

ACC 2017/A/032

OFFICE OF THE ATHLETICS CANADA COMMISSIONER

IN THE MATTER OF AN APPEAL

between

SHAYNE DOBSON

as Appellant

and

ATHLETICS CANADA

as Respondent

and

JESSICA FROTTEN

as Affected Athlete

CARDING APPEAL DECISION

APPEARANCES:

Shayne Dobson (Appellant)
Darren G. Blois (Appellant's Legal Representative)
Jessica Frotten (Affected Athlete)
Mohamed Umar Khan (Affected Athlete's Representative)
Jared MacLeod, Operations Lead, Athletics Canada

I. PARTIES

1. The Appellant, Shayne Dobson is a Paralympic athlete who has represented Canada internationally including at the 2016 Paralympic Games in Rio De Janeiro, Brazil, and at the 2017 World Para-Athletics Championships in London, England. He competes in the Mens T-37 1500 metre event.

2. The Respondent, Athletics Canada is the sport governing body for track and field in Canada.

II. JURISDICTION

3. This Appeal has been brought to the Athletics Canada Commissioner's Office pursuant to regulations found in the Athletics Canada Commissioner's Office Terms of Reference. Those terms of reference state that the Commissioner's Office is empowered to resolve appeals of carding (Athlete Assistance Program funding) decisions in any manner. The time required for the submission of appeals is 14 days following the announcement of the carding decision.

4. Section 7 of the Athletics Canada 2017-2018 Athlete Assistance Program (AAP) Policy Paralympic Stream states that:

Athletes who are not nominated for carding may appeal, which will be heard in accordance with AC's Procedures for Carding outlined in Rule 140 - Commissioner's Office - Terms of Reference of AC's Rules and Bylaws. Appeals are restricted to those athletes who were eligible to be considered for carding by virtue of meeting the requirements set out in Section 2, and who fulfilled any additional requirements for the different categories of cards as specified in Appendix 1.

5. The carding decisions were announced on November 30, 2017. The Appellant filed his appeal on December 8, 2017. The Commissioner's Office has determined that the Appellant was eligible to be considered for carding nomination as set out in Section 2 of the AAP Policy. Section 6.2 of Sport Canada's Athlete Assistance Program Policies and Procedures also grants a previously carded athlete a right of appeal. Mr. Dobson is therefore eligible to submit an appeal as his appeal was filed in compliance with the rules.

III. FACTUAL BACKGROUND

6. A teleconference hearing took place on January 12, 2018. The Appellant, Shayne Dobson, was present and was assisted by his counsel, Darren G. Blois. Jared Macleod, the Operations Lead for Athletics Canada, represented the Respondent. The Affected Athlete in this appeal is Jessica Frotten. She joined the hearing and was as-

sisted by Mohammed Umar Khan a law student at Western University who serves as Program Manager with AthletesCAN's Sport Solution Clinic. Below is a summary of the relevant facts and allegations based on the parties' written submissions and oral representations made at the hearing.

7. Mr. Dobson learned that he had not been nominated for carding during a conversation with National Team Head Coach, Glenroy Gilbert on November 30, 2017. It is not clear whether he received written notice of the decision with reasons prior to the release of Athletics Canada's response on December 16, 2017. As a previously carded athlete, (he was in the SR2 category in 2016/2017, and SR1 category in 2015/2016), Mr. Dobson was entitled to receive written notice from Athletics Canada that he had not been re-nominated for carding as stated in the Sport Canada AAP policy.

8. Nominations for carding were made by Athletics Canada using a multi-step process listed under Section 5 of the 2017-2018 Athlete Assistance Program (AAP) Policy Paralympic Stream. The Carding Process is reproduced below.

Nomination to Sport Canada

In November of 2017, the NTC will review eligible athletes, and select athletes to be nominated for carding. The NTC will consider athletes by proceeding through the following seven steps in sequential order until either the funds are exhausted, or there are no remaining athletes for consideration:

Step 1

- *Athletes who won an individual Gold medal at the 2017 World Para Athletics Championships in London in an event as per the 2020 Paralympic Games program will be selected.*

Step 2

- *Athletes who won a medal in an individual and/or Relay event at the 2017 World Para Athletics Championships in London in an event as per the 2020 Paralympic Games program will be selected; or*
- *Current SR1 athletes will be selected provided they adhere to an approved training plan.*

Step 3

- *Athletes who are ranked in the IPC Top 12 (and top 1/2 of the field) in an individual event in 2017, or who finish in the Top 12 (and top 1/2 of the field) in an individual event at the World Para Athletics Championships in 2017 in an event as per the 2020 Paralympic Games program, and who have a minimum proximity score of 85% will be selected.*

Step 4

- *Athletes currently carded at the Senior levels applying for a Medical Card will be considered at the sole discretion of the NTC based on details of the diagnosis and prognosis, the documentation provided, the quality of the athlete's rehabilitation and training plan, and the advice of medical experts.*

Step 5

- *Athletes currently carded at the Development level applying for a Medical Card will be considered at the sole discretion of the NTC based on details of the diagnosis and prognosis, the documentation provided, the quality of the athlete's rehabilitation and training plan, and the advice of medical experts.*

Step 6

- *Athletes eligible for Development Cards ranked in the IPC Top 16 (and top 1/2 of the field) in an individual event in 2017 in an event as per the 2020 Paralympic Games program will be considered for nomination by the NTC.*
 - *Athletes who the NTC believe demonstrate potential to win a medal in an individual event at future World Para Athletics Championships and/or Paralympic Games will be selected in priority order using the ranking system outlined below which identify an athlete's potential to win a medal at the 2020 Paralympic Games and/or 2019 or 2021 World Para Athletics Championships.*

Step 7

- *Any remaining athletes ranked in the IPC Top 20 (and top 1/2 of the field) in an individual event in 2017 in an event as per the 2020 Paralympic Games program who have not been nominated through any of the above 6 steps will be considered for nomination by the NTC.*
 - *Athletes who the NTC believe demonstrate potential to win a medal in an individual event at future World Para Athletics Championships and/or Paralympic Games will be selected in priority order using the ranking system outlined below which identify an athlete's potential to win a medal at the 2020 Paralympic Games and/or 2019 or 2021 World Para Athletics Championships.*

RANKING WITHIN STEPS 6 and 7

*Within steps 6 and 7, athletes will be ranked by the NTC in priority order based on an athlete's proximity to the 2017 IPC 3rd ranked athlete's performance as of September 30th, 2017. In order to account for differences in event performance measures, a **proximity score** will be calculated as such:*

- *All performances will be standardized using the 2017 IPC World Para Athletics Points Scores Calculator [found here: <https://www.paralympic.org/athletics/events/rules-and-regulations>]*
- *Athletes will be scored based on the event contested at the Paralympic Games (including those in Combined Classes being scored based on the Combined Class rankings and performances)*
- *The 2017 IPC 3rd ranked athlete's performance as of September 30th, 2017 will also be scored using the 2017 IPC World Para Athletics Points Scores Calculator.*
- *The percentage of the athlete's standardized seasonal best points as compared to the IPC 3rd ranked athlete's points will stand as their proximity score.*
- *Athletes will then be ranked in order of their proximity score.*

10. The International Paralympic Committee (hereinafter referred to as IPC) rankings for 2017 in the combined class Men's 1500m T37/38 show Mr. Dobson in #18 position out of 35 ranked competitors with a time of 4:39.07. This ranking does not reflect Mr. Dobson's performance of 4:20.90 in a 1500m race contested in Moncton, New Brunswick in May, 2017.

11. Mr. Dobson's 4:20.90 performance took place in a competition that was not sanctioned by IPC due to an administrative error by Athletics New Brunswick. Each year, Athletics Canada requests their provincial branches to submit a list of events that they wish to have sanctioned by IPC. The name, date and location of the competition would ordinarily be included in that information. Athletics Canada in turn forwards that list to the IPC. If the IPC sanctions the event, then performances from Paralympic athletes in those events can be used for rankings and qualifications.

12. When Athletics New Brunswick first received the request from Athletics Canada to submit a list of competitions for 2017, they submitted a list that did not include the ASEA Spring meet because the date and location of the competition had not yet been confirmed due to a facility availability concern.

13. When the date and location of the meet was confirmed, a revised competition list was not sent by Athletics New Brunswick to Athletics Canada. The ASEA spring meet was ultimately sanctioned by Athletics New Brunswick and Athletics Canada but without a request to submit the confirmed information to the IPC, no request was ever forwarded to the International governing body and the ASEA Spring meet never did receive IPC sanction in 2017.

14. In considering Mr. Dobson's eligibility to be nominated for carding assistance for the 2017-2018 funding cycle, Athletics Canada's National Team Committee (NTC) relied on the 4:39.07 time listed in the IPC rankings as opposed to the 4:20.90 time which appears on Athletics Canada's ranking list but does not appear on the IPC list. Based on the 4:39.07 time, Mr. Dobson was not ranked in the IPC Top 12 or top half of the field in his relevant event, the combined T37-38 1500m which will be contested at the 2020 Paralympic Games, and he was not selected for carding by the NTC.

IV. ISSUES

15. The issue in this case is focused on whether Mr. Dobson's eligibility for carding should be based on the 4:39.07 time or the 4:20.90 time.

V. APPELLANT SUBMISSIONS

16. The Appellant submits that his time of 4:20.90 qualified him for carding consideration under Step 3 of the AAP criteria. That time, had it been recognized by the IPC would have ranked him third overall on the Men's 1500m T37 list. Mr. Dobson's 5th place finish at the 2017 World Para Athletic Championships in London did not put him in the top half of the field since there were only eight competitors, but he submits that his 4:20.90 time would have put him in the Top 12 of the IPC ranking even if T37 and T38 were combined.

17. The Appellant also submits that the 4:20.90 time would have enabled him to achieve the second part of the Step 3 criteria, that being the minimum proximity score of 85%. Mr. Dobson adds that according to the World Para Athletics Points Scores Calculator his Moncton performance would convert to 832 points whereas, Madjid Djemai of Algeria, the IPC 3rd ranked athlete whose best result was 4:22.63 would have a score of 807 points. Mr. Dobson's score of 832 would be 103% of Mr. Djemai's score of 807, putting Mr. Dobson well in excess of the 85% threshold.

18. The Appellant maintains that the ASEA Spring meet in Moncton was sanctioned by both Athletics New Brunswick and Athletics Canada and that IPC sanctioning should be automatic upon Athletics Canada sanctioning. He submits that the failure of Athletics New Brunswick to list the ASEA Spring Meet was clearly an oversight and that the meet had been IPC sanctioned in 2011, 2012, 2013 and 2016 and was only unsanctioned in 2014 and 2015 due to late confirmation of the date and location.

19. In response to Athletics Canada's position that the combined T37-T-38 ranking must be used since this is the event that appears on the Tokyo 2020 Paralympic Program, Mr. Dobson submits that his 4:20.90 time would qualify both the Top 12/ Top Half and Proximity Score requirement as he would be ranked #7 of 35 competitors.

20. The Appellant also highlights the fact that Athletics Canada's carding criteria states that "only performances listed on the AC ranking page will be considered" and that this creates the anomaly of two different rankings that both have to be considered. It's the Appellant's position that Athletics Canada's language should be used against them (*contra proferentem*) and that the AC rankings list should be the determining factor.

21. The Appellant submits that the failure to list the ASEA Spring Meet was an administrative oversight and that the athlete ought not to pay the price for an administrative error by a governing body such as Athletics New Brunswick which could ultimately result in denying carding to an athlete who has the ability to succeed on the world stage.

22. Lastly, the Appellant submits that he did everything that was required of him in ensuring that his results were sent to Athletics Canada. He adds that he should not be punished for an administrative error and neither should the affected athlete, Ms. Frotten, be victimized by such an error. Mr. Dobson observes however, that had his ASEA Spring Meet time been ranked by the IPC he would have qualified for carding under Step 3, whereas Ms. Frotten qualified under Step 7.

VI RESPONDENT SUBMISSIONS

23. The Respondent, Athletics Canada submits that the Step 3 carding criteria includes a requirement that the athlete must attain the necessary ranking in an event as per the 2020 Paralympic Games program. Since the Men's T37 1500m is not an event on the 2020 Paralympic Games program, but the Mens's T38 1500m is on the program, Mr. Dobson would have to include T38 performances in his ranking and his IPC listed time of 4:39.07 ranks him 18th out of 35.

24. The Respondent also notes that both Steps 3 and Steps 7 of the AC carding process mention that the athlete must be ranked according to IPC ranking and based on that information the National Team Committee could not select him under either Step 3 or Step 7.

25. The Respondent further submits that there are quite a few events which are sanctioned by Athletics Canada but not by the IPC. They ask the provincial branches to submit a list of events that they wish to have sanctioned by the IPC so that an event list can in turn be forwarded to the IPC. The Respondent maintains that the rules as stated prevent the National Team Committee from using a performance that was not sanctioned and for the NTC to do so would have meant going against the Athletics Canada published criteria.

26. Mr. MacLeod observed that the IPC will not approve a ranking or sanction a competition retroactively, so the administrative error by Athletics New Brunswick became that much more critical once the event had been completed.

27. In summary, the Respondent argues that it would not be right to accept a performance from a meet that the IPC had not sanctioned, and would be unfair to other athletes who had been required to follow the rules. Athletics Canada adds that to do so would jeopardize the integrity of the entire selection process.

28. The Respondent therefore maintains that Mr. Dobson was treated fairly, that the NTC correctly followed the published AAP Selection Criteria and on that basis their decision not to nominate the Appellant for 2017-2018 AAP carding should not be disturbed.

VII AFFECTED ATHLETE SUBMISSIONS

29. The Affected Athlete submits that Athletics Canada acted reasonably in not accepting an unsanctioned time. It is further submitted on behalf of the Affected Athlete that she has done what was required of her to qualify for carding; that as a wheelchair athlete her financial needs may be greater than those of other athletes and that paralympic athletes are well aware that in order to standardize, Athletics Canada has consistently used the IPC performances.

30. In summary, the Affected Athlete submits that while it is unfortunate that Mr. Dobson is dealing with the consequences of an administrative error by his provincial governing body, fairness and the integrity of the process dictate that the appeal be denied.

VIII ANALYSIS

31. All parties are in agreement that the relevant issue is the consideration that can be given to the 4:20.90 time achieved by Mr. Dobson on May 13, 2017. This performance was achieved in a competition described as the ASEA Open or ASEA Spring Meet and was held in Moncton, New Brunswick.

32. During the hearing, Gabriel Leblanc, the Executive Director of Athletics New Brunswick testified that each year he prepares a list of all of the competitions that are planned for the province during that calendar year. The excel spread sheet contains the names, dates and locations of the competitions. That list is usually sent to Athletics Canada in early January. From his experience, every meet that they put forward is sanctioned.

33. Gabriel Leblanc also testified that the 2017 version of the ASEA Spring Meet was not on that list in early January because the date could not be confirmed due to certain facility questions. The meet is ordinarily held at Moncton stadium and the meet organizers are sometimes required to wait until later in the year to determine where the competition will be held if another event has booked the stadium. As a result, when the

2017 events list was submitted to Athletics Canada, the ASEA Spring Meet was not on the New Brunswick calendar.

34. Gabriel Leblanc also noted that 2017 was a very busy year and even after the 2017 ASEA Spring Meet had a confirmed date and location a revised fixtures list was not sent to Athletics Canada.

35. Steve Leblanc (no relation to Gabriel) is the head coach of the University of Moncton track team and is a coach with the ASEA track club. He also coaches throwers in para events and is familiar with the technical requirements of the IPC. He was the meet director for the ASEA Spring Meet. Steve Leblanc testified that from his perspective the ASEA Spring Meet was a fully sanctioned event by Athletics New Brunswick and Athletics Canada and he was not aware that this competition had not been submitted to the IPC for sanction.

36. Steve Leblanc added that it is customary to have para-athletes competing at the event, but it is generally not at the top of his thought process as to whether the meet is IPC eligible. He has been the meet director of the ASEA Spring meet for seven or eight years and recalled two other occasions when the competition was not IPC sanctioned (2014 and 2015) because they had been waiting for confirmation from the Moncton stadium facility as to whether it would be available.

37. In any event the IPC did not have this meet on their list of sanctioned competitions and Mr. Dobson's time of 4:20:90 is not reflected in their rankings. Is there a remedy for the Appellant?

38. First of all I will deal with the issue of the requirement from Athletics Canada that only performances listed on the AC Ranking page will be considered for carding eligibility. The Appellant has submitted that this requirement has created somewhat of an anomaly since so much emphasis is being placed on the IPC rankings. If there is such an anomaly I do not believe that it is irreconcilable with the other stated carding criteria.

39. The athlete has an onus to provide their results to Athletics Canada so that the most up to date performances can be recorded. Ms. Dobson did so and his 4:20.90 is listed in the AC rankings underneath Liam Stanley's 4:09.13 performance. He did what he was required to do to have his performance registered. The issue is not therefore whether Athletics Canada recognizes the performance, they clearly do. The issue is whether the IPC recognized the performance and ranked it accordingly.

40. Steps 3 and 7 of the Athletics Canada carding process make it clear that IPC ranking is paramount. AC can acknowledge that the performance was achieved but in accordance with their AAP criteria they can't use such performance under Steps 3 and 7 unless it occurred in an IPC sanctioned event.

41. The result of this is that Mr. Dobson through no fault of his own is being denied consideration of a performance that he legitimately achieved, because it took place in

an event that could have been sanctioned but was unfortunately not sanctioned due to an administrative error. Is his non selection for carding unreasonable on this basis?

42. The issue of unreasonableness in administrative tribunals has been considered in the Supreme Court of Canada decision in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*.¹

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Our Supreme Court also dealt with the importance of procedural fairness in this context.

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75)

43. As Arbitrator Pound stated in *Hank Palmer v. Athletics Canada*²,

Mere incorrectness of a decision (even assuming that my personal view on a particular matter were to be correct) is not sufficient for me to substitute my view as to what should have been the correct decision in the

¹ 2008 1 S.C.R. 190

² SDRCC/CRDSC 08-0080

circumstances. Reasonableness, for purposes of judicial review is whether the impugned decision can stand up to a "somewhat probing examination."³

44. In the matter before me, the National Team Committee made their selections based on the 2017-2018 Athlete Assistance Program Policy Paralympic Stream criteria. This criteria was published on March 31, 2017. In recognition of the fact that there are simply not enough funding cards to be given out to all the deserving athletes who might apply, the NTC has demonstrated scrupulous adherence to the criteria contained in the policy in the face of what would undoubtedly be very difficult decisions.

45. Athletics Canada has maintained that in so doing they have followed a process that was fair to all athletes and which respected the integrity of the program. The unsatisfactory result for the Appellant comes from the action or inaction of Athletics New Brunswick. The case law is clear that deference should be given to decision makers in the exercise of their discretion when they have acted reasonably. On the evidence before me I can find nothing unreasonable in the National Team Committee's reliance on the IPC rankings. This was the information published by them. It was the information that they shared with Sport Canada for review as they are required to do. Equally as important is the fact that this information would presumably be relied upon by other applicants in determining their eligibility to be nominated for carding.

46. For these reasons, I find no basis to interfere with the decision of the Athletics Canada National Team Committee not to nominate Shayne Dobson for AAP funding for the 2017-2018 cycle.

47. This decision will undoubtedly be disappointing to the Appellant since his loss of carding results primarily from matters outside of his control. I would remind Athletics Canada that as a previously carded athlete, Mr. Dobson is entitled to be advised of the opportunities available to him such as National Team program activities (camps, competitions, etc.) or AAP retirement support. As I understand it, pursuant to Sport Canada's Athlete Assistance Program Policies and Procedures, Athletics Canada is also required to notify Sport Canada of the result of this appeal and make any appropriate recommendations to that body.

48. I direct therefore that a copy of this decision be forwarded to Sport Canada by the appropriate Athletics Canada official.

³ See: Canada (Director of Investigation and Research) v. South Inc., [1997] 1 S.C.R. 748 (S.C.C.) at para. 56. See also Maloshicky v. Canada (Customs & Revenue Agency), 2005 FC 978 at para 10: "A reasonable decision is not necessarily a correct decision. There can be more than one reasonable decision. It does not matter whether or not I would have made the same decision. The reasonableness standard means that the decision should not be interfered with unless clearly wrong in the sense of being based on a wrong principle or a misapprehension of the facts." (per Harrington, J.) [referred to in B  chard v. Canadian Amateur Boxing Association, SDRCC 06-0044

IX DECISION

49. The Appeal filed by Shayne Dobson is hereby dismissed for the reasons given above.

I thank all parties for their very able assistance in this matter.

Dated at Ottawa, Ontario, this 18th day of January, 2018.

Hugh Fraser

Athletics Canada Commissioner