

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARGIT NAGY, LIDIA FEDINA, RITA BALAZS,
BORBALA BARTA, GIZELLA TOTH, JUDIT MARCZIS and ANDRAS SZASZ

Appeal No. 95-2924
Application 08/061,356¹

ON BRIEF

Before KIMLIN, ELLIS and WALTZ, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-9, all the claims in the present application. Claim 1 is illustrative:

1. An aerosol preparation comprising 1 to 4% by mass of sodium cromoglycate suspended in a mixture of propellants containing 0.3 to 2.0% by mass of a dispersing agent consisting of oleyl oleate.

¹ Application for patent filed May 14, 1993. According to appellants, this application is a continuation-in-part of Application 07/789,196, filed November 8, 1991, now abandoned.

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The examiner relies upon the following references as evidence of obviousness:

Mygind et al. (Mygind)	4,385,048	May 24, 1983
Grohe	4,844,902	July 4, 1989
Purewal et al. (Purewal)	5,225,183	July 6, 1993

(filed Jan. 30, 1991)

Appellants' claimed invention is directed to an aerosol preparation comprising sodium cromoglycate as the active agent and oleyl oleate as the dispersing agent.

Appealed claims 1-9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Purewal in view of Grohe. In addition, claims 7-9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Purewal and Grohe in view of Mygind.

We have carefully reviewed the respective positions advanced by appellants and the examiner, including appellants' specification evidence of nonobviousness. As a result, we concur with appellants that the claimed aerosol preparation would not have been obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103 in view of the applied prior art. Accordingly, for essentially the reasons expressed by appellants in the principal and Reply Briefs on appeal, we will not sustain the examiner's rejections.

Purewal, the primary reference, discloses an aerosol formulation comprising the presently claimed active ingredient,

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sodium cromoglycate, and isopropyl myristate as one of many possible surfactants. Purewal does not disclose appellants' oleyl oleate as a surfactant in the aerosol formulation. To remedy this deficiency in Purewal the examiner relies upon Grohe as disclosing the "equivalency between isopropyl myristate and oleyl oleate in terms of their spreading capacity of the medicaments" (page 3 of Answer). Based on this equivalency of isopropyl myristate and oleyl oleate as spreading agents, the examiner concludes that the substitution of oleyl oleate for isopropyl myristate in the aerosol of Purewal would have been obvious to one of ordinary skill in the art.

The flaw in the examiner's reasoning is that Purewal teaches the use of isopropyl myristate as a surfactant in the aerosol preparation whereas Grohe teaches the equivalency of isopropyl myristate and oleyl oleate as spreading agents in liquid formulations. Grohe does not teach the use of isopropyl myristate and oleyl oleate as surfactants. Indeed, at column 5, lines 52 et seq., Grohe expressly discloses a list of surfactants which does not include either isopropyl myristate or oleyl oleate. Consequently, since Grohe teaches oleyl oleate as an equivalent for isopropyl myristate as a spreading agent in liquid formulations, we cannot agree with the examiner that Grohe evidences that one of ordinary skill in the art would have

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gleaned from Grohe that oleyl oleate would have been a suitable replacement for isopropyl myristate in the aerosol formulation of Purewal. As noted by appellants, although Grohe does disclose spray or aerosol formulations, such preparations do not include oleyl oleate.

Furthermore, appellants' specification includes comparative data which demonstrates that aerosol formulations comprising oleyl oleate are superior to aerosol formulations comprising isopropyl myristate with respect to membrane diffusion of the active ingredient, sodium cromoglycate. The examiner has not adequately refuted this objective evidence by noting that Composition "C" according to the present invention also contains sorbitan trioleate, which is not included in the claimed composition. This is so because the amount of sorbitan trioleate is a constant in Composition "A" and Composition "C", and, furthermore, the examiner has not explained why the presence of sorbitan trioleate would undermine the superiority demonstrated by oleyl oleate over isopropyl myristate.

The examiner cites Mygind in the rejection of claims 7-9 as evidence of the obviousness of using a propellant mixture. However, Mygind fails to supply the requisite teaching that is missing in the combined disclosures of Purewal and Grohe.

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In conclusion, based on our review of the totality of evidence before us, the examiner's decision rejecting the appealed claims is reversed.

REVERSED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
)	
)	
JOAN ELLIS)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
THOMAS A. WALTZ)	
Administrative Patent Judge)	

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