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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHARLES JOHN BERG, JR.,
DIANA LYNNE GANN, and THOMAS WARD OSBORN, III

Appeal 2010-004985
Application 10/881,888
Technology Center 3700

Before: LINDA E. HORNER, PHILLIP J. KAUFFMAN, and
NEIL A. SMITH *Administrative Patent Judges*.

KAUFFMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1-18. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

The Invention

Appellants' claimed invention "relates to an applicator, particularly, to a tampon applicator that comprises an indicia of low placement on the plunger of the applicator." Spec. 1:7-8. Claims 1 and 17 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An applicator capable of housing a tampon comprising:

an insertion member having a hollow interior, an insertion end opposed to a gripper end;

a plunger slideably configured within said insertion member; said plunger having a longitudinal axis, a first end opposed to a second end and an indicia of low placement;

said indicia of low placement being positioned between said first end and said second end of said plunger when said applicator is in a pre-insertion position.

Evidence Relied Upon and the Rejections¹

The following rejections are before us on appeal:

- I. Claims 1-14 under 35 U.S.C. § 102(b) as anticipated by Tweddell (US 6,302,861 B2; iss. Oct. 16, 2001);
- II. Claims 15 and 16 under 35 U.S.C. § 103(a) as unpatentable over Tweddell; and
- III. Claims 17 and 18 under 35 U.S.C. § 103(a) as unpatentable over Tweddell and Suga (US 2003/0065300 A1; pub. Apr. 3, 2003).

OPINION

I. Claims 1-14 as anticipated by Tweddell²

Independent claim 1 calls for an applicator that includes indicia of low placement positioned between the first and second ends of the plunger when the applicator is in a pre-insertion position.

The Specification states that indicia for low placement 40 is positioned on the plunger 30 as a cue to the user so that the tampon 36 is inserted at a low placement position in the vagina. The low placement position being a vertical position of the tampon 36 inside the vaginal cavity, wherein the insertion end 54 of the tampon 36 is positioned generally below the cervix and the withdrawal end 56 of the tampon 36 is positioned

¹ Claims 1, 3, and 12-18 were provisionally rejected on the ground of non-statutory obviousness-type double patenting as unpatentable over claims 1, 2, 4-7, and 9-11 of co-pending application 10/881,887. Final Office Action, pp. 5-6, dated Mar. 28, 2007. However, co-pending application 10/881,887 has since been abandoned. Further, the rejection is not listed as a ground of rejection in the Answer or the Appeal Brief. *See* Ans. 3-5; Br. 2. Therefore this rejection is not before us.

² Appellants argue claims 1-14 as a group (Br. 3-4) and we select claim 1 as representative.

generally above the hymenal ring (the demarcation between the vaginal cavity and the external genitalia). Spec. 3:6-7, 12-14; 11:3-7; fig. 1.

Therefore, claim 1 calls for the indicia itself to be positioned between the first and second ends of the plunger when the applicator is in the pre-insertion position, and calls for the indicia to function to provide a cue to the user to facilitate positioning the tampon in low placement (inside the vaginal cavity so that the insertion end is generally below the cervix and the withdrawal end is generally above the hymenal ring).

The Examiner found that Tweddell discloses an applicator (tampon applicator 20) that includes indicia (gripping portion 50) positioned between the first and second ends (leading end 28A and distal end 28B) of the plunger (plunger 28). Ans. 3; *see also* Tweddell, col. 5, ll. 13-15; col. 10, ll. 6-17; col. 11, ll. 37-40. Appellants do not contest that gripping portion 50 is “indicia” or that the indicia itself is positioned between the first and second ends of the plunger. *See* Br. 3-4.

The Examiner found that Tweddell’s gripping portion 50 serves as a positioning cue to the user. Ans. 3, 5; *see also* Tweddell, col. 10, ll. 14-15. Appellants acknowledge that Tweddell’s gripping portion 50 can function as a positioning indicator. Br. 3. However, according to Appellants, gripping portion 50 indicates, “when tampon 26 is deployed, it will expand laterally within the wearer’s vaginal cavity,” and the Examiner’s rejection fails “to point out how the indicia of Tweddell [(gripping portion 50)] can function as a low placement indicia.” *Id.*

First, as explained, *supra*, low placement as claimed refers to the vertical position of the tampon, and therefore Appellants’ contention regarding *lateral* expansion of the tampon is inapposite.

Second, contrary to Appellants' assertion, the Examiner has pointed out how Tweddell's indicia functions as low placement indicia as claimed. The Examiner finds, and we agree, that in use, Tweddell's applicator is positioned adjacent the vaginal opening with the indicator aligned so that when tampon 26 is deployed from the applicator, it will be placed low into the vaginal canal. Ans. 5; Tweddell, col. 4, ll. 24-25; col. 5, ll. 14-16; col. 10, ll. 40-52; fig. 3; *see also* Spec. 5:1-3³ (indicating similar deployment of the claimed tampon). In this deployed position, Tweddell's tampon 26 is positioned inside the vaginal cavity so that the insertion end is generally below the cervix and the withdrawal end is above the hymenal ring (i.e., low placement) as claimed.

As such, we sustain the rejection of claims 1-14.

II. *Claims 15 and 16 as unpatentable over Tweddell*⁴

III. *Claims 17 and 18 as unpatentable over Tweddell and Suga*⁵

The rejection of claims 15 and 16 over Tweddell, and the rejection of claims 17 and 18 over Tweddell and Suga, like the rejection of independent claim 1, each rely upon Tweddell as disclosing indicia of low placement as claimed. Ans. 4-5. Appellants argue that Tweddell does not disclose indicia of low placement as claimed. Br. 4-5. Our analysis of claim 1, *supra*, is applicable here, and we sustain the rejections of claims 15-18.

³ The page numbers on this page are misaligned, and we use indicated line numbers rather than actual line numbers.

⁴ Claims 15 and 16 depend from independent claim 1.

⁵ Independent claim 17 is similar to independent claim 1 with regard to the indicia of low placement limitation. Claim 18 depends from claim 17.

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Application 10/881,888

DECISION

We affirm the Examiner's decision to reject claims 1-18.

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).

AFFIRMED

Vsh