

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL A. REPKA
and THOMAS G. GERDING

Appeal No. 94-1540
Application 07/861,558¹

ON BRIEF

Before WINTERS, WILLIAM F. SMITH, and GRON, Administrative Patent Judges.

WILLIAM F. SMITH, Administrative Patent Judge.

¹ Application for patent filed April 1, 1992. According to appellants, the application is a continuation-in-part of Application 07/585,666, filed September 20, 1990, now Patent No. 5,112,620.

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DECISION ON APPEAL

This is an appeal under 35 U.S.C. ' 134 from the final rejection of claims 1 through 33, all the claims pending in the application.

Claim 27, the broadest independent claim pending, is illustrative of the subject matter on appeal and reads as follows:

27. A bioadhesive composition comprising from about 3 to 15% by weight of a water-soluble salt of a copolymer of a lower alkyl vinyl ether and maleic acid or anhydride and from about 85 to 97% by weight of polyethylene glycol (PEG).

The references relied upon by the examiner are:

Martin	4,307,075	Dec. 22, 1981
Keith et al. (Keith)	4,764,378	Aug. 16, 1988
Blackman et al. (Blackman)	4,883,660	Nov. 28, 1989
Browning	4,948,580	Aug. 14, 1990
Repka et al. (Repka)	5,112,620	May 12, 1992

Claims 1 through 33 stand rejected under the judicially created doctrine of obviousness-type double patenting as unpatentable over claims 1 through 15 of Repka.

In addition, claims 1 through 33 stand rejected under 35 U.S.C. ' 103 as unpatentable over Browning in view of Blackman, Keith, and Martin. We affirm the double patenting rejection and reverse the prior art rejection.

Obviousness-type Double Patenting Rejection

As set forth at page 2 of the Appeal Brief, appellants do not contest the merits of the obviousness-type double patenting rejection. Accordingly, we affirm this rejection.

Prior Art Rejection

All of the claims on appeal are directed to a composition which comprises from about 3-15% by weight of a specified copolymer and from about 85-97% by weight of polyethylene glycol (claim 27) or the combination of that composition and a medicament (claim 1). Browning describes an ointment formulation in the paragraph bridging columns 2-3 of that patent as follows:

The ointment formulation of the invention will include a freeze dried combination of a lower alkyl vinyl ether/maleic anhydride copolymer and gelatin in an amount within the range of from about 25 to about 75% by weight and preferably from about 35 to about 65% by weight, and an ointment base in an amount within the range of from about 75 to about 25% by weight and preferably from about 65 to about 35% by weight, and a water-soluble or water-insoluble medicament in an amount within the range of from about 0.01 to about 25% by weight, and preferably from about 0.05 to about 15% by weight, depending upon the particular medicament employed, all of the above % being based on the total weight of the ointment formulation.

Blackman describes gel bases for pharmaceutical compositions including those which are suitable for topical, transmucosal, or oral administration which can comprise 90-99.5% of polyethylene glycol. See, e.g., column 4, lines 6-16 of Blackman.

In relevant part, the examiner's rejection proposes to use as the ointment base in Browning, the gel base described in Blackman which contains 90-99.5% polyethylene glycol. Assuming arguendo the propriety of such a combination, the examiner has not provided a cogent explanation as to how that combination necessarily results in the claimed subject matter. The ointment base of Browning is used in an amount within the range of from about 25-75% by weight. If one were to use the gel base of Blackman as the ointment base in Browning it would appear that, at most, the content of polyethylene glycol in the resulting composition would be about 75% (99.5% of 75% is approximately 75%). Appellants argue this as a point of distinction between the claimed invention and the composition suggested by the combination of references proposed by the examiner in the paragraph bridging pages 4-5 of the Appeal Brief. The Examiner's Answer simply does not come to grips with this argument.

The prior art rejection is reversed.

The decision of the examiner is affirmed.²

² We note in passing that appellants state that this application is a continuation-in-part of Application 07/585,666, now U.S. patent 5,112,620. However, the specification of this application does not contain a reference to this parent application as required by 35 U.S.C. ' 120.

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No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR ' 1.136(a).

AFFIRMED

Sherman D. Winters)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
William F. Smith)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
Teddy S. Gron)	
Administrative Patent Judge)	

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