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29 May 2025

REF: SHA/26545

APPEAL AGAINST NHS ENGLAND DECISION TO RECOVER AN OVERPAYMENT FROM O'BRIENS PHARMACY GROUP ("THE APPELLANT") WITH REGARD TO FLEETWOOD HEALTH CENTRE PHARMACY (FN702)

1 Outcome:

1.1 I dismiss the appeal and confirm the decision of NHS England to recover the overpayment of £636.00.

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:

O'Briens Pharmacy Group
NHS BSA on behalf of NHS England

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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 13 February 2025 in respect of Fleetwood Health Centre Pharmacy (ODS code FN702). 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 –

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

2.6 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.

2.7 **To date your pharmacy has not provided any reasoning 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.**

2.8 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.

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

2.9.1 FN702 – FLEETWOOD HEALTH CENTRE PHARMACY claimed 106 deliveries for the Medicines Delivery Service in the months of April 2021 to July 2021.

2.9.2 The NHSBSA Provider Assurance Team did not receive any reasoning which demonstrated that the Medicines Delivery Service claims made between the months of April 2021 to July 2021 were for eligible patients and therefore could not verify that these claims met the requirements set out in the service specification.

2.9.3 FLEETWOOD HEALTH CENTRE PHARMACY was contacted on 4 separate occasions by the NHSBSA Provider Assurance Team to request their reasoning which demonstrates that the Medicines Delivery Service claims made during this time met the requirements set out in the service specification.

2.10 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.

2.11 The tables below outline the monthly Medicines Delivery Service claims reimbursed to your pharmacy – **FLEETWOOD HEALTH CENTRE PHARMACY – FN702** in the months of April 2021 to July 2021 for your CEV patients, along with the associated recovery value:

	April 2021	May 2021	June 2021	July 2021	Total
CEV claims paid	60	46	N/A	N/A	**106**

2.12 Subsequently this has resulted in the following overpayment:

2.13 106 CEV claims paid x £6.00 **= £636.00.**

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

2.15 106 CEV claims paid x £6.00 **= £636.00.**

2.16 **Total value to be recovered = £636.00 deduction.**

2.17 **Action Required**

2.18 1. 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 15th March 2025.** Where you agree an overpayment has been made the amount over paid will be recovered by deduction from a future NHSBSA payment to you.

2.19 If you have any concerns regarding the deduction or would like to discuss an alternative approach to recovering the overpayment, please contact us by 15th March 2025.

2.20 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.

2.21 2. **Please be aware that failing to contact us by 15th March 2025 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:

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

2.23 3. If there is no appeal within 30 days from the date of this letter, NHS England has requested that the NHSBSA Provider Assurance Team commence overpayment recoveries under Regulation 94(1) (b) of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, on the basis that the final outcome of our investigation is that there has been an overpayment. The NHSBSA will notify you of when the overpayment recovery will take place. A record of this process will be kept on your NHS England contractor file.

2.24 For more information or for clarification of any of the details in the letter, please contact us by email at pharmacysupport@nhsbsa.nhs.uk, alternatively you can contact us on 0300 330 1295.

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

2.26 Your co-operation is very much appreciated."

3 THE DISPUTE

In an email dated 3 March 2025 addressed to NHS Resolution, the Appellant appealed against NHS England's decision. The grounds of appeal are:

3.1 "This email is with reference to sites

3.1.1 FWX91

3.1.2 FY672

3.1.3 FEW64

3.1.4 FQJ64

3.1.5 FN702

3.1.6 FPP13

3.1.7 FAH73

3.2 In respect to the medicines delivery service PPV April to July 2021.

3.3 We dispute the overpayment on the above pharmacies and disagree with the clawback.

3.4 We agree with the timeline of correspondence for each site with the exception that it does not contain information we provided to dispute the claims in email chains.

3.5 We dispute the overpayment for the following reasons

3.6 1. We have no evidence that the MOU was read and understood with a change to delivery service as the person who made these claims has left the business and we have no records of such MOU being distributed. We have requested a copy of such evidence but this has not been able to be provided other than 9it [sic] was sent to all mailboxes'. No read receipts have been provided for example.

3.7 2. When referring to sps guidelines for document retention https://www.sps.nhs.uk/articles/additional-services-records-in-community-pharmacy/ It clearly states normally a record for 2 years would be appropriate for other community pharmacy services (such as NMS/MUR/FIU) for post payment verification. The service in question was April-July 2021 and the first email request for post payment verification was sent on 17th June 2024. This is approximately three years after the service. We have no evidence of this provision. We are therefore unable to verify claims made as records have been destroyed and are not available.

3.8 We have requested further information from the NHSBSA with regards [sic] to claims that may allow us to identify patients we have claimed for but this information is not held.

3.9 We therefore dispute the claim of overpayment as the request for evidence and the ability to verify is not available as neither party can provide evidence of overpayment and it is outside of the standard post payment verification guidelines for many other pharmacy services. We have also not seen any MOU or evidence giving guidance for this service that evidence would be required to be retained for longer than this two year period.

3.10 3. We feel it is unethical to claw back monies from contractors given points 1 and 2 and would be a breach of trust and confidence in delivery of future community pharmacy services commissioned at short notice in unprecedented circumstances such as covid.

3.11 4. We do not believe we have fraudulently or otherwise claimed any eligible patients for the service and neither party are able to determine if the overpayment has been made.

3.12 5. The monies have now been spent given the 3 year time window and reclaiming this money will put the business into financial hardship at a time when we are already under

financial duress and are still awaiting news of a new contract- which is also almost a year out of date.

3.13 Therefore we reject the recovery of monies for this service as per emails from pharmacy support."

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 10th March 2025 and the opportunity to provide representations on the appeal.

4.1.2 **Background**

4.1.3 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.

4.1.4 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'.

4.1.5 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.

4.1.6 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.

4.1.7 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."

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

4.1.9 https://www.england.nhs.uk/coronavirus/publication/preparedness-letters-for-community-pharmacy/.

4.1.10 Following the publication of each of these letters on the NHS Website the Pharmaceutical Services Negotiating Committee (PSNC) – 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.

4.1.11 **April 2021 to July 2021 March 2022 claims**

4.1.12 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.

4.1.13 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.

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

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

4.1.16 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.

4.1.17 The 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 (SI) patients and contractors had Test and Trace referral records available to substantiate those claims.

4.1.18 Manage Your Service (MYS) put in place new functionality to enable contractors to claim for the delivery of the MDS to SI patients. In doing so it retained the functionality for contractors to submit claims for CEV patients to future proof the system in-case the response to the Pandemic and MDS changed again at some point in the future and required the MDS provision for CEV patients. DHSE, NHSE and PSNC agreed the wording of the communication regarding this change to the service expecting that this would be sufficient for those contractors delivering the service to understand the changes in patient eligibility.

4.1.19 However, MYS became aware that contractors continued to claim for deliveries to CEV patients. 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. CEV claims submitted after 05 May 2021 were not paid and only claims for deliveries to SI patients were processed for payment.

4.1.20 However, this did lead to the situation whereby for 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 patients who were ineligible for the service.

4.1.21 In the Post Payment Verification (PPV) exercise undertaken by the NHSBSA PAT FN702 - O'Brien's Pharmacy were contacted on 4 occasions between 5th September 2024 and 26th September 2024 to outline that the 106 CEV claims made between April 2021 to July 2021 were for deliveries made to ineligible patients as the ability to claim for CEV patients under the MDS has ended in March 2021.

4.1.22 Emails were sent to the pharmacy shared NHS mail address pharmacy.fn702@nhs.net as required by NHSE. All listed pharmacies must have a valid shared NHS mail account that should be regularly monitored by the pharmacy team as part of their terms of service. Later during our communication with the pharmacy, further emails were also sent to [XXX]@obrienspharmacy.com and fleetwoodhc@obrienspharmacy.com as requested.

4.1.23 A telephone call was made to the pharmacy to confirm receipt of our initial email and to inform them of the 3-week response deadline. The NHSBSA PAT spoke with the pharmacy staff member, Sam, who advised they would forward the email to the superintendent [XXX]. The NHSBSA PAT engaged with [XXX] during the PPV process, who the PAT were advised was the Operations Lead and Superintendent Pharmacist at O'Brien's Pharmacy Group. Following the telephone call [XXX] responded immediately to dispute any reclaim.

4.1.24 The PAT advised that the eligibility for CEV patients for the MDS ceased on the 31/03/2021 and therefore claims for deliveries to these patients after this date do not qualify for a MDS payment. Therefore, NHS England has requested that the ineligible claims made for O'Brien's Pharmacy (FN702) to be recovered.

4.1.25 Multiple O'Brien's Pharmacy Group accounts were included in the current PPV exercise. Therefore, to streamline the PPV process, the NHSBSA PAT emailed [XXX] to clarify if she was the person responsible for other O'Brien's pharmacies which appear in this PPV exercise. However, the NHSBSA PAT did not receive any clarification to this request. In her response email dated 26th September 2024, [XXX] stated, "*We have already stated we believe we have acted in a proper manner and claimed honestly*."

4.1.26 To avoid any doubt there is no dispute about these deliveries having been made, 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 Medicine Delivery Service.

4.1.27 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 Regulations 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.

4.1.28 **The PSRC decision**

4.1.29 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.

4.1.30 The engagement showed that despite repeated requests made by the NHSBSA to the contractor over four months to provide evidence of patient eligibility for the service claims submitted, no valid evidence was provided.

4.1.31 Consequently, the PSRC concluded that the NHSBSA had been unable to find any evidence to demonstrate that the 106 CEV claims made by the branch met the requirements set out in the service specification and therefore the claims made in April 2021/May 2021 were incorrectly claimed as the patients were no longer eligible.

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

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

4.1.34 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 March 2022 met the requirements set out in the service specification.

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

4.1.36 The MDS service specification/service announcements from April 2021 state:

4.1.37 *"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."*

4.1.38 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.

4.1.39 We include this information to establish that all claims for the MDS from April 2021 should be for patients self-isolating with supporting test and trace referral evidence and how that is clearly outlined in the service information available to pharmacy contractors.

4.1.40 O'Brien's Pharmacy did not claim for self-isolating patients during the time period we reviewed however, those claims are not a part of our assurance activity and instead it was only the 106 CEV claims made in April/May 2021 that we requested further explanation and evidence around.

4.1.41 The PAT are not disputing the fact that the deliveries have been made, however, as we have previously advised the pharmacy, NHSE have requested the PAT engage with contractors who claimed for deliveries to CEV patients. The service for 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 as this cohort was no longer eligible for the service.

4.1.42 O'Brien's Pharmacy in their appeal suggest they were unaware of this change due to a change in staff. In response we would highlight the following:

4.1.42.1 The pharmacy was still responsible for ensuring the claims submitted on MYS were for deliveries to patients eligible for the service under the service specification for the service in place when the deliveries were made.

4.1.42.2 The claims submitted were for CEV patients when these were not patients eligible for the service at the time the claims were submitted.

4.1.42.3 The appellant has not suggested or provided any evidence to demonstrate that the deliveries were for self-isolating patients instead of CEV patients.

4.1.42.4 The appellant does not then appear to be challenging that the claims were in fact submitted for ineligible patients.

4.1.43 In their appeal statement, the appellant states they appeal the decision for several reasons and the first of these was "*We have no evidence that the MOU was read and understood with a change to delivery service as the person who made these claims has left the business and we have no records of such MOU being distributed. We have requested a copy of such evidence but this has not been able to be provided other than 9it* [sic] *was sent to all mailboxes'. No read receipts have been provided for example"*

4.1.44 On this point the PAT appreciate the Pandemic was a stressful time for pharmacies however we need to state that information regarding the MDS was published regularly by NHSE on its website and following the publication of each of these letters on the NHS Website, Community Pharmacy England (CPE), also sent an update to its members. These updates highlighted the changes to the service specification, ensuring that all community pharmacies were informed of the necessary adjustments and extensions to the MDS. This comprehensive communication strategy was designed to ensure that all pharmacies were aware of the requirements and could comply accordingly. This method of communication was effective as the majority of pharmacy contractors stopped claiming for the ineligible CEV patients suggesting they were aware of the change to the service after April 2021. In support of this point

for the previous three months before the change to the service of January to March 2021 the 3-month average total number of pharmacies claiming for MDS was 6,621 however after the service change the 3-month average total number of pharmacies claiming for MDS from April to June 2021 reduced to 1,048. This is almost an 85% reduction in pharmacies claiming for MDS showing the message to pharmacies around who was eligible for the service was clear. The PAT would also state pharmacy contractors performing advanced services such as MDS have a responsibility to ensure they keep up to date with changes to the service they are providing on behalf of their patients.

4.1.45 The appellant refers to SPS guidelines for document retention and suggests that; *"It clearly states normally a record for 2 years would be appropriate for other community pharmacy services (such as NMS/MUR/FIU) for post payment verification. The service in question was April-July 2021 and the first email request for post payment verification was sent on 17th June 2024. This is approximately three years after the service. We have no evidence of this provision. We are therefore unable to verify claims made as records have been destroyed and are not available."*

4.1.46 In response to this statement, PAT would argue it does not specifically state in the service specification how long that MDS evidence should be kept by pharmacy contractors just that this evidence should be available upon request for PPV purposes. The lack of explicit instructions from the NHS regarding the timescales for the storage of these records does not negate the requirement in the service specification that appropriate records must be maintained. This documentation is essential to substantiate the deliveries made under the Medicine Delivery Service. The 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.

4.1.47 As the appellant has mentioned other advanced services and the retention period, the PAT would state that those services such as NMS it does specifically state in the service specification for that service how long evidence should be retained. 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 be retained for post payment verification purposes without the reference to a time scale for retention. For the New Medicines Service there is a time scale mentioned in paragraph 7- ongoing **conditions of arrangements**:

4.1.48 (l) P (pharmacy) 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).

4.1.49 (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

4.1.50 (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.

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

4.1.52 It is therefore clear that records being kept for 2 years only is not uniform and there is the precedence that evidence would be required to be retained for longer than two years. It, therefore, appears incredulous that a contractor providing this service in accordance with the service requirements and knowing that records would be required for PPV purposes may have then destroyed such records without confirming that they would not be needed for such a PPV exercise.

4.1.53 In similar situations NHS Resolution has taken the view "that the key question for an 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".

4.1.54 The appellant has not provided any data management policy to evidence what its actual retention period for relevant records were, or which part of the SPS refers to records for the medicines delivery service.

4.1.55 Further on the point around the evidence being available the appellant does state; *"We have requested further information from the NHSBSA with regards to claims that may allow us to identify patients we have claimed for but this information is not held"*. The PAT could not assist with this query as pharmacy contractors only submit monthly volumes onto MYS for the service. The NHSBSA did not require data of every patient who has had a delivery performed under MDS to be provided and so would not hold that data. It was incumbent of the pharmacy to hold the data required for PPV and for them to be able to provide this to the NHSBSA PAT not the other way round.

4.1.56 O'Brien's Pharmacy state: *"We therefore dispute the claim of overpayment as the request for evidence and the ability to verify is not available as neither party can provide evidence of overpayment."* NHSE and the PAT would completely disagree with this point as the evidence of overpayment by the contractor is that they have claimed and been paid for ineligible patients for the service as they continued to claim for CEV patients after March 2021 when the service changed, and that cohort was no longer eligible for deliveries under the MDS.

4.1.57 The submission and payment came about from information entered onto MYS by the appellant. Before undergoing our assurance activity, the PAT confirmed that there is a legal obligation for contractors such as O'Brien's Pharmacy to share evidence available in response to PPV and this is in accordance with data protection legislation. - 8.1. The pharmacy contractor must maintain appropriate records to ensure effective ongoing service provision and to support post-payment verification.

4.1.58 The appellant states: *"We feel it is unethical to claw back monies from contractors given points 1 and 2 and would be a breach of trust and confidence in delivery of future community pharmacy services commissioned at short notice in unprecedented circumstances such as covid."*

4.1.59 NHSE and the PAT do appreciate the pressures pharmacies face and were under during the impact of the COVID Pandemic however the assurance activity is a consistent national approach where pharmacy contractors are treated equally ensuring a fair and consistent approach. We do not feel this approach is breaching confidence in delivering future commissioned services but instead highlights that assurance activity will be undertaken to ensure public money is spent correctly. 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. It is only those pharmacies who have claimed for ineligible patients or those 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.

4.1.60 The appellant goes onto state; *"We do not believe we have fraudulently or otherwise claimed any eligible patients for the service and neither party are able to determine if the overpayment has been made."*

4.1.61 In response to these points the PAT would state that at no point during the engagement has the PAT suggested that O'Brien's Pharmacy have claimed fraudulently for MDS. Rather we highlighted that the pharmacy had submitted claims and been paid for deliveries to ineligible patients for the service, and despite the best endeavours it has not been possible to find evidence that the claims were for deliveries for eligible i.e. self-isolating patients.

4.1.62 Where the contractor is not able to provide evidence to demonstrate that the deliveries claimed were to patients who were eligible for the service then the NHSBSA PAT cannot provide assurance to NHS England that the service claims were in line with the service specification.

4.1.63 In this case the MYS records clearly show that the pharmacy made claims which were paid during April to May 2021 for patients who were no longer eligible patients for the service, and, despite the opportunities provided during the investigation the pharmacy has been unable to provide any evidence to show otherwise.

4.1.64 The PAT appreciate the hard work performed by pharmacies during the Pandemic, especially with the supporting of vulnerable and elderly patients and understand it was an unprecedented and challenging time; however, we must stress the service specification was clear as to which patients could receive a free delivery under the MDS and only those patients should have been claimed for. The PAT explained that there are some pharmacies who do choose to offer a free delivery service to some or all their patients and there are pharmacies who pass the cost of delivering prescriptions onto their patients. However, claims for ineligible patients for a service cannot be passed back onto the NHS.

4.1.65 The appellant finishes their appeal stating, *"The monies have now been spent given the 3 year time window and reclaiming this money will put the business into financial hardship."*

4.1.66 NHSE and the PAT does recognise the pressure's pharmacy contractors are facing, however, that does not mean that overpayments can then be written off. The MDS was set up so that public money should be focused to the provision of delivery services to eligible patients only. The NHS has a duty to ensure that public money is spent appropriately, and the assurance activity is in place to ensure that.

4.1.67 The PSRC considered that O'Brien's Pharmacy had not provided sufficient evidence to demonstrate that the claims it had submitted between April 2021 and July 2021 were for deliveries to patients eligible for the MDS. As a result, the decision determined that the £636.00 payment for the ineligible CEV claims were over payments and should then be recovered from the contractor.

4.1.68 **Key points for consideration**

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

4.1.69.1 The NHSE service announcement was very clear that the Medicines Delivery Service was limited from April 2021 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.

4.1.69.2 Contractors were advised to retain evidence of MDS deliveries as highlighted in the service announcements for post payment verification purposes. It is a contractors responsibility to be aware of any changes to the patient groups eligible for the service.

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

4.1.69.4 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.

4.1.69.5 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.

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

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

4.1.69.8 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.

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

4.1.70 Having considered these matters NHS England respectfully suggests that NHS Resolution conclude that the decision made by the PSRC in respect of the £636.00 overpayment recovery from O'Brien's Pharmacy was fair and in accordance with the regulations.

4.1.71 Please let me know if 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 It is clear to me that the home delivery service is dependant in terms of eligibility of patients and the geographical areas in which it applies on the contents of announcements made by NHS England. The NHS BSA has provided copies of announcements made by NHS England.

6.11 I note that the NHS BSA has indicated that the deliveries that are covered by the decision are those made in the period April to July 2021 inclusive. These were 106 deliveries to those who were Clinically Extremely Vulnerable (CEV).

6.12 A copy of the specification 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.

6.13 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.*" 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.*" which has not been disputed by the Appellant.

6.14 The specifications and guidance provided state:

6.14.1 "*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.*"

6.15 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 (SI) patients and contractors had Test and Trace referral records available to substantiate those claims."*

6.16 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.

6.17 The NHS BSA has provided a timeline detailing its contact with the Appellant between 5 September 2024 and 26 September 2024, where it outlined to the Appellant that "*the 106 CEV claims made between April 2021 to July 2021 were for deliveries made to ineligible patients as the ability to claim for CEV patients under the MDS has ended in March 2021.*"

6.18 I note that the Appellant has not been able to provide any information as to why it continued to inadvertently claim for CEV patients who became ineligible with effect from 31 March 2021.

6.19 I note that the service specification states:

6.19.1 *"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."*

6.20 I note in its appeal, the Appellant states "*We have no evidence that the MOU was read and understood with a change to delivery service as the person who made these claims has left the business and we have no records of such MOU being distributed. We have requested a copy of such evidence but this has not been able to be provided other than 9it* [sic] *was sent to all mailboxes'. No read receipts have been provided for example.*"

6.21 I note in response the NHS BSA states "*…information regarding the MDS was published regularly by NHSE on its website and following the publication of each of these letters on the NHS Website, Community Pharmacy England (CPE), also sent an update to its members. These updates highlighted the changes to the service specification, ensuring that all community pharmacies were informed of the necessary adjustments and extensions to the MDS. This comprehensive communication strategy was designed to ensure that all pharmacies were aware of the requirements and could comply accordingly. This method of communication was effective as the majority of pharmacy contractors stopped claiming for the ineligible CEV patients suggesting they were aware of the change to the service after April 2021.*" The NHS BSA states further that "*…pharmacy contractors performing advanced services such as MDS have a responsibility to ensure they keep up to date with changes to the service they are providing on behalf of their patients.*"

6.22 I note that updates which included changes to the service specification for MDS were widely distributed to all pharmacies by NHS England and subsequently by Community Pharmacy England. I consider that an employee having left the business should not be a reason for preventing the keeping of proper records for services being provided by the pharmacy and concur with the NHS BSA that it is the responsibility of the Appellant to keep up to date with changes to those services.

6.23 I note the Appellant refers in its appeal to guidelines for document retention from the Specialist Pharmacy Service (SPS) website. The Appellant states "*It clearly states normally a record for 2 years would be appropriate for other community pharmacy*

services (such as NMS/MUR/FIU) for post payment verification. The service in question was April-July 2021 and the first email request for post payment verification was sent on 17th June 2024. This is approximately three years after the service. We have no evidence of this provision. We are therefore unable to verify claims made as records have been destroyed and are not available."

6.24 I note the service specification is silent on this point. I also note the NHS BSA has commented that the service specification does not specify for how long contractors should keep records of the deliveries made and relies on the caveat that records must be retained for post payment verification. NHS BSA states that "*… those services such as NMS it does specifically state in the service specification for that service how long evidence should be retained. 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 be retained for post payment verification purposes without the reference to a time scale for retention.*" NHS BSA further states that "*Other advanced services such as the NHS community pharmacy hypertension case-finding advanced service requires records to be retained for 3 years.*"

6.25 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.

6.26 I consider that the Appellant was aware that other similar services had, at least, a two year retention period, due to its reference to the periods stated on the SPS website. I note that the Appellant has not provided any data management policy to evidence what its actual retention period for relevant records were. 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 2 year retention period without confirmation that there will be no post payment verification, and especially in circumstances where there are similar services which require a longer period.

6.27 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.

6.28 I have noted, the Appellant has not expressly stated what its retention policy was for the records and due to the evidence provided, I must consider the possibility that a two year retention policy was in place which in the Appellant's view, was the reason why *"records have been destroyed and are not available".* 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 set period. However, the fact of the matter is that the window for claiming for CEV patients ended on 31 March 2021. Conversely, the option was available for the Appellant to provide evidence in order for the NHS BSA

to verify the claims and allow it to give assurance to NHS England that the service was performed correctly. I take this to refer to self isolating claims which are not the subject of this dispute.

6.29 I note the Appellant's comments that "*We feel it is unethical to claw back monies from contractors given points 1 and 2 and would be a breach of trust and confidence in delivery of future community pharmacy services commissioned at short notice in unprecedented circumstances such as covid.*" and "*The monies have now been spent given the 3 year time window and reclaiming this money will put the business into financial hardship at a time when we are already under financial duress…*".

6.30 Whilst I am sympathetic towards the Appellant's position, given the claiming for CEV patients ceased, the Appellant does not qualify for payment in line with the service specification.

6.31 I agree with the NHS BSA that the decision to recover the overpayment is appropriate.

6.32 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.

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 £636.00.

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