

National Appeal Panel

Constituted under

THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)

(SCOTLAND) REGULATIONS 2009 (AS AMENDED)

("THE REGULATIONS")

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

Unit 3, Calderwood Village Square,

Calderwood. EH53 0GU

Applicant and Appellant: Calderwood Pharmacy Partnership Ltd

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 17 September 2024

Panel case number: NAP 129 (2024)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 17 September 2024 in relation to the application of Calderwood Pharmacy Partnership Ltd (“the Appellant”).
- 1.2. The application was originally made on 1 June 2023. The application was considered at a meeting of the PPC on 28 August 2024. The PPC issued its decision to refuse the application on 17 September 2024.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 7 October 2024.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This relates to whether there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based. In particular, the Board has failed to properly consider the CAR.
- 2.2. Ground of Appeal 2. This ground relates to the application of the legal test in terms of the Regulations. In particular, when considering adequacy, whether the PPC was correct to conclude that existing services being “not ideal” did not meet the threshold of inadequacy.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:

3.1.1. A procedural defect in the way the application has been considered by the Board;

3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or

3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:

3.2.1. To dismiss the appeal if I consider that they disclose no reasonable grounds or are otherwise frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions the Board is to grant the application.

3.4. The Regulations provide, at paragraph 3(1) of Schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the Consultation Analysis

Report (the “CAR”), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

- 4.1. Ground of Appeal 1. This relates to whether there has been a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based. In particular, whether the Board has failed to properly consider the CAR.
- 4.2. Failure to properly consider the CAR, as a matter of procedure, is a ground of appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - paragraph 3(6)(a) and (b) of Schedule 3.
- 4.3. The Appellant advances this ground with reference to the extent to which the PPC has properly considered the CAR as set out above, ending with a conclusion that it can longer be relied upon.
- 4.4. In considering this ground of appeal one can very quickly see that the procedural requirements regarding the CAR have not been met. The Minutes of the Meeting of the PPC simply state “The Committee noted the summary of the CAR in the Minutes” (paragraph 39.13) but there is no actual summary. There is an explanation of how the CAR was undertaken and a summary of the questions asked and answers provided (paragraphs 38.1 to 38.11), but there is no analysis as to what the CAR tells the PPC and then how the PPC took that into account, other than to note there had “been a number of negative responses in the CAR in relation to the current pharmaceutical service provision” (paragraph 39.15). This is before the PPC appears to qualify the finding of the CAR with reference to no formal complaints having been submitted (paragraph 39.15), that the CAR had been conducted over a year ago, and that

improvements at a neighbouring pharmacy had been made (paragraph 39.17). This is not, in my view, sufficient.

- 4.5. I will, therefore, uphold this ground of appeal and remit to the PPC for reconsideration. In doing so I would recommend that the PPC clearly record a summary of what the CAR discloses and how this was taken into account by the PPC.
- 4.6. Care should also be taken by the PPC to provide sufficient reasons when, having properly considered the findings of the CAR and then decided, as the Specialist Tribunal, what weight to apply to it. This is with a view to meeting the duty to provide sufficient reasons but also avoiding an error of fact in terms of paragraph 5(2B)(b) of Schedule 3. That is to say whether the passage of time (1 year) and improvements that are said to have been made during that time to a neighbouring pharmacy are consistent with requirement in the Regulations for the PPC to consider adequacy with reference to current provision or provision already in place; this being at the time the application is made (with reference to the supporting evidence of the application) and at the time the (first) decision of the PPC is taken.
- 4.7. Ground of Appeal 2. This ground relates to the application of the legal test in terms of the Regulations. In particular, when considering adequacy, whether the PPC was correct to conclude that existing services being “not ideal” did not meet the threshold of inadequacy.
- 4.8. The legal test is set out above (paragraph 3.3) and the relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum but neither automatically means that existing services are inadequate.

4.9. In my view “not ideal” is indicative of a level of service that could be improved upon. It does not however equate to inadequacy. The ground of appeal is not upheld as a result.

5. Disposal

5.1. For the reasons set out above I consider that the appeal is successful in relation to Ground of Appeal 1. I shall therefore refer the matter back to the PPC for reconsideration.

5.2. In reconsidering the application in relation to that ground of appeal the requirements regarding the CAR must be properly met and care should be taken, if attempting to qualify the CAR, to clearly state what information has been preferred and why – in terms of the CAR and that information that was submitted in support of the application.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

19 November 2024