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XBiotech, Inc.
5425 Park Central Court
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ALLEN, MARIANNE P

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN SIMARD

Appeal 2014-005641
Application 13/437,159
Technology Center 1600

Before DONALD E. ADAMS, JOHN G. NEW, and RICHARD J. SMITH,
Administrative Patent Judges.

ADAMS, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING¹

Appellant requests rehearing of the Decision, entered into the record July 27, 2016, affirming the rejection of: Claims 1–4 and 8 under 35 U.S.C. § 102(b) as anticipated by Witte²; Claims 1–8 under 35 U.S.C. § 103(a) as unpatentable over the combination of Witte, Simard,³ Mizutani,⁴ and Skurkovich;⁵ and, Claims 1–7 under the judicially created doctrine of

¹ Appellant identifies the Real Party in Interest as “XBiotech, Inc.” (Br. 3.)

² Witte et al., US 2003/0026806 A1, published Feb. 6, 2003.

³ Simard, US 2009/0298096 A1, published Dec. 3, 2009.

⁴ Hitoshi Mizutani et al., *Endogenous neutralizing anti-IL-1 α autoantibodies in inflammatory skin diseases: possible natural inhibitor for over expressed epidermal IL-1*, 20 J. DERM. SCI. 63–71 (1999).

⁵ Skurkovich et al., US 2005/0276807 A1, published Dec. 15, 2005.

obviousness-type double patenting as being unpatentable over claims 1–6 of copending Application 13/644,976 (Decision 1–6).

The method of Appellant’s claim 1 comprises administering, to a subject, a composition comprising: (1) a pharmaceutically acceptable carrier and (2) an amount of an agent (e.g., an anti-IL-1 α antibody) that selectively binds IL-1 α and is effective to reduce skin inflammation in the subject (Decision 2). Claims 2–8 depend directly or indirectly from claim 1 (*id.*).

Appellant contends that “Witte does not directly state that an anti-IL-1 α antibody is effective to reduce skin inflammation in particular” (Req. Reh’g ¶¶ 1, 4, and 5). We are not persuaded (*see* Decision 4, citing FF 1–7). In this regard, Witte “relates to antibodies . . . , compositions, uses and methods for treating . . . IL-1 mediated disorders,” such as “psoriasis” that comprises the administration of a composition comprising a pharmaceutically acceptable carrier and an effective amount of an anti-IL-1 α monoclonal antibody to treat the IL-1 mediated disorder, psoriasis (FF 1–7). Appellant fails to establish an evidentiary basis on this record to support a finding that psoriasis is *not* a condition that involves skin inflammation in the subject.

Appellant contends that the Decision failed to establish “that any of the conditions Witte lists as ‘IL-1 mediated diseases’ are specifically associated with IL-1 α as opposed to IL-1 β ” (Req. Reh’g ¶¶ 2, 3, and 7). We are not persuaded. Appellant’s claimed invention does not require the skin inflammation to be “specifically associated with IL-1 α as opposed to IL-1 β ” (*see id.*; *cf. id.* ¶ 6, citing *Richardson v. Suzuki Motor Co.*, 868 F.2d, 1226, 1236 (Fed. Cir. 1989), (“To find anticipation ‘[t]he identical invention must be shown in as complete detail as is contained in the . . . claim”)) (alteration

original)). To the contrary, Appellant's claim requires only the administration of a composition comprising a pharmaceutically acceptable carrier and an amount of IL-1 α antibody that is effective to *reduce skin inflammation in the subject* (Decision 2). Appellant provides no persuasive evidence or argument to support a different finding.

Notwithstanding Appellant's contention to the contrary, Witte expressly defines an antibody as an agent "that binds 'IL-1 α or IL-1 β ' or both of IL-1 α and IL-1 β " (Decision 3: FF 2). Thus, Witte teaches that anti-IL-1 α and/or IL-1 β antibodies are effective in treating psoriasis (Decision 3–4). Appellant provides no persuasive evidence or argument to support a different finding.

Having found no deficiency in Witte, we are not persuaded by Appellant's contention regarding Examiner's rejection under 35 U.S.C. § 103(a) involving the combination of Witte, Simard, Mizutani, and Skurkovich (Req. Reh'g ¶ 9; *cf.* Decision 5–6).

To be complete, Appellant does not address the rejection under the judicially created doctrine of obviousness-type double patenting (*see* Decision 3).

In conclusion, Appellant failed to identify an issue of fact or law that was overlooked or misunderstood. Therefore the Request for Rehearing is denied.

TIME PERIOD FOR RESPONSE

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