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blake.morgan@allergan.com
pair_allergan@firsttofile.com
patents_ip@allergan.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTOPHER A. DADAS and
TAMER ABOUSHWAREB

Appeal 2019-003280
Application 14/722,473
Technology Center 1600

Before DONALD E. ADAMS, ERIC B. GRIMES, and TAWEN CHANG,
Administrative Patent Judges.

CHANG, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING

Appellant¹ requests rehearing of the decision entered 18, 2019 (“Decision”), which entered a new ground of rejection of claim 1 as obvious over Veeratterapillay and Schmidt.

We deny the requested relief.

DISCUSSION

Appellant contends that “Schmidt does not contemplate stones, much less bladder calculi formation associated with bladder augmentation surgery,

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42.

as one of the symptoms of urinary retention that can be treated by local administration of botulinum toxin.” Req. Reh’g 2.

We are not persuaded. “Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole.” *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). In this case, while Schmidt does not specifically mention bladder calculi (i.e., stone) formation caused by bladder augmentation surgery, Veeratterapillay teaches that bladder stones in augmentation cystoplasty are thought to arise as a result of urinary stasis (i.e., retention), while Schmidt similarly teaches that stones may be a symptom of urinary retention and further teaches that administering a therapeutic amount of botulinum toxin into the bladder wall of a patient with urinary retention can relieve said urinary retention *and/or a symptom thereof*. Veeratterapillay 325; Schmidt 2:30–32; 5:61–66; 6:31–35; 7:42–47.

Appellant cites to other portions of Schmidt as teaching that “botulinum can be used to treat urinary retention caused by a hypertrophied bladder neck and/or symptoms of it,” that “[s]ymptoms of urinary retention include recurrent bladder infection, incontinence, and urge incontinence,” and that “preferred symptom[s] to relieve by methods of the present invention include increased incidents of UTIs . . . or recurrent infection . . . [,] urge incontinence and incontinence.” Req. Reh’g 2. These passages do not render irrelevant Schmidt’s general teaching that bladder stones may be a symptom of urinary retention and that botulinum toxin is useful for treating symptoms of urinary retention: “It is well settled that a prior art

reference is relevant for all that it teaches to those of ordinary skill in the art,” not merely its preferred embodiments. *In re Fritch*, 972 F.2d 1260, 1264 (Fed. Cir. 1992). In short, the additional passages in Schmidt Appellant cites do not support Appellant’s contention that “[n]owhere does Schmidt consider stones as a symptom of urinary retention that is treatable by botulinum toxin.” *Id.*

Appellant concedes that “Schmidt discloses that ‘[s]tones may also form in the urinary tract of individuals with urinary retention caused by the stoppage of urine flow and/or infection.’” Req. Reh’g 2. Appellant argues, however, that Schmidt teaches that “urinary retention *caused by a hypertrophied bladder neck . . . can be treated by botulinum toxin*” and “the Board has not established that urinary retention caused by the stoppage of urine flow and/or infection equates to urinary retention caused by a hypertrophied bladder neck.” *Id.* Req. Reh’g 2 (emphasis added). Appellant contends that Veeratterapillay adds nothing to Schmidt’s disclosure on this point.

We are not persuaded. As discussed above, and contrary to Appellant’s argument, Schmidt’s teaching is not limited to treatment of urinary retention *caused by a hypertrophied bladder neck*. Rather, Schmidt generally teaches that botulinum toxin may be used to treat urinary retention and/or its symptoms. *See, e.g.*, Schmidt Abstract (invention relates to methods for treating urinary retention by administering botulinum toxin into lower urinary tract of patient); 5:61–66 (generally teaching method for relieving urinary retention and/or symptoms thereof by administering botulinum toxin); 7:42–60 (teaching method of treating urinary retention

where urinary retention is due to causes other than hypertrophied bladder neck, including where urinary retention is due to idiopathic causes).

Appellant contends that, assuming Schmidt teaches that “stones are symptoms of urinary retention caused by a hypertrophied bladder neck, the fact that Schmidt is aware of stones but fails to list stones as a symptom treatable by botulinum toxin does not support the Board’s position that bladder calculi formation associated with bladder augmentation surgery is a symptom of urinary retention treatable by botulinum toxin.” Req. Reh’g 2.

We are not persuaded for reasons similar to those already discussed above. Schmidt teaches that stones may be a symptom of urinary retention and that botulinum toxin can relieve urinary retention and/or a symptom thereof. Schmidt 2:30–32; 5:61–66; 6:31–35; 7:42–47. The fact that Schmidt does not list stones as a symptom of urinary retention treated by botulinum toxin in its preferred embodiment does not render treatment of stones by botulinum toxin non-obvious. *In re Fritch*, 972 F.2d at 1264.

Appellant contends that “the Board’s unspoken theory that a therapy for any given disease (such as urinary retention) would necessarily treat every condition/complication/symptom (such as the alleged stones) resulting from the disease is baseless and lacks scientific support.” Req. Reh’g 3.

We are not persuaded. The obviousness rejection of claim 1 over Veeratterapillay and Schmidt was not based on an “unspoken theory that a therapy for any given disease . . . would necessarily treat every condition/complication/symptom . . . resulting from the disease.” Rather, as discussed above and in the Decision, the rejection is based on the teaching in Veeratterapillay and Schmidt that bladder stones, including stones in augmentation cystoplasty, may be a symptom of urinary retention, and

Schmidt's teaching that administration of botulinum toxin can relieve urinary retention and/or its symptoms.

Finally, Appellant contends that, "under an analysis analogous to the Board's causative reasoning, evidence on the record, including Linsenmeyer and Veeratterapially [sic], together actually teaches against using botulinum toxin to treat bladder stone associated with bladder augmentation," because Veeratterapillay teaches that bladder stones are thought to arise as a result of urinary retention, while Linsenmeyer teaches that one of botulinum toxin's side effects is urinary retention. *Id.* at 3–4.

We are not persuaded. Linsenmeyer does teach that urinary retention is a potential adverse reaction following injection of botulinum neurotoxin A for treatment of neurogenic detrusor overactivity. Linsenmeyer Abstract; 414, right column; 415, left column; Table 2. However, "[w]here the prior art contains 'apparently conflicting' teachings (i.e., where some references teach the combination and others teach away from it) each reference must be considered 'for its power to suggest solutions to an artisan of ordinary skill. . . . consider[ing] the degree to which one reference might accurately discredit another.'" *Medichem S.A. v. Rolabo S.L.*, 437 F.3d 1157, 1165 (Fed. Cir. 2006) (quoting *In re Young*, 927 F2d 588, 591 (Fed. Cir. 1991)).

In this case, Linsenmeyer notes that, in one study at least, incidents of urinary retention primarily occurred in patients with multiple sclerosis and was also more frequent at higher dosages (e.g., 300 U). Linsenmeyer 415, left column. Given this relatively limited teaching and especially given Schmidt's explicit teaching that botulinum toxin can relieve urinary retention and its symptoms, we find that a skilled artisan would find the method of claim 1 to be obvious in light of the combination of references

despite Linsenmeyer’s teaching of urinary retention as a potential adverse reaction following injection of botulinum neurotoxin A.

CONCLUSION

We have carefully reviewed the original decision in light of Appellant’s request, but we find no point of law or fact which we overlooked or misapprehended in arriving at our decision. Therefore, Appellant’s request is denied with respect to making any modifications to the Decision.

Outcome of Decision on Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Denied	Granted
1	103	Veeratterapillay, Schmidt	1	

Final Outcome of Appeal after Rehearing:

Claims	35 U.S.C. §	Reference(s) / Basis	Affirmed	Reversed	New Ground
1–4, 7–9, 11, 13	103	Linsenmeyer, Veeratterapillay		1–4, 7–9, 11, 13	
1, 5–8, 10, 12	103	Linsenmeyer, Veeratterapillay, Brin		1, 5–8, 10, 12	
14	103	Linsenmeyer, Veeratterapillay, Brin, Schmidt		14	
1	103	Veeratterapillay, Schmidt			1
Overall Outcome				1–14	1

Appeal 2019-003280
Application 14/722,473

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED