NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

IN RE: URVASHI BHAGAT,
Appellant

2016-2525

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. 12/426,034.

Decided: March 16, 2018

URVASHI BHAGAT, Palo Alto, CA, pro se.

NATHAN K. KELLEY, Office of the Solicitor, United States Patent and Trademark Office, Alexandria, VA, for appellee Andrei Iancu. Also represented by THOMAS W. KRAUSE, AMY J. NELSON.

Before NEWMAN, O'MALLEY, and TARANTO, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Urvashi Bhagat ("the Applicant") appeals the decision of the Patent Trial and Appeal Board ("the Board") affirming the examiner's rejection of claims 52, 61, 64, 65, 67–69, 73–75, 77, 78, 80, 82, 83, 90–102, 107, 116–122, 124,

and 128–145 of U.S. Patent Application No. 12/426,034 ("the '034 application").[1] We affirm the Board's decision.[2]

BACKGROUND

The '034 application is directed to lipid-containing compositions comprising omega-6 and omega-3 fatty acids. The '034 application states that dietary deficiency or imbalance of these fatty acids may lead to a variety of illnesses, and that omega-6 and omega-3 fatty acids are naturally occurring in oils, butters, nuts, and seeds. The '034 application claims a range and ratios of these fatty acids and other limitations. Application claim 65 is the broadest claim:

> 65. A lipid-containing formulation, comprising a dosage of omega-6 and omega-3 fatty acids at an omega-6 to omega-3 ratio of 4:1 or greater, contained in one or more complementing casings providing controlled delivery of the formulation to a subject, wherein at least one casing comprises an intermixture of lipids from different sources, and wherein
>
> > (1) omega-6 fatty acids are 4–75% by weight of total lipids and omega-3 fatty acids are 0.1–30% by weight of total lipids; or
> >
> > (2) omega-6 fatty acids are not more than 40 grams.

Other claims add specificity of amounts or ratios, additional ingredients, sources of the lipids, and delivery methods. The examiner held all of the claims unpatenta-

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[1] *In re Bhagat*, Appeal No. 2016–004154 (P.T.A.B. Apr. 15, 2016) ("Board Op.").

[2] Applicant's motions to expedite are denied as moot.

ble as directed to products of nature, and also held most claims unpatentable as anticipated.

The Board sustained the rejection of the claims, leading to this appeal.

DISCUSSION

On review of the Board's decision on an examiner's rejection, the Board's legal determinations receive de novo review, and the Board's factual findings are reviewed for support by substantial evidence in the examination record. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1363 (Fed. Cir. 2004). Claims in pending applications receive their broadest reasonable interpretation during examination, for adjustment of claim scope or clarification of meaning may be achieved by amendment during examination.

I

ANTICIPATION

A. The Mark reference

The Board affirmed the examiner's rejection of claims 52, 61, 64, 65, 67–69, 73, 75, 77, 78, 80, 83, 90, 92–96, 98, 100, 129–131, 133, 135–137, 142 and 144 on the ground of anticipation by U.S. Patent No. 5,549,905 ("Mark"). Mark describes a nutritional composition for pediatric patients, including a protein source, carbohydrate source, and lipid source containing omega-6 and omega-3 fatty acids in a ratio of "approximately 4:1 to 6:1." Mark, col. 2, ll. 32–38; col. 4, ll. 21–23. Mark states that the omega-6 fatty acid "is present in a range of approximately 4–6% of the total calories" of the pediatric composition, and the omega-3 fatty acid "is preferably present in the range of approximately 0.8–1.2% of the total calories." *Id.* at col. 4, ll. 27–31. Mark describes a specific composition containing 38.5 grams of total lipids, *id.* at col. 6, l. 9, administered intra-

venously in a "typical feeding regimen" of "50 mL/hour for 20 hours/day," *id.* at col. 5, ll. 7–8.

The Board agreed with the examiner that Mark discloses minimum and maximum amounts of omega-6 and omega-3 fatty acids within the claimed range, and also discloses a mixture of several types of oils as fatty acid sources. The Applicant argues that Mark does not "unequivocal[ly]" disclose the claimed omega-6 to omega-3 ratio because Mark does not clearly state whether its compositions are total omega-6 and omega-3 acids, or only alpha-linolenic and linoleic acids. The Board found that Mark expressly discloses an omega-6 to omega-3 fatty acid ratio of 5:1; Mark, col. 6, l. 15; which is within the ratios in all of the '034 application claims. Board Op. at *19.

The Applicant also argues that Mark does not meet the "dosage" limitation of claim 65 because Mark discloses concentrations of nutrients, rather than a dosage of omega-6 and omega-3 fatty acids. Responding to this argument, the Board found that Mark's "typical feeding regimen" of "50 mL/hour for 20 hours," a total of 1,000 mL/day, meets the claim 65 "dosage," for Mark's daily dosage may include 1,000 mL, as the table in column 4 refers to g/1,000 mL, teaching the daily amount fed to a child. Board Op. at *18. This finding is supported in the record, as is the Board's resulting finding of anticipation of claims 65, 92–93, and 95 based on Mark's feeding regimen within the dosage stated in these claims.

The Applicant argues that even if the broadest claims are deemed anticipated by Mark, the other claims are not anticipated. The Applicant argues that Mark teaches a composition for children ages 1–10, and does not anticipate claim 137 which states "the formulation is for a human infant, or adult." The Board found this argument did not distinguish claim 137 because "Mark teaches pediatric patients which necessarily encompasses human

infants and children." Board Op. at *26. We discern no error in the finding that claim 137, which includes "human infants," is anticipated by Mark's reference to children ages 1–10.

The Board received argument of the general unpredictability of components of natural products, and deemed this argument irrelevant because "the Examiner relies upon evidence of particular compositions of walnut oil or olive oil that satisfy the requirements of claim 65." Board Op. at *11. This is a correct application of the law of anticipation, for compositions containing the components and ratios in claim 65 are shown in Mark for uses that include the pediatric use described in Mark. The Applicant's claims are all directed to formulations and compositions, not to any asserted new use.

The Board also found that while "casing" and "dosage" are not expressly defined, the specification states that any "orally accepted form" of delivery is within the scope of the claims. Board Op. at *9. The specification states that "the compositions comprising the lipid formulation disclosed herein may be administered to an individual by any orally accepted form." J.A. 65 ¶34. The Board found that the "casing" and "dosage" terms do not impart patentability to the claimed compositions, and we agree, for the specification states that these claim elements are not limiting, and does not describe any assertedly novel characteristics of these components or their formulations.

The Applicant also argues that Mark does not teach "steady delivery" as required by claim 78. Claim 78 states "the formulation provides gradual and/or steady delivery so that any omega-3 withdrawal is gradual, and/or any omega-6 and/or other fatty acid increase is gradual." The Board found that claim 78 does not recite a patentably significant difference from Mark's typical feeding regimen of 50 mL/hour for 20 hours. Board Op. at *24. The Applicant does not provide any distinction in claim 78 from

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