

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RUPERT P. DAY

Appeal No. 2004-0383
Application No. 09/703,279

ON BRIEF

Before WILLIAM F. SMITH, TIMM, and ADAMS, *Administrative Patent Judges*.
TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

Claims 1-3, 5-16, and 18-23 are pending in the application and all of the pending claims are rejected by the Examiner as unpatentable. As Appellant states that claims 1-3, 5-10, 14-16, and 18-23 are the subject of the appeal (Brief, p. 2), we will limit our review to those claims.¹ Accordingly, the rejection of claims 13-15 will not be reviewed. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 134.

¹References to the Brief are to the Supplemental Brief filed on June 2, 2003.

INTRODUCTION

The claims are directed to a powder composition and a process for treating skin by contacting the skin with the powder composition. The powder composition, at a minimum, contains two basic components: a solid particulate component and chitosan in particulate form.

Claims 1 and 14 are illustrative on the invention on appeal:

1. A powder composition comprising a solid particulate component and from about 0.01 to about 10% by weight, based on the weight of the composition, of chitosan having a particle size of from about 0.1 to about 50 microns.

14. A process for treating skin comprising contacting the skin with a powder composition containing a solid particulate component and from about 0.01 to about 10% by weight, based on the weight of the composition, of chitosan having a particle size of less than 400 microns.

As evidence of unpatentability, the Examiner relies upon the following prior art references:²

Yoshihide Kawamura et al. (Yoshihide)	JP 63-027,501	Feb. 5, 1988
Toshiya et al. (Toshiya)	JP 11-124,324	May 11, 1999

Claims 1-3, 5-16, and 18-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Yoshihide in view of Toshiya. For the reasons expressed by Appellant in the Brief and the following reasons we reverse with respect to the claims on appeal, claims 1-3, 5-10, 14-16, and 18-23.

²We rely upon and cite to the English translations of record for each of the references.

OPINION

The Examiner bears the initial burden of presenting a *prima facie* case of unpatentability. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). All of the claims are directed to a powder composition containing the combination of a solid particulate component and chitosan particles. All of the claims require that chitosan be present in the powder composition at a concentration of about 0.01 to about 10% by weight. The rejection does not provide the required evidentiary basis supporting a *prima facie* case of obviousness for such a powder composition.

First, our review indicates that the Examiner has not adequately supported the finding that “Yoshihide’s patent provides for various amounts of chitosan in the formulation as demonstrated in the examples (2 to 20%).” (Answer, p. 4). Turning to the examples (Yoshihide, pp. 8-15), we do not find the percentage concentrations referred to in the rejection. Where, as here, the amounts are not directly stated, the Examiner must provide more specific details as to how the disclosure supports the finding. It appears that the Examiner may have been referring to a range of chitosan discussed at page 5 of the reference. Here a range of 2 to 20% is discussed, but it refers to the concentration of dissolved chitosan in an acid solution subsequently coagulated and washed to form granulated chitosan, not the range of concentration of particulate chitosan in a powder composition containing a solid particulate. Yoshihide, in other portions of the reference, indicates a higher level of chitosan is used in the powder composition. Yoshihide disperses an amount of 0.01 to 1 part by weight titanium oxide powder per 1 part by weight

chitosan microparticles (Yoshihide, p. 7, ll. 16-18). Therefore, at a minimum, the powder composition contains 50% chitosan particles. The level of chitosan in the powder composition of Yoshihide is, therefore, much higher than the about 0.01 to about 10% by weight level of the powder composition of the claims.

Second, the Examiner finds that Toshiya teaches a skin makeup composition containing chitosan in an amount of 0.1-10%, but has ignored the fact that the compositions of Toshiya are not described as powder compositions. The “skin makeup” compositions of Toshiya are solid soaps, liquid soaps, ointments and creams (Toshiya, p. 1, ¶ 0002, ll. 1-2). Moreover, Toshiya blends chitosan with a charge of skin makeup in the state of a solution (Toshiya, p. 2, ¶ 0008, ll. 1-2). Toshiya provides no teaching with respect to powder compositions. The disclosure in Toshiya of a concentration of chitosan in a non-powder formulation does not provide sufficient evidence of a reason, suggestion, or motivation to modify the level of chitosan in the powder composition of Yoshihide.

We agree with Appellant that the combined teachings of Yoshihide and Toshiya, as applied by the Examiner, fail to teach or suggest a powdered composition having the required level of chitosan particulate concentration (Brief, p. 3). Nor has the Examiner established the obviousness of the process of treating skin with such a powder composition. We conclude that the Examiner has not established a *prima facie* case of obviousness with respect to the subject matter of claims 1-3, 5-10, 14-16, and 18-23, the claims on appeal.

CONCLUSION

To summarize, the decision of the Examiner to reject claims 1-3, 5-10, 14-16, and 18-23 under 35 U.S.C. § 103(a) is reversed. The rejection of claims 11-13 was not subject to our review.

REVERSED

WILLIAM F. SMITH)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
CATHERINE TIMM)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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