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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KEVIN MEEHAN

Appeal 2012-007736
Application 11/351,538
Technology Center 1600

Before: DONALD E. ADAMS, DEMETRA J. MILLS, and SCOTT E. KAMHOLZ, *Administrative Patent Judges*.

KAMHOLZ, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the decision of the Examiner to reject claims 1–23 and 25–28. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

THE CLAIMED SUBJECT MATTER

The claimed subject matter is directed to animal feed compositions. Claim 1, reproduced below, is illustrative of the claimed subject matter:

> 1. A food product for consumption by animals, a serving of food product consisting essentially of:

carotenoids;
methionine;
cysteine; and
selenium, where the serving of the food product has a total weight,
wherein the food product contains the carotenoids, methionine, cysteine and selenium in amounts effective to increase the production of glutathione peroxidase and superoxide dismutase when the serving of the food product is consumed by the animal.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Hageman US 6,544,547 Apr. 8, 2003

Becky, http://www.cyber-kitchen.com/ubbs/archive/POULTRY/Chicken_Chicken_Stuffed_Cabbage_Rolls.html (2002).

Marla, http://www.freerecipesbook.com/free-recipe-6686-cabbage-rolls-with-sour-cream-sauce.html (2002).

Wikipedia, http://web.archive.org/web/20050120174017/http:en.wikipedia.org/wiki/Brown_rice (Jan. 2004).

REJECTIONS

Appellant seeks our review of the following rejections:

Claims 1–23 and 25–28 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over copending Application No. 12/032,406. Ans. 5.

Claims 1, 11, and 25 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Ans. 6.

Claim 1 is rejected under 35 U.S.C. § 102(b) as being anticipated by Hageman. Ans. 7.

Claims 1–5 and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hageman. Ans. 9.

Claims 1–23 and 25–28 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Becky, Marla, and Wikipedia. Ans. 10–11.

ANALYSIS

1. Provisional obviousness-type double patenting

We do not reach the Examiner's provisional obviousness-type double patenting rejection. *See Ex parte Moncla*, 95 USPQ2d 1884, 1885 (BPAI 2010).

2. Written Description

The Examiner rejected claims 1, 11, and 25 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Ans. 6. The Examiner takes the position that the "amounts effective" limitation added during prosecution lacks the support of adequate written description in the original Specification. *Id.*

Appellant argues that a construction of this phrase is provided implicitly at page 2, line 25 through page 3, line 25 of the Specification as originally filed. Br. 9.

We agree with Appellant. The cited passage includes a description of what ingredient ratios Appellant considered to be effective. The paragraph at page 3, line 31 through page 4, line 7 discloses that ratios that are "more or less than the preferred ratio by about 30% in either direction . . . still achieve the benefits according to embodiments of the invention." This paragraph also discloses that Appellant considered ratios above this range potentially harmful and ratios below this range ineffective. The preferred ingredient ratios are provided in Tables 1 and 2 on page 3 of the Specification. Considering this disclosure, and recalling that there is no *in haec verba* requirement, we conclude that the "amounts effective" limitation is adequately supported by the original Specification and refers to ingredient ratios within 30% of the preferred ratios listed in Tables 1 and 2. We reverse the rejection.

3. Anticipation by Hageman

The Examiner takes the position that Hageman discloses a composition having all the ingredients listed in claim 1 and that would, therefore, inherently increase the production of glutathione peroxidase and superoxide dismutase. Ans. 7–8.

We will not sustain the rejection. Claim 1 implicitly requires ingredient ratios that are within 30% of the preferred ratios specified in Tables 1 and 2. *See* discussion of the "amounts effective" claim language in the written description rejection, *supra*. Elsewhere the Examiner acknowledges that Hageman does not disclose the preferred ingredient ratios. Ans. 9. For this reason, we determine that Hageman does not anticipate the subject matter of claim 1.

4. Obviousness over Hageman

The Examiner argues that, although Hageman does not disclose the claimed ingredient amounts, they are "clearly" result-effective parameters that would have been arrived at readily through routine optimization as needed for the benefit of a patient. Ans. 9, 18–19. The Examiner also points out that Hageman discloses particular ranges for certain ingredients, such as 600–7,000 milligrams of methionine/cysteine, and 0.07–0.3 milligrams of selenium, both based on a 2,000-kilocalorie-per-day diet. *Id.* at 18 (citing Hageman 3:48–4:22).

Appellant argues that the Examiner has not established that the ingredient values are result-effective variables. Br. 16–17. Appellant argues that Examiner has simply asserted this to be the case *per se* without undertaking a proper obviousness analysis. *Id.* Appellant also argues that the ranges Hageman discloses would be the limits within which routine optimization would have been carried out. Br. 17–18.

We are constrained to reverse the rejection, because the Examiner has not demonstrated adequately that the ingredient amounts have been established as result-effective variables for patient treatment over ranges that encompass the claimed values. Hageman, at most, indicates that the amounts of its ingredients are result-effective over its disclosed ranges. The Examiner has not shown, however, that the claimed ingredient amounts (e.g., 250±30% micrograms sodium selenate per 24 ounces of the food product) are within (or at least overlap) the ranges indicated by Hageman (e.g., 80–300 micrograms per 2,000-liocalories-per-day) to be result-effective. *See In re Antonie*, 559 F.2d 618, 620 (CCPA 1977); *In re Boesch*, 617 F.2d 272, 276 (CCPA 1980). We do not determine that the ingredient

amounts are *not* result-effective variables over ranges encompassing or overlapping the claimed amounts; rather, we conclude that the Examiner has failed to show that they are.

5. Obviousness over Becky, Marla, and Wikipedia

We reverse this rejection for reasons similar to those given with respect to the Hageman obviousness rejection. The Examiner has not shown that the prior art establishes the ingredient amounts as being result-effective over ranges that encompass or overlap the claimed values.

DECISION

For the above reasons, the Examiner's decision to reject claims 1–23 and 25–28 is REVERSED, except as to the provisional obviousness-type double patenting rejection, which we do not reach.

REVERSED

cdc