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Bayer Public Limited Company
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11 December 2009

Dear [redacted]

Final Appraisal Determination: Sorafenib for treatment of advanced hepatocellular carcinoma

Thank you for lodging Bayer's appeal against the above Final Appraisal Determination.

Introduction

The Institute's appeal procedures provide for an initial scrutiny of points that an appellant wishes to raise, to confirm that they are at least arguably within the permitted grounds of appeal ("valid"). The permitted grounds of appeal are:

- Ground 1: The Institute has failed to act fairly and in accordance with its published procedures as set out in the Institute's Guide to the Technology Appraisal Process.
- Ground 2: The Institute has prepared guidance which is perverse in the light of the evidence submitted.
- Ground 3: The Institute has exceeded its powers.

This letter sets out my initial view of the points of appeal you have raised: principally whether they fall within any of the grounds of appeal, or whether further clarification is required of any point. Only if I am

satisfied that your points contain the necessary information and arguably fall within any one of the grounds will your appeal be referred to the Appeal Panel.

You have the opportunity to comment on this letter in order to elaborate on or clarify any of the points raised before I make my final decision as to whether each appeal point should be referred on to the Appeal Panel.

I can confirm that there will be an oral hearing of Bayer's appeal.

Initial View

Ground one: Procedural Unfairness

1.1 The Appraisal Committee has failed to explain why it has changed its conclusions with respect to the modelling of overall survival following Nexavar treatment, in the absence of new data regarding this effect

This is a valid ground 1 appeal point. To assist with preparation for the appeal, it was not obvious to me from your letter that the appraisal committee had indeed changed its conclusions, as opposed to having expressed them more fully, but this will be a point to explore at the appeal hearing.

1.2 The Institute has acted in a non transparent and unfair manner by not stating the degree to which they considered evidence received during the appraisal regarding appropriate survival extrapolation methods.

The appraisal committee is not obliged by the Institute's procedures or by the requirement of fairness expressly to "state the degree to which they considered" any specific item of evidence. However it seems to me that the point you are making here is in substance the same as your point 1.1. On that basis I agree it should be considered by an appeal panel.

1.3 Insufficient time was allowed for consideration of the response to consultation by the appraisal committee in this case.

This is a valid ground 1 appeal point. To assist with preparation for the appeal, the issue is whether all relevant issues were fairly considered during the appraisal process. I have not, at this preliminary stage, attempted to identify whether and to what extent comments on the second ACD may have repeated comments which had already been made and considered in the context of earlier consultations. The appeal panel may well need to consider this issue.

1.4 In reaching its recommendation, the Institute has failed to place adequate weight on

innovation, and has therefore acted unfairly and not fulfilled its obligations to the Secretary of State in considering the long term benefits to the NHS of innovation.

An allegation of failure to give adequate weight does not amount to an allegation of unfairness contrary to ground one of the Institute's appeal grounds. The weight to give to a piece of evidence is a matter for the Appraisal Committee's judgement. I note the judgment of Mr Justice Simon in the case of *Douglas Fraser and Kevin Short v the National Institute for Health and Clinical Excellence*. In his judgment Simon J stated (at paragraph 64), when considering a challenge to the weight NICE had given to evidence:

"On the clearest and highest authority it was for the GDG [ie, NICE] *to decide what weight to attach to evidence, and it cannot be said that the decision to make the recommendations on the basis of what was available to the GDG was irrational. Decisions of fact are for those entrusted to make those decisions."*

He added at paragraph 47(iii)

There is an important distinction to be drawn between the question of whether something is a material consideration and the weight which should be given. The latter is a matter for the decision maker, subject to questions of Wednesbury *irrationality; and, providing the decision-maker has taken* [it] *into account,* ***the fact that it has given it no weight is not a ground for review****,* Emphasis supplied

I regard the same principle as applying to the appeal panel. Therefore, it seems to me that the argument you make about the weight placed on the evidence is not a valid ground of appeal.

I will however allow this appeal point to go forward, but only on a different basis. The point that the appeal panel should consider is whether any pronouncement of the Institute has created any specific expectation as to the treatment of innovation which has not been satisfied here.

1.5 In reaching its recommendation, the Institute has failed to take into account the follow up research programme offered by Bayer as part of the Patient Access Scheme which would address any residual uncertainty regarding survival, and has therefore acted unfairly.

The Appraisal Committee can only make a recommendation on the evidence before it. If there is uncertainty regarding survival, the Committee has to reflect this. I do not feel it can be unfair or a departure from published processes not to take account of the possibility that uncertainty might be reduced by future research, which must be both hypothetical and a matter for the Committee's judgement. My preliminary view is that this is not a valid ground one appeal point.

1.6 The Institute has acted unfairly by not accounting for the degree of clinical need of patients under consideration as directed by the Secretary of State.

From a review of the FAD and other appraisal documents I do not think it can be argued that the Appraisal Committee was unaware of or failed to take account of the degree of clinical need of these patients, which is self-evident. My preliminary view is that this is not a valid ground one appeal point.

1.7 The Appraisal Committee's approach to the difference between independent and investigator assessments of time to disease progression in the SHARP trial is inappropriate and unfair

It is clear that you understand the approach that the Committee has adopted. I cannot see any arguable procedural unfairness or departure from published procedures.

My preliminary view is that this is not a valid ground one appeal point.

1.8 The Appraisal Committee has not explained its conclusion that the magnitude of additional weight that would need to be assigned to the original QALY benefits would be too great for the product to be cost effective.

I note that you claim that the value to be assigned to Sorafenib would be "wholly consistent with those for other technologies recommended by NICE for the treatment of other cancers, and that you cite lenalidomide and sunitinib. In Sorafenib's case the lowest credible ICER appears to have been £52,600. For lenalidomide the values were in the order of £43,000 and £41,000. For sunitinib the committee did not feel able to give a specific figure, commenting only that it was less that £50,000, and that this was at the upper end of what might be considered.

I do not therefore accept that there is an inconsistency to explain.

Even were there an apparent inconsistency I would approach your argument with great caution. This is a policy which is a discretionary relaxation of the usual approach. In this context I am doubtful of the extent to which this should or can be a comparative exercise, or one where the committee rigidly applies a set approach. The discretion has to be considered on the facts of the appraisal under way, and two appraisals that eventually produce the same ICER may have many relevant differences between them.

My preliminary view is that this is not a valid ground 1 point.

Grounds 2, perversity, and 3, exceeding powers

No grounds raised

Conclusion

As I am minded to rule that at least some of your appeal points are valid, I will pass your appeal to the Appeal Panel for consideration.

If you wish to make any further comment on the points that I have indicated that I do not, at this preliminary stage, view as valid, or that I have re-cast, please provide to me this, no later than Friday 8 January 2010 (taking into account the Christmas and New Year break). I will then reach a final decision on the validity of those points.

Yours sincerely

[redacted]

Appeals Committee Chair
National Institute for Health and Clinical Excellence