UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANCOIS COUZY and CATHERINE BOISSIN-DELAPORTE

Appeal 2008-3509
Application 10/339,349
Technology Center 1600

Decided: August 27, 2008

Before TONI R. SCHEINER, DONALD E. ADAMS, and FRANCISCO C. PRATS, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-5, 7-13, 15-18, and 20, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

INTRODUCTION

The claims are directed to a pet food composition (claims 1-5 and 7) and a method for improving skin health and/or coat quality in a pet (claim

8), and a method for reducing body surface odor and/or coat odors of a pet (claims 9-13). Claim 1 is illustrative:

> 1. A pet food composition comprising a starch source, a protein source and at least a source of dietary lipids comprising at least 0.02% of palmitoleic acid and at least 1.0% of lauric acid by weight of the pet food composition and selected for their ability to modulate the content of anti-microbial fatty acids in the epidermis of mammals.

The Examiner relies on the following prior art references to show unpatentability:

Ogilvie	US 5,776,913	Jul. 7, 1998
Teter	WO 99/66804	Dec. 29, 1999

The rejection as presented by the Examiner is as follows:

Claims 1-5, 7-13, and 15-18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Ogilvie and Teter.

We affirm.

FINDINGS OF FACT (FF):

1. Ogilvie teaches a "method of reducing metabolic abnormalities found in animals with cancer and including a pet food composition effective for this purpose" (Ogilvie, col.1, ll. 6-8).

2. Ogilvie teaches a pet food composition comprising, a protein source including, *inter alia*, beef lungs, pork liver and chicken, a starch source, including, *inter alia*, rice, and a source of dietary lipids including, *inter alia*, 11.6% palmitoleic acid (Ogilvie, col. 4, l. 42 – col. 5, l. 9; Table II).

3. Ogilvie teaches that

> [t]he specific dietary balance between fat and carbohydrates in combination with the specific concentrations of arginine, omega-6 polyunsaturated fatty acids set forth herein is believed to positively affect the negative impact of metabolic abnormalities in animals with cancer by providing a means for correcting such abnormalities in the animal.

(Ogilvie, col. 2, ll. 57-63).

4. Ogilvie teaches that "[e]xamples of omega-6 polyunsaturated fatty acids include linoleic acid and arachidonic acid [and that] [s]ources [of these fatty acids] typically are animal fats and vegetable oils such as soy, canola and corn oil" (Ogilvie, col. 3, ll. 47-50).

5. Ogilvie teaches that

> [t]he fat and carbohydrate nutrients used to prepare the pet food compositions of the present invention may be supplied by ingredients such as meat, meat by-products, other animal protein sources and grains as the food source . . . . The nutrient ingredients may also include amounts of cereal grains such as wheat, corn, barley and rice and fibrous bulking materials such as cellulose, beet pulp, peanut hulls or soy fiber.

(Ogilvie, col. 2, l. 64 – col. 3, l. 12.)

6. Ogilvie teaches that "[o]ther additives may be included in this pet food as needed. These other additives include flavoring, vitamins, minerals, coloring and mixtures thereof. These additives are added for nutritional purposes and palatability" (Ogilvie, col. 3, ll. 60-63).

7. Teter teaches "methods and compositions for reducing or eliminating the use of antibiotics to promote the growth of animals" (Teter 1: 17-18).

8. Teter teaches that "[t]he methods and compositions relate to the use of an anti-microbial fatty acid component as part of the animal feed, either

combined with the feed or administered separately as a feed supplement" (Teter 1: 18-20).

9. Teter teaches that "high lauric acid oil will be employed as part of the feed or as a feed supplement such that the lauric acid will preferably comprise about 0.5% to about 10% of the animal feed" (Teter 4: 1-3).

10. Teter teaches that the source of oil may be "any oil derived from plant or animal material including, but not limited to oils that are derived from plants that have been genetically modified . . . . As one example, canola oil . . . derived from plants that have been genetically modified to have a high lauric acid content may be employed" (Teter 3: 20-25).

11. Teter teaches that the animals include "farm livestock, pets, and any animals produced for human consumption" (Teter 4: 9-10).

DISCUSSION

Claims 1-5, 7-13, and 15-18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Ogilvie and Teter. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Therefore, we limit our discussion to representative claim 1.

Claim 1 is drawn to a pet food composition. The composition comprises:

1. a starch source,

2. a protein source,

3. at least a source of dietary lipids comprising at least 0.02% of palmitoleic acid, and

4. at least 1.0% of lauric acid by weight of the pet food composition.

While the ingredients listed in claim 1 are selected for their ability to modulate the content of anti-microbial fatty acids in the epidermis of mammals; claim 1 does not require the composition to have any effect on the anti-microbial fatty acid content in the epidermis of mammals.

Based on the combined teachings of Ogilvie and Teter the Examiner concludes that "[i]t would have been obvious to a person of ordinary skill in the art at the time the invention was made, utilizing diet as of the Ogilvie, that adding 0.5-10% of lauric acid to the animal feed would provide additional antimicrobial benefits as shown by Teter" (Ans. 4).

In response, Appellants assert that "[a]t no point does Ogilvie disclose or suggest using any lauric acid, a saturated fatty acid, which has completely different properties from the polyunsaturated fatty acids disclosed in Ogilvie. Ogilvie, therefore, teaches away from a combination with Teter" (App. Br. 13 (emphasis removed)). We are not persuaded.

We agree that Ogilvie teaches that a "specific dietary balance between fat and carbohydrates in combination with the specific concentrations of arginine [and] omega-6 polyunsaturated fatty acids . . . is believed to positively affect the negative impact of metabolic abnormalities in animals with cancer by providing a means for correcting such abnormalities in the animal" (FF 3). However, we do not find, and Appellants do not identify, a suggestion in Ogilvie to avoid administering *saturated* fatty acids to an animal. To the contrary, Ogilvie teaches the use of animal fats and vegetable oils, meat, meat by-products, grains, beet pulp, peanut hulls and other additives for nutritional purposes (FF 4-6). There is no evidence on this record that Ogilvie intended to exclude *saturated* fatty acids or that any of the sources of ingredients included in Ogilvie's composition would not

contain saturated fatty acids. In this regard, we note that Teter teaches that the source of oil may be "any oil derived from plant or animal material including . . . canola oil . . . derived from plants that have been genetically modified to have a high lauric acid content" (FF 10).

Accordingly, we are not persuaded by Appellants' assertion that Ogilvie teaches away from the inclusion of saturated fatty acids and therefore teaches away from its combination with Teter (App. Br. 13-14 (emphasis removed)). To the contrary, Teter teaches that "[t]he methods and compositions relate to the use of an anti-microbial fatty acid component as part of the animal feed, either combined with the feed or administered separately as a feed supplement" (FF 8). As the Examiner explains it would have been prima facie obvious to a person of ordinary skill in this art to include Teter's lauric acid feed supplement in Ogilvie's composition for the additional antimicrobial benefits taught by Teter (Ans. 4)[1]. "The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007).

We are also not persuaded by Appellants' assertion that "Ogilvie and Teter fails to disclose or suggest a pet food composition comprising at least 0.02% of palmitoleic acid and at least 1.0% of lauric acid by weight of the pet food composition as required, in part by the present claims" (App. Br. 15 (emphasis removed)).

[1] Accordingly, we are not persuaded by Appellants' assertion that the Examiner's only rationale for combining Ogilvie with Teter is "[t]hat the references both relate to animal feeds" (Reply Br. 3).

Teter teaches that "high lauric acid oil will be employed as part of the feed or as a feed supplement such that the lauric acid will preferably comprise about 0.5% to about 10% of the animal feed" (FF 9). "[W]here there is a range disclosed in the prior art, and the claimed invention falls within that range, there is a presumption of obviousness." *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1322, (Fed. Cir. 2004).

As to the percentage of palmitoleic acid, as the Examiner explains Ogilvie teaches a composition comprising 5.75% by weight of menhaden oil, which comprises 11.6% palmitoleic acid (Ans. 3; Ogilvie, col. 4, l. 45 and col. 5, ll. 5-7). Thus, contrary to Appellants' assertion (App. Br. 15), Ogilvie's composition comprises at least 0.02% palmitoleic acid by weight of the pet food.

Further, while Appellants assert that they have "found that lauric acid can have a synergistic effect with palmitoleic acid . . . by boosting its concentration in the epidermis" (App. Br. 16), we note that claim 1 is drawn to a pet food composition. "In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103." *KSR*, 127 S.Ct. at 1741-42; *see also In re Beattie*, 974 F.2d 1309, 1312, (Fed. Cir. 1992) ("[T]he law does not require that the references be combined for the reasons contemplated by the inventor.").

Stated differently, while Appellants selected the ingredients for their ability to modulate the content of anti-microbial fatty acids in the epidermis of mammals, the prior art suggests the combination of a composition comprising the same ingredients, including, at least 0.02% palmitoleic acid

and at least 1.0% lauric acid (1) to reduce metabolic abnormalities found in animals with cancer (FF 1) and (2) to reduce or eliminate the use of antibiotics to promote the growth of animals (FF 7).

While Appellants assert that their combination achieves "a synergistic effect with respect to boosting the palmitoleic concentration in the epidermis" claim 1 does not require a "boost" in the palmitoleic concentration or any other "modulation" of anti-microbial fatty acids in the epidermis of mammals.

We also recognize Appellants' assertion that they "have demonstrated that, if lauric acid is added to a diet in addition to palmitoleic acid, this diet can result in a concentration of epidermal palmitoleic acid that is higher than could be expected from a concentration of epidermal palmitoleic acid derived from a diet in the absence of lauric acid" (Reply Br. 4). Claim 1 does not, however, require an increase in epidermal palmitoleic acid, to the contrary claim 1 simply states that the ingredients are "selected for their ability to modulate the content of anti-microbial fatty acids in the epidermis of mammals" (Claim 1). "Modulating" the content of anti-microbial fatty acids in the epidermis of mammals does not require an increase in epidermal palmitoleic acid. To the contrary, a person of ordinary skill in this art could reasonably infer that modulating results in a decrease in epidermal palmitoleic acid in the epidermis of a mammal. Further, claim 1 does not require that the anti-microbial fatty acids in the epidermis of the mammal actually be modulated (either up or down). To the contrary, claim 1 simply requires the ingredients to be "selected" for their "ability" to modulate the content of anti-microbial fatty acids in the epidermis of mammals. As

discussed above, the prior art of record provides another reason to select the ingredients of the claimed composition.

In order to establish unexpected results for a claimed invention, objective evidence of non-obviousness must be commensurate in scope with the claims which the evidence is offered to support. *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978); *In re Lindner*, 457 F.2d 506, 508 (CCPA 1972); *In re Tiffin*, 448 F.2d 791, 792 (CCPA 1971). Accordingly, we disagree with Appellants' assertion that "at the time of the presently claimed invention, it would not have been obvious to combine two different ingredients from the disclosure of two different references wherein the combination of the two would result in synergistic effects on the epidermal palmitoleic acid of a pet" (Reply Br. 4). For the reasons set forth above, the prior art suggests the combination of the ingredients set forth in Appellants' claim 1 and there is no requirement in claim 1 that the composition have any effect on a pet. Accordingly, we are not persuaded by Appellants' arguments relating to unexpected results.

For the foregoing reasons, we affirm the rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over the combination of Ogilvie and Teter. Claims 2-5, 7-13, and 15-18 fall together with claim 1.

CONCLUSION

In summary, we affirm the rejection of record.

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

AFFIRMED

Ssc:

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