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MARVIN A. GLAZER 2141 E. HIGHLAND AVE SUITE 155 PHOENIX, AZ 85016			JEAN-LOUIS, SAMIRA JM	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RORY J. ALBERT and MICHAEL R. BLAIRE¹

Appeal 2015-005276
Application 13/195,194
Technology Center 1600

Before ERIC B. GRIMES, TAWEN CHANG, and
DEVON ZASTROW NEWMAN, *Administrative Patent Judges*.

NEWMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a composition for topical treatment of ear infections in animals. The Examiner entered final rejections for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

STATEMENT OF THE CASE

“The present invention relates to a liquid composition which is effective in the topical treatment of animal ear infections, its method of

¹ Appellants identify the Real Party in Interest as the joint inventors named above. Br. 3.

formulation, and its manner of use to treat ear infections in animals. The composition includes an antifungal agent, an antibiotic agent, a steroidal anti-inflammatory agent, and an acid. In the preferred embodiment, the composition further includes dehydrated alcohol and propylene glycol to dissolve and combine the previously-mentioned components.” Spec. 2:18–24.

Claims 1–13 are on appeal. Claim 1 is illustrative and reads as follows:

1. A composition for topical treatment of ear infections in animals comprising:
 - a. an antifungal agent;
 - b. an antibiotic agent;
 - c. a steroidal anti-inflammatory agent; and
 - d. an anhydrous organic acid;
 - e. liquid dehydrated alcohol; and
 - f. propylene glycol.

Br. Claims App’x. 19.

The claims stand rejected as follows:

Claims 1–12 are rejected under 35 U.S.C. § 103(a) as obvious over Jones,² Rosenberg,³ Lipsky,⁴ and Erowid.⁵ Ans. 4.

² U.S. 6,126,920, issued Oct. 3, 2000 (“Jones”)

³ U.S. 4,569,935, issued Feb. 11, 1986 (“Rosenberg”)

⁴ BA Lipsky, et al., *Oflaxacin versus cephalixin for treating skin and soft tissue infections*, 31(6) INT. J. DERMATOL., 443-445(1992) (“Lipsky”)

⁵ Erowid Alcohol Vault: Alcohol Chemistry (entry regarding “ethyl alcohol”) published online Nov. 1999, printed by Examiner October 24, 2012, pp. 1–2 (“Erowid”)

Claim 13 is rejected under 35 U.S.C. § 103(a) as obvious over Jones, Rosenberg, Lipsky, Erowid, and Gleich.⁶ Ans. 9.

I

The Examiner has rejected claims 1–12 on appeal as obvious based on Jones, Rosenberg, Lipsky, and Erowid. The Examiner finds that Jones teaches “a foamable pharmaceutical composition comprising a corticosteroid active substance, a quick break foaming agent, a propellant and a buffering agent for the treatment of various skin diseases.” Ans. 5. The Examiner additionally finds that Jones teaches “addition of alcohol to the quick break agent and other additives including humectants such as propylene glycol in order to reduce the drying effects of the alcohol,” “triamcinolone acetonide as the corticosteroid,” and “anhydrous citric acid/potassium citrate” as the preferred buffering agent. *Id.* at 6.

The Examiner finds that Jones does not “teach addition of an antifungal agent, an antibiotic agent, or that the alcohol is dehydrated alcohol.” *Id.* The Examiner relies on Rosenberg for its disclosure that imidazole can be used to “treat skin diseases including psoriasis and seborrheic dermatitis . . . is preferably ketoconazole . . . and “is useful in controlling or inhibiting growth of . . . fungi.” *Id.* at 6–7. The Examiner relies on Lipsky’s teaching that “ofloxacin is a good alternate antibiotic for treating skin and skin structure infections caused by a variety of pathogens.” *Id.* at 7. The Examiner relies on Erowid to demonstrate that “dehydrated alcohol is known as ethanol or ethyl alcohol in the art” and “dehydrated

⁶ U.S. 5,837,713, issued Nov. 17, 1998 (“Gleich”)

alcohol is useful in the art as a solvent or a pharmaceutical aid and useful as an antiseptic.” *Id.* at 7.

The Examiner concludes that,

[g]iven the teachings of Jones, Rosenberg, Lipsky, and Erowid, one of ordinary skill would have been motivated to add ketoconazole, ofloxacin and dehydrated alcohol to the modified composition of Jones with the reasonable expectation of providing a topical composition that is effective in treating various skin diseases and a composition with enhanced antiseptic properties.

Id. at 8.

Appellants argue, among other points, that

Lipsky teaches the *oral* administration of ofloxacin (“300 mg orally, [twice daily]”) to treat acute localized skin or soft tissue infections. In contrast, Jones is directed to a foamable composition that applies an anti-inflammatory for treating skin diseases like psoriasis and eczema, wherein the quick-break foam breaks down at skin temperature to a liquid to saturate the treatment site []. Jones and Lipsky are directed to two different types of skin maladies, and are practiced using two different administration modalities (oral v. topical). Rather than finding it “obvious” to combine such teachings, those skilled in the art would be discouraged from even attempting to combine such techniques, since they are directed to two different maladies, and since Lipsky teaches oral administration, while Jones teaches topical administration.

Br. 12.

In response, the Examiner finds

[w]hile Lipsky teaches oral administration of ofloxacin, . . . it is well known in the art that ofloxacin can be applied orally, topically, intravenously, ocularly or as ear drops. Moreover, . . . Lipsky was provided to demonstrate that ofloxacin is known to be effective for treating skin and skin structure infections and thus one skilled in the art would have found it

obvious to further add ofloxacin in the modified composition of Jones if the desire is to enhance[] the anti-skin disease effect and in light of Kerkhoven⁷ who teaches that it is prima facie obvious to combine compositions known individually for the same purpose into a third composition for the very same purpose.

Ans. 12.

We are persuaded by Appellants that a preponderance of the evidence does not support the Examiner's finding that Lipsky's teachings render the topical use of ofloxacin for skin maladies obvious. The Examiner does not supply any teaching in Lipsky or any of the other references to support the finding that "it is well known in the art that ofloxacin can be applied orally, topically, intravenously, ocularly or as ear drops." *Id.* Without such a teaching, we agree that the Examiner has not shown that a person of ordinary skill in the art would be motivated to use the ofloxacin of Lipsky, which is taught for oral use only, in a modified composition of Jones intended for topical application. Because the Examiner has not provided evidence sufficient to support a prima facie case of obviousness, we reverse the rejection of claims 1–12 as obvious based on Jones, Rosenberg, Lipsky, and Erowid. *See In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993) ("In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.").

⁷ The Examiner cites *In re Kerkhoven*, 626 F.2d 846, 850 (CCPA 1980).

II

The Examiner has rejected claim 13 as obvious over Jones, Rosenberg, Lipsky, Erowid, and Gleich. As discussed above, however, the Examiner has not shown that Jones, Rosenberg, Lipsky, and Erowid teach all of the limitations of claim 1, from which claim 13 depends. We therefore reverse the rejection under 35 U.S.C. § 103(a).

SUMMARY

The Examiner's rejection of claims 1–13 is reversed.

REVERSED