

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JAN. 6, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dan E. Rogers

Request for Reconsideration

Serial No. 75/013,108

Freling E. Baker of Baker and Maxham for applicant.

Mary E. Crawford, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Walters, Chapman and Wendel, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

On October 27, 1999, the Board affirmed the refusal to register in this case under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that applicant's mark is primarily merely a surname and applicant has not established, under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), that his mark has acquired distinctiveness in relation to other goods or

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services that, in this intent-to-use application, will transfer to applicant's use of the mark in connection with the services of "providing medical treatment for human illnesses by means of nutritionally based therapy."

On December 2, 1999, applicant requested reconsideration of the Board's decision. Applicant contends that "the Board erred in reaching the decision it issued due to an alleged ambiguity in the facts presented and Applicant's declarations"; and that "[a]s a result of misunderstanding the relationship between the Applicant and others using the mark GERSON on Applicant's behalf, the Board 1) failed to take into consideration the fact that the use of the mark on related goods and services and in offering the services of Applicant were (*sic*) directly marketing and advertising for Applicant's benefit, and 2) failed to take into consideration that the Applicant has offered its services in commerce continuously for more than five years prior to the application." In support of his position, applicant submitted a further declaration regarding, *inter alia*, the relationship of the Gerson Institute and of the Gerson Research Organization to applicant.

We find applicant's arguments unpersuasive of a different result. The Board is without authority,

following the issuance of its final decision in this *ex parte* appeal, either to consider additional evidence or to remand this case to the Examining Attorney for further examination. *See, Trademark Trial and Appeal Board Manual of Procedure (TBMP)* Sections 1217 and 1218 and cases cited therein. In both her response to applicant's request for reconsideration and in her brief on appeal, the Examining Attorney raised the issue that applicant's evidence of use of the mark GERSON on related goods or services appears to be by persons or organizations other than applicant. If applicant believed he could have overcome the refusal in this case and prevailed on appeal by submitting additional evidence or explanation, applicant was required to submit such evidence or explanation during examination or, if the evidence was newly discovered, with a request for remand during the pendency of the appeal, prior to issuance of the Board's decision in this case. The interests of judicial economy are not served by applicant's "wait-and-see" approach to the appeal process.

Further, we note that, regardless of whether we had considered the evidence and explanation submitted with applicant's request for reconsideration, our decision would remain the same. As indicated in our decision, applicant has not established acquired distinctiveness of GERSON in

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connection with printed publications, educational seminars, tape recordings, or any other goods or services. Even if we were to conclude that applicant's declarations, evidence and explanations clearly establish applicant's use in commerce of the term GERSON in connection with printed publications, tape recordings and educational seminars, we would find that this evidence falls far short of proving that GERSON has acquired distinctiveness as applicant's trademark and service mark in connection with such goods or services. As we stated in our original decision:

[I]t is impossible to determine whether applicant's use as indicated translates into substantial exposure of applicant's goods and services to relevant purchasers or substantial sales to a significant percentage of the relevant market. The record contains no evidence of consumer perception or information linking applicant's evidence with use in contexts that would condition consumers to react to or recognize the designation as an indication of applicant as the source of such goods and services.

For the reasons stated herein, we stand by our decision affirming the refusal to register in this case under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), on the ground that applicant's mark is primarily merely a surname and applicant has not established, under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), that his mark has acquired

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distinctiveness in relation to other goods or services that, in this intent-to-use application, will transfer to applicant's use of the mark in connection with the services of "providing medical treatment for human illnesses by means of nutritionally based therapy."

C. E. Walters

B. A. Chapman

H. R. Wendel
Administrative Trademark Judges,
Trademark Trial and Appeal Board