



Arbitration CAS 2009/A/1914 World Anti-Doping Agency (WADA) v. International Federation of Bodybuilding & Fitness (IFBB) & Kelli Johnson, award of 1 February 2010

Panel: Judge James Reid QC (United Kingdom), President; Mr Alan Sullivan QC (Australia); Mr Pekka Ilmivalta (Finland)

Bodybuilding

Doping (possession of prohibited substances)

Applicable law

Scope of the appeal

Significant fault or negligence excluding a reduction of the sanction

Admission of a doping offense as mitigating circumstances justifying a reduction of the sanction

Credit for delays in the proceedings not attributable to the athlete

- 1. If the rules contained in the three different versions of a federation's Anti-Doping Rules (ADR) for 2007, 2008, 2009 are in all material respects the same in respect of the anti-doping violations committed by an athlete, the findings of violations are not affected by the fact that a federation hearing body may have been having regard to the wrong edition of the ADR. The fact that the last edition of the ADR contain different provisions in respect of penalties is not material in considering the violations alleged. Unlike the substantive anti-doping rules, the new procedural rules adopted by the federation apply as of the day of their entry into force.**
- 2. The matter before the CAS panel is an appeal against the decision of the federation's hearing body which was dealing with a specific allegation and found specific facts. It is not possible for WADA to seek to bring into the appeal matters with which the athlete was never charged and to seek to base the introduction of these matters on a copy of a document which was not in existence at the time of the federation's hearing, the provenance of which was not the subject of any evidence.**
- 3. So far as the "no significant fault" provision is concerned, it is well established that to benefit from a reduction of the otherwise applicable sanction an athlete must establish that s/he did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution, that s/he had used or been administered the prohibited substance. The burden on an athlete seeking to establish "no significant fault or negligence" is high. Athletes are notably responsible for the choice of their medical personnel. The failure for a doctor to check the prescribed substance does not exclude the personal responsibility of the athlete especially if no evidence establishes that the latter had taken any steps by way of precaution.**

4. **An athlete's "admissions" of a doping offence cannot be taken into account as basis for mitigating the applicable penalty when such admissions are made because of the findings of the offending products in the athlete's possession by the national customs.**
5. **Under the IFBB ADR, for a first violation, possession of prohibited substances should be sanctioned by a period of two years. If there have been delays in the proceedings which cannot in any way be attributed to the athlete, fairness requires that not only should the athlete be given credit for the period of ineligibility already served but that the remaining period should be treated as commencing before the date on which the decision is published.**

World Anti-Doping Agency (WADA) is the international body charged with the fight against doping in sport.

International Federation of Bodybuilding & Fitness (IFBB) is the international body governing Bodybuilding and Fitness. It is a signatory of the World Anti-Doping Code (WADC).

Ms Kelli Johnson is an Australian international-level bodybuilder. She has been taking part in international events organized by IFBB since, at least, 2003.

This arbitration concerns the penalty of 6 months ineligibility imposed on Ms Johnson by a decision of the IFBB Hearing Panel dated 7 December 2008 for her violation of the IFBB Anti-Doping Rules (IFBB ADR).

On September 26, 2007, an inspector of the Australian customs found some medication in Ms Johnson's possession as she was returning from the 2007 Women's World Bodybuilding, Fitness and Bodyfitness Championships which had been held in Santa Susana, Spain on 21 to 23 September 2007. The products found in her possession were testosterone and dehydroepiandrosterone (DHEA).

The case was reported to the Australian Sport Anti-Doping Agency (ASADA), which decided to enter the details of this matter onto its Register of Findings and to inform IFBB of these details.

Ms Johnson did not have any Therapeutic Use Exemption (TUE) for either of these substances.

By its decision dated 7 December 2008, the IFBB Hearing Panel imposed on Ms Johnson a six month period of ineligibility for her violation of the anti-doping rules. That penalty was a reduction from the usual sanction of two years ineligibility. The terms in which the IFBB hearing panel expressed its conclusions as to the reduction were:

"4.3 The Hearing Panel considered that, based in the circumstances that the violation was done, a elimination or reduction of the sanction, in agreement with the Article 10.5.2 of the Code should be applied, once

4.3.1 The athlete establishes that she bears no significant fault or negligence, the period of ineligibility may be reduced, but no more than one half of the sanction applied, once she established clearly for the satisfaction of the Panel why she had the Prohibited Substance;

4.3.2 Considering that the athlete in question provided substantial assistance in discovering or establishing an ADRV, committed by herself without knowledge of the fact, the Panel in absence of other evidence and according to the Article 10.5.4 of the Code, the period of ineligibility may be suspended by one half;

4.3.3 Where an Athlete establishes entitlement to a reduction of sanctions under more than one provision of the Article 10.5, the period of ineligibility may be reduced or suspended, but not below one fourth of the otherwise applicable sanction;

4.3.4 Considering the example 1 of comments of the Article 10.5.5 the sanction could start in the day that the athlete was controlled by the inspector of the Australian Custom and she should be ineligible for three months of the date of the conclusions of the Panel;

4.3.5 The sanction, based in the combination of these Articles, should be six month, starting on 7 of September and finishing on 7 of March;

4.4 Based in Article 10.8 individual results of this athlete should be disqualified from any individual result after the commencement of this sanction, with all of the resulting consequences, including forfeiture of any medal, points or prizes”.

It should be noted that the references to Articles are references to the articles in the 2009 edition of the IFBB ADR which had not come into effect at the date of the decision: they came into effect on 1 January 2009 (see Article 18.7). There was however a comparable provision to Article 10.5.2 in the 2006 edition (which was in force in September 2007) and the 2008 edition (which was in force in December 2008). There was no equivalent provision to Article 10.5.4 before the 2009 edition of the rules came into effect.

According to what purported to be a copy of a medical certificate issued on 1 July 2009 (i.e., over six months after the decision of the IFBB hearing panel) by Dr Mark Veltmeyer, Ms Johnson “*had been receiving Natural Hormone Therapy in the form of troches from 2007. The composition of her troches was testosterone 60 mg and DHEA 40 mg, she took half per day basically. These have been under medical supervision, are low dose bioequivalent hormones, and have not been used to give Mrs Johnson excessive levels of hormone*”. There is no indication as to how this certificate came into existence or for what purpose, or indeed as to who Dr Veltmeyer is or his relationship to Ms Johnson.

WADA was informed of this decision by an email from ASADA on 19 May 2009 and on 20 May 2009 WADA requested the full case file from IFBB. Following reminders, on 30 June 2009 IFBB finally sent to WADA the complete file of the case.

On 20 July 2009, WADA filed its statement of appeal with the Court of Arbitration for Sport (CAS) against the decision of the IFBB Hearing Panel rendered on 7 December 2008.

On 30 July 2009, WADA filed its appeal brief.

The Respondents have not filed any answer nor otherwise participated in this procedure.

By letter dated 23 July 2009, the CAS Court Office notified the statement of appeal to the Respondents by DHL. By letter dated 3 August 2009, the CAS Court Office notified the appeal brief to the Respondents by DHL. The Respondents were invited to file an answer to the appeal brief within 20 days of receipt of same.

The Respondents have not responded to WADA's appeal brief and have not filed any answer within the time limited by Article R55 of the Code of Sports-related Arbitration (the "Code") or at all. The Panel have nevertheless proceeded with the arbitration and this award in accordance with Article R55.

WADA has indicated its preference for the arbitration to be dealt with solely on the basis of written submissions. The Respondents have not indicated any preference as to whether the arbitration should be dealt with by way of a hearing or solely on written submissions.

Pursuant to Article R57 the panel has considered itself sufficiently well informed and has decided not to hold a hearing.

LAW

CAS Jurisdiction

1. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

2. IFBB is the international federation governing Bodybuilding and Fitness. It is a signatory of the World Anti-Doping Code (WADC) as is recited in article 22.2 of the IFBB Constitution. The IFBB Anti-Doping Rules (the "IFBB ADR").
3. By article 13.2 IFBB ADR (both 2008 and 2009 editions), "... a decision imposing consequences for an Anti-Doping Rule Violation was committed, a decision imposing consequences for an Anti-Doping Rule Violation ... may be appealed exclusively as provided in this Article ...".
4. Pursuant to article 13.2.1 IFBB ADR:

“In cases arising from competition in an international event or in cases involving international-level Athletes, the decision may be appealed exclusively to Court of Arbitration for Sport (CAS) in accordance with the provisions applicable before such court”.

5. By article 13.2.3 IFBB ADR:

“In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: ... and (d) WADA ...”.

6. By article 9.2 of the IFBB Constitution:

“Although the IFBB shall not offer direct individual membership, members of National, Regional and Continental Federations, by virtue of their acceptance into the IFBB family, agree to be bound by the Constitution and Rules”.

7. Article 11.2 of the 2006-2007 IFBB Rulebook provide:

“As a participant in an International Competition, an athlete agrees to abide by the IFBB rules governing doping controls. Should an athlete be found guilty of an anti-doping rule violation, the athlete agrees to accept whatever penalties or sanctions may be imposed pursuant to the IFBB Anti-Doping Rules [...]”.

8. As a member, by association, of the IFBB as well as a regular participant to IFBB International Competitions for years, Ms Johnson was bound to comply with the IFBB Rules and Regulations, in particular with the IFBB ADR.

9. In the present case Ms Johnson was found in possession of prohibited substances on 26 September 2007 as she was returning from an international event organized by the IFBB, accordingly the appeal is admissible before CAS under Article 13.2.1 of the 2009 IFBB ADR and WADA is entitled to appeal under Article 13.2.3.

Admissibility of the appeal

10. Under article 13.7 of the 2009 IFBB ADR:

“The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to the decision subject to appeal:

- a) Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;*
- b) If such a request is made within the ten-day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.*

The above notwithstanding, the filing deadline for an appeal or intervention filed by WADA shall be the later of:

- a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*

b) *Twenty-one days after WADA's receipt of the complete file relating to the decision*".

11. By an email sent by the ASADA on May 19, 2009, WADA was informed that the Athlete was sanctioned with a 6-months period of ineligibility for her violation of the IFBB Anti-Doping Rules. Within the 10 days time limit, WADA requested the IFBB to provide the full file of the case of the Athlete. On June 30, 2009, WADA was provided with the full file of the case. The Statement of Appeal filed by WADA on 20 July 2009 was lodged within the time limit set forth under article 13.7 IFBB ADR.
12. WADA complied with the provisions of article R48 of the Code of Sports-related Arbitration and paid the Court office fee as per article R65.2. The Appeal Brief dated 30 July 2009 is filed within the 10-day time limit provided for under article R51 of the Code of Sports-related Arbitration.
13. In the circumstances WADA's appeal is admissible.

The relevant IFBB rules

14. Since 1 January 2009, the new IFBB Anti-Doping Rules are fully applicable (art. 18.7 of the 2009 IFBB ADR).
15. However, the pending cases are still to be governed by the substantive anti-doping rules in effect at the time the anti-doping rule violation occurred, unless the panel hearing the case determines that the principle of "*lex mitior*" should apply under the circumstances of the case (art. 18.7 of the 2009 IFBB ADR).
16. In this case Ms Johnson was found in possession of prohibited substances on September 26, 2007. This would lead to the application of the IFBB ADR adopted in 2006 and still in effect in 2007. However WADA submitted that since Ms Johnson has allegedly been using prohibited substances continuously from 2007 to date, (according to the purported medical certificate apparently issued on 1 July 2009 by a doctor), the 2009 IFBB ADR should prevail over the previous rules.
17. WADA submitted that the IFBB Hearing Panel must have applied the 2009 IFBB ADR in the decision under appeal, as it makes reference in its decision to articles 10.5.4 and 10.5.5, which only exist in the 2009 version of IFBB ADR. It further submitted that in any event the three different versions of the IFBB ADR for 2006, 2008 and 2009 are the same in all material respects in respect of the anti-doping violations committed by Ms Kelli Johnson, and so the outcome of this arbitration procedure does not depend on the version of the rules to be applied.
18. The Panel disagrees with WADA's primary submission in this regard. Ms Johnson's alleged offence related to her possession of prohibited substances, which are also prohibited out of competition unless the athlete possesses a therapeutic use exemption, when she passed through customs on her return to Australia from Spain in September 2007. It was this offence with which the IFBB hearing

panel dealt. The fact that Ms Johnson may have continued to commit the offence thereafter does not alter that fact. The purported doctor's certificate issued on 1 July 2009 (almost 6 months after the decision of the IFBB hearing panel) cannot have any effect on which rules were applicable at the hearing. However the Panel notes that the rules contained in each of the 2006, 2008 and 2009 IFBB ADR are in all material respects the same in respect of the anti-doping violations committed by Ms Johnson and therefore takes the view that the findings of violations (against which Ms Johnson has not appealed) are not affected by the fact that the IFBB hearing panel may have been having regard to the wrong edition of the IFBB ADR. The fact that the 2009 IFBB ADR contain different provisions in respect of penalties is not material in considering the violations alleged.

19. Unlike the substantive anti-doping rules, the new procedural rules adopted by the IFBB apply as of the day of their entry into force. The 2009 IFBB Anti-Doping Rules are therefore applicable to this appeal so far as procedural matters are concerned.

Merits

20. The Panel has not had the assistance of any submissions from IFBB or Ms Johnson. It has therefore scrutinised the submissions made on behalf of WADA with particular care.
21. The Panel has disregarded WADA's submissions made on the basis that because the doctor's certificate dated 1 July 2009 showed that Ms Johnson had been receiving natural hormone therapy in the form of troches from 2007, Ms Johnson should be treated as having been found to have committed the additional doping offence of having used prohibited substances as well as the offence of possessing such substances. The matter before the Panel is an appeal against the decision of the IFBB hearing panel which was dealing with a specific allegation and found specific facts. It is not possible for WADA to seek to bring into the appeal matters with which Ms Johnson was never charged and to seek to base the introduction of these matters on a copy of a document which was not in existence at the time of the IFBB Hearing, the provenance of which was not the subject of any evidence. It should also be noted that there is no evidence that Ms Johnson has competed in her sport at any level since September 2007 or that she has sought to do so or will seek to do so at any time in the future.
22. Ms Johnson's possession of the substances in question was never in issue, nor was it ever contended that the substances were not prohibited. It was never suggested that Ms Johnson had a TUE for the substances. It was common ground that her violation was a first violation. In these circumstances the only live issue was as to the penalty to be imposed. The starting point is that there should be a period of two years ineligibility under Article 10.2 of IFBB ADR.
23. The IFBB hearing panel determined that the period should be reduced to six months, to run as to three months before the date of the IFBB decision and three months thereafter. The basis of that decision appears to have been (1) that Ms Johnson was guilty of no significant fault or negligence in committing the offence and (2) that she had admitted a doping offence without there being any other reliable evidence of a violation. This would have entitled the IFBB hearing panel to reduce the period of ineligibility under rule 10.5.4 of the 2009 edition of the Rules if (a) the relevant rules

were the 2009 edition of the Rules, (b) the admission was made before she had received first notice of the admitted violation and (c) at the time of the admission the admission was the only reliable evidence of the violation.

24. In our view the hearing panel was not entitled to reduce the period of ineligibility by reference to either of these provisions.
25. So far as the “no significant fault” provision is concerned, it is well established that to benefit from the “no fault or negligence” provisions the athlete must establish that he did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution, that he had used or been administered the prohibited substance. The burden on an athlete seeking to establish “no significant fault or negligence” is high. Athletes are responsible for the choice of their medical personnel. The failure for a doctor to check the prescribed substance does not exclude the personal responsibility of the player. In the present case there was no evidence that Ms Johnson had taken any steps by way of precaution. There was simply no basis on which the IFBB hearing panel could have determined that Ms Johnson was guilty of no significant fault or negligence.
26. So far as the “admissions” point is concerned, it could not properly have been said that her admission, when it was made, was the only reliable evidence of an anti-doping violation. The admission was made because Australian customs found the offending products in her possession. The first and most important piece of reliable evidence was that the products were found in her possession. Even assuming that the IFBB hearing panel could take into account the “admissions” basis for mitigation, notwithstanding that the 2009 rules were not yet in force, there was no basis on which the panel could have mitigated the penalty by reference to her admissions.
27. It follows that the decision of the IFBB hearing panel was flawed. The panel should have imposed a period of two years ineligibility.
28. It was open, however, to the IFBB hearing panel to determine that three months of the period should be treated as having run before the date of the hearing. By Article 10.8 of the 2008 edition of the IFBB ADR (which is the relevant edition of the IFBB ADR) provides *“Where required by fairness, such as delays in the hearing process or other aspects of doping control not attributable to the Athlete, the IFBB or anti-doping organization imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection”*. This provision reappears in amended form in rule 10.9.1 of the 2009 edition.
29. In this case there was a delay of 15 months between the finding of the products and the hearing and in the circumstances it would have been open to the IFBB hearing panel to take that period into account. There was a further period of delay in the bringing of this appeal brought about by the dilatoriness of the IFBB in forwarding all the material documents to WADA. The panel does not have any information that Ms Johnson has sought to compete at any time after the imposition of the original sanction, but it has no information that she has not sought to compete. The absence of information is at least in substantial part due to the decision of the IFBB and Ms Johnson not to participate in the appeal process.

30. In the judgment of this Panel it would be extremely harsh if at this time a period of two years ineligibility were to commence with the publication of this decision. Given the delays in these proceedings which cannot in any way be attributed to Ms Johnson fairness, in the Panel's judgment, requires that not only should she be given credit for the six month period of ineligibility which she has already served but that the remaining period of 18 months should be treated as commencing six months before the date on which this decision is published.
31. In relation to disqualification of results, Article 10.7 of the 2008 edition of the IFBB ADR provides that "*all other competitive results obtained from the date a positive sample was collected...or other doping violation occurred, through the commencement of any provisional ineligibility or period, shall, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes*". Given the delays referred to above, in the Panel's judgment, fairness requires that all competitive results should be disqualified from 7 September 2008, with all of the resulting consequences including forfeiture of any medals, points and prizes.
32. It follows that Ms Johnson will be declared ineligible for a period of two years from the date of this decision but be given credit for the full six months ineligibility already served and that the remaining period of ineligibility shall be treated as starting six months before the date this decision is published.

The Court of Arbitration for Sport rules:

1. The appeal of the World Anti-Doping Agency against the decision of the IFBB Hearing Panel rendered on 7 December 2008 is allowed.
2. Ms Kelli Johnson is sanctioned with a two year period of ineligibility, the period of six months ineligibility which she has already served being credited against that period and the remaining period of 18 months should be treated as commencing six months before the date of this award.
3. All competitive results obtained by Ms Kelli Johnson from 7 September 2008 to the date of this award shall be disqualified with the consequent forfeiture of any medals, points or prizes.
4. (...).
5. Any further claims for relief are dismissed.