

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel

UNITED STATES ANTI-DOPING AGENCY)	
Claimant,)	
)	
v.)	AAA Case #01-16-0000-7103
)	
ANA MILENA FAGUA RAQUIRA)	
Respondent.)	

AWARD

I, the undersigned Arbitrator, having been designated by the above-named parties (the "Parties") in accordance with the applicable rules and having duly heard the allegations, proofs, testimony and arguments presented in this matter, do hereby find and issue this Award, as follows:

SUMMARY AND DECISION

1. This case arises out of the collection by Claimant, United States Anti-Doping Agency ("USADA"), of a urine sample from Respondent, Ana Milena Fagua Raquira, at the Willow Springs Road Race on July 19, 2015. As more fully described herein, that sample was reported as an Adverse Analytical Finding consistent with the administration of testosterone of exogenous origin.

2. USADA has alleged that Respondent violated Article 2.1 of the Union Cycliste Internationale Anti-Doping Rules ("UCI ADR"), the World Anti-Doping Code (the "Code"), and the USADA Protocol for Olympic and Paralympic Movement Testing (the "Protocol"). USADA also asserts that the appropriate sanction is a four-year ban from competition.

3. Respondent stipulated to facts sufficient to establish a violation of Article 2.1 of the UCI ADR, but alleged that she did not intentionally commit an anti-doping rule violation and should not be subject to a four-year sanction.

4. A telephonic hearing was held on July 18, 2016.

5. For the reasons described more fully below, based on the evidence presented and the stipulations, arguments and submissions of the Parties, I conclude that (1) USADA has met its burden of proof and established to my comfortable satisfaction that Respondent committed a violation of Article 2.1 of the UCI ADR; and (2) Respondent has not met her burden to prove based on the balance of the probabilities that this violation was not intentional.

6. For the reasons described more fully below, the required sanction is a period of ineligibility of 4 years beginning on August 17, 2016, with credit provided against the total period of ineligibility for the Provisional Suspension imposed on October 9, 2015.

7. The Parties shall bear their own attorney fees and costs associated with this Arbitration.

8. The Administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the Arbitrator shall be borne entirely by USADA and the United States Olympic Committee.

9. This Award is in full settlement of all of the claims and counterclaims submitted to this Arbitration. All claims not expressly granted are hereby denied.

FACTS

10. Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and adjudicating any positive

test results or other anti-doping violations pursuant to the Protocol. At the Hearing, Claimant was represented by Jeffery Cook, Esq.

11. Respondent, Ana Milena Fagua Raquira, is a cyclist who resides in Bogota, Columbia. In the early stages of this case, Respondent was represented by Gustavo Pinilla Florian, an attorney in Bogota. Mr. Pinella withdrew from representing Respondent prior to the hearing held in this case.

12. The Parties in this case entered into a written stipulation of facts. That stipulation was written in English and signed by Claimant and Respondent. However, recognizing that Respondent's legal counsel withdrew early in the pendency of this matter and that Respondent indicated that she does not speak or understand English, a qualified English – Spanish translator was provided, without expense to Respondent, for the hearing held on July 18, 2016. At that hearing, following a verbal translation into Spanish of the written stipulation she signed, Ms. Raquira acknowledged that she understood and agreed to all of the terms of the written stipulation and also that she understood that the stipulated facts may be sufficient to prove a violation of Article 2.1 of the UCI ADR. In addition, USADA submitted documentation supporting the facts set out in the written stipulation. Accordingly, I conclude that the following facts were stipulated and agreed to by the Parties in this matter:

12.1 The Protocol governs all proceedings involving USADA urine specimen number 1575501;

12.2 The mandatory provisions of the Code, including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, sanctions, the Protocol, the UCI ADR, and the

United States Olympic Committee (“USOC”) National Anti-Doping Policies are applicable to any matter involving the USADA urine specimen number 1575501;

12.3 USADA collected the urine sample designated as USADA urine specimen number 1575501 at the Willow Springs Road Race on July 19, 2015;

12.4 USADA sent USADA urine specimen number 1575501 to the World Anti-Doping Agency (“WADA”) accredited laboratory, Sports Medicine and Research Testing Laboratory (“SMRTL” or “Laboratory”) in Salt Lake City, Utah for analysis;

12.5 USADA’s collection of the sample and the chain of custody for USADA urine specimen number 1575501 was conducted appropriately and without error;

12.6 The Laboratory’s chain of custody for USADA urine specimen number 1575501 was conducted appropriately and without error;

12.7 The Laboratory, through accepted scientific procedures and without error, determined that the A bottle of USADA urine specimen number 1575501 had an elevated testosterone/epitestosterone (T/E) ratio greater than 4:1. The Laboratory also reported that no specific prohibited substances had been detected. Therefore, in accordance with the rules, the sample 1575501 then received additional analysis using the Gas Chromatography Isotope Ratio Mass Spectrometry (“GC/IRMS”) method, also known as Carbon Isotope Ratio (“CIR”) analysis. Based on that analysis, the

Laboratory reported sample 1575501 as an Adverse Analytical Finding because the IRMS analysis reflected values consistent with the administration of a steroid of exogenous origin;

12.8 Ms. Fagua voluntarily and knowingly waived her right to have her B sample of urine specimen number 1575501 analyzed;

12.9 Ms. Fagua did not challenge the Provisional Suspension imposed on October 9, 2015, barring her from competing in any competitions under the jurisdiction of UCI, USA Cycling and the USOC, or any clubs, member associations or affiliates of these entities, until her case is deemed not to be a doping offense, she accepts a sanction, she fails to contest this matter, or a hearing has been held and a decision reached in this matter;

12.10 So long as she does not participate in any competition or prohibited activity during her period of provisional suspension, the time served under the Provisional Suspension will be deducted from any period of ineligibility that Ms. Fagua might receive beginning on October 9, 2015, the date the Provisional Suspension was imposed.

13. On September 10, 2015, USADA notified Respondent that her specimen was negative and that there were no banned substances present.

14. Matthew Fedoruk, Ph.D., USADA's Science Director ("Dr. Fedoruk"), testified that the September 10, 2015 notification was sent automatically to Respondent prior to completion of the additional GC/IRMS testing based on the elevated T/E ratio, which detected the presence of an exogenous steroid in the specimen and resulted in the assertion by USADA of the violation

at issue in this matter. Dr. Fedoruk also testified that the testing of Respondent's sample followed all relevant technical WADA protocols and that the results of the testing confirmed the presence of metabolites of exogenous testosterone in the sample.

15. In Respondent's testimony and written submissions in the matter, Respondent claims that she did not intentionally or knowingly violate the UCI ADR and asserted that the presence of exogenous testosterone in her sample was possibly due to her inadvertent ingestion of something that contained that substance. Respondent has posited several possible sources of the exogenous testosterone.

16. She alleged that it could have resulted from medication a female friend gave her to lose weight and improve her sex life. However, Respondent later admitted that this statement was not true and that she made it as a result of pressure from her coach, Jorge Ivan Gonzalez Balaquera. At the hearing, Coach Gonzalez admitted that he was the source of this fabrication and admitted that he made a mistake by encouraging Respondent to lie about this.

17. In a letter to USADA dated November 27, 2015, Respondent stated:

A. With all do respect and of a free will, conscious, voluntary and spontaneous, I possibly may have consumed some substance without any malice or bad faith an that if this happened; it was in order to overcome problems of health and under medical suggestion.

18. In her letter to me dated May 21, 2016, Respondent provided the following explanation:

I finish by saying that, at this time, I do not know what my Coach gave me, if that was the reason for the reulst [sic], or if indeed it is something hormonal, anyway I do not have the financial backing to have lab tests done to check what actually happen there I leave my case in your hands as an athlete that has never acted with bad intentions I only did what my Coach told me to do, therefore if you impose any sanctions, you should also take corrective action against Coach Jorge Ivan Gonzalez

Balaguera [sic], because he took advantage of the situation of superiority as a position of Coach.

19. Respondent also alleged that the source may have been two capsules that her Coach gave her minutes before a stage race on July 17, 2015. Although Coach Gonzalez told her that they were “salts” used to avoid possible muscle cramps in hot weather, Respondent asserted that he was “acting a little weird” and suggested that these capsules could have been the source of her positive sample. Respondent, however, testified at the hearing that she did not know whether the capsules her Coach had given her contained any prohibited substance. Coach Gonzalez testified that he never gave Respondent any prohibited substances. Respondent also admitted that she did not declare these two capsules on her doping control form after the race, and that she alone – and not her coach – was responsible for complying with the UCI ADR.

20. At the hearing, Respondent for the first time provided a list of a certain pharmaceuticals and various supplements she had used which she alleges were “possible sources” of the exogenous testosterone in her sample. She did not provide any support for her assertion that any of these substances was the source of the exogenous testosterone, however, and could not identify any one of these substances as the source of the prohibited substance at issue in this case. After review of the active ingredients in the pharmaceuticals identified by Respondent, Dr. Fedoruk testified that none of them could have been the source of the exogenous testosterone in Respondent’s specimen.¹

¹ Out of respect for the medical privacy of the Respondent, I have decided not to provide a list of all pharmaceuticals identified by the Respondent. I do not believe that such a list is necessary given that the Respondent did not identify any specific pharmaceuticals as the source of the exogenous testosterone in her specimen and in light of Dr. Fedoruk’s testimony that none of the pharmaceuticals could have been the source of the exogenous testosterone

21. Respondent testified that she has not competed in any races since the Provisional Suspension was imposed on October 9, 2015.

APPLICABLE RULES AND ANALYSIS

22. Article 2.1 of the UCI ADR provides:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in a *Rider's Sample*

2.1.1 It is each *Rider's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Riders* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, *Negligence* or knowing *Use* on the *Rider's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

[Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to a Rider's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". A Rider's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Rider's A Sample* where the *Rider* waives analysis of the *B Sample* and the *B Sample* is not analyzed; or, where the *Rider's B Sample* is analyzed and the analysis of the *Rider's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Rider's A Sample*; or, where the *Rider's B Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

identified in Respondent's specimen.

23. The Parties have stipulated and agreed that the Laboratory analysis of specimen 1575501, which was collected from Respondent at the Willow Springs Road Race on July 19, 2015, revealed an elevated testosterone/epitestosterone (T/E) ratio greater than 4:1, and that this specimen then received the additional CIR analysis which confirmed values consistent with the administration of a steroid of exogenous origin. Exogenous testosterone is an Anabolic Androgenic Steroid (“AAS”) identified as a Prohibited Substance in S.1.1.a of the Code’s 2015 Prohibited List.

24. The appropriate sanction in this case is determined by reference to Article 10.2 of the UCI ADR, which in relevant part provides:

10.2 *Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method*

The period of *Ineligibility* for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Rider* or other *Person* can establish that the anti-doping rule violation was not intentional.

* * *

10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those *Riders* who cheat. The term therefore requires that the *Rider* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an

Adverse Analytical Finding for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not intentional if the substance is a *Specified Substance* and the *Rider* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered intentional if the substance is not a *Specified Substance* and the *Rider* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

25. Respondent's sample was determined positive for the exogenous testosterone, a steroid which is not a Specified Substance under the UCI ADR and is classified as an Anabolic Androgenic Steroid ("AAS") under S.1.1.a of the Code's 2015 Prohibited List:

4.2.2 *Specified Substances*

For purposes of the application of Article 10, all *Prohibited Substances* shall be *Specified Substances* except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the *Prohibited List*. The category of *Specified Substances* shall not include *Prohibited Methods*.

26. Consequently, under Article 10.2.1.1, the sanction in this case must be a four-year period of ineligibility unless the Respondent can establish that the anti-doping rule violation was not intentional. If Respondent can meet her burden of establishing that her anti-doping rule violation was not intentional, then Article 10.2 will not apply and the maximum sanction will be two years.

27. In order to prove that her anti-doping rule violation was not intentional, Respondent must satisfy the "balance of probability" standard:

3.1 Burdens and Standards of Proof

The *UCI* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *UCI* has established an anti-doping rule 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 Anti-Doping Rules place the burden of proof upon the *Rider* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

[Comment to Article 3.1: This standard of proof required to be met by the UCI is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

28. The relevant case law provides guidance on the types of evidence that Respondent must provide to meet her burden of establishing that her conduct was not intentional.

29. In *UK Anti-Doping Limited v. Graham*, (27 August 2015, SR/0000120259), the Tribunal concluded that:

it is incumbent upon an Athlete who wishes to establish that the ADRV was not intentional to satisfy the Tribunal on a balance of probabilities as to (a) the nature of the conduct which led to the [anti-doping rule violation], which in the case of an [adverse analytical finding] will be how the Prohibited Substance came to be found in his body and (b) he did not know that such conduct constituted an [anti-doping rule violation] or knowing that there was a significant risk that such conduct might constitute or result in an [anti-doping rule violation], he did not manifestly disregard that risk.

30. *Graham* at ¶ 46. The Panel in *Graham* concluded that imposing such a requirement was preferable to the approach of relying only on an athlete's testimony to establish a lack of intent, an approach which the Court of Arbitration for Sport and other anti-doping tribunals have consistently deprecated, as illustrated by a list of decisions set out in *International Wheelchair-*

Federation v. UKAD and Gibbs (CAS 2010/A/2230, 22 February 2011) and referenced by the Panel in *Graham*. *Graham* at ¶ 40.

31. Moreover, the Panel in *Graham* was also concerned that an approach allowing reliance only on an athlete's testimony would serve as "an invitation to unscrupulous athletes in the future to simply deny all knowledge of the source of a prohibited substance" to avoid a four-year ban and make it "difficult if not impossible for [an anti-doping agency] to go behind such protestations of innocence," and thus fundamentally undermine the scheme established by the 2015 WADA Code. *Graham* at ¶ 45.

32. For similar reasons, other cases have reached the same conclusion. See e.g., *UKAD v. Hastings* (18 November 2015, SR0000120256); *UKAD v. Songhurst* (8 July 2015, SR/0000120248); *FEI v. Aleksandr Kovshov*, (27 November 2012, FEI 2012/02); and *IRB v. Keyter* (13 October 2006, CAS 2006/A/1067).

33. I have determined that this approach set out in *Graham* and echoed by the cases listed above should be applied to the facts in this case.

34. In this case, Respondent admits that she does not know how the Prohibited Substance detected in her specimen came to be found in her body. While she has identified certain possible sources of the exogenous testosterone, including supplements and pharmaceuticals, she has offered nothing but pure speculation regarding those possible sources. Moreover, the testimony of Dr. Fedoruk clearly indicated that the pharmaceuticals she was taking could not have been the source.

35. It is certainly possible that Respondent's assertion that she did not intend to cheat was truthful and that her ingestion of the Prohibited Substance was inadvertent, but this possibility is not sufficient to meet her burden of proof in this case.

36. Respondent also may be of limited means and therefore find it difficult to meet the required burden of proof in this case. However, that factor does not permit me to deviate from the standard established by the UCI ADR. *See Graham* at ¶ 51.

37. For the foregoing reasons, I must conclude that Respondent has not met her burden of proof in this case and a four-year suspension should be imposed.

38. Pursuant to Article 10.11 of the UCI ADR, which provides that the period of ineligibility shall commence on the date of the final hearing decision, but that a Rider "shall receive credit for such period of a Provisional Suspension against any period of *Ineligibility* which may be ultimately imposed" where the Rider respects the Provisional Suspension, Respondent must receive credit for the Provision Suspension which began on October 9, 2015, against the total period of ineligibility.



Mark Muedeking
Arbitrator

Date: August 17, 2016