last claim. I fail to see why the goal post has moved and why we are getting repeated requests for data which should have been destroyed based on normal practice. We are being penalised for following the guidance that is issued on PPV document retention. If there is a request for the records prior to this and within the 2 year timescale then please provide this.

3.3 In summary we are happy for the £480.00 to be reclaimed, however the £2640.00 should not be reclaimed."

4 SUMMARY OF REPRESENTATIONS

This is a summary of representations received on the appeal.

4.1 The NHS BSA on behalf of NHS England stated:

4.1.1 "Thank you for your letter of the 2nd of July 2024 and the opportunity to provide representations on the appeal.

Background

4.1.2 As part of the national response to the COVID-19 Pandemic, NHS England (NHSE) commissioned a delivery service from community pharmacies to those patients classed as Clinically Extremely Vulnerable (CEV) or 'Shielded Patients' who were required to self-isolate at home. This group of people were at a very high risk of serious illness from COVID-19 infection and were asked to remain indoors for their own safety.

4.1.3 To allow these patients to receive their prescriptions, an Advanced service known as the Medicine Delivery Service (MDS) was created to provide funding for deliveries of prescriptions to CEV patients. The service was limited to CEV patients who could be identified on their Summary Care Record (SCR) as 'Shielded Patients'.

4.1.4 Contractors claimed for the service via the Manage Your Service (MYS) portal and for each delivery claimed as part of the Medicine Delivery Service, a payment of £6.00 (including VAT) was paid as part of the normal end of month process.

4.1.5 The Medicines Delivery Service was commissioned from both pharmacies and dispensing doctors across England from 9th April 2020

until 1st July 2020 in the first instance, but in the introductory letter – attached – it stated that this service may be extended as necessary as part of the Covid-19 response.

4.1.6 In its letter of 30th June 2020 – attached - NHSE announced that the service would be extended so that both pharmacies and dispensing doctors across England will be required to ensure shielded patients can receive a home delivery of their medicines until 31st July 2020. The letter informed contractors that the Government had published plans on 22nd June 2020 for a phased easing of the shielding advice to people who are clinically extremely vulnerable from 6th July 2020 however went on to explain that "the provision of this service throughout July will enable patients who are shielding time to make alternative arrangements for access to their prescription medications, after which both the essential and advanced pharmaceutical service, and both elements of the dispensing doctor COVID-19 home delivery service cease to be commissioned."

4.1.7 This and subsequent letters were published by NHS England on its website at: https://www.england.nhs.uk/coronavirus/publication/preparedness-letters-for-community-pharmacy/.

4.1.8 Following the publication of each of these letters on the NHS Website the Pharmaceutical Services Negotiating Committee – the representative body for the community pharmacy sector, now known as Community Pharmacy England (CPE) also sent an update to its members highlighting the change to the service specification.

April 2021 to March 2022 claims

4.1.9 In the months of April 2021 to March 2022 the Medicines Delivery Service was limited to those patients who had been notified by Test and Trace to self-isolate. The Service was only available to people during their 10-day self-isolation period and who had provided their Test and Trace Account ID when requesting the service. Eligibility for Clinically Extremely Vulnerable (CEV) patients for the MDS ceased on the 31st of March 2021 and therefore claims for deliveries to these patients after this date no longer qualified as valid for a MDS payment.

4.1.10 The guidance stated that only self-isolators that have provided their Test and Trace Account ID reference number when requesting the service are eligible to receive it. A record of the Test and Trace Account ID reference number must be made and retained as part of the contractor's delivery record to ensure effective ongoing service provision, and for post-payment verification purposes. It also stated that pharmacies should familiarise themselves with the details of the service before making a claim.

4.1.11 Please find further information in this link to the service announcement - https://www.england.nhs.uk/coronavirus/documents/home-delivery-of-medicines-and-appliances-during-the-covid-19-outbreak-march-2021/.

4.1.12 The service specification also states that claims should only be made in the event that no friend, relative, carer or volunteer is available to collect the prescription on the patient's behalf.

4.1.13 NHSBSA Pharmaceutical Provider Assurance (NHSBSA PAT), on behalf of NHSE, were requested to conduct a Post Payment Verification exercise to ensure that pharmacy contractors claimed correctly for the Medicines Delivery Service between the months of April 2021 to March 2022 to ensure that all claims were for Self-Isolating patients and contractors had test and trace referral records available to substantiate those claims.

4.1.14 It was also raised that Manage Your Service retained the functionality for contractors to submit claims for CEV patients. This functionality was retained to future proof the system in-case the response to the Pandemic and MDS changed again as NHSE felt it had been clearly communicated to pharmacy contractors around the change in the service. Once it became apparent that many contractors were still submitting claims for these ineligible patients, MYS was amended to ensure these claims were no longer automatically paid. This was made operational from June 2021 onwards; however, this did lead to the situation where claims submitted for CEV patients for the months of April 2021 and May 2021 were paid. Subsequently, NHSBSA PAT were requested to recover the identified CEV claims, as there was no regulation to allow payments for those patients due to being ineligible.

4.1.15 In the Post Payment Verification exercise undertaken by the NHSBSA PAT, FRH16 – EIGHTLANDS LIMITED was contacted on five occasions to request specific Test and Trace referral evidence to show that the 440 Self-Isolating patient claims made between April 2021 and July 2021 were for deliveries made to eligible patients' self-isolating in response to a positive Covid test, as specified in the NHSE service announcements.

4.1.16 Alongside that NHSBSA PAT, additionally outlined that FRH16 – EIGHTLANDS LIMITED also incorrectly claimed for 80 CEV patients during the months of April and May 2021 to enquire if they were aware of the change in the service and that these patients were no longer eligible.

4.1.17 Emails were sent to the pharmacy shared NHS mail address pharmacy.frh16@nhs.net as required by NHSE. All listed pharmacies must have a valid shared NHSmail account that should be regularly monitored by the pharmacy team as part of their terms of service.

4.1.18 Several phone calls to the pharmacy were also made, to confirm receipt of these emails and to advise the pharmacy of the final 14-day response deadline.

4.1.19 NHSBSA PAT spoke to the Pharmacy Manager …on two occasions and found him helpful, confirming that the PAT emails had been received and explaining he would forward them to the Pharmacy Director, [Mr A] to deal with.

4.1.20 [Mr A], replied to our emails twice during the Post Payment Verification exercise, with very limited information.

4.1.21 Despite these attempts made by the NHSBSA PAT, EIGHTLANDS LIMITED did not provide any evidence to demonstrate that the 440 Medicine Delivery Service claims made between April 2021 and July 2021 were made to patients self-isolating who had provided their test and trace referral number when requesting the service as specified in the service specification at this time.

4.1.22 As such the NHSBSA were then unable to verify that the deliveries claimed met the requirements set out in the service specification.

4.1.23 To avoid any doubt there is no dispute that these deliveries were made, the engagement with the pharmacy was to confirm that the deliveries were made to patients who were self-isolating and therefore eligible for the Medicine Delivery Service.

4.1.24 During the engagement process NHSBSA PAT initially received no information to confirm that the CEV claims had been entered in error and a recovery of the overpayment could take place. This was despite being advised on calls and via email that these patients were no longer eligible for deliveries after 1st March 2021.

4.1.25 However, [Mr A] confirmed within the appeal submitted by EIGHTLANDS LIMITED to NHSR that '*This is an over claim as our area was not commissioned at this time to supply the service'.* And *'we are happy for the £480.00 to be reclaimed*'.

4.1.26 As the NHSBSA PAT have been unable to validate the deliveries claimed by the pharmacy during this time, the details of the case were passed to the NHS England regional team for their Pharmacy Services Regulation Committee (PSRC) to review. A decision was sought as to whether the deliveries made by the contractor were eligible for a payment under the terms of the Medicine Delivery Scheme at the time that the deliveries were made; and if they were not eligible, for the delivery fees that have been paid to be recovered under regulation 94 (1) (a) as an overpayment.

The PSRC decision

4.1.27 To assist with their review, the PSRC was provided with the NHSE service announcements and the timeline of correspondence showing all contact the Provider Assurance team had with the pharmacy for review. This timeline has been provided to you in addition to this information.

4.1.28 The engagement showed that despite repeated requests made by the NHSBSA to the contractor to provide such evidence, no evidence was forthcoming.

4.1.29 Consequently, the PSRC concluded that the NHSBSA had been unable to find any evidence to demonstrate that the 440 deliveries claimed by the contractor between April 2021 and July 2021 met the requirements set out in the service specification alongside the incorrectly claimed 80 MDS deliveries made for CEV patients.

4.1.30 Following this conclusion, the PSRC determined that the pharmacy was not entitled to the payment for which it had received.

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

4.1.32 In making this decision the PSRC relied on the information that it had before it, following the extensive investigation undertaken by the NHSBSA and the repeated requests to the contractor for evidence of how the Medicine Delivery Service claims made for April 2021 to July 2021 met the requirements set out in the service specification.

In response to the points made in the contractor's appeal:

4.1.33 The service specification/Service Announcements states: In the months of April 2021 to July 2021 the Medicines Delivery Service (MDS) was limited to those patients who had been notified by Test and Trace to self-isolate. The Service was only available to people during their 10-day self-isolation period and who have provided their Test and Trace Account ID when requesting the service. Eligibility for Clinically Extremely Vulnerable (CEV) patients for the MDS ceased on the 31st March 2021 and therefore claims for deliveries to these patients after this date no longer qualified for a MDS payment.

4.1.34 The Appellant acknowledges within the appeal that the '*Over claim 80 CEV claims paid x £6.00 = £480.00 for April 2021 and May 2021 which was after the CEV service ended. This is an over claim as our area was not commissioned at this time to supply the service'* and *we are happy for the £480.00 to be reclaimed,*

4.1.35 NHSBSA PAT appreciates the agreement to a recovery of the overpayment of 80 CEV claims and will work with the Contractor to arrange this recovery.

4.1.36 The Appellant states in the appeal '*440 Self-isolating claims paid x £6.00 = £2,640.00 This claim we believe is genuine and is claimed correctly and was a commissioned service for the months of April to July 2021. The provision was only to patients that supplied Test and Tread (sic) codes to the pharmacy.'*

4.1.37 At no time during the engagement did the Contractor provide any explanation as to how the Pharmacy recorded the Test and Trace ID reference number or any other patient details. The Contractor mentions '*records and 'paperwork'* throughout the PPV however, does not expand on what information was contained in these.

4.1.38 The NHSBSA PAT requested on several occasion that the Contractor provide the patient's Test and Trace ID Reference number, postcode, and date of delivery, which would have been expected to be recorded, however none of these was forthcoming.

4.1.39 The Appellant continued in the appeal *'The records were kept for 2 years. There is no time frame in the specification, however, it is expected that claims records are kept for 2 years for PPV. This is also eluded (sic) to in the timeline on 09/01/2024 by [LE]. (sic) The earliest date of destruction for the records would be 2 years from July 2021 which would be July 2023. The request for records came on the 06/12/2023 which is 2.5 years after the last claim. I fail to see why the goal post has moved and why we are getting repeated requests for data which should have been destroyed based on normal practice. We are being penalised for following the guidance that is issued on PPV document retention. If there is a request for the records prior to this and within the 2-year timescale then please provide this.'*

4.1.40 NHSBSA PAT acknowledges that whilst the service specification is clear that records need to be kept for PPV purposes, it does not advise of exactly how long contractors were required to keep such evidence. It is unclear how this contractor formed the opinion that records only needed to be retained for two years.

4.1.41 Section VIC of the Drug Tariff contains the Pharmaceutical Services (Advanced and Enhanced Services) (England) Directions 2013. Throughout the directions there are repeated requirements for records to retained for post payment verification purposes without the reference to a time scale for retention.

4.1.42 For the New Medicines Service there is a time scales mentioned in paragraph 7- ongoing **conditions of arrangements**:

(l) P ensures that a written record (which may be an electronic record) of each consultation carried out by or on behalf of P as part of P's New Medicine Service is prepared by the registered pharmacist who carried out the consultation and includes the approved data ("approved" for these purposes means approved by the NHSCB);

(m) P provides information from those records to the NHSCB or the Secretary of State, on request, in the manner approved for this purpose, and for the purposes approved, by the NHSCB; and

(n) P keeps a copy of the record mentioned in sub-paragraph (l) for at least 2 years from the date on which the service intervention is completed or discontinued.

4.1.43 Other advanced services such as the NHS community pharmacy hypertension case-finding advanced service requires records to be retained for 3 years.

4.1.44 The NHSBSA appreciate that is not as clear as it could be what retention periods should be applied for what pharmacy records. However, throughout the investigation the contractor was not able to provide any records to demonstrate a patient's eligibility for the service; or provide any details of how they confirmed a patient's eligibility in advance of providing the service.

4.1.45 The MDS Service Specification clearly states 'A record of the Test and Trace Account ID reference number must be made and retained as part

of the contractor's delivery record to ensure effective ongoing service provision, and for post-payment verification purposes. Despite the multiple interactions with the contractor, they gave no information as to how the pharmacy confirmed eligibility with patients who would have had to provide evidence that they were requested to self-isolate by the Test and Trace Service and were provided with their Test and Trace number as their evidence.

4.1.46 In an email sent to the Contractor on 9th January 2024 NHSBSA PAT stated *'Although there is no length of time mentioned within the specifications, in line with other Advanced Services it would have been expected that evidence should have been kept for at least a minimum of 2 years.* At no point was it mentioned by the PAT that the end date for retaining records was exactly 2 years. The appellant also failed to mention what the Pharmacy procedure was for destroying records only that it was '*based on normal practice.'*

4.1.47 EIGHTLANDS LIMITED was contacted on five separate occasions prior to the PSRC referral to request they provide evidence of the claims or confirm the claims had been made inadvertently incorrectly. The PPV engagement consisted of two phone calls and three emails sent by NHSBSA PAT, no Teams meeting was ever requested by the Appellant. The Pharmacy Manager confirmed on two phone calls that the emails sent from PAT had been received and forwarded to the Director.

4.1.48 A response from the Director to an initial email was limited to confirming that '*the claim was made appropriately but the documents were only kept for 2 years. NHSBSA documents are only kept for 2 years and then shredded*.' And in the same email when referring to the CEV MDS claims also confirmed '*Yes, the claims were made appropriately and evidence for kept for 2 years. The documents have been shredded after that.'*

4.1.49 No explanation was provided on what information was recorded, how it was stored, whether in paper form or electronically or how it was maintained and where in any guidance does it state that NHSBSA documents are only kept for 2 years.

4.1.50 The NHSBSA PAT have previously engaged with EIGHTLANDS LIMITED for potentially incorrect MDS claims having contacted the pharmacy in October 2021. This was for a previous MDS PPV exercise, for the period of August to October 2020. During this period the MDS service was not commissioned nationally, the service was commissioned for 4 small geographical regions in the country.

4.1.51 The appellant did correspond with the PAT throughout the process of this PPV exercise. The contractor was unable to provide any records to demonstrate that the claims submitted were for deliveries patients for eligible for the service at this time. Instead, the contractor informed the PAT that they had mis-interpretated the directions of the service and claimed incorrectly for the provision of the service during this time.

4.1.52 Subsequently the appellant agreed to the recovery of the overpayment which was for the 575 claims submitted for these three months.

4.1.53 This information is provided to NHS Resolution to demonstrate that the contractor has been involved in previous MDS PPV exercises and was aware of the on-going MDS PPV work being performed by PAT. This engagement occurred well before any potential concerns about the retention period for the records became relevant. The contractor had sufficient good reason to ensure that relevant evidence was retained as it was made clear during the previous MDS PPV exercises that contractors could be reviewed again for claims made in later phases of the service and be required to provide evidence in support of those claims.

4.1.54 It, therefore, appears incredulous that a contractor providing this service in accordance with the service requirements, knowing that records would be required for PPV purposes, would then destroy such records without confirming that they would not be needed for any future PPV exercises.

4.1.55 When reviewing the claims made by the pharmacy, from when the service was first commissioned to when the pharmacy was contacted for initially for the first MDS PPV exercise it can be seen that the claims submitted were, after the initial month all similar in size – roughly 200 per month. This is despite the parameters of the service specifications and patient eligibility changing during the pandemic.

4.1.56 Table 1 shows MDS deliveries claimed by FRH16 to CEV patients during the initial phase of the service, where the service was commissioned for CEV patients across England and from all community pharmacies in England.

	April 2020	May 2020	June 2020	July 2020
MDS claims paid	25	200	180	220

4.1.57 EIGHTLANDS LIMITED were not included in PPV activity for this time period as they were not considered outliers of the service.

4.1.58 As outlined earlier the MDS was commissioned for patients who resided in an area subject to local lockdown procedures only during Aug 2020 to October 2020. Despite not being an eligible lockdown area, FRH16 continued to claim for MDS deliveries. Table 2 shows the consistent nature of the number of deliveries claimed.

	August 2020	September 2020	October 2020
MDS claims paid	195	180	200

4.1.59 Table 3 presents the number of deliveries FRH16 claimed and was paid for each month during November 2020 to March 2021. The Service

Specification at this time continued to be for CEV patients. The figures continue to show a steady number of patients, with little fluctuations in totals.

	November 2020	December 2020	January 2021	February 2021	March 2021
MDS claims paid	189	250	195	210	200

4.1.60 Other than the claims for August 2020 – October 2021, the claims made by this contractor between April 2020 and March 2021 were not reviewed as part of other PPV exercises as they were not considered as a sufficient outlier to be included in the PPV samples.

4.1.61 Table 4 combines the claims that were submitted and paid for both CEV and SI claims together and this continues to show the similar pattern of claiming behaviour - similar levels of claims submitted as for those previously claimed for the CEV claims alone.

4.1.62 Both the claims for deliveries to CEV patients when the service was not commissioned for this cohort of patients, and the large number of claims for deliveries to SI patients in the months of April and May 2021 led to this pharmacy been classed as an outlier, and for their inclusion in the this PPV exercise.

4.1.63 Following the amendment to the MYS portal in June 2021, claims for the provision of service to CEV patients were not paid. EIGHTLANDS LIMITED appeared to be unaware of this situation as it continued to claim for the service to CEV patients, as well as claiming for deliveries to SI patients.

4.1.64 In the PPV exercise undertaken, the PAT only investigated the claims submitted by the contractor between April and July 2021, as the contractor was paid for both the claims for CEV and SI claims submitted.

4.1.65 The CEV claims submitted by EIGHTLANDS LIMITED after June 2021 were not paid, so the low level of SI claims submitted after June were not sufficient to make the pharmacy an outlier for follow up for their subsequent claims.

	Apr 2021	May 2021	Jun 2021	Jul 2021	Aug 2021	Sept 2021	Oct 2021	Nov 2021
Self-isolating claims paid	160	180	60	40	40	180	180	160

CEV claims Paid	40	40	0	0	0	0	0	0
CEV claims not paid	0	0	180	180	180	60	80	60
Total Claims submitted	200	220	240	220	220	240	260	220

4.1.66 If the CEV claims after June had been paid, then the claims for the 8 months from April 2021 – November 2021 by this pharmacy would be 1,820 in total. This would class the contractor as a significant outlier This consistent nature of claiming also does not follow the national pattern seen from the data for other contractors. Nor what we would expect to see for those patients who would be eligible for the deliveries.

4.1.67 During the engagement the PAT raised questions as to the sudden end to the MDS claims after the month of November 2021 despite the service being commissioned for a further four months. The representatives from the pharmacy offered no explanation and chose not to answer the questions.

4.1.68 The PAT are not able to provide an explanation either, but it does seem to be highly co-incidental that the claiming for such large levels of deliveries would stop so soon after the initial PPV engagement for claims submitted incorrectly for the period August 2020- October 2020.

4.1.69 During a follow up call, the Pharmacy manager believed that the Pharmacy stored some NHSBSA documents for between 2 and 5 years. As part of the conversation PAT requested that the Director, [Mr A] respond with details of how the Pharmacy recorded MDS deliveries during this time.

4.1.70 Following an email sent by NHSBSA PAT advising that without the requested evidence the case would be forwarded to PSRC, [Mr A] once again sent a limited response with no further expansion regarding how the Pharmacy recorded and stored the MDS patient information, advising that ' *the paperwork was only kept for 2 years as per the NHS rules (2 years for papers to be stored for post verification) It is not possible to verify these post payment verification. These post payment verification should have taken place within the time frame.'*

4.1.71 Due to the rapidly changing Covid situation, NHSE guidelines were adjusted several times to reflect those changes and were cascaded to community pharmacies. Subsequently it was necessary for NHSE to break the MDS Post Payment verification task into segments depending on the pandemic restrictions at the time. Due to the volumes of data needed to be collated, and time taken for each PPV sample to be conducted effectively, it would not have been possible for the NHSBSA to complete the task within the Appellants suggested timeframe.

4.1.72 The NHSBSA were therefore unable to verify that the deliveries claimed for were eligible under the Medicine Delivery Service. The NHSBSA also did not have agreement from the pharmacy that an overpayment had been made and could be recovered, and so had no alternative but to refer the case to the PSRC.

4.1.73 NHS England appreciate that it has been an extremely busy time for pharmacies and are grateful for the work undertaken to protect vulnerable patients. However, only those pharmacies delivering to patients covered by the NHSE announcements between the months of April 2021 to July 2021 were still eligible to claim for the Medicine Delivery Service. Pharmacies choosing to deliver to patients outside of the eligibility did so outside of the scope of the Medicine Delivery Service and therefore the costs for these deliveries would need to be met by means other than claiming under the Medicine Delivery Service.

4.1.74 Therefore, NHS England maintains that EIGHTLANDS LIMITED was not compliant with the requirements set out in the service specification and their claims for deliveries to patients during April 2021 to March 2022 were to patients who were ineligible for this advanced service at that time. As a consequence of having then been paid for these deliveries to ineligible patients, an overpayment had been made. The decision to then recover the £2,640.00 overpayment for self-isolating claims was then in accordance with the regulations. A recovery of the £480.00 paid for the ineligible CEV claims was later agreed to by the contractor in response to the PSRC decision.

Key points for consideration

4.1.75 NHS England respectfully asks that NHS Resolution considers the following key points when making its determination on the appeal:

4.1.76 The NHSE service announcement was very clear that the Medicines Delivery Service was limited to only those patients who had been notified by Test and Trace to self-isolate and was only available to people during their 10-day self-isolation period. Also, patients must have provided their Test and Trace Account ID when requesting the service.

4.1.77 Contractors were advised to retain evidence of deliveries made to Self-isolating patients as highlighted in the service announcements for post payment verification purposes.

4.1.78 From 1st April 2021 NHS England did not commission a delivery service for CEV patients. Any claims submitted for delivery to CEV patients were not then eligible for payment. Those claims submitted and paid are therefore an overpayment and have been treated as such.

4.1.79 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.

4.1.80 The contractor had numerous opportunities to provide evidence to demonstrate that the deliveries claimed met the requirements set out in

the service specification. Only those contractors where no or insufficient evidence of meeting these requirements were referred to the regional PSRC.

4.1.81 The pharmacy was included in a previous PPV exercise and was unable to provide evidence to demonstrate how the claims met the service specification and so agreed to an overpayment recovery.

4.1.82 Having been involved in the previous PPV exercise the pharmacy would have been aware of the need to retain records for any subsequent PPV exercises.

4.1.83 The PSRC was presented with timelines of correspondence, showing all contact between the Provider Assurance team and the pharmacy.

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

4.1.85 The appeal has not provided any evidence to suggest that the deliveries were made to patients eligible for the Medicines Delivery Service. The deliveries then claimed were not eligible for the Medicines Delivery Service payments resulting in an overpayment to the pharmacy.

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

4.1.87 Having considered these matters NHS England and Improvement respectfully suggests that NHS Resolution conclude that the decision made by the PSRC in respect of the £3,120.00 overpayment recovery from Eightlands Limited 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 I have considered further the requirements relating to the home delivery service referred to by the NHS BSA.

6.8 I note that the Pharmaceutical Services (Advanced and Enhanced Services) (England) Directions 2013 (the "Advanced and Enhanced Services Directions") were amended on 27 March 2020 to require NHS England to commission a home delivery service from a pharmacy contractor who is to make a delivery of a prescription as mentioned in paragraph 22A(3)(a) or (b) of Schedule 4 to the Regulations. Paragraph 22A(3)(a) and (b) relate to deliveries to eligible patients in an area specified in an announcement made by NHS England with the agreement of the Secretary of State. The announcement must be to the effect that in order to assist in the management of the serious risk or potentially serious risk to human health, eligible patients are advised to stay away from pharmacy premises in the area specified, in the circumstances specified and for the duration of the period specified in the announcement.

6.9 The Advanced and Enhanced Services Directions go on to say that NHS England is directed to ensure there is a service specification for the home delivery service. A pharmacy contractor must comply with the requirements of the service specification.

6.10 I note the decision letter relates to deliveries made in the months of April – July 2021 inclusive, to both Clinically Extremely Vulnerable (CEV) and self-isolating patients.

6.11 I note in its appeal, in relation to CEV patients, the Appellant states that "*This is an over claim as our area was not commissioned at this time to supply the service*" and therefore agrees to the NHS BSA recovering the overpayment of

£480. Therefore I take no view on this matter and it is now for the NHS BSA to make the necessary arrangements to recover those monies.

6.12 I limit my consideration to those payments in relation to self-isolating patients.

6.13 A copy of the specifications and guidance for the 'Home delivery of medicines and appliances during the COVID-19 outbreak' dated 16 March 2021 have been provided to me by the NHS BSA, who has also provided a number of NHS England announcements.

6.14 I note the NHS BSA states that "*In the months of April 2021 to March 2022 the Medicines Delivery Service was limited to those patients who had been notified by Test and Trace to self-isolate*".

6.15 One of the announcements provided to me is dated 16 March 2021 and states the following:

6.15.1 "*To help provide support to people who have been notified of the need to self-isolate by Test and Trace, the Community Pharmacy Home Delivery Service and the Dispensing Doctor Home Delivery Service will be commissioned from 16 March 2021 to 30 June 2021 (inclusive) for anyone living in England who has been notified by Test and Trace to self-isolate. Upon receiving contact from Test and Trace, the individual is provided with a unique Test and Trace Account ID, which is an 8-character mix of letters and numbers.*

6.15.2 *This service is only available to people during their 10-day self-isolation period and who have provided their Test and Trace Account ID when requesting the service.*"

6.16 I do not appear to have been provided with an announcement relating to the period 1 July 2021 to March 2022. However I note that there is no dispute that the Community Pharmacy Home Delivery Service was commissioned during the period April 2021 to March 2022 inclusive and that it was only available to people during their 10-day self-isolation period who had provided their NHS Test and Trace Account ID when requesting the service.

6.17 The specifications and guidance provided state:

6.17.1 "*Pharmacy contractors should ensure that they are only delivering to eligible patients in the areas specified in the announcement in place at that time when they are acting in accordance with this service specification. Appropriate checks should be made to ensure that the patient remains eligible for this service, which may include checks on the summary care record.*"

6.18 I note the NHS BSA states that it was "*requested to conduct a Post Payment Verification exercise to ensure that pharmacy contractors claimed correctly for the Medicines Delivery Service between the months of April 2021 to March 2022 to ensure that all claims were for Self-Isolating patients and contractors had test and trace referral records available to substantiate those claims.*"

6.19 The NHS BSA has provided a timeline detailing its contact with the Appellant between 6 December 2023 and February 2024, in order to request evidence that the 440 self-isolating patient claims made between April 2021 and July

2021 were for deliveries made to eligible patients as detailed in the service specification.

6.20 I note that the service specifications state:

6.20.1 "*The pharmacy contractor must maintain appropriate records to ensure effective ongoing service provision and to support post-payment verification. This should include, as a minimum, details of the eligible patients to whom a delivery was made under this service, including the postcode of the patient's address, and the date of the delivery.*"

6.21 I note in its appeal, the Appellant contends that "*the records were kept for 2 years. There is no time frame in the specification, however, it is expected that claims records are kept for 2 years for PPV. This is also eluded to in the timeline on 09/01/2024 by [LE]. The earliest date of destruction for the records would be 2 years from July 2021 which would be July 2023. The request for records came on the 06/12/2023 which is 2.5 years after the last claim. I fail to see why the goal post has moved and why we are getting repeated requests for data which should have been destroyed based on normal practice. We are being penalised for following the guidance that is issued on PPV document retention. If there is a request for the records prior to this and within the 2 year timescale then please provide this*."

6.22 I note in response the NHS BSA has acknowledged that the service specification does not specify for how long contractors should keep records of the deliveries made but relies on the caveat that records must be retained for post payment verification. The NHS BSA states that "*Contractors were advised to retain evidence of deliveries made to Self-isolating patients as highlighted in the service announcements for post payment verification purposes*." The NHS BSA goes on to state that "*throughout the investigation the contractor was not able to provide any records to demonstrate a patient's eligibility for the service; or provide any details of how they confirmed a patient's eligibility in advance of providing the service.*"

6.23 Further *"The MDS Service Specification clearly states 'A record of the Test and Trace Account ID reference number must be made and retained as part of the contractor's delivery record to ensure effective ongoing service provision, and for post-payment verification purposes. Despite the multiple interactions with the contractor, they gave no information as to how the pharmacy confirmed eligibility with patients who would have had to provide evidence that they were requested to self-isolate by the Test and Trace Service and were provided with their Test and Trace number as their evidence."*

6.24 However the question being asked of the Appellant, was to review their claims and provide evidence to support the claims made for the relevant time period. Simply because the records have been destroyed does not mean that the Appellant did not collect the relevant information in relation to these claims. That being said, if the records were not retained in line with the service specification, then I do not consider that the lack of records should result in the benefit of the Appellant.

6.25 The NHS BSA states that "*It is unclear how this contractor formed the opinion that records only needed to be retained for two years*." I note the correspondence referred to by the Appellant, dated 9 January 2024 which is embedded in the timeline provided by the NHS BSA. The email sent to the

Appellant dated 9 January 2024 states "*Although there is no length of time mentioned within the specifications, in line with other Advanced Services it would have been expected that evidence should have been kept for at least a minimum of 2 years."* The NHS BSA contends that at no point was it mentioned that the end date for retaining records was exactly 2 years.

6.26 I agree that the NHS BSA does not state that records should be kept for a maximum of 2 years before being destroyed and I consider that the wording could be read as meaning that the records could be kept for more than 2 years such as 2 years and 1 day before being destroyed, thus meeting the expectation that records are kept 'for at least a minimum of 2 years'. Nevertheless, I consider that applying a longer retention period would have been to the benefit of the Appellant, and ensured that any work carried out was properly reimbursed.

6.27 Regardless, I consider this a point moot, as the email from the NHS BSA is dated 9 January 2024, and, as stated by the Appellant the records were destroyed around July 2023. I, therefore, consider that the records were already destroyed when the email from the NHS BSA was received. I also note that if they had not been destroyed at that point, the records should not have been subsequently destroyed as the Appellant had already been made aware on 6 December 2023, via the email provided by the NHS BSA, that evidence was required for post payment verification.

6.28 Due to the email from the NHS BSA, regarding a minimum 2 year retention period, being received after the records were already "*shredded*" I do not consider that the Appellant can rely on it as a justification for their prior actions. Therefore, in July 2023, when I consider it likely that the records were destroyed, the Appellant would have had to have regard to the service specification, as I have quoted above.

6.29 I note that the Appellant's reasoning for the destruction, were that it was "*normal practice*", and, in an email dated 28 February 2024, "*per NHS rules*". I note that they have not provided any evidence as to the NHS rules being referred to, or the basis upon which 2 years was considered normal practice. I also note that, as per the NHS BSA, the Appellant stated in a phone call on 16 January 2024 that NHS BSA records were kept "*between 2 and 5 years*". I consider that the Appellant was provided with the opportunity to comment on this phone call by the NHS BSA in an email dated 27 February 2024. I note that it did not do so, at the time, and, where the NHS BSA has restated this in its Representations, the Appellant has not contested it by providing observations. I consequently consider that the Appellant did make these statements, and that this directly contradicts the Appellant's position as to 2 years being "normal practice". I also note that the NHS BSA has stated that the NHS community pharmacy hypertension case-finding advanced service requires records to be retained for 3 years, which also runs counter to the Appellant's reasoning. As such, I do not consider the Appellant's position in relation to "*normal practice*" to be factually correct.

6.30 On this basis, I am of the view that the key question for this appeal is whether the Appellant's record retention was reasonable. In the absence of any specified time period, the requirement in the specification is absolute – appropriate records must be maintained. But it is not reasonable to expect a pharmacy to keep records forever so it is appropriate to imply into the wording that records will be kept for a reasonable time period, taking into account the

reasons expressly stated for maintaining records. Those reasons are to ensure effective ongoing service provision and to support post payment verification. The former would likely fall away once service provision ceases but the latter clearly extends after the provision of service and after payment has been received. The key question is therefore, knowing that records were to be maintained for post payment verification, whether the policy of the Appellant to destroy records when it did was reasonable.

6.31 As I have noted, other similar services had retention periods of both 2 and 3 years. I note that the Appellant has not provided any data management policy to evidence what its actual retention period for relevant records were, the basis upon which they were destroyed, or any specific reasons to illustrate why a 2 year retention period was reasonable in these circumstances. I do not consider it reasonable that, where a service specification expressly requires records to be maintained to support post payment verification, a pharmacy should be entitled to apply a short retention period without confirmation that there will be no post payment verification, and especially in circumstances where similar services require a longer period.

6.32 I note the NHS BSA's argument that the Appellant was previously involved in a post payment verification exercise and therefore the Appellant would have been aware of the need to retain records for any subsequent post payment verification exercises. I have not been provided with any information in relation to the previous post payment verification exercise, such as the dates in question and whether the request for information from the Appellant was made within 2 years, or whether the Appellant was advised to keep its records for longer than 2 years following the previous post payment verification exercise. However, the NHS BSA has stated that the Appellant agreed to recovery of an overpayment where it was unable to provide records to demonstrate eligibility. I conclude that, at a minimum, this should have alerted the Appellant to the significance of retaining evidence for post payment verification and indicated the benefit of a longer retention period. I consider that it was in the Appellant's best interest to retain records for as long a period as necessary, and to engage with the NHS BSA, prior to destroying any relevant records.

6.33 I note the Appellant's comments regarding "moving the goalposts", however, I have not been provided with any evidence to suggest that, at the time of the record's destruction, there was any representation made to the Appellant that a 2 year retention period was appropriate or should apply to the Community Pharmacy Home Delivery Service. In circumstances where longer retention periods were known to the Appellant, where it was in its best interest to retain the records and it was aware of the consequences of not doing so, in the absence of any explanation as to why it considered 2 years reasonable, and where it had previously kept NHS BSA records for up to 5 years, I must conclude that a 2 year retention period was not reasonable.

6.34 I note the NHS BSA's comments in relation to the Appellant's failure to provide any details regarding the process for confirming a patient's eligibility. I consider that where the records have been destroyed it is impossible to validate if any process was followed. Therefore, I do not consider that the Appellant's failure to explain its adherence to the service specification is either beneficial or detrimental to this appeal.

6.35 I consider that had any evidence, at all, relating to these months been provided then this might have enabled the Appellant to evidence that claims were made

in accordance with the requirements of the service specification. However, the Appellant has stated that the information "*was only kept for 2 years*". I do not consider that this destruction was in accordance with the service specification, as, the Appellant has not set out a reasonable basis for applying a 2 year retention period. I consider that the Appellant should have been able to provide the necessary information for post payment verification by the NHS BSA. As it has not done so, I consider that the NHS BSA's decision to recover the overpayment is the only appropriate outcome.

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 £2,640 in relation to self-isolating patients and £480 in relation to claims made for CEV patients.

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