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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KAREN JOY WEDEKIND¹

Appeal 2015-005778
Application 12/161,583
Technology Center 1600

Before DONALD E. ADAMS, TAWEN CHANG, and
RACHEL H. TOWNSEND, *Administrative Patent Judges*.

CHANG, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) involving claims to a method of reducing the risk of developing chronic renal failure in a feline, which have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

According to the Specification, chronic renal failure (CRF) is “one of the leading causes of death in felines” and “there is a need for compositions

¹ Appellant identifies the Real Party in Interest as Hill’s Pet Nutrition, Inc. (Appeal Br. 2.)

and methods for preventing CRF in felines” and “for treating CRF which provide partial or complete relief.” (Spec. ¶ 4.)

Claims 1–3, 6–9, and 12–14 are on appeal. Claims 1 and 14 are illustrative and reproduced below:

1. A method for reducing the risk of development of chronic renal failure in a feline in need thereof, the method comprising feeding the feline a composition comprising from about 28 to about 38% protein on a dry matter basis, wherein the protein comprises at least 75% vegetable protein.

14. The method of claim 8 wherein the method further comprises administering to the feline an anti-chronic renal failure agent wherein the anti-chronic renal failure agent is selected from the group consisting of agents that reduce blood pressure, that reduce protein loss in urine, that are anabolic steroid agents, that are antibiotic agents, that treat anemia, that control vomiting, and combinations thereof.²

(Appeal Br. 6 (Claims App’x).)

The Examiner rejects claims 1–3, 6–9, and 12–14 under 35 U.S.C. § 103(a) as being unpatentable over Sunvold. (Ans. 2.)

The Examiner provisionally rejects claims 1–3, 6–9, and 12–14 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–11, 14–26, and 29–33 of co-pending Application No. 12/300,539. (Ans. 5.)

² Claim 8 recites “[a] method for treating chronic kidney disease in a feline comprising feeding the feline in need thereof a composition that comprises from about 26 to about 30% protein on a dry matter basis wherein the protein comprises at least 75% vegetable protein.” (Appeal Br. 6 (Claims App’x).)

I.

Issue

The Examiner has rejected claims 1–3, 6–9, and 12–14 under 35 U.S.C. § 103(a) as obvious over Sunvold. (Ans. 2.) The Examiner finds that Sunvold discloses “methods of improving clinical signs associated with renal disease by feeding a pet food composition to a companion animal such as a dog or cat.” (Ans. 2.) The Examiner finds that Sunvold teaches that its composition is “a low-phosphorus pet food composition . . . comprising from about 10 to about 32% crude protein.” (*Id.*) The Examiner finds that Sunvold teaches that “[p]referred low-phosphorus sources of protein . . . include soy protein isolate and corn gluten meal’ . . . , i.e., vegetable proteins, implicitly disclosing that as much as 100% of the protein, i.e., at least 75% of the protein[,] is vegetable protein, as recited by claims 1 and 8.” (*Id.* at 2–3.) The Examiner finds that Sunvold teaches that its composition “may also contain . . . omega-6 and omega-3 fatty acids, which decrease blood triglyceride levels and lower intra-renal blood pressure,” thus, teaching a composition comprising “an anti-chronic renal failure agent which is an agent that reduces blood pressure . . . , as recited by claim 14.” (*Id.* at 3.)

Relying on Sunvold’s disclosure that the protein in its composition “preferably comprises 5–15% of soy protein isolate and 0.5-2.5% corn gluten meal,” Appellant contends that “Sunvold fails to disclose or suggest the required ranges of protein, and in particular, at least 75% vegetable protein.” (Br. 3–4 (emphasis omitted).) With respect to claim 14, Appellant contends that the omega-6 and omega-3 fatty acids disclosed by Sunvold are not “agents that reduce blood pressure,” because that claim limitation

“should be accorded [its] normal meaning as known in the art, i.e., agents that lower arterial pressure of the systemic circulation.” (*Id.* at 4.)

The issues with respect to this rejection are whether Sunvold discloses or suggests: (1) “a composition comprising from about 28 to about 38% protein on a dry matter basis, wherein the protein comprises at least 75% vegetable protein” as recited in claim 1, and (2) “administering . . . an anti-chronic renal failure agent wherein the anti-chronic renal failure agent is selected from the group consisting of agents that reduce blood pressure . . . ,” as recited in claim 14.

Findings of Fact

1. Sunvold discloses “[a] pet food composition which, when fed to a companion animal such as a dog or cat, results in an improvement in several clinical signs associated with renal disease.” (Sunvold 3:45–48; *see also id.* at Abstract.)

2. In particular, Sunvold teaches “a composition which includes from about 10 to about 32% crude protein.” (*Id.* at Abstract, 2:4–8, 3:10–21, 5:7–13, 5:54–58, 13:49–54 (claim 1, noting that all percentages are by weight on a dry matter basis), 14:9–40 (claim 9).)

3. Sunvold teaches that “[p]revious scientific research has indicated that lowering dietary intake of phosphorus is beneficial to lessening the progression of renal disease.” (*Id.* at 1:28–30; *see also id.* at 5:20–22.)

4. Sunvold teaches that, “[i]n order to maintain . . . low phosphorus content while still providing an adequate amount of amino acids [in its pet food composition,] a combination of low phosphorus-containing protein sources are utilized.” (*Id.* at 2:62–65; *see also id.* at 5:22–25.)

5. Sunvold teaches that “[p]referred low phosphorus sources of protein for the composition include soy protein isolate and corn gluten meal.” (*Id.* at 2:65–67; *see also id.* at 5:25–27, 13:56–58 (claim 2).)

6. Sunvold discloses that “[l]owering the level of blood triglycerides in an animal with renal disease is important as high triglyceride levels are often manifested with the disease.” (*Id.* at 5:49–51; *see also id.* at 1:42–46.)

7. Sunvold discloses that the diet of its invention may also include sources of omega-6 and omega-3 fatty acids in a ratio from about 1:1 to about 10:1 of omega-6 fatty acids to omega-3 fatty acids. Such a combination of these fatty acids increase the activity of lipoprotein lipase (LPL) in the animal. Increased LPL activity increases fatty acid oxidation and thus decreases blood triglyceride levels. The omega-6:omega-3 fatty acid ratio also results in lower intra renal blood pressure and reduces inflammatory mediators.
(*Id.* at 6:9–17; *see also id.* at 3:29–33.)

8. The Specification defines “anti-CRF agent” as “a compound, a derivative thereof (*e.g.*, a salt, solvate, or hydrate of the compound), or a composition comprising such compounds and/or derivatives that is used to prevent and/or treat CRF.” (Spec. ¶ 25.)

Analysis

Claim 1

Sunvold teaches feeding a pet food composition to a cat to improve clinical signs associated with renal disease (FF1), where the composition comprises about 10 to about 32% crude protein on a dry matter basis (FF2). Sunvold further teaches that a combination of low phosphorus-containing proteins are utilized for its composition and that preferred sources of such

low-phosphorus proteins include soy protein isolate and corn gluten meal. (FF4, FF5.) The range of percentage protein in Sunvold's pet food composition overlaps the claimed range of "about 28% to about 38%," and Appellant has not disputed that soy protein isolate and corn gluten meal are vegetable proteins. "A prima facie case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art." *In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003). Accordingly, we find that the Examiner has established a prima facie case that Sunvold suggests "a composition comprising from about 28 to about 38% protein on a dry matter basis, wherein the protein comprises at least 75% vegetable protein," as recited in claim 1.

Appellant contends that "Sunvold discloses the protein preferably comprises 5-15% of soy protein isolate and 0.5-2.5% corn gluten meal." (Br. 3 (emphasis omitted).) Appellant argues that, to the extent these vegetable proteins comprise 100% of the protein in Sunvold's composition, or 75% as recited in claim 1, Sunvold's composition would comprise at most 17.5% or 23% protein rather than about 28 to about 38% as claimed. (*Id.* at 3-4.) Appellant further argues that, as Sunvold is otherwise "silent as to the amount of vegetable protein that may be present in the broadest range of crude protein disclosed, i.e., about 10 to about 32%," Sunvold fails to disclose or suggest the required ranges of protein where at least 75% of the protein comprise vegetable protein. (*Id.*)

We are not convinced. Appellant focuses only on a preferred embodiment in Sunvold, but "[p]atents are . . . relevant for all they contain." *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991). Neither are we persuaded by Appellant's argument that Sunvold is "silent as to the amount of

vegetable protein that may be present in the broadest range of crude protein disclosed.” (Br. 4.) “A person of ordinary skill is also a person of ordinary creativity, not an automaton,” and the obviousness analysis “can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 421 (2007). Sunvold discloses a pet food composition having about 10% about 32% protein, and further teaches that preferred protein sources are proteins derived from soy and corn (i.e., vegetable proteins). (FF2, FF4.) Based on these disclosures, we agree with the Examiner that a skilled artisan would find obvious a pet food composition containing 10–32% protein where all (i.e., at least 75%) of the protein comprise vegetable protein. (Ans. 2–3, 8–9.)

Claim 14

We agree with the Examiner that Sunvold discloses the limitation in claim 14 relating to “administering . . . an anti-chronic renal failure agent wherein the anti-chronic renal failure agent is selected from the group consisting of agents that reduce blood pressure” (Ans. 3, 10–11.) The Specification defines “anti-CRF agent” as “a compound, a derivative thereof . . . , or a composition comprising such compounds and/or derivatives that is used to prevent and/or treat CRF.” (FF8.) Sunvold teaches that “[l]owering the level of blood triglycerides in an animal with renal disease is important as high triglyceride levels are often manifested with the disease.” (FF6.) Sunvold also teaches including as part of its pet food composition sources of

omega-6 and omega-3 fatty acids, which decrease blood triglyceride levels and lower intra renal blood pressure.³ (FF7.)

Appellant argues that “‘agents that reduce blood pressure’ should be accorded[its] normal meaning as known in the art, i.e., agents that lower arterial pressure of the systemic circulation,” rather than agents that lower intra renal blood pressure. (Br. 4 (emphasis omitted).) Appellant relies on the Specification of its PCT application, which gives calcium channel blockers (e.g., amlodipine besylate) as an example of agents that reduce blood pressure. (*Id.*)

We are not persuaded. “[D]uring examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification.” *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000). While the Specification of Appellant’s PCT application describes calcium channel blockers as examples of agents that reduce blood pressure, it does not limit agents that reduce blood pressure to calcium channel blockers or otherwise limit such agents to those that lower arterial pressure of the systemic circulation.

Accordingly, we affirm the Examiner’s rejection of claims 1 and 14. Claims 2, 3, 6–9, 12, and 13 have not been argued separately and therefore fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

³ Claim 14 depends from independent claim 8 and further requires the administering step discussed above. Appellant did not separately argue claim 8, which is obvious for the same reasons discussed above with respect to claim 1.

II.

Appellant does not contest the provisional obviousness-type double patenting rejection. We therefore summarily affirm this rejection. *See* MANUAL OF PATENT EXAMINING PROCEDURE § 1205.02 (“If a ground of rejection stated by the examiner is not addressed in the appellant's brief, that ground of rejection will be summarily sustained by the Board.”)

SUMMARY

For the reasons above, we affirm the Examiner's decision rejecting claims 1–3, 6–9, and 12–14.

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).

AFFIRMED