Arbitral Award (Summary Version)

The Japan Sports Arbitration Agency (JSAA)
JSAA-DP-2018-001

Appellant:	X
Counsels of Appellant:	Takahito Igami, attorney-at-law
	Kengo Iida, attorney-at-law
Respondent:	Japan Anti-Doping Agency
Counsels of Respondent:	Koichi Tsujii, attorney-at-law
	Shoichi Satake, attorney-at-law

Decision

The Sports Arbitration Panel rules that:

1. All of the Appellant's claims shall be set aside.
2. The fees for filing arbitration in an amount of JPY 54,000 shall be borne by the Appellant.

Reasons

No. 1 Arbitral Awards Requested by the Parties

The arbitral awards requested by the parties are as follows.

1. Arbitral award requested by the Appellant

(1) The decision not to grant the application for therapeutic use exemption ("TUE") (application number: 18031), rendered by the Respondent towards the Appellant as of July 23, 2018, shall be annulled.

(2) The Respondent must grant the TUE application (application number: 18031) towards the Appellant.

(3) Any arbitration expenses shall be borne by the Respondent.

2. Arbitral award requested by the Respondent

(1) The Appellant's claims shall be set aside.

(2) Any arbitration expenses shall be borne by the Appellant.

No. 2 Overview of the Case

1. Overview of the case

This is a case in which the Appellant, who participated in the "UCI Certified International Cycling Road Race 'NTN presents 2018 Tour of Japan'" sponsored by the Japan Cycling Federation (hereinafter, the "Competition") as a rider of "Aisan Industry racing team" from May 20 to May 27 of 2018, undertook the doping test conducted after the race of May 20 (hereinafter, the "Doping Test"), where Vilanterol, which is one of "S3. Beta-2 Agonists" provided in the 2018 Prohibited List International Standard announced by the World Anti-Doping Agency, was detected from the Appellant's sample, and the Appellant made an application for a retroactive TUE towards the Respondent on June 19, 2018 (hereinafter, the "TUE Application"), and because the TUE committee of the Respondent rendered a decision not to grant the TUE Application on July 23, 2018 (hereinafter, the "Original Decision"), the Appellant filed for arbitration requesting for annulment of the Original Decision and grant of the TUE Application.

2. Contents of the Original Decision

The TUE Application shall not be granted.
The reason for not granting the TUE Application is that "The circumstances under which inhalation of Vilanterol became necessary do not fall under '4.1.c of the International Standard for Therapeutic Use Exemptions (ISTUE).' Reasonable therapeutic alternatives are considered to be available."

No. 3 Facts Upon Which the Decision is Based

The following are the facts found by the Sports Arbitration Panel in the Arbitration, which are based upon the facts undisputed by both parties and the evidences submitted by both parties as well as the entire purport of the Arbitration.

1. Parties, etc.

The Appellant is a professional rider of cycling road race belonging to the "Aisan Industry racing team" of Aisan Industry Co., Ltd. (hereinafter, the "Team").
Y is the Appellant's mother and a physician practicing at Y Clinic, and the Appellant's primary care physician (hereinafter, "Dr. Y").

2. Prescription of "Relvar"

Upon examining the Appellant, Dr. Y prescribed to the Appellant "Relvar", which is an inhalation steroid medication and long-time operating beta-2 stimulant compounding agent containing

Vilanterol, in order to make preparations for severe attacks of bronchial asthma.

3. Inhalation of "Relvar"

On May 17, 2018, Dr. Y examined the Appellant and gave instructions to inhale "Relvar", and the Appellant inhaled "Relvar" once every day on May 18 and May 19.
The Appellant inhaled Vilanterol twice and the inhalation volume was 25 μg.

4. Sequence of events leading up to refusal to grant the TUE Application

(1) Sequence of events leading up to the TUE Application

After the Doping Test, the Appellant was informed by the Respondent that the results of the simple test of the A sample were positive, so on June 19, 2018, the Appellant made a TUE Application towards the Respondent for the aforementioned inhalation of "Relvar" prior to the Competition.

(2) Circumstances of preparation of the TUE Application documents and required documents

In the course of making the TUE Application, Dr. Y requested Dr. Z, an acquaintance at Mie Respiratory & Allergy Clinic (hereinafter, "Dr. Q"), to prepare a part of the application forms. In relation to the TUE Application, Dr. Q described "Medical Information" of paragraph 2, "Details of Medication" of paragraph 3, and "Declaration by the Physician" of paragraph 3 of the TUE Application. With respect to the contents of "Details of Medication" of paragraph 3, Dr. Y, who prescribed "Relvar" for the Appellant, informed Dr. Q orally.

No. 4 Issues

1. May the Arbitration Panel not only determine whether the Original Decision was right or wrong but also determine whether the grant of the TUE Application was right or wrong in emergency arbitration proceedings, based upon the claims and evidences submitted to the Arbitration Panel (issue 1)?

2. Does the TUE Application meet the requirements of "There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method" of 4.1c of the International Standard for Therapeutic Use Exemptions (hereinafter, "ISTUE") of the World Anti-Doping Code (hereinafter, "WADC") (issue 2)?

No. 5 Decision of the Sports Arbitration Panel

1. Issue 1

In accordance with various provisions such as Article 49.1 of the Sports Arbitration Rules related to Doping Disputes provided by JSAA, as well as Article 13.1.1, Article 13.1.2 and the comments thereto, and Article 13.8.2.1 and the other provisions of the Japan Anti-Doping Code (hereinafter, "JADC"), JSAA is authorized to render decisions regarding the issues presented at the proceedings at JSAA with respect to appeals at JSAA made pursuant to JADC.
Accordingly, the Sports Arbitration Panel is entitled to not only determine whether the Original Decision was right or wrong, but also to determine whether the grant of the TUE Application was right or wrong in the emergency arbitration proceedings, based upon the claims and evidences submitted to the Sports Arbitration Panel.

2 Issue 2

(1) History of illness of the Appellant

It is found that the Appellant has been suffering from bronchial asthma from an early age till the present, and that the Appellant has been using medication in order to control bronchial asthma; however, the degree of the symptoms during such time and the volume of inhalation and the frequency of medication are unclear.

(2) Perceptions and attitudes of the Appellant and Dr. Y in relation to TUE application

(i) Perceptions and attitudes of the Appellant

The Appellant, who has been suffering from bronchial asthma from young age, has been endeavoring to control bronchial asthma for a long time with Dr. Y, his mother, as his primary care physician.
The Appellant had been participating in competitions where doping tests were conducted, for several times before the Competition. Therefore, the Appellant was exercising care for medication and supplements in order to avoid any anti-doping rule violations, and in the case of taking medication, he confirmed with Dr. Y as to whether it was permissible to take such medication.
With respect to "Relvar", the Appellant had heard from Dr. Y that such medication could be taken so long as a TUE application was made.

(ii) Perceptions and attitudes of Dr. Y

Dr. Y is the Appellant's primary care physician, and has endeavored to control the Appellant's bronchial asthma for a long time as his mother. Since she resided together with the Appellant at their home which also concurrently operated as a clinic, she was constantly capable of being consulted by the Appellant, and consulted with the Appellant as to whether a medication may be taken when the Appellant took medication, and how to deal with illness when the Appellant felt ill.

Dr. Y was informed by a person in charge at GlaxoSmithKline that since 2017 it was permissible to use "Relvar" so long as a TUE application was made, and had the perception that it was permissible to use "Relvar" by making a TUE application so long as Formoterol and the like containing "Symbicort" could not be used.

Dr. Y had responsibility for making preparations required for TUE application such as examination records and testing records in preparation for prescribing "Relvar" in order to avoid any anti-doping rule violations by the Appellant as an athlete.

Before prescribing "Relvar" to the Appellant on April 23, 2018, Dr. Y prescribed "Relvar" to the Appellant on March 11, March 27, June 7 and July 28 of 2017; however, no TUE applications appear to have been made.

(3) Appellant's state on May 18 and May 19, 2018, upon inhaling "Relvar"

(i) Factors

The Appellant claims that, due to the extreme insufficiency of mites extermination at the training camp in Nagano Prefecture where the Team stayed from May 7, 2018 to May 14, 2018 (hereinafter, the "Camp"), cedar and cypress pollen, and accumulation of tiredness due to upland training for the first time there, his cough became unstoppable and he became unable to sleep, and it otherwise became difficult for the Appellant to control bronchial asthma and he became subject to attacks from mid degree to strong degree.

In this regard, according to the evidence, it can be presumed that the environment of the training camp was bad, but it is unclear as to whether the mites extermination was extremely insufficient. The Appellant also submits evidence that there was much cedar and cypress pollen; however, this is merely evidence which was related to a spot approximately 100 kilometers away from the location of the Camp, and we are hesitant to recognize the volume of cedar and cypress pollen of the Camp location by this evidence.

In light of the circumstances above, we inevitably must say that the degree of impact that the factors claimed by the Appellant had upon the aggravation of the Appellant's bronchial asthma is unclear.

However, since during the Camp, Dr. Y gave instructions to the Appellant, due to the Appellant's requests, to increase the quantity of "Symbicort" used by the Appellant two or four times, it can be found that his bronchial asthma became worse in comparison to before the Camp.

(ii) State on May 18 and May 19, 2018

Dr. Y claims that it was difficult to control bronchial asthma even by inhaling an increased quantity of "Symbicort", and that there was also the possibility that the Appellant would suddenly die due to aggravation of his bronchial asthma.
However, although the Appellant suffered from continuous coughs and could not sleep sufficiently, he took meals three times a day, went to the bathroom, and could lie down to sleep, and he was able to move to Sakai City in Osaka Prefecture, the location of the Competition, on May 19; therefore, his attacks were not of strong degree but light to mid degree.

(4) Availability of reasonable therapeutic alternatives on May 18 and May 19, 2018, when the Appellant inhaled "Relvar"

The Respondent claims that "Flutiform" is a reasonable therapeutic alternative.
In this regard, Dr. Y claims that she determined that she should not let the Appellant inhale "Flutiform" because when the Appellant inhaled "Meptin", a pMDI pharmaceutical (mist type), only once in the past, he threw up and had uncomfortable oral symptoms, and had strong gag reflexes, and when he tried to inhale mist type aerosol, he choked and coughed, and not only could he not easily inhale the medication but there was also the possibility that it would induce bronchial asthma attacks.
In this regard, although "Meptin" and "Flutiform" are common in that they are both pMDI pharmaceuticals (mist type), their ingredients are not necessarily the same, and they cannot be said to be the same medication. Supplementary equipment also exists for cases in which pMDI pharmaceuticals (mist type) cannot be inhaled easily.
However, Dr. Y and the Appellant excluded the use of "Flutiform" from the therapeutic options without trying it, just by a single past experience of using pMDI pharmaceuticals (mist type).
As found above, in light of the fact that the Appellant and Dr. Y have a certain degree of understanding of anti-doping, it must inevitably be said that the inhalation of "Relvar" without trying "Flutiform" was a thoughtless decision.
As one reason for not selecting "Flutiform", Dr. Y raises the reason that it required time to obtain supplementary equipment; however, the fact that there was no supplementary equipment at hand cannot be a medical reason for the non-use of "Flutiform."
The Respondent also claims that whole body administration of steroid is a reasonable therapeutic alternative; however, this cannot be said to be a reasonable therapeutic alternative in this case where the attacks were of light to mid degree.

(5) Summary

It cannot be said that there were no reasonable therapeutic alternatives to deal with the aggravation of the Appellant's bronchial asthma on May 18 and May 19 of 2018, when the Appellant inhaled

“Relvar.”
Therefore, the TUE Application does not meet the requirements of “There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method” of 4.1c in ISTUE.

No. 6 Conclusion

In accordance with the above, we determine as per the Decision.

End of text

September 6, 2018

Sports Arbitration Panel
Shigeyuki Mito, arbitrator
Takuo Ohashi, arbitrator
Dai Yokomizo, arbitrator

Seat of arbitration: Tokyo