

Doping Hearing Panel of the Badminton World Federation

DOPING HEARING PANEL DECISION

Decision delivered on 25th April 2015

Athlete:	Mr. Lee Chong Wei, Malaysia
Date of Hearing:	Saturday 11 th April 2015
Place of Hearing:	Sheraton Amsterdam Airport Hotel
The Doping Hearing Panel:	Mr. Rune B. Hansen (Chair) Dr. P.S.M. Chandran Prof. Dr. Toni Graf-Baumann
Athlete Representative:	Lawyers Mike Morgan, Howard Jacobs, assisted by lawyers Richard Martin, Donna Bartley, Bryan Song ,Chandra Jadadish.
Expert Witness:	Prof. Dr Guenther Hochhaus
Anti-Doping Rule Violation:	Violation in terms of Article 2.1 of the Badminton World Federation Anti-doping Regulations (BWF ADR), effective from January 1. 2009.

I - The Facts

1. On 30th August 2014, Mr. Lee Chong Wei, ranked world number one in badminton men's singles, was selected for doping control testing at the BWF World Championships in Copenhagen as a part of the BWF "in-competition" testing program. The sample collection took place immediately after the athlete had won his semi-final match. A urine sample was provided by the athlete and sent to the Norwegian Doping Control Laboratory in Oslo, Norway for analysis (Sample Code 6116366).

2. The Oslo Laboratory submitted its analytical report on 19th September 2014. The laboratory reported an Adverse Analytic Finding (AAF) of Sample A6116366 with the presence of Dexamethasone – a Class S9 Glucocorticosteroid. Dexamethasone is a Specified Substance that is prohibited "in-competition", according to the World Anti-Doping Agency (WADA) Prohibited Substance List 2014. The analysis indicated the concentration of Dexamethasone to be 330ng/ml.
3. The athlete and the Badminton Association of Malaysia (BAM) were notified of the result of the test in letters delivered by hand on 2nd October 2014. The athlete withdrew from all further competition and has not competed since that date.
4. On 16th October 2014 the athlete requested that the B Sample be analyzed. The athlete attended the opening of the B Sample on 5th November 2014. The result confirmed the presence of Dexamethasone in the B Sample provided on 30th August 2014. The concentration of Dexamethasone in the B Sample was estimated to be 380ng/ml.
5. The Athlete was notified by letter from BWF on 7th November 2014 that he was provisionally suspended.
6. On 8th of November, the athlete requested that Sample code number 2933378, provided by the athlete in an "out-of competition" test in Kuala Lumpur on 15th August 2014 should be analyzed for the presence of Dexamethasone. The reason for this request was that he had become aware, that on 17 July 2014, when undergoing stem cell therapy for multiple injuries at the Kuala Lumpur Sports Medicine Centre, and while under anesthesia, Mr. Lee was administered Dexamethasone without his own knowledge, by Dr. Saw, an orthopedic surgeon. By report dated 7th November 2014, the Doping Control Laboratory in Barcelona confirmed the presence of Dexamethasone in the Sample of 15th August 2014^h, at a concentration of 0.2 ng/ml.
7. The hearing date was first set for 8th December 2014^h, however that was postponed at the request of the athlete's lawyer, Mr. Mike Morgan. The reason for the request was that the athlete would not be ready to present a full defense for the hearing date set. The request was granted and the athlete continued his investigation through December 2014 to March 2015. The hearing was postponed two more times following requests from Mr. Morgan. In March 2015 the parties agreed on the 11th of April 2015 as the hearing date.

8. 9. On April 9th the Panel, through BWF, received a comprehensive defense file from Mr. Morgan. The defense file, the other documents produced during the hearing preparations and the statements and other evidence presented at the hearing itself, are the basis for the Panels conclusions.

II - THE APPLICABLE REGULATIONS

9. The Athlete was charged with a breach of Regulation **2.1.3 of the BWF Anti-Doping Regulations:**

Article 2.1.3 "Excepting those substances for which quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Players` Sample shall constitute an anti-doping violation".

10. The offense is one of "strict liability". No mental element (intent of fault or negligence) needed to be established. The presence of a Prohibited Substance in the Sample is sufficient.
11. Dexamethasone is listed in the WADA Prohibited List 2009 as a Class S9 substance - Glucocorticosteroids. As a Class S9 substance, Dexamethasone is also a "Specified Substance". In other words, the Substance is not in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List.

12. **Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances**

Article 10.5.1 of the BWF ADR states:

" No Fault or Negligence - If the Player establishes in an individual case involving an anti-doping regulation violation that the Player bears No Fault or Negligence the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Specimen in violation of Regulation 2.1 (Presence of Prohibited Substance), the Player must also establish how the Prohibited Substance entered the Player's system in order to have the period of Ineligibility eliminated. In the event this Regulation is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping regulation violation shall not be considered a violation for the

limited purpose of determining the period of Ineligibility for multiple violations under Regulation 10.7."

13. Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Article 10.4 of the BWF ADR reads:

"Where a Player or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 10.2 shall be replaced with the following:

First violation: *At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) year's Ineligibility. To justify any elimination or reduction, the Player or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing Substance. The Player or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."*

14. Burden and Standards of Proof

Article 3.1 of the BWF ADR reads:

"The BWF and its Member Associations shall have the burden of establishing that an anti-doping regulation violation has occurred. The standard of proof shall be whether the BWF or its Member Association has established an anti-doping regulation violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Regulations place the burden of proof upon the Player or other Person alleged to have committed an anti-doping regulation violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Regulations 10.4 and 10.6 where the Player must satisfy a higher burden of proof."

15. The Court of Arbitration for Sport (CAS) has established such jurisprudence regarding the athletes' burden of proof (Arbitration CAS 2011/A/2384):

"[o]nce an adverse analytical finding has been established the burden of proof shifts to the athlete who has to establish on the balance of probabilities in order to escape sanction, or to

obtain a reduction of the sanction, how the prohibited substance entered his system and that he in an individual case bears no fault or negligence, or no significant fault or negligence. For the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% change of it having occurred. The athlete thus needs to show that one specific way of ingestion is marginally more likely than not to have occurred."

16. Lee Chong Wei explained at the hearing that he accepts that Dexamethasone was present in the Sample collected "in-competition" from him on 30th August 2014, and that he has consequently committed an anti-doping rule violation under Article 2.1 of the BWF ADR. His argument was that he had done so inadvertently and that no sanction should take place according to Regulation 10.5.1, or at least that a sanction should be reduced according to Article 10.4 of the BWF ADRs.
17. The key questions for the Panel, is therefore if the athlete has managed to satisfy the burden of proof regarding how Dexamethasone entered his system (10.5.1 and 10.4), that he bears no fault or negligence (10.5.1) or to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance (10.4).

III - The Panels Deliberations and Conclusions

How did Dexamethasone enter the body of Mr. Lee Chong Wei?

18. Based on the evidence presented at the hearing, the Panel abbreviates the relevant facts to the following:
During October 2009 Dr Saw, an orthopedic surgeon at the Kuala Lumpur Sports Medicine Centre, harvested some of Mr Lee's peripheral blood stem cells (PBSC) from his blood. The athlete's PBSC were subsequently used by Dr. Saw to treat a number of his injuries in October 2009, May 2012 and three times in July 2014. This is perfectly legal treatment. The most recent PBSC-based treatment took place on 17th July 2014 under general anesthetic and involved the administration of Dexamethasone.
19. The athlete was not told and did not know that he had been administered Dexamethasone. He became aware of the administration after he found out about his failed doping control test.

20. The administration of Dexamethasone on 17th July 2014 was the sole reason for the presence of the substance in the athlete's "out-of competition" test of 15th August 2014 and is irrelevant to this case. The only possible explanation of the AAF in the 30th August 2014 sample is that the athlete was exposed to Dexamethasone again between 15th of August and 30th of August 2014.

21. The only other substances the athlete consumed between 15th July 2014 and 30th August 2014 were multi- vitamins and Cordyseps. The latter is a fungus which grows parasitically on the larvae and pupae of insects in winter, leading to the formation of a fungal fruiting body in summers. Cordyseps is a natural food product.

22. Lee Chong Wei began taking Cordyseps in or around 1995 at the age of thirteen because his mother believed it was beneficial for his health. When he moved from Perak to Kuala Lumpur in 2000, his mother used to have the Cordyseps pounded and inserted into gelatin capsules, which she sent to the athlete at the National Sports Centre.

23. Between 2005 and 2008 the National Sports Institute of Malaysia (ISN) supplied some of its athletes, including Lee Chung Wei, with a Cordyseps-based product called Cordymax. In 2008 the ISN began to supply its athletes with yet another Cordyseps-based product called OptygenHP. In July 2013 OptygenHP was tested at Doping Control Centre at the Universiti Sains Malaysia to be analysed for safety. It was tested, also for Dexamethasone, and no prohibited substances were detected.

24. In around 2005, the athlete befriended the wife of a very influential man in Malaysia. In around 2007 or 2008 this lady gave the athlete some of her own supply of pure Cordyceps. She purchase Cordyseps in raw whole form and arranges for it to be powdered and capsulated at the same store in KL. She began to send Lee Chong Wei her Cordyseps capsules on regular basis as a gift.

25. The athlete does not wish to identify the lady by name because he fears the consequences for her, if she is associated with his doping case. Lee Chong Wei nevertheless gave her name to the Panel in an "in-camera" session of the hearing, when only the three panel members

and the athlete and one of the Malaysian lawyers were present in the hearing room. In the opinion of the panel, this strengthened his trustworthiness.

26. For the last six/seven years the athlete has consumed two capsules of Cordyseps every morning which he received from his friend.
27. On behalf of Mr Morgan the lawyer Song Wei Kar in March 2015 visited the shop in Kuala Lumpur where the athlete's friend had told him, she brought the pure Cordyseps to have it powdered and capsulated. The proprietor confirmed to Mr Song that he ground and capsulated the pure Cordyseps the athlete's friend brings to his shop, however he did not want to give a statement because of fear that it would adversely affect his business. The proprietor acknowledged that his treatment of the Cordyseps involved a potential contamination risk.
28. Chai Wen Jin is a Sports Nutritionist at the National Sport Institute of Malaysia (ISN). She is specially assigned to the BAM badminton national team and has been Lee Chong Wei's nutritionist since 2005. She first became aware of the athlete's own Cordyseps when Mr Lee showed her a bottle of the capsules in around 2007/2008. She advised him that the Cordyseps capsules were safe to use since they were a food-based product. She advised him only to take 100% pure Cordyseps with no other additives. Since she knew the athlete had been using Cordyseps for many years without any problems she did not find it necessary to have the product tested.
29. Mr. Lee Chong Wei confirmed that, as always, he consumed two Cordyseps capsules – ground and capsulated in the shop in Kuala Lumpur – every morning in August 2014, including the morning of the semi- finals of the BWF World Championships 2014.
30. In the Panels opinion the most likely reason for the Adverse Analytical Finding of Mr Lee's Sample provided on 30th August 2014 is that the athlete prior to this date had consumed Cordyseps capsules and that (one or more) of the gelatin capsule shells was contaminated with Dexamethasone. How the contamination occurred is not known for sure, but most likely it occurred during the process of grinding the raw Cordyseps into powder and putting this powdered Cordyseps into the gelatin capsules in the shop in Kuala Lumpur.

31. The Panel refers to the analysis conducted in March 2015 by LGC forensic laboratory in England. This was the analysis of the two remaining capsules from the container of Cordyseps capsules the athlete was consuming from August 2014 and onwards. The analysis identified the presence of Dexamethasone in and/or on the shell of one of the two capsules analysed. According to expert witness Professor Guenther Hochhaus the concentration of Dexamethasone reported in the 30th August Sample could have resulted from either a one-time dose of within the range of 0.47 mg to 3.9 mg or not more than 0.47 mg of Dexamethasone or smaller doses accumulated over a period of days or weeks.
32. Lee Cong Wei has established – on a balance of probability how Dexamethasone entered his body. The AAF is most likely the result of him consuming gelatin capsules containing Cordyseps , and that one or more of the gelatin capsules was contaminated with Dexamethasone. When reaching this conclusion the Panel emphasises:
- The athlete's own statement is supported by other evidence, including the statements from Mr Song Wei Kar, Ms Chai Wen Jin and the analysis report of the Cordyseps capsules from LGC laboratory.
 - The Panel was not presented with any evidence supporting other possible theories.
 - Dexamethasone is not a performance-enhancing substance. The Panel rules out the possibility that the athlete or his support team should have brought Dexamethasone into his system intentionally. The panel is convinced that this is not a case of doping with an intent to cheat.

IV - Does the athlete bear no fault or negligence?

33. According to Article 10.5.1 of the BWF ADR - quoted above – the otherwise applicable period of ineligibility shall be eliminated if the player establishes that he bears “no fault” or “negligence”.
34. The commentary to the 2009 World Anti-Doping Code, from which the BWF ADRs are derived states that 10.5.1 (and 10.5.2) "*are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases*".
35. The rules provide a definition of “no fault” or “negligence”:

"The athletes establishing that they did not know or suspect, and could not reasonable have known even with the exercise of utmost caution, that they had just or been administered the prohibited substance or prohibited method."

36. The defense has strongly argued that Lee Chong Wei was not at fault and was not negligent.

The arguments of the defense are shortened and summarized in the following:

- The athlete takes his general anti-doping obligations very seriously and takes all reasonable precautions to ensure he does not ingest any prohibited substances, despite never having received any formal anti-doping training or education.
- The athlete has been sourcing Cordyseps from the same trusted person for 7 years and never failed any doping test. He was entitled to trust that person.
- The athlete follows all instructions of his nutritionist at ISN in terms of what he can and cannot safely consume from an anti-doping perspective. The nutritionist advised him that the Cordyseps capsules were safe and that it was not necessary to test the product as long as it was "pure Cordyseps". There are nothing on the Internet suggesting that gelatin capsules or Cordyseps are risky substances.
- The case is about the Cordyseps gelatin capsules which are used merely as a vessel to swallow Cordyseps. This is not a supplement case. The athlete was not, as of 30th August 2014, aware of any case in the world in which an AAF was caused by the contamination of gelatin capsules. The case of SAID v. Daryl Impey deals with contaminated capsules, but the case was decided 16th September 2014 and could not have warned the athlete.

37. In the opinion of the Panel, despite the arguments of the defense, Mr. Lee Chong Wei has been negligent.

38. The athlete has accepted Cordyseps for about 7 years from a private person without any knowledge or control regarding how the Cordyseps has been treated and capsulated. They were given to him in containers without label or description. The single comforting statement of his nutritionist many years ago, is not a sufficient excuse for consuming the capsules for years.

39. Lee Chong Wei has been one of the world's very top athletes for close to ten years. From an athlete in such a prominent position the demands of caution to avoid negligence are

expected to be very high. Even though he has been cautious, Lee Chong Wei has not met the required level to be characterized without fault or negligence.

40. It is worrying if he has received unsatisfactory anti-doping education from BAM or other sources and/or the focus on anti-doping security has been unsatisfactory. Nevertheless the responsibility to act without negligence is the personal obligation of the athlete.
41. By accepting the Cordyseps capsules Mr Lee exposed himself for a completely unnecessary risk of consuming illegal substances for many years, regardless of the source being the Cordyseps itself or the gelatin capsules. The risk materialized with the AAF in the 30th August test.
42. In the opinion of the Panel, 10.5.1. is not applicable.

**V - Elimination or Reduction of the Period of Ineligibility under Specific Circumstances, BWF ADRs
Article 10.4.**

43. In paragraph 31 above, the Panel concluded that the athlete has established – on a balance of probability - how Dexamethasone entered his body.
44. The Anti-Doping Rule Violation involves Dexamethasone, which is a Specified Substance.
45. According to BWF ADR 10.4 (quoted above in paragraph 14) the athlete must establish to the **comfortable satisfaction** of the Hearing Panel the absence of intent to enhance the sport performance or mask the use of a performance-enhancing substance.
46. The Panel underlines that Lee Chong Wei did not know that by consuming the Cordyseps capsules, he also ingested Dexamethasone. He was negligent, but did not act with intent. When he did not know or realized that he had ingested a specified substance (Dexamethasone), he cannot have intended to enhance his sporting performance by the unwitting ingestion.
47. The athlete has met all three conditions for the applicability of the BWF ADR 10.4.

VI - Appropriate Sanction

48. According to 10.4 the players degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility. The operation of 10.4 gives the Panel a possibility to give a sanction between zero and 24 months.
49. Both objective and subjective elements must be taken into consideration when deciding the degree of negligence, cf CAS 2013/A/3327 M. Cilic vs ITF.
50. When carefully considering all elements of the case, it is the opinion of the Hearing Panel that Lee Chong Wei's degree of negligence is rather light.
51. It is the Panels opinion that a **period of ineligibility of 8 months** is the appropriate sanction in this case.
52. According to 10.9 any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility imposed.
53. Article 10.9.2 states that the period of ineligibility may start as early as the date of the Sample collection where there have been substantial delays in the hearing process or the results management process not attributable to the player or other person. This is exactly what has happened here.
54. Because of the unfortunate and unlikely coincidence, the athlete was - without his knowledge - administered Dexamethasone on 17th July 2014 – under general anesthetic . As a consequence his investigation was diverted away from the real cause of the AAF – the contaminated Cordyseps capsules – for more than 6 weeks. The particular nature of Cordyseps resulted in the fact that LGC laboratory used several weeks to conduct development work before being able to properly analyse the Cordyseps and the gelatin capsules.
55. The Hearing Panel finds that it is correct and fair to **backdate the period of ineligibility** to the date of sample collection **30th August 2014**.

56. According to Article 9 of the BWF ADRs, violation of the regulations in individual sports in connection with “in-competition” test automatically leads to disqualification of the result obtained in that competition with all resulting consequences, including forfeiture of any medals, points and prizes.

The Panel is required to apply the mandatory sanction and the result (silver medal) Lee Chong Wei obtained at the World Championship 2014 is disqualified and consequently any world ranking points attributed to the result shall be forfeited.

57. Article 10.8 states that all competitive results obtained from the date a positive sample was collected, shall be disqualified, *unless fairness requires otherwise*. CAS has consistently held that it would be unfair to disqualify results which were not likely to have been affected by the anti-doping rule violation, cases in point are CAS 2013/A/3274 (Glasner vs. FINA) and CAS 2007/A/1362 & 1363 (CONI vs Petacchi & FCI and WADA vs Petacchi and FCI).

58. The Panel agrees that Dexamethasone is not a performance-enhancing substance. The results obtained by Lee Chong Wei subsequent to 30th August 30th and until he voluntarily withdrew from all competition 2nd October 2014, were not affected by the anti-doping rule violation. The Panel finds that fairness requires that Lee Chong Wei’s results from that period are not disqualified.

59. Each party should bear its own costs in connection with the hearing.

Conclusion

- 1. Lee Chong Wei is sanctioned with a period of ineligibility of eight months, commencing on 30. August 2014.**
- 2. His result in the BWF World Championship 2014 shall be disqualified and world ranking points forfeited.**
- 3. Results obtained between 30th August 2014 and 2nd October 2014 shall not be affected by the decision of the Panel.**
- 4. Each party shall bear its own legal costs and other expenses incurred in connection with this Doping Panel Hearing.**

This done and signed this 25th day of April 2015



Rune B. Hansen (Chair)

On behalf of Panel members - Dr. P.S.M. Chandran and Prof. Dr. Toni Graf-Baumann.
