

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte DEAN L. RHOADES

Appeal 2007-4382

Application 10/349,156

Technology Center 3700

Decided: September 12, 2008

Before TONI R. SCHEINER, DEMETRA J. MILLS, and ERIC GRIMES,
Administrative Patent Judges.

MILLS, *Administrative Patent Judge.*

REQUEST FOR REHEARING

This is a Request for Rehearing under 37 C.F.R. §41.52. Appellant requests reconsideration of our Decision dated March 25, 2008.

The following claim is representative.

1. An apparatus comprising:
a head portion;
a handle portion coupled to the head portion and suitable for gripping by a human hand, the handle portion comprising a first member extending

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from the head portion, and a second member coupled to the first member at an angle; and

an applicator comprising a porous mass coupled to the head portion, the porous mass having an average pore size in the range of about 40 microns to about 200 microns and having dimensions suitable for contacting localized areas of human skin.

Cited References

Burkardt	US 2,985,166	May 23, 1961
Muchisky	US 4,102,334	Jul. 25, 1978
Meledandri	US 6,006,761	Dec. 28, 1999
Sereg	US 6,010,268	Jan. 04, 2000
Bock	WO 97/22325	Jun. 26, 1997

Grounds of Rejection

1. Claims 1-4, 13 and 14 stand rejected under 35 U.S.C. § 103(a) as obvious over Muchisky in view of Meledandri.
2. Claims 1-4, 13 and 14 stand rejected under 35 U.S.C. § 103(a) as obvious over Sereg in view of Meledandri.
3. Claims 1-5, 7-11, 13 and 14 stand rejected under 35 U.S.C. § 103(a) as obvious over Burkardt in view of Meledandri.
4. Claim 6 stands rejected under 35 U.S.C. § 103(a) as obvious over Burkardt in view of Meledandri and Sereg.
5. Claim 12 stands rejected under 35 U.S.C. § 103(a) as obvious over Muchisky or Sereg or Burkardt in view of Meledandri and Bock.

DISCUSSION

Background

The invention relates to an apparatus for skin treatment, such as microdermabrasion. (Spec. 1.)

Appellant argues that the Board misapprehended or overlooked Appellant's calculations of pores per inch as set forth in the Reply Brief. (Request 1.)

Appellant argues that:

In the Decision, ... the Board has overlooked the argument by the Appellant in the Reply Brief rebutting the calculations and argument of the Examiner concerning Melandandri's teaching of pore size (see Reply Brief mailed December 12, 2005, p. 3, lines 14-17).

Specifically, in that argument Appellant addresses the Examiner's calculation of pore size from pores per inch by stating that regarding pores per inch, "In any event [pores per inch] it is no more than a counting mechanism without reference to particular pore size. There can be 50 20-micron pores in an inch and there can be 500 20-micron pores in an inch. Neither such case falls within Appellant's claimed ranges." (See Reply Brief, p. 3, lines 14-17.) As noted by the Board in the Decision, "density and pore size are independent" (Decision, p. 6, lines 6-7). This is exactly the argument made by the Appellant in the Reply Brief to rebut the Examiner's strained calculation that a teaching of a range of between 50 to 500 pores per inch necessarily results in a pore size of between 40 to 200 microns. Instead, as noted in the Reply Brief, there can be between 50 and 500 pores per inch of pores having a size less than the claimed 40 microns. Hence, the Examiner's argument may be relevant to a maximum pore size possible given the pores per inch teaching of Melandandri, but is irrelevant to teaching any specific pore size or range of pore sizes below that maximum, as noted in the Reply Brief.

(Request 1-2.)

We are not persuaded by Appellant's argument. Meledandri discloses a "pore size" of 50 to 500 pores per inch (Meledandri, col. 4, ll. 10-14), which overlaps the claimed pore sizes range of 40 to 200 microns (see Answer 4). "A prima facie case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art." *In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003). The claimed range of 40-200 micron pore size, overlaps pore sizes in the range of 50-500 pores per inch disclosed in Meledandri, and thus the claimed range would have been obvious in view of the prior art.

Appellant's arguments presented in the Reply Brief, were also made in the Brief, at page 14, and addressed in our original Decision, pages 5-6. Having reviewed Appellant's arguments in the Reply Brief and Request for Reconsideration, we conclude that Appellant has failed to provide any evidence that the Examiner's pore size calculations are inaccurate, that the definition of pore size presented in our Decision, page 6, is inaccurate, or that Meledandri's reference to "pores per inch" differs from the pore size claimed. Appellant is reminded that the arguments of counsel set forth in the Reply Brief and Request for Reconsideration cannot take the place of evidence. *In re DeBlauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984), *In re Payne*, 606 F.2d 303, 315 (CCPA 1979).

SUMMARY

We find no error in our Decision and the request for rehearing is denied.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REHEARING DENIED

Ssc:

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