

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

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UNITED STATES ANTI-DOPING AGENCY, (USADA) :
 :
 Claimant, :
 : AAA No. 30 190 00091 04
and :
 :
 CALVIN HARRISON, :
 :
 Respondent. :
-----X

AWARD

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement governing this matter, and having duly heard the proofs and allegations of the parties, have been requested, by reason of the desire on the part of United States Track and Field (USATF) and Claimant to declare the eligibility or ineligibility of Respondent for selection to the U.S. Olympic team, to issue an Award promptly.

1. Chronology.

1.1 This proceeding was initiated in late December and early January 2004, with the filing of competing Demands for Arbitration by Claimant and Respondent. As more fully discussed infra in Section 2, entitled "Jurisdiction", Mr. Edward G. Williams, Respondent's counsel, following the rejection of his Demand for Arbitration by the United States Olympic Committee (USOC) and the American Arbitration Association (AAA),¹ filed lawsuits in the United States District Court for the Southern District of New York (SDNY or District Court) to compel arbitration in this case and in the similar case of Regina Jacobs v. United States Anti-Doping Agency. After his claims were

¹ See ¶ 2.2 infra.

rejected by the SDNY, he appealed to the United States Court of Appeals for the Second Circuit, which on July 8 affirmed the dismissal of Ms. Jacobs' lawsuit. USADA thereupon "informed Mr. Williams that it considered the lawsuit filed on Mr. Harrison's behalf to be frivolous and requested it be withdrawn."²

1.2 This Panel was appointed toward the end of June 2004 and proceeded to hold a Preliminary Hearing with the parties on June 30, 2004, at which time an evidentiary hearing was scheduled to take place on July 9, 2004, in Denver, or, at Respondent's option, in Sacramento, where the U.S. Olympic trials were to commence. Respondent's first qualifying event was scheduled for July 11. Claimant and USATF had requested an expedited hearing in the interest of Respondent and his competing athletes, and the date and location of the hearing were fixed in such a manner as to accommodate Respondent and facilitate an early decision on his eligibility for the 2004 Olympic trials prior to his participation.

1.3 Respondent's counsel at the eve of the scheduled hearing obtained a postponement of the hearing until July 26, 2004, citing severe hardship for him and his client to meet preparation deadlines. The panel, with Claimant's concurrence, granted the postponement in part based on Respondent's counsel's undertaking that Mr. Harrison would be present at the hearing, now to take place, also as an accommodation to Mr. Williams, in New York.

1.4 The Panel in its July 7, 2004 Procedural Order had directed Respondent to comply with specific deadlines for exchanging information in order to narrow the issues in contention and in preparation for the July 26, 2004 evidentiary hearing. Claimant, upon Respondent's noncompliance with the Panel's order, brought a Motion for Enforcement of the Panel's Order and

² Claimant's Pre-Hearing Brief, dated July 20, 2004 at 5.

to Compel Discovery on July 15, 2004, in which it "requests that this Panel enforce its order and impose [any] sanctions . . . necessary to compel compliance . . ."

1.5 The July 26, 2004 hearing took place without the attendance of Respondent.

1.6 On Friday, July 30, 2004, Counsel for USADA wrote to the Panel stating that time is of the essence for a decision by August 3, 2004.⁴

1.7 In order to comply with Claimant's request to preserve the parties' rights for a timely and also a better prepared appeal to the Court of Arbitration for Sport (CAS), and to address the concerns of the United States Olympic Committee (USOC), we are expediting the issuance of this reasoned Award and have chosen not to issue an interim Award.

³ Id. at ¶ 10, p. 3.

⁴ The letter speaks, in full, as follows:

Dear Members of the Panel:

In response to the Panel's inquiry regarding the timing of its decision, USADA has made inquiries concerning when a decision is required in this matter in order for the United States not to lose a position on its Olympic roster in Athens should the decision in this case be adverse to the athlete. The responses received by USADA from the United States Olympic Committee and other entities have uniformly been that time is of the essence and that due to many extenuating factors each day is important.

As a result of these inquiries USADA informs the Panel that USADA believes that it is necessary for this matter, including any appeal from the instant panel's decision, to be resolved as far in advance of August 13, 2004, commencement of the Olympic Games as possible. In order to allow the Court of Arbitration for Sport (CAS) a ten (10) day period of time in the event of an appeal in which to establish a panel, permit briefing, hold a hearing and issue a decision, USADA respectfully requests that this Panel issue its interim award by Tuesday, August 3, 2004 with its reasoned decision to follow by Thursday, August 5, 2004.

USADA further wishes to inform counsel for the Claimant that in the event that a CAS appeal is initiated that USADA will request that any hearing be held at the earliest practicable date.

(Letter dated July 30, 2004 from William Bock, III to the Panel)

2. Issues.

2.1 The parties⁵ entered into a Stipulation of Uncontested Facts and Issues. One agreed fact was the finding of the existence of the substance "modafinil" in the Respondent's bodily fluids from the urine sample he gave on June 21, 2003 following his participation in the U.S. Jr. and Sr. Outdoor National Track & Field Championships (U.S. National Championships) on that date. The parties agree that the only substantive issue before the Panel is whether modafinil, a prescription drug, was a prohibited substance under the rules of the International Association of Athletics Federations (IAAF rules) applicable in 2003 when Respondent tested positive for the drug.⁶ Claimant alleges it is, and, therefore, Respondent committed a doping offense. Respondent denies that when taken by him modafinil was prohibited, and thus he did not commit a doping offense.

2.2 The parties further agree and stipulate that Respondent provided an in-competition urine sample in June, 1993, which tested positive for pseudoephedrine, a drug then, but not currently, on IAAF's prohibited substance list, for which he received a hearing resulting in the imposition, at that time, of the prescribed sanction.

2.3 Since a finding that Respondent committed a doping offense would constitute a second offense under IAAF rules, Claimant requests that the Panel impose a sanction that would include a minimum two-year period of ineligibility from July 26, 2004, the date of the evidentiary

⁵ The Claimant pursuant to the USADA Protocol for Olympic Movement Testing (USADA Protocol) is the independent anti-doping agency for Olympic Sports in the United States responsible for conducting drug testing and adjudicating positive test results; the Respondent, Calvin Harrison, is an elite competitive track athlete who has been selected for the 2004 United State Olympic team.

⁶ Modafinil since that date has been added to the IAAF's prohibited substances list as a specific example of a banned stimulant.

hearing, and disqualification of Respondent's results and awards from the June, 2003 U.S. National Championships through July 26, 2004.

2.4 Respondent has judicially challenged the jurisdiction of the Panel to hear and decide this case. Although the Panel is advised by Respondent's counsel that he has filed for a voluntary dismissal of this lawsuit, he has indicated to Claimant and the Panel that Respondent has reserved his rights with respect to the composition of the panel and its jurisdiction to proceed under the AAA Supplementary Procedures, Annex D of the USADA Protocol (Supplementary Procedures). Accordingly, Claimant has requested that the Panel determine that it has jurisdiction over the parties and their dispute under the USADA Protocol and the Supplementary Procedures.

3. Jurisdiction.

3.1 Respondent's counsel, in his Pre-Hearing and Post-Hearing Submissions, has asserted he does "not recognize the jurisdiction of the AAA, or any arbitrators who may be appointed, to proceed in any arbitration hearing against Calvin Harrison" under the USADA Protocol and Supplementary Procedures and reserves "all objections to the composition of the Panel." At the outset of the July 26, 2004 hearing, the Panel noted the parties' extensive written submissions⁷ and heard oral argument by their counsel on the jurisdiction issues raised by Respondent, reserving its decision (made pursuant to Rule 8 of the Supplementary Procedures, which is identical to Rule 7 of the AAA Commercial Rules) until after the conclusion of the hearing. We now make that determination in accordance with that rule.

3.2 The AAA, in a letter dated January 30, 2004, to the parties, stated:

"The Association has reviewed the USOC Constitution, USADA Protocol for Olympic

⁷ Since then augmented by post-hearing memoranda.

Movement Testing and the contentions of the athlete, USADA and USATF and decided that this matter should proceed under the Association's Supplementary Procedures for Arbitration initiated by the United States Anti-Doping Agency (USADA) as filed by USADA per Section 4 of the supplementary procedures. Please note that the supplementary procedures provide for the Commercial Arbitration Rules of the Association, where applicable. Any issues remaining among the parties may be presented to the panel for consideration."

3.3 Respondent subsequently filed in the United States District Court for the Southern District of New York a petition to compel arbitration under the AAA Commercial Rules (rather than under the USADA Protocol and the AAA Supplementary Procedures), which Petition the Panel understands from Respondent's counsel is being withdrawn in view of a decision by the same court in a similar proceeding brought by Respondent's counsel on behalf of Regina Jacobs, another track and field athlete. By its decision on May 17, 2004 the District Court dismissed the Jacobs lawsuit and, on July 8, 2004, the United States Court of Appeals for the Second Circuit (Second Circuit) affirmed the dismissal.⁸ In circumstances very similar to the instant case, the Second Circuit noted, citing the District Court decision, that since USADA had not refused to arbitrate, Petitioner cannot compel its arbitration under Section 4 of the Federal Arbitration Act (FAA) since under the FAA there must be a showing that a party has "failed, neglected or refused to arbitrate."⁹ Since USADA has not refused to arbitrate, the Court concluded, there is no basis for reviewing AAA's decision that the matter proceed under the AAA Supplementary Procedures for Arbitration initiated by USADA

⁸ Regina Jacobs v. USA Track & Field and United States Anti-Doping Agency, 2004 WL 1521478 (2nd Cir. N.Y., July 8, 2004).

⁹ Ibid.

rather than under the AAA Commercial Rules. As the SDNY noted in the Jacobs case, any questions related to jurisdiction or arbitrability in these circumstances are for the arbitration panel to decide.

3.4 After an extensive review of the applicable provisions of the USOC Constitution and By-laws, the AAA commercial Rules and Supplementary Procedures, the USADA Protocol, USATF's rules and regulations (including Regulation 10), the Amateur Sports Act, and the parties' pre-hearing and post-hearing memoranda and hearing exhibits, the Panel concludes that it is properly constituted and has jurisdiction over the parties. The Panel further finds that this dispute shall be, and is, governed by the USADA Protocol and the Supplementary Procedures.

3.5 The panel bases its conclusions on the following findings:

3.5.1 By accepting membership in, and consequent benefits from, USATF, the USOC recognized national governing body (NGB) for track and field, Respondent has agreed to be bound by its rules and regulations. Regulation 10 requires USATF's members to submit to doping control under the USADA Protocol, and that proceedings resulting from positive test results be conducted by USADA, which requires adherence to the USADA Protocol and the Supplementary Procedures, for arbitrations of disputes arising from application of the USADA Protocol.¹⁰

3.5.2 To maintain its recognition as an NGB, the USOC requires USATF to meet governance requirements for all NGBs. As the District Court in Jacobs noted, these requirements are set forth in the USOC constitution and by-laws and derive from provisions in the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501, et seq. ("Amateur Sports Act"). One such provision requires that USATF submit certain disputes with its members to binding arbitration "conducted in accordance with the Commercial Rules of the American Arbitration Association, as

¹⁰ All of the more than 100 adjudications of Olympic sports doping cases heard over the past three plus years have been governed by the USADA Protocol and the Supplementary Procedures.

modified and provided for in the [USOC's] constitution and bylaws." 36 U.S.C. § 220522(a)(4)(B) (emphasis added). The requirement was in fact modified by a USOC by-law, which compelled NGBs to "comply with the procedures pertaining to drug testing and adjudication of related doping offenses of the independent anti-doping organization designated by the USOC to conduct drug testing. No exceptions shall be allowed unless granted by the Board" USOC By-laws, Chapter XXIV, Section 2(G). That agency is USADA, and its Protocol provides that doping offenses be arbitrated under the Supplementary Procedures. Respondent argues, however, that USATF agreed in its By-law, Article 23J, to the use of the AAA commercial rules; however, the Respondent ignores the very specific requirement of USATF's Regulation 10, which provides that proceedings involving doping offenses of USATF athletes be governed by the USADA Protocol and the Supplementary Procedures.

3.5.3 We concur with Claimant that USATF is required to arbitrate disputes with its members only to the extent permitted under the USOC Constitution and By-laws. The USOC requires that doping offenses be arbitrated under the USADA Protocol. In this regard we credit the USOC's own interpretation of its Constitution and By-laws issued in a letter dated January 14, 2004 in reply to Respondent's request for an investigation of his eligibility dispute under Article IX of the USOC Constitution:

Let me state unequivocally that there is no support found in either the Act or the USOC Constitution or Bylaws that gives Mr. Harrison a right to initiate an arbitration before the AAA, except as provided for under the USADA Protocol, including under the modifications to the AAA Commercial Arbitration Rules ("AAA Supplementary Rules").

Instead, the Act gives the USOC, with concurrence of the Athletes' Advisory Council ("AAC") and the National Governing Bodies'

Counsel [sic] ("NGB Council"), the authority to designate the type of hearing an athlete is entitled to where an eligibility question impacts a protected competition. For disputes involving doping violations the USOC, with the concurrence of the AAC and NGB Council, has properly designated the USADA Protocol, including the incorporated AAA Supplementary Rules, as the exclusive grievance procedure by which an athlete can contest a doping violation.

(Letter from Jeffrey G. Benz, General Counsel, USOC, to Respondent's counsel, dated January 16, 2004 at 4.)

3.5.4 Accordingly, the Panel finds that the Supplementary Procedures were validly adopted by the USOC, insofar as doping violations are concerned, and that they constitute the sole and exclusive procedures governing an athlete's alleged doping violations. This panel has been validly constituted in accordance with such procedures and concludes that it has jurisdiction to render this Award pursuant thereto.

3.5.5 In addition, Claimant cites several examples by which Respondent agreed by his own conduct to abide by the USADA Protocol and the Supplementary Procedures. In view of our conclusion that the applicable law, rules and regulations support the decision of the AAA as expressed in its January 30, 2004 letter to the parties, Respondent's conduct, cited by Claimant, merely is additional support for Respondent's acceptance of the USADA Protocol and the Supplementary Procedures.

4. Doping Offense.

4.1 The parties agree that the sole substantive issue to be determined is whether the prescription drug modafinil (also known as Provigil, the trademark of its manufacturer, Cephalon, Inc.) was a prohibited substance under the applicable IAAF rules when admittedly taken by

Respondent. We conclude, based on the evidence adduced at the hearing, including expert testimony given by Dr. David F. Dinges and Dr. Charles R. Gerfen, witnesses called by Claimant, and Dr. Matthew S. Miller, called by Claimant, that modafinil, though not specifically named on the IAAF's prohibited substance list, is a stimulant of the type listed and is pharmacologically related to stimulants on the IAAF prohibited substance list.

4.2 Rule 55 of the IAAF rules on anti-doping provides:

- (1) Doping is strictly forbidden and is an offense under IAAF Rules.
- (2) The offense of doping takes place when either:
 - (i) a prohibited substance is present within an athlete's body tissues or fluids; or,
 - (ii) an athlete uses or takes advantage of a prohibited technique; or
 - (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique.

* * * * *

- (4) It is the athlete's duty to ensure that no substance enters his body or fluids which is prohibited under these Rules is present in his body tissues or fluids. Athletes are warned that they are responsible for all or any substance present in their body.¹¹ (Emphasis added)

4.3 Prohibited substances include those listed in Schedule 1 in the IAAF publication "Procedural Guidelines for Doping Control". It is not disputed that Respondent's urine specimen was reported by the IOC accredited Lab at UCLA to contain modafinil. For a doping offense to have occurred modafinil must be found to be covered by the language of Schedule 1. The relevant portions of the prohibited substance list in Schedule 1 read:

¹¹ IAAF Rule 55. USADA is not required to prove intent to dope or intent to take a prohibited substance. IAAF v. Walker (IAAF Arbitration Panel August 20, 2000; IAAF v. Ottey (IAAF Arbitration Panel); see also Baumann v. IOC, et al. (CAS OG 00/006) at 145.

PART I

(b) Amphetamines: e.g.

amphetamine	methylamphetamine	ethylamphetamine	phendimetrazine
amphetaminil	methylenedioxymphetamine	fenethylamine	phenmetrazine
benzphetamine	methylenedioxymphetamine	fenproporex	pipradrol
bromantan	methylphenidate	furfenorex	pyrovalerone
dimethylamphetamine	pemoline	mesocarb	

and chemically or pharmacologically related compounds.

PART II

(a) Stimulants: e.g.

amfepramone	heptaminol	ephedrine*	pholedrine
amiphenazole	mephentermine	etafedrine	prolintane
bambuterol	methoxyphenamine	etamivan	propylhexedrine
caffeine*	methylephedrine*	etilefrine	pseudoephedrine*
cathine*	nikethamide	fencamfamin	reproterol
chlorphentermine	norfenfluramine	fenfluramine	salbutamol
clobenzorex	parahydroxyamphetamine	fenoterol	
clorprenaline	pentetrazol	formoterol	
cropropanamide	phentermine	salmeterol	
crotethamide	phenylpropanolamine*	terbutaline	

and chemically or pharmacologically related compounds.

(emphasis added)

It can be seen that modafinil is not among the compounds itemized on the IAAF prohibited substance list.¹²

4.4 It is a matter of practicality that every prohibited substance is not listed but merely captured by the general language. The *Chambers* decision¹³ explains the approach very well in dealing with the so-called "designer steroid" tetrahydrogestrinone (THG) that allegedly emanated

¹² The World Anti-Doping Code List, as of 31 March 2004, makes specific reference to modafinil as a banned stimulant.

¹³ A decision of the Disciplinary Committee appointed by the Board of UK Athletics Limited under their Doping Rules and Procedures. The Committee was comprised of Charles Flint QC, Prof. Ray Brooks and Frank Clement. UK Athletics, Ltd. v. Dwain Chambers, February 24, 2004.

from the Bay Area Co-Operative Laboratory (BALCO). The decision explains at paragraph 30, page

9:

"The reason for the drafting of the list in the form of example substances is derived from the complexity of the subject matter, the continuing advances in scientific understanding and the need for a rule which is comprehensive, fair and clear. It would be impracticable to identify all forms of steroids in the list of prohibited substances, and it is always possible for new substances to be synthesized. It would be unfair to some athletes, and detrimental to the health of others, to permit athletes to experiment with novel forms or derivations of steroids until such time as the rule makers detected the new compounds and moved to add them to the list of identified substances. To restrict the prohibition to certain named substances would be both unfair and detrimental to the interests of the sport and athletes." (emphasis added)

4.5 If modafinil is to be a prohibited substance, it must be found to be so within the general language of Schedule 1; that is, it must be either a stimulant or one chemically or pharmacologically related to those listed by illustration. The expert witnesses evidently agreed that modafinil is not chemically related to substances on the prohibited list. Therefore, this Panel need only answer the matter of construction as to whether modafinil is either a stimulant or a pharmacologically related compound to a stimulant on the IAAF list of prohibited substances.

4.6 Each category of prohibited substances on the IAAF list begins with a descriptive term, namely, "Amphetamines" or "Stimulants" that is followed by the Latin abbreviation "e.g.", which, in turn, is followed by a list of named substances. IAAF panels, which formerly interpreted the rules before the present system involving CAS arbitration, determined that the proper

construction of the list was that the specifically named compounds were not intended to be an exhaustive list of banned substances, but, rather, merely examples of banned substances.¹⁴

4.7 This Panel finds that the proper construction of Schedule 1 does not require the compound to be specifically named on the prohibited list in order to be banned for use in competition. Our conclusion is consistent with CAS decisions in ruling that darbepoetin (Aranesp) is either an analogue or mimetic of r_EPO.¹⁵

4.8 The foregoing interpretation of the prohibited list makes it apparent that the scientific evidence must be examined to determine if modafinil is a stimulant or, alternatively, if modafinil is a compound pharmacologically related to the classes of stimulants on the IAAF prohibited list. If it is either a stimulant or pharmacologically related, then it is a prohibited substance within the meaning of the IAAF rules.

4.9 Modafinil first emerged as a drug available by prescription in the early 1990s in France. By the middle of the decade it was available in the United Kingdom and before the end of the decade it was available in the United States. Modafinil is a controlled substance in the United States available only by prescription. Dr. Dinges in his testimony indicated that it could be used as a lifestyle drug, which is the justification for its control, by medical prescription.

4.10 Dr. Miller, who from 1994 to 2002 was an employee of Cephalon, Inc., which manufactured and sold modafinil, stated that the pharmacological activity of modafinil is to promote wakefulness and that, "unlike amphetamine-like drugs or caffeine it increases wakefulness without increasing locomotor activity beyond that associated with normal wakefulness." Expert Report by

¹⁴ See IAAF v. Walker, (IAAF Arbitration Panel), August 20, 2000, supra fn 10.

¹⁵ See Muchlegg v. IOC, CAS 2002/A/374 (Jan. 24, 2003) & Lazutina v. IOC, CAS 2002/A/370 (Nov. 29, 2002).

Matthew S. Miller, Ph.D. at 3, Resp. Exh. 9 to Respondent's Pre-Hearing Submission dated July 20, 2004. Simply put, he distinguishes the drug from such psychomotor stimulants as amphetamine or methylphenadate (both listed on the IAAF prohibited substance list) and argues that modafinil is pharmacologically dissimilar to them. He concludes that modafinil, unlike amphetamine, is not a general CNS stimulant and was neither an example of a banned stimulant on the IAAF list nor one pharmacologically similar.

4.11 By contrast, Dr. Gerfen concluded that modafinil is both a CNS stimulant and a drug pharmacologically related to other classified IAAF stimulants based on the effects it has within the brain consistent with behavioral effects of a stimulant. While he conceded that it is distinguished from other stimulants by its evident absence of adverse behavioral effects, and in that regard may be considered to have unique characteristics, its effects, nonetheless, are performance enhancing, and it satisfies the same criteria as apply to listed stimulants which clearly constitute modafinil as a drug pharmacologically related to other CNS stimulants. In reaching his conclusion Dr. Gerfen employs a set of criteria not dissimilar to that which Dr. Miller describes.

4.12 Dr. Dinges, whose report is based on experience over the past ten years studying the effect of modafinil on performance and physiology in healthy human adults, concluded that "modafinil has effects on performance like other stimulants that promote behavioral alertness, including enhancement of psychomotor reaction time. Consequently, modafinil could provide a performance advantage if ingested by an athlete, particularly one suffering from jet lag (circadian misalignment) or other interruptions in sleep-wake patterns." Report by David F. Dinges, PhD, on Modafinil's Stimulant Effects on Human Performance, March 30, 2004. Dr. Dinges found that modafinil "improves reaction time and other aspects of psychomotor and cognitive performance" even in non-sleep-deprived healthy subjects. Id. at 3. The Dinges Report noted also that in 1999 the

Drug Enforcement Administration of the Department of Justice determined that modafinil is a controlled substance in that it "is a central nervous stimulant (CNS) that produces many of the same pharmacological effects and adverse reactions as classic psychomotor stimulants, but at higher doses." (See Federal Register, Vol. 64, No. 17, 21 CFR Part 1308, [DEA-17F], Schedules of Controlled Substances: Placement of Modafinil Into Schedule IV, 64 FR 4050). Modafinil is also classified as a stimulant by the Federal Food and Drug Administration (FDA) (which approved the drug on December 24, 1998) and in pharmacy textbooks. Moreover, the scientific community talks about it as a CNS stimulant, while recognizing its unique characteristics, and, indeed, Dr. Miller holds patents which, as a matter of law, acknowledge novel features of the drug. Nevertheless, the scientific literature provided to the Panel uniformly discusses and refers to modafinil as a CNS stimulant. The scientific community does so because the substance has behavioral effects similar to the classic CNS stimulants. Dr. Miller submits that modafinil is not a stimulant, because it does not have the adverse side effects of the classic stimulants. While not everything is known about how the drug acts in the human brain in comparison to its classical counterparts, it has the desired effects of increased wakefulness, greater alertness and quicker reaction times.¹⁶

4.13 To similar effect, Cephalon, Inc., the manufacturer of modafinil, included the following description in its February 2004 patient information leaflet (which was FDA approved):

"In addition to its wakefulness-promoting effects and increased locomotor activity in animals, modafinil produces psychoactive and euphoric effects, alterations in mood, perception, thinking, and feelings typical of other CNS stimulants in humans."

(See USADA Exhibit 19 to USADA Pre-Hearing Brief, entitled PROVIGIL® (modafinil) Tablets [c-iv] Rx Only).

¹⁶ This latter characteristic of modafinil may well be the interest athletes have in the drug as it may quicken the reaction time to the starters' gun in athletics.

4.14 While the experts who provided the Panel with reports appeared to agree that modafinil is a somewhat unique substance with wakefulness-promoting effects, the scientific understanding of the drug, and how it acts in the human brain, is still being discovered, learned and understood. The science and learning on the subject is evolving constantly. It is this fact that make the expert reports submitted in this proceeding appear to be more in conflict with one another than the Panel finds them to be.

4.15 The classic CNS stimulants act on the brain arousal circuits. In the human brain there are a number of substances, which follow certain pathways sometimes referred to as circuits. Substances of importance appear to be dopamine but also serotonin and norepinephrine. Modafinil could be pharmacologically related if it acts as a dopaminergic agent.

4.16 Dr. Miller, relying on the earlier literature in the 1990s, opined that modafinil does not bind to the dopamine receptors, which is something that the classic CNS stimulants do. Dr. Gerfen, focusing on some scientific studies in the early years of this decade, opines that modafinil may well be a dopaminergic agent. Each has in his testimony convincing responses to the other's viewpoint. We refer to this debate in the experts' conference session before the Panel to illustrate that much is yet to be learned about how this substance acts in the human brain. The Panel cannot resolve the scientific debates; however, it does not have to do so to make its decision.

4.17 Like the dopaminergic analysis, modafinil could be pharmacologically related if it acts in the human brain through one or more of the same pathways as the classic CNS stimulants. The prominent pathway for modafinil appears to be the tuberomammillary nucleus, which would not make it pharmacologically related; however, the precise pathways used by modafinil in the human brain are still being learned. The experts do agree that some of the same pathways may be used by

modafinil that are known to be used by the classic CNS stimulants. Once again the Panel cannot and need not resolve the current legitimate scientific debate actively demonstrated in the hearing.

4.18 Aside from the "pharmacologically related" test to determine if modafinil is on the prohibited list, it may be held to be so if it is a stimulant. The IAAF rules neither define "stimulant" nor the particular effects that would cause a given substance to be banned on the IAAF list as a stimulant. Respondent and Dr. Miller argue that "stimulant" must be *a priori* defined in order that an athlete can be advised as to what is or is not banned. The Panel disagrees with that position. Any elite performance athlete such as Mr. Harrison knows that he must seek the advice of a Dr. Miller or other equally qualified persons before ingesting any substance but particularly a prescription drug. Indeed, this athlete knew this and did seek advice in 1993 when he was found to have committed his first doping offense for use of a stimulant. The approach of any advisor ought to be one of leaving absolutely no doubt and thus always erring on the side of caution. If in doubt as to whether a substance such as modafinil is a stimulant then it should not be used. Otherwise, the athlete is taking the risk in consuming the substance.¹⁷

4.19 That a substance does not have to be specifically named on a prohibited substance list to be banned for use in competitions has been established in IAAF panel and CAS decisions, which have prohibited both examples of listed substances as well as those pharmacologically related thereto. See e.g. as to "pharmacologically related", Muehlogg v. I.O.C., footnote 15, *supra* at ¶¶ 7.2.1-7.2.4; Lazutina v. I.O.C., footnote 15, *supra* at ¶¶ 6.7-6.8 and ¶ 9.5; as to examples of listed substances, IAAF v. Walker, footnote 14, *supra* at ¶17 and UK Athletics Limited v. Dwain

¹⁷ Cephalon Inc.'s Patient Information Leaflet for modafinil, referred to in 4.13 *supra*, warns: "Physicians should follow patients closely, especially those with a history of drug and/or stimulant (e.g., methylphenidate, amphetamine, or cocaine) abuse. Patients should be observed for signs of misuse or abuse . . ."

Chambers (Disciplinary Committee Appointed by Board of UK Athletics Limited) footnote 13, supra at ¶ 30.

4.20 As above noted, under IAAF Rule 55, the mere presence of a prohibited substance constitutes an offense. Claimant is not required to prove any intent on the part of Respondent to take a prohibited substance, nor does Respondent allege a lack of such intent. We find that Respondent, who admittedly took modafinil without a prescription, ingested a stimulant of the type specifically prohibited or pharmacologically related thereto.¹⁸

4.21 Since Claimant has met its burden of proving that Respondent ingested a prohibited substance, as IAAF Rule 59.6 requires it to do, we conclude that Respondent has committed a doping offense within the meaning of the applicable IAAF rules.

5. Sanction.

5.1 The Panel finds that Respondent committed a second offense.¹⁹

5.2 We note that despite Respondent's counsel's undertaking, as set forth in the Panel's Procedural Order #3, that Calvin Harrison would be present at the hearing as a fact witness, to testify on his behalf and be examined by counsel and the Panel, he did not appear. In response to the Panel's inquiry, Respondent's counsel affirmed that Respondent had been fully apprised of his rights to appear and express any "exceptional circumstances" for consideration by the Panel, but that he chose not to do so.

¹⁸ Since the Panel has been requested to reach its decision on an expedited basis, the transcript of the July 26, 2004 hearing has been unavailable for the Panel's consideration prior to its issue of this Award. Nevertheless, given the narrowness of the single substantive issue in dispute, the Panel believes that a transcript was not necessary for it to render its decision.

¹⁹ Neither the allegations of procedural deficiencies in the rules applicable to the 1993 adjudication nor the fact that the substance is no longer IAAF banned constitute evidence legally sufficient for this panel to ignore the finding that in 1993 he committed a doping offense by ingesting pseudophedrine, which until this year was an IAAF prohibited substance.

5.3 Respondent's counsel stipulated at the hearing that Respondent does not allege that there are any "exceptional circumstances" that might be considered by the Panel or IAAF in reducing the sanction prescribed under the IAAF Doping Control Rules.

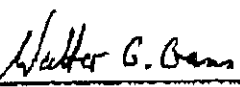
5.4 Accordingly, pursuant to IAAF Rule 60.2(b)(ii), Respondent is suspended for the minimum two-year period to commence from July 26, 2004, the date of the evidentiary hearing, to and including July 25, 2006. In addition, pursuant to IAAF Rule 60.2(5), Respondent is and shall be ineligible to receive any award or addition to his trust fund which would have resulted from his appearances or performances from June 21, 2003 through July 26, 2004.

5.5 Each party shall bear its own costs and attorneys' fees.

5.6 The administrative fees and expenses of the AAA, the compensation of the arbitrators and the costs of the hearing transcript shall be borne entirely by Claimant.

5.7 This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly herein granted, including Claimant's motion to impose sanctions on Respondent's counsel, are hereby denied.

Dated: August 2, 2004


Walter G. Gans, Chair


C. Mark Baker


Richard H. McLaren