

No. DT 23-0350

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA
(CRDSC)**

DOPING TRIBUNAL

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION ASSERTED BY
THE CANADIAN CENTRE OF ETHICS IN SPORT AGAINST BEN ASSELIN:

CANADIAN CENTRE FOR ETHICS IN SPORT

Claimant

-and-

BEN ASSELIN

Respondent

AWARD

Arbitrator: The Honourable Robert P. Armstrong, K.C.

Counsel:

Adam Klevinas

Counsel for the Claimant, Canadian Centre for Ethics in Sport

Peter Howard and Howard Jacobs

Counsel for the Respondent, Ben Asselin

I. INTRODUCTION AND BACKGROUND

1. Ben Asselin is a 28 year-old equestrian athlete who resides in Calgary. He has competed at both the national and international levels since 2010.
2. Mr. Asselin has struggled since childhood with a limited ability to focus, inattention to detail and impulsivity. These issues became magnified when he participated in a rigorous program similar to an MBA course in 2020. He undertook the program to prepare himself together with his siblings for future participation in his family's businesses in the Calgary area. He was referred for testing for ADHD in about November 2021. Due to a family vacation over the holiday period and subsequent equestrian competitions between January and April 2022, the testing did not take place.
3. When he returned to Calgary in April 2022, his girlfriend Taylor Drake, gave him approximately 20 Vyvanse pills over the next four months. He believed this medication would assist him with his focus while he continued his education program.
4. Mr. Asselin did not take Vyvanse during his equestrian competitions. He knew it was banned in competition. He took the medication only as necessary for his pursuit of his education program. Unfortunately, he took some Vyvanse tablets a few days before competing in an equestrian event on June 18th, 2022.
5. On June 18, 2022, Mr. Asselin was subject to a routine in-competition test while competing in Calgary. On August 9, 2022, he received a notice from CCES that his sample taken in June had tested positive for amphetamine and dexamphetamine. He accepted a provisional suspension by CCES on August 16, 2022. Also, on August 16, 2022, he provided a letter of explanation to CCES declaring his intention to file a retroactive and prospective TUE (Therapeutic Use Exception) for the use of Vyvanse.

6. Mr. Asselin submitted a TUE application for use of Vyvanse on October 14, 2022. The application requested coverage for both long-term use and retroactively to June 18, 2022.
7. Mr. Asselin had been formally diagnosed with ADHD on September 28, 2022. The following excerpt is taken from the report of his psychologist, Simren Juhuty, MSc:

Behaviour Rating Inventory of Executive Function - Adult (BRIEF-A)

The Behaviour Rating Inventory of Executive Function for Adults (BRIEF-A) is a questionnaire completed by adults and informants (parents, partner etc.). It is designed to provide a better understanding of an adult's self-control and problem-solving skills by measuring nine aspects of executive functioning. The executive functions are mental processes that direct an individual's thoughts, actions, and emotions, particularly during active problem solving. The executive functions are also responsible for controlling an individual's emotional responses, thereby allowing for more effective problem solving.

Ben completed the BRIEF-A rating scale.

Ben views himself as having appropriate ability to modulate emotions, monitor social behavior, and organize environment and materials. He noted concerns with his ability to inhibit impulsive responses, adjust to changes in routine or task demands, initiate problem solving or activity, sustain working memory, plan and organize problem-solving approaches, and attend to task-oriented output. Ben's

ratings produced a score within the elevated range for the overall index, the Global Executive Composite (GEC) (96th percentile), in relation to the scores of his peers, indicating perceived difficulty in several aspects of executive functioning.

Summary/Diagnostic Impressions

Ben is a 28-year-old individual who is exhibiting difficulties with sustained attention, impulsivity, hyperactivity and executive functions. He is also experiencing symptoms of depression and anxiety. This psychological assessment is intended to evaluate his intellectual and social-emotional/behavioral profile and to suggest strategies and recommendations to best meet his personal needs.

Current assessment results revealed that Ben performed in the Average range on the Verbal Comprehension, Perceptual Reasoning, and Working Memory indexes and demonstrated strengths in word knowledge and verbal abstract reasoning abilities. In contrast, Ben performed in the Very Low range on the Processing Speed index and demonstrated relative weaknesses in interpreting information that is seen and giving it meaning and in quickly and efficiently copying simple visual information

Ben reported many symptoms associated with Attention-Deficit/Hyperactivity Disorder (ADHD). When evaluating the severity of attention difficulties, two types of symptoms are considered. The first are those consistent with the Predominantly

Inattentive Presentation of ADHD, which is characterized by distractibility, lack of focus and disorganization. The second are those consistent with the Predominantly Hyperactive/Impulsive Presentation of ADHD, which is characterized by physical over-activity and impulsive behaviour. The third subtype of ADHD, the Combined Presentation, is present when criteria for both Inattention and Hyperactivity/Impulsivity are met. To meet criteria for either of these types, an individual needs to have both a significant scope and severity of symptoms, with these symptoms present in a variety of situations from a young age. Finally, there must be clear evidence that the symptoms cause clinically significant impairment in social, academic, or occupational functioning.

Information obtained from the clinical interview with Ben, completed questionnaires, behavioural observations and assessment results are consistent with a significant attentional disorder. Ben is experiencing clinically significant symptoms of inattention, as well as difficulty in multiple aspects of executive functioning. At this time, Ben meets formal diagnostic criteria for the following diagnosis as specified by the Diagnostic and Statistical Manual of Mental Disorders -Fifth Edition (DSM-5)

I. 314.00 (F90.0) Attention-Deficit/Hyperactivity Disorder (ADHD), Predominantly Inattentive Presentation, Moderate.

It is very likely that Ben's difficulties with attention have adversely affected his ability to meet his full academic, social and occupational potential in the past and currently. It is very common to find that individuals with ADHD have challenges completing complex tasks because of their inherent difficulty with sustained mental effort. While some symptoms of ADHD may lessen overtime, restlessness, inattention, poor planning, and impulsivity typically persist into adulthood.

8. His TUE application was supported by Dr. Susan Lea McKenny, who referred to his "longstanding difficulties with focus and attention for academic and business activities." She also made reference to the formal testing for ADHD, her awareness that Mr. Asselin had taken Vyvanse and an August 10, 2022, prescription for Vyvanse 20mg for Mr. Asselin.
9. On January 24, 2023, Mr. Asselin received notice that his prospective TUE for the use of Vyvanse was granted effective November 8, 2022. Three days later on January 27, 2023, he was advised that his retroactive TUE for Vyvanse was denied for the following reasons:

[...A] Retroactive TUE has not been granted because of a failure to meet any of the criteria of Article 4.1 of the ISTUE (and in particular element (e) of that article) I failed to note that it is important to note that, according to the standard any retroactive application must also “...*still meet each of the conditions in Article 4.2*”.

In this respect the application does not meet the condition expressed in element (a) of Article 4.2: “*The Prohibited Substance or Prohibited method in question is needed to treat a diagnosed medical condition supported by relevant clinical evidence.*” At the time of the use of the prohibited substance there had been no diagnosis of a medical condition nor any plan of medical management -- and thus no relevant clinical evidence to justify the therapeutic use of the substance in question.

10. Mr. Asselin was charged on February 6, 2023, by the CCES with an anti-doping rule violation and that a penalty of a 2-year period of ineligibility would be sought.

II. EVIDENCE AT THE HEARING

11. Counsel for Mr. Asselin called a number of witnesses at the hearing. Mr. Asselin testified in his own behalf. He said that he is now 29 years old. He described his involvement in the family business in Alberta and his equestrian career as a show jumper where he has enjoyed considerable success.
12. The family business includes a company, ATCO, which has 6,500 employees. He is also involved in Spruce Meadows, which is a world recognized equestrian show jumping venue, which has about 100 full time employees and 125 part time employees and hundreds of volunteers. He is a member of the Board at Spruce Meadows.
13. Mr. Asselin described in some detail his involvement in the academic program, Sentgraf Academy, which involved his attendance at lectures and seminars a number of hours each week. He recently graduated from that program after 2 ½ years.
14. Mr. Asselin has been actively involved in show jumping since he was 10 years old. He has successfully competed in Canada, USA and Europe.

15. Ian Millar, a family friend and Canada's leading show jumper for many years testified.

Mr. Millar represented Canada in many international competitions and 10 Olympic games. Mr. Millar testified that he has known Mr. Asselin since he was a young child. He testified that he is a person of good character and is recognized as having considerable talent as a show jumper. He indicated that Mr. Asselin's abilities as a show jumper are of an extremely high calibre and he is clearly a likely prospect for the Canadian Olympic team in Paris in 2024.

16. Ian Allison, Senior Vice President of Spruce Meadows, testified also to the good character of Mr. Asselin. He described him as a mature and responsible person. He testified that he operates at a high standard.

17. Taylor Drake, who is the girlfriend and partner of Mr. Asselin, testified. She explained her involvement in introducing Mr. Asselin to Vyvanse, which she had found useful in addressing her own health issues.

18. Finally, Dr. Susan Lee – Makenny, testified to her involvement in referring Mr. Asselin to a specialist who ultimately diagnosed Mr. Asselin suffering from ADHD. This evidence is discussed previously in these reasons.

III. SUBMISSION ON BEHALF OF MR. ASSELIN

19. Mr. Asselin does not challenge the finding that there has been a breach of the provisions of the Canadian Anti-Doping Program. The sole issue is the length of the suspension from competition to be imposed. Counsel for Mr. Asselin submits that the appropriate term of the suspension in the circumstances here ought to be 1 year. The rationale for a 1-year suspension is discussed in the following paragraphs.

20. Counsel submits that the first step that must be taken is to analyze the applicable default sanction before considering the possible reduction of the “default sanction”. In this case the substance involved is a Non-Specified Substance. The default sanction is a 4-year suspension unless Mr. Asselin can establish on a balance of probabilities that his anti-doping violation was not intentional.
21. Mr. Asselin testified that his use of Vyvanse, a Non-Specified Substance, was limited to out of competition use – unrelated to sport performance. Mr. Asselin’s use of Vyvanse was unrelated to his equestrian competitions. His practice was to stop using the medication several days before a particular competition. He testified that he used Vyvanse solely to treat his ADHD problem and not to improve his equestrian performance.
22. The evidence before me is that the levels of amphetamine in Mr. Asselin’s sample (317ng/ml) are consistent with the use of Vyvanse days prior to the competition for which he received his positive test.
23. Counsel submits that in all these circumstances the default starting position (subject to possible further reduction) is 2 years. Counsel for Mr. Asselin further submits in the circumstances of this case he is entitled to the maximum reduction in respect of his situation. The following excerpt from Counsel’s written submissions sets out the position:

6.1 Where it has been established that the athlete did not intentionally violate the CADP, under CADP Art. 10.6.2, “If an *Athlete* or other *Person* establishes in an individual case where Article 10.6.1 is not applicable that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Article 10.7, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person’s* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable.” The CADP defines “No Significant Fault or Negligence” as follows:

“The *Athlete* or other *Person’s* establishing that any *Fault* or *Negligence*, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault* or *Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Protected Person* or

Recreational Athlete, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered the *Athlete's* system.”

24. In support of his position, Counsel for Mr. Asselin cites two cases: *Cilic v ITF* (CAS 2013/A/2237) and *Lea v USADA* (CAS 2016/A/2924) which he submits are relevant to assessing Mr. Asselin’s sanction in light of his degree of fault. In *Cilic*, the Arbitrator stated:

69. The breadth of sanction is from 0-24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognizes the following degrees of fault:

- a. Significant degree of fault or considerable fault.
- b. Normal degree of fault.
- c. Light degree of fault.

25. Counsel further submits in the following paragraphs of his written submissions:

6.3 As in both *Cilic* and *Lea*, Ben Asselin’s fault was not in using Vyvanse in the first place, but rather, in using Vyvanse (which is only banned in competition) out of competition *but too close to the start of the competition*. On an assessment of the objective factors, it is submitted that Ben Asselin is in the “light” degree of fault category. Furthermore, and also as in *Lea*, if Mr. Asselin’s objective fault is in the moderate category, then it is submitted that this is one of those “exceptional cases” in which the subjective elements are so significant that they should move Ben Asselin to the “light” category of fault.

6.3.1 As in *Lea*, the athlete’s fault was not in taking Vyvanse out of competition (when it was not banned), but in failing to determine the length of time it would stay in his system after ingestion. See *Lea* at par. 95.

6.3.2 While the athlete in *Lea* was found on the objective fault criteria to be in the moderate fault category, it is submitted that Ben Asselin’s objective level of fault is lower than in that case:

6.3.2.1 Bobby Lea’s use of oxycodone to help him sleep would never have qualified him for a TUE.¹⁵ In contrast, Ben Asselin’s use of Vyvanse to treat his ADHD symptoms is the type of medication use for which TUE’s are routinely granted; and in fact, Ben Asselin was granted a TUE once he did apply for one.

6.3.2.2 Bobby Lea did not suffer from a medical condition for which the primary trait is inattentiveness. In contrast, Ben Asselin’s ADHD – diagnosed as

“Predominantly Inattentive Presentation” explains (i) why his formal ADHD diagnosis was delayed, and (ii) why his TUE application was delayed as well.

26. Counsel further submits that an assessment of the objective factors relevant to the appropriate sanction also supports a sanction for Mr. Asselin should be at the lower end of the scale.

27. Counsel reviewed the consideration of the subjective factors as discussed in the cases.

These include:

- (i) Mr. Asselin took care to stop using Vyvanse several days before the competition.
- (ii) He never used his prescription in competition.
- (iii) He only used his prescription to manage his ADHD and not to improve his equestrian competitive results.

28. In respect of Mr. Asselin’s failure to submit a more timely TUE application, which

Counsel submits at paragraph 6.4.3 of his submissions:

6.4.3 Mr. Asselin’s diagnosis with ADHD, characterized by extreme hyperactivity, inability to focus/concentrate, procrastination and difficulty remembering appointments or obligations, is the underlying cause of his failure to timely submit his TUE application. Very similarly, in ITIA v. Verdasco, the athlete argued that “his failure to monitor the expiry date of his TUE was adversely impacted by the nature and extent of his ADHD condition”. ITIA v. Verdasco at 25.

29. Counsel cites the case of ITIA v Verdasco where the athlete had forgotten his TUE had expired and failed to apply for a renewal in time. He tested positive after the expiry date and in the circumstances of that case, the Arbitrator accepted that the athlete’s degree of fault was extremely “light”. The sanction of suspension was then set at two months.

IV. SUBMISSIONS ON BEHALF OF THE CCES

30. The CCES emphasizes that at the time of the sample collection from Mr. Asselin on June 18th, 2022, he did not have an official ADHD diagnosis. He was not diagnosed with ADHD until September 28th, 2022 – more than three months after his sample was taken. After he had previously discussed his issues with lack of focus with his family doctor in October 2021, he did not have an official ADHD diagnosis at the time his sample was taken.
31. When Mr. Asselin provided his urine sample on June 18th, 2022, he declared that he had taken an Aleve pill on February 12th, 2022 and Advil on June 17th, 2022. He did not disclose that he had taken Vyvanse.
32. On October 14th, 2022, Mr. Asselin applied for both a prospective and retroactive TUE. On January 24th, 2023, the CCES advised Mr. Asselin that he was granted a prospective TUE. Mr. Asselin was advised on January 27th, 2023, that the CCES had denied his retroactive TUE application.
33. The CCES submits the following undisputed facts:
- (i) At sample collection on June 18th, 2022, he had not been diagnosed with ADHD, which only occurred on September 28th, 2022.
 - (ii) At the time his sample was taken, he did not have his own prescription for Vyvanse, which he obtained from his girlfriend.
 - (iii) Prior to June 18th, 2022, he had self-medicated and self-diagnosed.
 - (iv) The CCES relies on *ASADA v O’Neill*, CAS 2008/A/1591. In that case, the panel rejected a “no significant fault or negligence” finding in a similar case. This panel said: “athletes who have used a prohibited substance out of competition have a personal duty to ensure a substance prohibited for in-competition is not found in his/her system on the occasion of an in-competition sample collection testing.”
 - (v) There is no evidence that Mr. Asselin consulted an appropriate expert before taking Vyvanse.

34. In the circumstances, counsel for CCES submits that there is a higher duty in respect of athletes who take medicines because it is well-known that medicines often contain prohibited substances.
35. Counsel for CCES further submits that in spite of being aware that Vyvanse is prohibited in competition he took a significant risk by taking the medication four days before competition. Counsel submits that in these circumstances Mr. Asselin is in a “significant fault range”.
36. In support of these submissions, counsel cites *Cilic v. ITF, CAS 2013/A/3327*. Finally, counsel submits that Mr. Asselin would not have been entitled to a TUE prior to June 18th, 2022, due to the fact he did not then have the required medical diagnosis.
37. At the outset of the hearing Mr. Klevinas on behalf of CCES submitted that the appropriate penalty in this case is a 20-month suspension from competition. However, in his closing argument Mr. Klevinas indicated that since hearing the evidence led by counsel for Mr. Asselin he had revised his view of the appropriate penalty, which he now submits should be a 16-month suspension rather than the 20-months initially submitted.

V. CONCLUSION

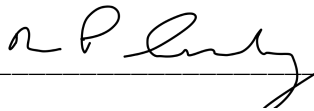
38. I accept the evidence of Mr. Asselin and the witnesses who were called on his behalf. In particular, I accept that he did not take the Vyvanse pills a few days before the June 18th competition for the purpose of improving his performance in that competition. There is no doubt, on the evidence before me, that he took the Vyvanse pills to deal with his attention deficit issues, although at that time he had no formal diagnosis. He made an honest mistake and has admitted it virtually from the moment that he was advised that he had tested positive. Counsel for CCES quite properly did not challenge this evidence.

39. Mr. Asselin has voluntarily accepted a suspension from competing in his equestrian events since being advised of his positive test. As a result, he has already lost, what I assume, is valuable competitive experience for an athlete of his standing. So, he has already paid a significant price.

40. While setting the penalty in this case is clearly not an exact “science”, I believe a reasonable suspension in the circumstances is a 14-month suspension from the time Mr. Asselin began his voluntary suspension.

41. I thank counsel for their helpful submissions and their capable and professional approach to this case.

Dated in Toronto this 16th day of June, 2023.

A handwritten signature in cursive script, appearing to read 'R P Armstrong', is written over a horizontal line.

The Honourable Robert P. Armstrong, K.C