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21 January 2025

REF: SHA/26311

APPEAL AGAINST NHS ENGLAND DECISION TO RECOVER AN OVERPAYMENT FROM SHAN PHARMACY LTD (FYY52) ("THE APPELLANT")

1 **Outcome**:

1.1 I dismiss the appeal and confirm the decision of NHS England to recover the overpayment of £4,014.00.

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:

Shan Pharmacy Ltd (FYY52)
NHS BSA on behalf of NHS England

8th Floor
10 South Colonnade
Canary Wharf
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APPEAL AGAINST NHS ENGLAND DECISION TO RECOVER AN OVERPAYMENT FROM SHAN PHARMACY LTD (FYY52) ("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 14 August 2024 in respect of Shan Pharmacy Ltd (ODS code FYY52). The decision stated:

2.1 **"Medicines Delivery Service - Post Payment Verification**

2.2 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.

2.3 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.

2.4 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/.

2.5 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.

2.6 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.

2.7 **Pharmacy Provider Assurance Team.**

2.8 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.

2.9 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.

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

2.10.1 FYY52 – SHAN PHARMACY LTD claimed for **303 Self-isolating** and **366 Clinically Extremely Vulnerable** deliveries for the Medicines Delivery Service in the months of April 2021 to July 2021.

2.11 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.

2.12 SHAN PHARMACY LTD was contacted on 11 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.

2.13 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.

2.14 The tables below outline the monthly Medicines Delivery Service claims reimbursed to your pharmacy – **SHAN PHARMACY LTD** – **FYY52** in the months of April 2021 to July 2021 for Self-isolating and CEV patients, along with the associated recovery values:

2.15 **Self-isolating claims**

2.16 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	103	98	102	0	303

2.17 303 Self-isolating claims paid x £6.00 **= £1,818.00**

2.18 **CEV claims**

2.19 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	190	176	N/A	N/A	366

2.20 Subsequently this has resulted in the following overpayment:

2.20.1 366 CEV claims paid x £6.00 **= £2,196.00.**

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

2.21.1 303 Self-isolating claims paid x £6.00 **= £1,818.00**

2.21.2 366 CEV claims paid x £6.00 **= £2,196.00.**

2.22 **Total value to be recovered = £4,014.00 deduction**.

2.23 **Action Required**

2.24 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 13th September 2024.**

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

2.26 If you have any concerns regarding the deduction or would like to discuss an alternative approach to recovering the overpayment, please contact us by 13th September 2024.

2.27 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.

2.28 **Please be aware that failing to contact us by 13th September 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:

NHS Resolution
Primary Care Appeals
10 South Colonnade
Canary Wharf
London

E14 4PU

2.29 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.

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

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

3 THE DISPUTE

In an email dated 11 September 2024 addressed to NHS Resolution, the Appellant appealed against NHS England's decision. The grounds of appeal are:

3.1 "We would like to appeal for this decision.

3.2 As per the previous owner (Mahendra Shah - who was in charge of the medicine delivery service April to July 2021) he has advised us that he only claimed for the eligible patients which he provided the service for. Unfortunately, he cannot find any evidences related to the claim. It is unfair for us as the new owners who never received any payment for this period, to pay such a large fine.

3.3 We find the below decision unfair. As we explained over the zoom call and via email, we purchased the pharmacy on the 3rd December 2021. The claims you are trying to recover relate to April and July 2021. We were not the owners during this period and should not be penalised for this. We have never been advised to change the ODS code. We should not be put in a position to lose monies that we have worked hard to make. It should not be our responsibility if the previous owners cannot find information relating to the deliveries carried out during Covid.

3.4 This type of fine imposed upon us will force us into administration, as we are barely scraping by. If your recovery goes ahead we will have no other option than to go down the Insolvency route. We kindly ask you to reconsider your decision and be fair.

3.5 We have discussed this with the previous owner for his input and he has asked us to appeal the decision.

3.6 We should not be fined for records not being accurately kept prior to our purchase or knowledge.

3.7 We respectfully await your decision."

4 SUMMARY OF REPRESENTATIONS

This is a summary of representations received on the appeal.

The NHS BSA on behalf of NHS England stated:

4.1 "Thank you for your letter of the 18th of September 2024 and the opportunity to provide representations on the appeal.

Background

4.2 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.

4.3 To allow these patients to receive their prescriptions, an Advanced service known as the Medicines 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'.

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

4.5 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.

4.6 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 would be required to ensure shielded patients could 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 were 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."

4.7 This and subsequent letters were published by NHS England on its website at:

4.8 https://www.england.nhs.uk/coronavirus/publication/preparedness-letters-forcommunity- pharmacy/.

4.9 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

4.10 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.

4.11 The guidance stated that only self-isolators that had provided their Test and Trace Account ID reference number when requesting the service were eligible to receive it. The guidance also stated that 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 acquaint themselves with the details of the service before making a claim.

4.12 Please find further information in this link to the service announcement –

4.13 https://www.england.nhs.uk/coronavirus/documents/home-delivery-of-medicinesand-appliances-during-the-covid-19-outbreak-march-2021/.

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

4.15 NHSBSA Pharmaceutical Provider Assurance Team (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.

4.16 It should be noted that Manage Your Service (MYS) 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. However, this did lead to the situation whereby in the months of April 2021 and May 2021, contractors were paid for those ineligible patient claims. Subsequently, NHSBSA PAT were requested to recover the identified CEV claims, as there was no regulation to allow payments for those patients due to them being ineligible.

4.17 In the Post Payment Verification (PPV) exercise undertaken by the NHSBSA PAT, FYY52 – Shan Pharmacy Ltd was contacted on 11 occasions between 6th December 2023 and 26th March 2024 to request evidence that the 303 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.

4.18 Alongside that, the NHSBSA PAT outlined that FYY52, Shan Pharmacy Ltd also incorrectly claimed for 366 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.

4.19 Emails were sent to the pharmacy's shared NHS mail address pharmacy.fyy52@nhs.net as required by NHSE, and from 24th January 2024 all emails were also sent to shanpharmacy@aah-n3.co.uk. 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.

4.20 The NHSBSA PAT engaged with [FR] during the PPV process, who the PAT were advised was the current pharmacy manager of Shan Pharmacy Ltd at that time.

4.21 The PAT also received emails from [MS], who the PAT was informed was the previous owner by the current pharmacy manager. [M] did request a call with the PAT to discuss the MDS PPV exercise. The PAT advised the case could not be discussed entirely with him directly as he was apparently no longer the manager of the pharmacy. However,

an option of a Microsoft Teams meeting was offered to discuss the details with both the current pharmacy manager and the previous owner present. This option was agreed, and the Microsoft Teams meeting was arranged for 15th February 2024.

4.22 During the Microsoft Teams meeting on the 15th February 2024 between the PAT, [FR] (who was introduced as the current pharmacy manager) and [MS] (who was introduced as the previous owner), [M] advised he would respond on behalf of [F] as he was responsible at the time the claims were made. A discussion took place where the PAT outlined why the claims for CEV patients were no longer eligible and also set out the evidence that was required to support the claims made for their Self Isolating patients, as without this specified evidence to support the MDS claims the PAT are unable to provide assurance to NHSE that the service was being performed correctly. [M] advised that they did make deliveries to all patients when asked to do so, but that they were under immense pressure at the time as they did not have the capacity to make all the deliveries. [M] also stated that they did have a list of patients, but [F] outlined they have been unable to locate this since the change of management. No further detail was provided to indicate what was recorded on this 'patient list' or how patients were identified as being eligible for self-isolating deliveries or even why the pharmacy continued to claim for CEV patients even though they were no longer eligible for the service.

4.23 Despite the numerous attempts made by the NHSBSA PAT, Shan Pharmacy Ltd did not provide any evidence to demonstrate that the 303 Medicine Delivery Service deliveries claimed for between April 2021 and July 2021 were made to self-isolating patients who had provided their test and trace referral number when requesting the service as specified in the service specification at that time.

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

4.25 For the avoidance of doubt, NHS England and the NHSBSA PAT do not dispute that these deliveries were made, rather that the engagement with the pharmacy was to confirm that the deliveries were made to patients who had been informed by Test and trace to self-isolate and were therefore eligible for the Medicines Delivery Service.

4.26 As the NHSBSA PAT have been unable to validate the deliveries claimed by the pharmacy during this time, an amount to be recovered was calculated. However, Shan Pharmacy Ltd did not accept the proposed recovery and requested 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 Medicines 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

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

4.28 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.

4.29 The engagement timeline showed that despite repeated requests made by the NHSBSA PAT to the contractor to provide evidence of patient eligibility for the service claims submitted, no evidence was forthcoming.

4.30 Consequently, the PSRC concluded that the NHSBSA PAT had been unable to find any evidence to demonstrate that the 303 deliveries claimed for Self-isolating patients by the contractor between April 2021 and July 2021 met the requirements set out in the service specification alongside the incorrectly claimed 366 MDS deliveries made for CEV patients.

4.31 Following this conclusion, the PSRC determined that the pharmacy was not entitled to the payments which it had received in relation to these patients.

4.32 Having made this decision, the PSRC then directed that as Shan Pharmacy Ltd 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.

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

4.33 The service specification/Service Announcements states:

4.34 *'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 postpayment verification purposes.'*

4.35 The service specification is therefore clear that *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. All contractors providing the service in line with the service specification would then have been aware that these records would be required should a contractor be required to provide evidence for the Post Payment Verification of service delivery eligibility.*

4.36 Shan Pharmacy Ltd appeal is based on the fact that a change of ownership occurred of which following the official process there is no record of this taking place therefore although we will respond to the points made the basis of the argument is moot as no change of ownership occurred. Shan Pharmacy Ltd stated that the previous owner, who was responsible for the MDS during April to July 2021, advised only eligible patients for which the service was provided were claimed for under MDS. Unfortunately, they are unable to locate any evidence relating to these claims nor was the previous owner able to explain why they continued to claim for two different kinds of MDS (Self Isolating and CEV) during the months in question.

4.37 However, without this evidence the PAT are unable to provide assurance that Shan Pharmacy Ltd followed the service specification and only claimed for deliveries to self-isolating patients who were eligible for the service. This eligibility should have been recorded including details of the patient's Test and Trace referral numbers as outlined in the service specification.

4.38 Shan Pharmacy Ltd goes on to state that *"We find the decision unfair.",* and "*We were not the owners during this period and should not be penalised for this. We have never been advised to change the ODS code. We should not be put in a position to lose monies that we have worked hard to make. It should not be our responsibility if the*

previous owners cannot find information relating to the deliveries carried out during Covid". As outlined in an email sent to Shan Pharmacy Ltd on 21st December 2023, the PAT advised that if there had been a change of ownership since the claims were made but no change to the ODS code unfortunately, as the new owners, they would still be responsible for all debts and liabilities, and therefore responsible for the MDS claims made during April 2021 to July 2021.

4.39 This information is clearly outlined on the application form that is required to be completed as part of a change of ownership.

4.40 The application form chapter-19_annex-1_application-form-application-in-respect-ofa-c.docx (live.com) asks:

Basis for the change of ownership [1]

4.41 Please can you confirm whether you are buying the pharmacy business on a:

4.41.1 Non debts and liabilities basis - Yes? No?

4.41.2 Debts and liabilities basis, with or without access to the existing bank account -Yes? No?

4.42 So Shan Pharmacy Ltd, if they completed the change of ownership process, should have been aware on what basis they were taking over the pharmacy. Alongside the application form there is further information in the Pharmacy manual NHS England » Pharmacy Manual.pdf pages 23 and 24 are relevant. Allocation of organisation data service codes 43. The following information sets out NHS England's policy in relation to the allocation of organisation data service codes (also known as ODS or F codes).

4.43 *44. Buying a retail pharmacy business or DAC business on a debts and liabilities basis means that the electronic prescription nominations do not need to be transferred to a new code. However, it also means that the new owner of the pharmacy or DAC premises will be liable for any monies owed to the commissioner by the previous owner. Applicants should therefore seek their own professional advice before submitting an application that involves a change of ownership.*

4.44 CPE also provide support to contractors and applicants buying an existing pharmacy.

4.45 Change of ownership - Community Pharmacy England (cpe.org.uk) and they also provide advice regarding when a change of ODS is and is not required following a change of ownership - We're all community pharmacy (cpe.org.uk).

4.46 If a change of ownership had occurred, the paper from NHSBSA would also reiterate this fact as PCSE Market Entry fill in the change of ownership form on behalf of the contractor and on the form, it clearly states select which option is applicable and if the pharmacy retains the same F-code the new ownership is agreeing to: -

4.47 *"Change of ownership (contractor completely buys out another company including debts, liabilities and/or access to bank account) – resulting in change of company name only. See Regulation 26 of the NHS (Pharmaceutical Services) Regulation 2012."*

4.48 However, upon review of the information to double check the facts of this case both NHSE and the NHSBSA were unable to find any paperwork or any record of a change of ownership occurring for the pharmacy FYY52. Also, if a change of ownership application had been correctly submitted, Shan Pharmacy Ltd should also be able to evidence payment of the application fee and a final decision letter issued to them by

PCSE as part of the application process. We are not aware that as part of the appeal this information has been submitted in support of their case.

4.49 Having checked their records the ICB were able to confirm that in December 2021 five directors resigned, and two new directors were appointed to Shan Pharmacy Ltd. Effectively the company has been bought out, but that has then continued to carry on trading as the same owners of the pharmacy and continued using the ODS code as a going concern. The current owners may therefore believe that there has been a change of ownership i.e. who owned the company. However, in terms of the pharmacy regulations, this is still the same company and when they purchased the company, they purchased any debts or liabilities, so unfortunately this is not something that they can use to mitigate this issue.

4.50 NHSBSA payments team have confirmed that there has been no change in the bank account details for Shan Pharmacy Ltd since the introduction of the MDS service. The payments for the MDS claims have all been made to the same contractor that the recoveries will be made from should the decision of the PSRC be upheld. We would therefore argue that even if a change of ownership could be evidenced, the payments (and therefore any recovery amounts) have continued to be paid to the same business entity, and therefore any suggestion by the appellant that the business has in some way changed and the current pharmacy is in no way connected to the provider who claimed for the Medicines Delivery Service in 2021 is plainly incorrect.

4.51 Therefore, both NHSE and the PAT would reiterate there is no basis for this appeal as the pharmacy is incorrect in the statement that a change of ownership has occurred and that they should not therefore be responsible or penalised. Shan Pharmacy Ltd was the contractor on the pharmaceutical list at the time of the delivery of the MDS, and they remain the contractor on the pharmaceutical list today.

4.52 *"This type of fine imposed upon us will force us into administration, as we are barely scraping by. If your recovery goes ahead, we will have no other option than to go down the Insolvency route. We kindly ask you to reconsider your decision and be fair."*

4.53 NHSE and the PAT do appreciate the pressures pharmacies can be under. However, the assurance activity is a consistent national approach where pharmacy contractors are treated equally. We must also clarify that this is not a fine but rather this is a potential recovery of public money which has been claimed for deliveries that the PAT has not been able to verify were to eligible patients. Public money should not be used to fund private services therefore the NHS has a duty to ensure that public money is spent appropriately - the assurance activity undertaken is intended to ensure that. The PAT have undertaken the assurance of the MDS in a systematic and consistent approach across all of the contractors it has identified as "anomalies" in their pattern of claiming for the service. Engagement with the anomalous contractors has then been undertaken to enable them to provide evidence of delivering in line with the service specification and then claiming for that service provision for eligible patients. It is only those pharmacies that have not been able to provide evidence to verify their claims that are then followed up in accordance with Regulation 94 of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

4.54 Shan Pharmacy Ltd state in their appeal *"We should not be fined for records not being accurately kept prior to our purchase and knowledge".* PAT would respond to this statement by highlighting as previously discussed no change of ownership occurred therefore, they are very much responsible and also that the previous manager was unable to state what evidence was necessary to be captured after April 2021 and also why the pharmacy continued to submit two separate claims for MDS.

4.55 Shan Pharmacy Ltd were also seen as a significant outlier nationwide for the service claims made by pharmacy contractors. By continuing to claim for both CEV and Self Isolating patients this led to high volumes overall when compared to national figures. As part of the assurance activity, we have reviewed all claims made by the contractors.

4.56 This volume meant that Shan Pharmacy Ltd across the months of April to July 2021, when the payment of the ineligible CEV claims was a factor, were one of the highest claiming pharmacies nationwide for MDS. The table below shows that the claims for MDS deliveries made by Shan Pharmacy Ltd were consistently and significantly higher than the national average in the months reviewed. PAT would also wish to flag that the Self Isolating patient claims were of a consistent amount across the three months the pharmacy claimed. This does not follow the overall national pattern of Self Isolating claims. The pharmacy failed to claim for the service again after July 2021 and no explanation was provided for this if they believed they had been claiming correctly prior to this date.

	Apr 2021	**May 2021**	**Jun 2021**	**Jul 2021**
Self-isolating claims paid	103	98	102	0
Combined CEV and SI	293	274	102	0
National monthly average claims Combined CEV and SI	87.36	72.03	28.07	19.79

4.57 NHS England maintains that Shan Pharmacy Ltd 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. In addition, the basis of the appeal (that a change of ownership has occurred which makes claiming the overpayment back from Shan Pharmacy Ltd unfair) is not evidence, and both NHSE and PAT would consider the contractor has no basis for their appeal. The decision to then recover the £1,818.00 overpayment for self-isolating claims and £2,196.00 for ineligible CEV claims was then in accordance with the regulations.

Key points for consideration

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

4.58.1 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.

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

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

4.58.4 Following on from the previous point, 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.

4.58.5 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.

4.58.6 No change of ownership was undertaken in December 2021 as outlined by Shan Pharmacy Ltd. Shan Pharmacy Ltd was the contractor on the pharmaceutical at the time of the delivery of the MDS, and they remain the contractor on the pharmaceutical list today. The change of ownership was the basis for the appeal, and there was no change of ownership.

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

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

4.58.9 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.

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

4.58.11 Having considered these matters NHS England respectfully suggests that NHS Resolution conclude that the decision made by the PSRC in respect of the £4,014.00 overpayment recovery from Shan Pharmacy Ltd was fair and in accordance with the regulations.

4.59 Please let me know of you need anything further to help in these deliberations."

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. I will consider these two sets of deliveries separately.

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

6.12 I note the NHS BSA states that "*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*" and that *"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."*

6.13 In the announcement dated 16 March 2021 it states the following:

6.13.1 "*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.*

6.13.2 *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.*"

6.14 I do not appear to have been provided with an announcement relating to the period 1 – 31 July 2021. However, I note that there is no dispute that the Community Pharmacy Home Delivery Service was commissioned during the period 1 – 31 July 2021 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.

6.15 The specifications and guidance provided state:

6.15.1 "*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.*"

6.16 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.*"

6.17 I further note the NHS BSA's comments that the Manage Your Service ("MYS") system had retained functionality for contractors to submit claims for delivering to CEV patients, which had led to claims being submitted for ineligible patients during the months of April and May 2021. The MYS service had subsequently been amended to ensure such claims could not be automatically paid. The NHS BSA states that it was, therefore,

requested to recover those CEV claims which had been paid in error, given that those patients were ineligible.

6.18 The NHS BSA states that it outlined to the Appellant that it had incorrectly claimed for deliveries to 366 CEV patients during April and May 2021 and enquired whether it was aware of the change to the service. I note that the Appellant has not contested this fact, therefore, I consider that the NHS BSA should make the necessary arrangements for recovery of the monies. However, I note the Appellant's comments that it should not be responsible for any repayment due to it not being the owners at the time of the payment. I consider that, as a matter of common sense, if the current pharmacy is not the one who received the overpayment then it should not be making the repayments. As the same reasoning was also put forward in relation to the self-isolating patient deliveries, I will consider this point in more detail following my consideration of the specific comments made regarding self-isolating patients.

6.19 The NHS BSA has provided a timeline detailing its contact with the Appellant between 6 December 2023 and March 2024, in order to request evidence that the 303 self-isolating deliveries were made to patients as detailed in the service specification. I note that the Appellant has stated:

6.19.1 *"As per the previous owner ([MH] - who was in charge of the medicine delivery service April to July 2021) he has advised us that he only claimed for the eligible patients which he provided the service for. Unfortunately, he cannot find any evidences related to the claim"*

6.20 In it representations, the NHS BSA states that during a meeting on the 15 February 2024, the previous owner "*advised that they did make deliveries to all patients when asked to do so, but that they were under immense pressure at the time as they did not have the capacity to make all the deliveries.*" The previous owner also stated that they did have a list of patients, but the Appellant outlined they have been unable to locate this since the change of management.

6.21 I note that the service specifications states:

6.21.1 "*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."*

6.22 I note that at the time of the NHS BSA's post payment verification exercise the pharmacy was unable to produce any records to show that the pharmacy had claimed correctly for the Medicines Delivery Service between the months of April 2021 to July 2021. The Appellant claims that the responsibility for evidencing the claims and repaying any overpayments rests with the previous owner of the pharmacy and that the reason for there being no evidence is that he was unable to find it.

6.23 I note that the requirement in the specification is absolute – appropriate records must be maintained. I consider that the pharmacy should have been able to provide the necessary information for post-payment verification by the NHS BSA. I note that it has not been suggested that any records were destroyed or otherwise deleted, only that they are unable to find them. I do not consider that this misplacing of the information, regardless of any alleged change in ownership, is a sufficient reason for them to be exempt from the requirements of post-payment verification.

6.24 I note that the Contractor has stated that they should not be penalised due to "*records not being accurately kept prior to our purchase*". I consider that this suggests some level of acceptance with regard to a lack of adequate records in relation to self-isolating patients.

6.25 This leads me to the question of the Appellant's change of ownership. The Appellant, whilst not disputing the service specification or the amounts that the NHS BSA has determined was overpaid by it, has repeatedly claimed that there are mitigating circumstances that should be considered. This is due to the fact that they allege a change of ownership has taken place, and thus it would be "unfair" for them to incur any repayments.

6.26 I have also had regard to the following comments made by the Appellant regarding ownership:

6.26.1 *"As per the previous owner ([MS] - who was in charge of the medicine delivery service April to July 2021)"*

6.26.2 *"It is unfair for us as the new owners who never received any payment for this period, to pay such a large fine."*

6.26.3 "*As we explained over the zoom call and via email, we purchased the pharmacy on the 3rd December 2021. The claims you are trying to recover relate to April and July 2021. We were not the owners during this period and should not be penalised for this".*

6.27 I note the NHS BSA's representations on the appeal have made a number of comments [see points 4.36 to 4.50 above] regarding ownership of the pharmacy. From these I have noted:

6.27.1 The link to a copy of the Community Pharmacy England 'Briefing: 038/18: Change of pharmacy circumstance checklist: ODS codes and planning required' dated February 2024 includes:

6.27.2 *"This briefing for pharmacy owners explains pharmacy ODS (F) codes and those actions needed if your pharmacy circumstances are going to change (e.g. location or ownership). Pharmacy relocation, closures or sales are subject to regulatory requirements, but this briefing focuses on mitigating IT impacts where such changes are planned. Community Pharmacy England recommends that pharmacy owners planning such changes work through all of this guide and let the relevant Integrated Care Board (ICB) know at least one month ahead of the planned date for the change and changes to it. The full transition period lasts for at least one month. The timescale above is separate from the formal notice period stated in the "notice of commencement" form1 . Please tick off each item as it is completed."*

6.27.3 A link to the Community Pharmacy England information sheet entitled 'Change of ownership' which includes:

6.27.3.1"A "change of ownership" for the purposes of the National Health Service (Pharmaceutical and Local Pharmaceutical Services Regulations 2013 (the Regulations) covers the situation where the legal identity of the pharmacy contractor has changed. Before a change of ownership takes place, the proposed incoming pharmacy contractor must make an application pursuant to regulation 26 of the Regulations. Unless there is good cause for delay, NHS England must determine the change of ownership application as soon as it is

practicable to do so and within 30 days of the date on which all the required information and documentation was received by them (this will include fitness to practise).”

6.27.4 A link to the Chapter 19, Annex 1, Application form ‘Application in respect of a change or ownership’ [I note the form includes the wording referred to by the NHS BSA at point 4.41 above.]

6.28 I note that the NHS BSA has stated that it has no record of a change of ownership taking place. As I have not been provided with any comments in response by the Appellant, I consider that no change of ownership application was made. I note specifically that the Appellant has not provided any information to show that a change of ownership has been granted in respect of the pharmacy code FYY52.

6.29 I note that this appeal is not about whether the proper change of ownership process required under the Regulations was accorded with, I therefore make no comment in that regard. Regardless of if it had been properly enacted, if the legal entity owning the pharmacy had, in actual fact, changed then this might impact on the fairness of any repayments. I note that the NHS BSA has stated that the ICB were able to confirm that a change in directors in relation to the Appellant has taken place. However, I note that that this does not actually change the legal entity of the Appellant. Whilst the pharmacy owners (the directors) may have changed, the entity that is the Appellant remains the same. As such, I consider it irrelevant that the directorship has changed in regards to the liability for repayment. The Appellant is the same Appellant who received the overpayments and the change in directorship has no impact on this. I note that the Appellant has made no comment if this is the case or not.

6.30 To illustrate this point further I note the NHS BSA's comments that there has been no change in the bank account details of the Appellant. I, therefore, consider that the NHS BSA is correct, that the entity that is the Appellant has not changed. As the Appellant has provided no observations, I consider the NHS BSA's comments to be reflective of the situation. Consequently, as the ODS code, the bank accounts and the name of the Appellant is the same, and in the absence of any evidence regarding a change of ownership application, I consider that the Appellant is required to make any necessary repayments in relation to both the CEV and self-isolating patient deliveries and that there is no unfairness in this outcome.

6.31 I note the Appellant's comments relating to the impact of the repayment. I would ask the NHS BSA to liaise with NHS England to put in place a phased recovery over several months so as to mitigate the impact.

6.32 Finally, I note the Appellant's references to the repayment as a "fine". I consider this characterisation is not correct. As I have considered above, the Appellant was not entitled to the monies paid in respect of the CEV patients. I also consider that, due to the lack of any evidence of the deliveries to self-isolating patients being correctly carried out, it was also not entitled to those monies either. Therefore, this is not a "fine" but the correction of an overpayment made to the Appellant in circumstances where the payment should not have been made.

6.33 In light of these issues, I am of the view that the Appellant is required to make the repayments as requested by the NHS BSA.

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 £4,014.00.

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