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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JIMMY JEN, AMELIA LASSER,  
DANIEL H. SHUMER, JUERGEN ANTON HAHN,  
RALPH SCHNEIDER, and HARTMUT GRATHWOHL

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Appeal 2010-007870  
Application 10/932,964  
Technology Center 3700

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Before: PHILLIP J. KAUFFMAN, GAY ANN SPAHN, 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, 3-13, 15, 17, 18, 20-22, 24, 25, 39, and 45. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part.

*The Invention*

Appellants' claimed invention relates to relates to "a delivery system for delivery of one or more medical devices, such as a stent, stent-graft or filter." Spec. para. [001]. Claims 1, 24, and 39 are the independent claims on appeal. Claim 39, reproduced below, is illustrative of the claimed subject matter:

39. A delivery system for delivery of a medical device, the delivery system comprising:

an inner member having a proximal end and a distal end, the inner member defining a longitudinal axis therebetween;

a tip formed at the distal end of the inner member;

a bumper freely disposed on the inner member and having no points of fixation therebetween, the bumper having a proximal end and a distal end, a seat being defined between the tip and the distal end of the bumper, the bumper including a sleeve member, the sleeve member having a length and a tubular wall, the tubular wall defining a longitudinal channel therein;

a sheath disposed about the inner member, the sheath having a proximal end and a distal end, the sheath being movable from a first sheath position substantially covering the seat, and a second sheath position axially offset to expose the seat; and

a handle connected to the proximal end of the inner member.

*Evidence Relied Upon*

Strecker	US 5,405,378	Apr. 11, 1995
Lukic	US 5,709,703	Jan. 20, 1998
Loeffler	US 5,891,154	Apr. 6, 1999
Baker	US 6,346,118 B1	Feb. 12, 2002
Wilson	US 6,425,898 B1	Jul. 30, 2002

*The Rejections*

The following rejections are before us on appeal:

- I. Claim 39 under 35 U.S.C. § 102(b) as anticipated by Baker;
- II. Claims 1, 3-7, 9-13, 15, 17, 18, 24, and 25 under 35 U.S.C. § 103(a) as unpatentable over Baker and Loeffler;
- III. Claims 8 and 22 under 35 U.S.C. § 103(a) as unpatentable over Baker, Loeffler, and Lukic;
- IV. Claims 20 and 21 under 35 U.S.C. § 103(a) as unpatentable over Baker, Loeffler, and Wilson; and
- V. Claim 45 under 35 U.S.C. § 103(a) as unpatentable over Baker, Loeffler, and Strecker.

OPINION

*I. Anticipation by Baker*

The Examiner found that Baker's bumper (inferior capsule assembly 130) is free floating about the inner member (inner shaft 61) when locking ring 147 is in the unlocked (loosened position). Ans. 3, 7-8. Appellants do not contest this finding of fact, and we therefore accept it as correct. *See* App. Br. 13-16; Reply Br. 5-6.

Rather, Appellants contend that Baker does not disclose a bumper as called for in claim 39 because, regardless of the operational state (i.e. locked or unlocked), locking ring 147, is a point of fixation between the bumper (inferior capsule assembly 130) and the inner member (inner shaft 61).<sup>1</sup> App. Br. 13-16; Reply Br. 5-6. Therefore, the question before us relates to the scope of claim 39.

Claim 39 calls for a bumper to be freely disposed on the inner member with no points of fixation to the inner member. The context of claim 39 suggests that a point of fixation between the bumper and inner member prevents relative movement between those two components. The Specification does not provide a lexicographical definition of the claim term “point of fixation.” In accord with the claim language, the Specification states that, “bumper 50 is configured to move freely on inner member 10 with no points of fixation therebetween.” Spec. para. [071]. Thus, a bumper, as called for in claim 39, must not include a point that prevents relative movement between the bumper and the inner member.<sup>2</sup>

Because Baker’s bumper (inferior capsule assembly 130) is free floating about the inner member (inner shaft 61) when locking ring 147 is in the unlocked (loosened position), there is no point that prevents relative movement between the bumper and the inner member. Thus, Appellants

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<sup>1</sup> Appellants also argue that Baker teaches away from a bumper as claimed; however, such a contention is inapplicable to an anticipation rejection. *See* App. Br. 15; *Celeritas Techs., Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354, 1361 (Fed. Cir. 1998) (Teaching away is irrelevant to an anticipation analysis).

<sup>2</sup> Consistent with this interpretation, the Specification states that *fixation* member 225 fixes the position of portion 221 with respect to portion 223. Spec. para. [0122].

have not persuasively explained how the Examiner's finding is in error. Accordingly, we sustain the rejection of claim 39 as anticipated by Baker.

*II. Obviousness over Baker and Loeffler*

Independent claims 1 and 24, like independent claim 39, are directed to a delivery system for delivery of a medical device; however, these claims differ from independent claim 39 in that each calls for a plurality of perforations within the tubular wall of the bumper. The Specification states that the tubular wall 56 of bumper 50 may contain perforations 64 to modify the flexural characteristics of bumper 50. Spec. para. [072]-[073].

The Examiner found that the tubular wall of Baker's bumper does not include a plurality of perforations. Ans. 4. The Examiner concluded that it would have been obvious to modify the tubular wall of the sleeve member (inferior capsule 132) of Baker's bumper (inferior capsule assembly 130) to include perforations, as taught by Loeffler. *Id.* The Examiner provides two reasons for this proposed modification: one, "to allow for greater flexibility in navigating tortuous lumens while maintaining axial strength to push the device forward through the lumen"; and two, "to allow for perfusion during placement of the medical device." *Id.* We examine these rationale in turn.

The first reason is based upon a finding that Loeffler's perforations (perfusion ports 1 and 2) allow for greater flexibility in navigating tortuous lumens. Ans. 4. This finding is not supported by the reference, which discloses Loeffler's perforations (perfusion ports 1 and 2) serve to permit blood to enter delivery sheath 10. Loeffler, col. 7, ll. 18-26; figs 2, 3. We do not discern, nor has the Examiner identified a disclosure in Loeffler that

the perforations (perfusion ports 1 and 2) allow for greater flexibility. *See* Ans. 4, 8.

The Examiner interprets that claims 1 and 24 call for perforations, and that increasing flexibility is a limitation of the Specification that is not imported into the claim. Ans. 8. We agree claims 1 and 24 do not call for the perforation to increase flexibility. However, whether such a limitation is contained in the claim is a separate issue from the reference's support for the Examiner's proffered reason. The Examiner concluded that it would have been obvious to a person of ordinary skill in the art would to add perforations to increase flexibility as disclosed in Loeffler, yet Loeffler contains no such disclosure. Thus, this reason is not based upon a rational underpinning.

The second reason is that the proposed combination would permit perfusion during placement of the medical device. Loeffler's device is specifically designed to provide blood flow to the tissue distal of the stent during delivery of a stent utilizing a balloon.<sup>3</sup> Loeffler, col. 2, l. 49-col. 3, l. 38. In contrast, Baker's device does not utilize a balloon, and is used in larger body lumens that are generally not occluded by the medical device utilized for the repair of the body lumen. Baker, col. 1, ll. 44-53. In other words, Baker's device has no need to permit blood flow through the device as disclosed by Loeffler because blood is free to flow around the device. Thus, the Examiner's second reason, to permit perfusion during placement of the device, also lacks a rational underpinning.

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<sup>3</sup> Blood passes into perfusion ports 1 and 2 of sheath lumen 11, into catheter perfusion port 3, into first inner lumen 22, through distal port 20, and on to supply distal port 20 to reach the tissue on the distal side of balloon 14. Loeffler, col. 7, ll.18-26; figs 2, 3.

Consequently, we do not sustain the rejection of independent claims 1 and 24 and their respective dependent claims 3-7, 9-13, 15, 17, 18, and 25.

*III.-V. Obviousness over Baker, Loeffler, and one of Lukic, Wilson, and Strecker*

Each of these rejections is based in part on the same combination of Baker and Loeffler utilized for the second rejection. Since none of Lukic, Wilson, and Strecker cure the deficiency of the combination of Baker and Loeffler, the third through fifth rejections suffer from the same shortcoming as explained in the second rejection *supra*. Accordingly, we do not sustain the Examiner's third through fifth rejections.

DECISION

We affirm the Examiner's decision to reject 39 under 35 U.S.C. § 102(b) as anticipated by Baker.

We reverse the Examiner's decision to reject claims 1, 3-13, 15, 17, 18, 20-22, 24, 25, and 45.

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-IN-PART