

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 42

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEISUKE FUJITA

Appeal No. 1996-2413
Application 08/120,194

HEARD: March 20, 2000

Before GARRIS, PAK, and LIEBERMAN, Administrative Patent
Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1,
2, 6 through 8 and 12 through 15 which are all of the claims
pending in the application.

The subject matter on appeal relates to a vacuum freeze-

Appeal No. 1996-2413
Application No. 08/120,194

dried mass consisting essentially of freeze dried ingredients of the entire leaf of a plant belonging to the genus Aloe. Further details of this appealed subject matter are set forth in representative independent claim 1 which reads as follows:

1. A vacuum freeze-dried mass made by homogenizing an entire leaf of a plant belonging to the genus Aloe of the family Liliaceae to produce a crushed Aloe liquid and then freeze-drying said crushed Aloe liquid in a vacuum to produce said vacuum freeze-dried mass, said mass consisting essentially of freeze dried ingredients of said entire leaf.

The references set forth below are relied upon by the examiner as evidence of obviousness:

Tovey	4,493,822	Jan. 15, 1985
McAnalley	4,966,892	Oct. 30, 1990
Grossman et al. (Grossman)	4,976,960	Dec. 11, 1990
Dennis et al. (Dennis)	5,137,730	Aug. 11, 1992 (filed May 28, 1991)
Hanada (Japanese '390)(translation copy attached)	40012390	Jun. 17, 1965
Marsh (South Africa '391)	693,391	May 12, 1969
Marsh (Great Britain '887)	1,199,887	Jul. 22, 1970
Kobayashi et al. (Japanese '526)(translation copy attached)	60109526	Jun. 15, 1985

On the record before us, claims 1, 2 and 12 are rejected

Appeal No. 1996-2413
Application No. 08/120,194

under 35 U.S.C. § 103 as being unpatentable over Japanese '526 in view of Great Britain '887, South Africa '391 in view of McAnalley and Japanese '390, and claims 6 through 8 and 12 through 15 are correspondingly rejected over these references and further in view of Tovey in view of Dennis and Grossman.¹

We refer to the brief and reply brief and to the answer for a thorough exposition of the opposing viewpoints expressed by the appellant and by the examiner concerning the above noted rejections.

OPINION

For the reasons which follow, we will sustain the rejections before us on this appeal.

We share the examiner's conclusion that the applied references establish a prima facie case of obviousness with respect to the subject matter defined by, for example, independent claim 1 on appeal. Concerning this issue, the appellant argues that Japanese '526 "does not disclose vacuum freeze-drying an entire leaf of an aloe plant" and indeed that

¹On page 3 of the brief, the appellant states that "[c]laims 1, 2, 6-8 and 12-15 stand or fall together". See 37 CFR § 1.192(c)(7)(1995).

Appeal No. 1996-2413
Application No. 08/120,194

in the disclosure of this reference "[t]here is no freeze-drying step at all" (brief, page 9). This argument is unpersuasive.

Contrary to the appellant's belief, Japanese '526 discloses "aloe (leaf, stem)" as an example of the plant materials envisioned for treatment by the process of this reference (see the second full paragraph on translation page 7) and discloses freeze-drying to a dried powder the liquid obtained from the plant material (see the last sentence in the paragraph bridging translation pages 9 and 10). From our perspective, the teachings of Japanese '526 including the aforementioned disclosures would have suggested a vacuum freeze-dried mass consisting essentially of freeze dried ingredients of an entire leaf from an aloe plant in accordance with the appellant's independent claim 1. Moreover, it is reasonable to consider the freeze dried powder obtained from an aloe leaf in accordance with the Japanese reference as corresponding to the here claimed freeze dried mass particularly in view of the correspondence between the process steps by which these respective products are made (e.g., compare the Japanese grinding step to the appellant's claimed

Appeal No. 1996-2413
Application No. 08/120,194

homogenizing step and the Japanese freeze-drying to the appellant's claimed freeze-drying step).

Under these circumstances, it is appropriate to require the appellant to prove that the freeze dried powder obtained from an aloe leaf in accordance with Japanese '526 does not necessarily or inherently possess the characteristics of the here claimed product. Whether the rejection is based on "inherency" under 35 U.S.C. § 102, on prima facie obviousness under 35 U.S.C. § 103, jointly or alternatively, the burden of proof is the same, and its fairness is evidenced by the inability of the Patent and Trademark Office to manufacture products or to obtain and compare prior art products. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-434 (CCPA 1977).

On this record, the appellant has not carried his above mentioned burden. Although a section 1.132 declaration was filed October 30, 1992 in the appellant's parent application (i.e., 07/713,052) as pointed out in the brief, this declaration compares products in accordance with the appellant's invention and products in accordance with the invention disclosed in the McAnalley (not Japanese '526) reference. It follows that the reference evidence adduced by

Appeal No. 1996-2413
Application No. 08/120,194

the examiner establishes a prima facie case of obviousness with respect to the subject matter defined by, for example, appealed claim 1 which has not been successfully rebutted by the appellant with objective evidence of nonobviousness.

Similar reasoning applies to the other claims on appeal including, for example, independent claim 6. With respect to the Tovey, Dennis and Grossman references applied against this last mentioned claim, the appellant seems to believe that no reason exists for combining these references with the other applied references. In our view, however, it would have been obvious for one with ordinary skill in the art to combine the references in question in order to obtain the freeze dried powder of Japanese '526 in the desirable form of a tablet as required by appealed claim 6.

In light of the foregoing, we hereby sustain each of the section 103 rejections advanced by the examiner on this appeal.

The decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

Appeal No. 1996-2413
Application No. 08/120,194

AFFIRMED

	Bradley R. Garris)	
	Administrative Patent Judge)	
)	
)	
	Chung K. Pak)	BOARD OF
PATENT	Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
	Paul Lieberman)	
	Administrative Patent Judge)	

tdl

Appeal No. 1996-2413
Application No. 08/120,194

MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006-1888