

Decision of the Japan Anti-Doping Disciplinary Panel

Case 2018-003

Name of Athlete: X
Sport: Cycling

Pursuant to the decision of the Hearing Panel convened for this case, the Japan Anti-Doping Disciplinary Panel has made the following decision with respect to this case.

November 19, 2018
Japan Anti-Doping Disciplinary Panel
Chair: Yoshihisa Hayakawa

Hearing Panel Decision

The Hearing Panel for this case, which is composed of the following members appointed by the Chair of the Japan Anti-Doping Disciplinary Panel pursuant to Article 8.3.2 of the Japan Anti-Doping Code (hereinafter, the “Code”), has made the following decision concerning this case pursuant to the results of the hearing held on November 19, 2018 (hereinafter, the “Hearing”).

November 19, 2018
Yoshihisa Hayakawa _____
Katsumi Tsukagoshi _____
Noboru Mesaki _____

Decision:

- A violation of Article 2.1 of the Code is found to have occurred.
- In accordance with Articles 9 and 10.8 of the Code, all of the individual results of the Athlete obtained from the date of sample collection through the commencement date of the provisional suspension period (including the competition results at NTN presents 2018 Tour of Japan (UCI Asia Tour Class2.1)) shall be disqualified, and all medals, points and prizes obtained during such period shall be forfeited.
- In accordance with Articles 10.2.2, 10.5.1.1, 10.11.2 and 10.11.3 of the Code, ineligibility shall be imposed for a period of six months starting from August 19, 2018.

Reasons:

- The substance “vilanterol” that was detected from the Athlete in in-competition testing conducted on May 20, 2018 (hereinafter, the “In-Competition Testing”) is designated as a prohibited substance under “S3. Beta-2-Agonists” in The 2018 Prohibited List International Standard (hereinafter, the “Prohibited List”), and it constitutes a “Prohibited Substance” as prescribed in Article 2.1 of the Code. In response to this, the Athlete neither requested an analysis of the B sample, nor contested the abovementioned test result or the process and procedure that led to those results at the provisional hearing or the Hearing.
- Accordingly, the Athlete can be found to have violated Article 2.1 of the Code (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample) in this case, and it is appropriate to consider that, in accordance with Articles 9 and 10.8 of the Code, all of the individual results of the Athlete obtained from the date of sample collection through the commencement date of the provisional suspension period (including the competition results at NTN presents 2018 Tour of Japan (UCI Asia Tour Class2.1)) shall be disqualified, and all medals, points and prizes obtained during such period (if any) shall be forfeited.
- Furthermore, the substance above that was detected in this case, while on the one hand constituting a “Prohibited Substance,” also is a “Specified Substance” under the Prohibited List. Based on the testimonies at the Hearing by the responsible persons at the Japan Anti-Doping Agency (hereinafter, “JADA”), the Athlete himself, and the family physician of the Athlete, and the documents submitted by JADA and the Athlete, as well as the entire purport of the Hearing, the following facts can be found.
 - (1) The vilanterol that was detected in this case derives from Relvar, a therapeutic medicine prescribed by the Athlete’s family physician and taken by the Athlete to cure the bronchial asthma contracted by the Athlete (hereinafter, the “Therapeutic Medicine”). In this regard, JADA does not assert or prove that the use of the Supplement by the Athlete was “intentional” in the meaning of Article 10.2.3 of the Code, and neither can such fact actually be found.
 - (2) The Athlete has made a retroactive application for therapeutic use exemption (TUE) towards the TUE Committee of JADA (hereinafter, the “TUEC”) on June 19, 2018. However, the TUEC has made a decision to dismiss such application on July 23, 2018, and an arbitral decision dismissing the petition for arbitration made by the Athlete in objection thereto towards the Japan Sports Arbitration Agency (JSAA-DP-2018-001) has been given and has finalized. Therefore, it can no longer be contested that TUE is inapplicable to the use of the Therapeutic Medicine by the Athlete, and neither was this issue actually contested at the procedures.
 - (3) Based upon the above, it is an issue as to whether the elimination or the reduction of the period of ineligibility is possible pursuant to Articles 10.4 or 10.5.1 of the Code. Although the use of the Therapeutic Medicine by the Athlete in this case is based upon

the physician's prescription, such physician is a personal family physician of the Athlete, and the Athlete must bear responsibility for the selection of such physician (please refer to comment (b) to Article 10.4 of the Code). Therefore, it cannot be said that there was absolutely no Fault or Negligence on the part of the Athlete, and Article 10.4 of the Code is inapplicable.

(4) Next, we turn to the issue of Significant Fault or Negligence. In this regard, there are the following matters which should be taken into account; therefore we consider such matters as follows.

(i) The Athlete's family physician who prescribed the Therapeutic Medicine had previously received a document titled "Guide to Inhalation Therapy" from an employee of a pharmaceutical company. The family physician considered that TUE would be automatically applicable to the prescription of the Therapeutic Medicine to the Athlete from the descriptions in the said Guide, and prescribed the Therapeutic Medicine. However, the description related to the Therapeutic Medicine relied on by the Athlete's family physician actually stated that "use is possible upon approval of the TUE application" and "it is necessary to clearly indicate the reasons and grounds why the inhalation β 2 stimulant, and not the inhalation Salbutamol, inhalation Formoterol or inhalation Salmeterol, must be used", and did not state that TUE was applicable on an unconditional basis. Therefore, it cannot be said that there was no Fault on the part of the Athlete's family physician in that she considered that TUE would be automatically applicable to the prescription of the Therapeutic Medicine to the Athlete. In addition, such fact cannot be said to change even if the employee of the pharmaceutical company who handed over the said document to the Athlete's family physician had given an oral explanation which might mislead her to misunderstand in such manner.

(ii) The Athlete's family physician asserts that she was given an explanation, during the course of a telephone conversation with one of the employees of JADA, that TUE would be automatically applicable to the prescription of the Therapeutic Medicine to the Athlete (however, JADA contests the existence of such fact). In this regard, there are no other objective evidences regarding such explanation given over the telephone by an employee of JADA other than the testimony of the Athlete's family physician, and in addition, even if such conversation existed, this was only at the stage after the Therapeutic Medicine was prescribed to the Athlete. This means that the abovementioned Fault on the part of the Athlete's family physician at the time of prescribing the Therapeutic Medicine cannot be reduced, whether

such fact existed or not.

- (iii) Although the Athlete and the Athlete's family physician recognized that a TUE application was required for the use of the Therapeutic Medicine, the TUE application was made only after it was communicated, after the In-Competition Testing, that the results of the simple test were positive. This means that there was failure to make a TUE application, even though there was ample opportunity to make a TUE application till such communication was made, and it was an act which may likely be interpreted to have been based upon an understanding that it was not necessary to make a TUE application notwithstanding the use of the Therapeutic Medicine containing a Prohibited Substance so long as it did not test positive, and it is unavoidable to find Fault in this respect.
- (iv) Although, upon In-Competition Testing, the Athlete described in detail the over-the-counter medicine and supplements in the column describing "Please describe the prescribed medicine, over-the-counter medicine and supplements taken within seven (7) days. We recommend that you make a notification if you are undecided as to whether or not to make a notification." in the "Doping Control Form", he did not give any description whatsoever of the inhalant including the Therapeutic Medicine which he used within seven (7) days. In this regard, with respect to the reason why he did not give any description of the inhalant, the Athlete explains that he had forgotten the product name of such inhalant, and that he did not consider that it was possible to give a description in a manner that did not specify the product name. However, such explanation cannot be considered persuasive at all.
- (v) The Athlete asserts that the fact that no trainings or the like related to anti-doping including TUE were provided at the team to which he belonged is a circumstance which should be taken into account in this case, and also submits a statement to such effect by the representative of the team to which he belonged. If this were true, it is extremely regretful as this means that no sufficient education or enlightening were made even though cases of doping violation regarding cycling were reported in various manners on a global scale up till now, and extremely strong emphasis is being placed on further education and enlightenment activities under the International Federation and the National Sports Federation. However, even if this were true, it cannot be considered to be a circumstance which could largely reduce Negligence on the part of the Athlete in this case.
- (vi) However, even taking the above issues into account, it cannot be said that the Fault or Negligence in this case was significant. Therefore, it is possible to

find that Article 10.5.1 of the Code applies.

- Taking into consideration the abovementioned circumstances and the fact that this was a first violation, it is appropriate, upon comprehensively taking into account the abovementioned degree of Fault of the Athlete, to impose upon the Athlete a six month period of ineligibility pursuant to Article 10.5.1.1 of the Code.
- In this case, the Athlete has been under a provisional suspension pursuant to Article 7.9.2 of the Code from the date of notice of September 6, 2018 by the responsible person at JADA until the time of the present decision (a provisional hearing was held on November 19, 2018 concerning the relevant provisional suspension). Accordingly, pursuant to Article 10.11.3.1 of the Code, the Athlete shall receive a credit for the period of provisional suspension against the period of ineligibility. In addition, the Athlete asserts that a so-called “timely admission” was formed at the time that he became aware of his violation in this case, and JADA does not contest this. Therefore, in light of the facts also, an early start of the commencement date of ineligibility is possible to a certain extent pursuant to Article 10.11.2 of the Code; however, the provision in the proviso of Article 10.11.2 which provides that the Athlete shall serve “one-half of the period of ineligibility” going forward from “the date of a hearing decision imposing a sanction” serves as a limit. Taking the above into account, even if the Athlete receives a credit for the period of provisional suspension from September 6, 2018 till November 19, 2018, the Athlete shall serve a period of three months, which is one-half of a period of six months of the period of ineligibility going forward from “the date of a hearing decision imposing a sanction.” Accordingly, ineligibility shall be imposed for a period of six months starting from August 19, 2018.

Based on the foregoing, we have made our decision as stated above.

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