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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LONNY S. GREEN

Appeal 2007-2556
Application 10/274,711
Technology Center 1700

Decided: 2 July 2007

Before FRED E. McKELVEY, *Senior Administrative Patent Judge*, and
RICHARD TORCZON and JAMES T. MOORE, *Administrative Patent
Judges*.

TORCZON, *Administrative Patent Judge*.

DECISION ON APPEAL

The claims on appeal relate to a food formulation with natural ingredients intended to maintain good health and bladder function. The examiner rejected all pending claims, claims 1-27, under 35 U.S.C. § 103(a) as having been obvious. The appellant seeks review. We affirm.

FINDINGS

Claims

The appellant challenges the rejection of the claims as a unitary group¹ so we will analyze the rejection in terms of claim 1,² which defines the invention as follows—

1. A food supplement formulation, comprising:
 - L-methionine;
 - L-arginine;
 - zinc;
 - selenium;
 - Echinacea;
 - cranberry;
 - ginkgo; and
 - usnea barbata.

The Board must give claim 1 its broadest reasonable construction.³ Claim 1 is a composition claim without any express or implicit use limitation. It uses the "comprising" transition, which means the claim is open to the inclusion of ingredients other than those expressly listed. Although the formulation must supplement food, the formulation itself could be a liquid, a solid, or a mixture of the two. The amount of each ingredient is not specified in claim 1.

Obviousness

In analyzing obviousness, the scope and content of the prior art must be determined, the differences between the prior art and the claims

¹ Appeal Brief (Br.) 4-6.

² Claim language is taken from the claims appendix of the appeal brief. The authority for selecting claim 1 appears in 37 C.F.R. § 41.37(c)(1)(vii).

³ *In re Bigio*, 381 F.3d 1320, 1324, 72 USPQ2d 1209, 1211 (Fed. Cir. 2004).

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ascertained, and the ordinary level of skill in the art resolved. Objective evidence of the circumstances surrounding the origin of the claimed subject matter (so-called secondary considerations) may also be relevant. Such secondary considerations guard against the employment of impermissible hindsight.⁴

Scope and content of the prior art

The examiner rejected all twenty-seven claims in view of the published applications of Collins⁵ and Zhao⁶ and of the patent of Mehansho.⁷ All three references relate to health foods or drinks.

Collins is directed to compositions containing a more biologically useful analogue of vitamin B₁₂, adenosylcobalamin. A broad spectrum of disorders are said to result from vitamin B₁₂ deficiency, including anemia and neurological disorders.⁸ Collins teaches that adenosylcobalamin can be combined with amino acids and minerals,⁹ and with popular herbal supplements, expressly including Echinacea, ginkgo, and usnea extracts.¹⁰ One embodiment uses the adenosylcobalamin in a fortified fruit juice,

⁴ *Graham v. John Deere Co.*, 383 U.S. 1, 17, 36 (1966), *cited with approval in KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007). The appellant has not directed us to any objective evidence of secondary considerations.

⁵ Douglas A. Collins, "Adenosyl-cobalamin fortified compositions", US 2003/0018009 A1 (pub'd 23 January 2003) (Collins).

⁶ Iris Ginron Zhao, "Multi-phase food & beverage", US 2003/0228393 A1 (pub'd 11 December 2003) (Zhao).

⁷ Haile Mehansho et al., "Beverage compositions comprising arabinogalactan and defined minerals", U.S. 6,703,056 B2 (issued 9 March 2004) (Mehansho).

⁸ Collins ¶0003.

⁹ Collins ¶0034.

¹⁰ Collins ¶0047.

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specifically including cranberry juice, to which herbal extracts and amino acids may be added.¹¹ Collins lists both arginine and methionine as examples of amino acids to add.¹² Zinc and selenium are specifically suggested mineral additions.¹³ In short, Collins teaches all of the ingredients in claim 1 as suggested additions to his food supplement.

Zhao is concerned with producing a satisfying food or drink with less of the "empty sweet-sour water related disadvantages" she ascribes to current health drinks.¹⁴ Zhao provides guidance to the advantages and disadvantages of common additions to such compositions. A table¹⁵ entitled "Providing & Using Amino Acids" discusses the pros and cons of arginine and methionine. She also teaches the use of zinc and selenium,¹⁶ Echinacea,¹⁷ cranberry,¹⁸ and ginkgo,¹⁹ but not usnea barbata. Zhao also recommends the use of cyanocobalamin,²⁰ which is the common synthetic vitamin B₁₂ analogue that Collins wishes to see replaced with adenosylcobalamin.

Mehansho and his colleagues disclose beverages for providing minerals and fiber in a stable, palatable formulation.²¹ They specifically

¹¹ Collins ¶¶0082-0083.

¹² Collins ¶0046. We note that amino acids in the human diet typically have an L conformation.

¹³ Collins ¶0043.

¹⁴ Zhao ¶¶0001-0002.

¹⁵ Zhao pp. 10-11.

¹⁶ Zhao ¶173; see also ¶¶0064, 0085 & 102.

¹⁷ Zhao ¶¶0130, 0131 & 0192 (for infections).

¹⁸ Zhao ¶¶0148 (for flavor and treating urinary tract infections) & 0178 (for kidney stones). We note that the bladder is part of the urinary tract.

¹⁹ Zhao ¶0190 (for osteoporosis).

²⁰ Zhao ¶0091.

²¹ Mehansho 1:11-56.

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disclose a beverage with arabinogalactan (a fiber) and several minerals including zinc and selenium.²² Echinacea is a recommended source for arabinogalactan.²³ They recommend the use of amino acids, specifically including arginine and methionine, as chelators to stabilize zinc,²⁴ while selenomethionine is described as the principle form of selenium in foods.²⁵ Cranberry is a recommended flavor source.²⁶

Differences

Collins teaches the use of all the ingredients in claim 1. Collins would use them to fortify an improved vitamin B₁₂ supplement. Collins does not appear to be concerned with bladder function, but bladder function is not a feature of claim 1.

Zhao teaches the use of all the ingredients in claim 1 except usnea.

Mehansho does not disclose the use of ginkgo or usnea barbata. Although Echinacea is a source of the arabinogalactan, in most embodiments very little of the Echinacea apart from the arabinogalactan would remain after processing.

Ordinary level of skill

We look to the evidence of record—the applicant's disclosure, the cited references, and any declaration testimony—in resolving the ordinary

²² Mehansho 2:62-67.

²³ Mehansho 3:35-36.

²⁴ Mehansho 5:27-40. They are also used to stabilize other minerals.

²⁵ Mehansho 9:22-23.

²⁶ Mehansho 18:1-11.

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level of skill in the art.²⁷ Those of skill in the art were aware of the panoply of common additions to health foods and drinks, including the advantages and disadvantages of each. They knew an ingredient could be included for more than one use, including both a health-related and an unrelated use. For instance, cranberry could be added to as a flavoring or to address urinary tract infections. Amino acids could be supplements in their own right or chelators for mineral supplements.

ANALYSIS

The reason to combine need not be the same as the appellant's stated purpose.²⁸ In the present case, appellant's stated purpose is not a limitation in claim 1 anyhow. Moreover, the appellant's stated purpose of maintaining bladder function is inherently met by the use of cranberry juice, something all three references recommend.

Collins teaches the use of all of the ingredients in claim 1 as part of a food supplement. Thus, the reason for combining Collins with Zhao and Mehansho is moot since the subject matter of claim 1 would have been obvious in view of Collins alone.

Collins, Zhao and Mehansho belong to the same art, food supplements, and independently teach all or nearly all of the ingredients of claim 1 as standard additions to a food supplement. When standard

²⁷ *Ex parte Jud*, 2006 WL 4080053 at *2 (BPAI) (rehearing with expanded panel).

²⁸ *In re Dillon*, 919 F.2d 688, 692-94, 16 USPQ2d 1897, 1901-02 (Fed. Cir. 1990) (en banc).

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ingredients are used in standard ways to produce standard benefits, the combination is facially obvious.²⁹

HOLDING

In view of the strong teachings and suggestions in the prior art to use all of the ingredients in claim 1 in a food supplement, we must uphold the examiner's rejection of claim 1. Since the appellant has not specifically argued the separate patentability of any other claim, we uphold the rejection of claims 2-27 as well. The examiner's rejection of claims 1-27 is—

AFFIRMED

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²⁹ *KSR Int'l*, 127 S. Ct. at 1740, 82 USPQ2d at 1395-96, *citing Sakraida v. AG Pro, Inc.*, 425 U.S. 273, 282 (1976); *accord Richardson-Vicks Inc. v. Upjohn Co.*, 122 F.3d 1476, 1484, 44 USPQ2d 1181, 1187 (Fed. Cir. 1997) (obvious to combine compositions treating different symptoms of same disorder).