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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte OLAF SCHERMEIER, HEIKO LOKOTSCH,
AXINJA SCHOENBECK, and MICHAEL WILKENING

Appeal 2011-005439
Application 11/381,662
Technology Center 3700

Before STEVEN D.A. McCARTHY, STEFAN STAICOVICI, and
BARRY L. GROSSMAN, *Administrative Patent Judges*.

STAICOVICI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Olaf Schermeier et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision finally rejecting claims 1, 2, 4-13, 16-22, and 24-28. Claims 3, 14, 15, and 23 have been canceled. Appellants' representative presented oral argument on February 5, 2013. We have jurisdiction over this appeal under 35 U.S.C. § 6.

THE INVENTION

Appellants' invention relates to "a process and a device for the automatic identification of breathing tubes." Spec. 1, para. [0002].

Claim 1 is illustrative of the claimed invention and reads as follows:

1. A process for the automatic identification of a type of a breathing tube, the process comprising:
 - providing a respirator with a reading unit and a control unit for controlling respiration processes during operation of the device based on respiration parameter settings;
 - providing a memory element connected to a breathing tube, the memory element having data identifying the breathing tube stored thereon;
 - reading data from the memory element with the reading unit which is part of the respirator, when the breathing tube is brought into the vicinity of the respirator;
 - identifying, with the control unit, when the breathing tube is not suitable for an intended mode of respiration, associated with the respiration parameter settings, or identifying a mode of respiration set at the respirator, associated with the respiration parameter settings, that does not fit the breathing tube set at the respirator; and
 - triggering an alarm upon identifying when the breathing tube is not suitable for an intended mode of respiration or upon identifying a mode of respiration that does not fit the breathing tube set at the respirator.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

DeVires	US 5,474,062	Dec. 12, 1995
Truschel	US 6,360,741 B2	Mar. 26, 2002
Preveyraud	US 2004/0016431 A1	Jan. 29, 2004
Faram	US 2005/0061318 A1	Mar. 24, 2005
Anttila	US 2005/0211761 A1	Sep. 29, 2005
Krüger	US 6,968,843 B2	Nov. 29, 2005

The following rejections are before us for review:

The Examiner rejected claims 1, 2, 4, 11, 12, 16-18, and 21 under 35 U.S.C. § 103(a) as unpatentable over Faram, DeVires, Krüger, and Preveyraud.

The Examiner rejected claims 5-8, 13, 19, 20, and 22 under 35 U.S.C. § 103(a) as unpatentable over Faram, DeVires, Krüger, Preveyraud, and Anttila.

The Examiner rejected claim 24 under 35 U.S.C. § 103(a) as unpatentable over Faram, DeVires, Krüger, Preveyraud, and Truschel.

The Examiner rejected claims 9, 10, and 25-28 under 35 U.S.C. § 103(a) as unpatentable over Faram, DeVires, Krüger, Preveyraud, Anttila, and Truschel.

SUMMARY OF DECISION

We REVERSE.

ANALYSIS

Claims 1, 2, 4-13, 16-22, and 24¹

Independent claim 1 requires, *inter alia*, providing a controller for (1) “identifying . . . when the breathing tube is not suitable for an intended mode of respiration” or for (2) “identifying a mode of respiration set at the respirator . . . that does not fit the breathing tube.” App. Br., Clms. App’x. Similarly, independent claim 11 requires, *inter alia*, a controller for (1) determining whether the breathing tube is suitable or not suitable for respiration parameters set on the respirator or (2) for changing the respiration parameters set on the respirator to respiration parameters suitable for the breathing tube. *Id.*

The Examiner found that Faram discloses respirator 1 (high frequency oscillation breathing treatment apparatus)², breathing tube 11, 21 (breathing head assembly and nebulizer), memory element 43 (RFID tag) connected to breathing tube 11, 21, and memory element reading unit 42 (RFID transceiver). Ans. 3-4; *see also* Faram, para. [0097] and fig. 6. The Examiner further found that: (1) “DeVires teaches a respirator with a control unit [44];” (2) Krüger teaches a chip card that stores information regarding available modes of operation for respirators; and (3) Preveyraud teaches light alarm 42/sound alarm 44 “for improper connection . . . of ventilation devices which would include improper modes associated with various respirator machines.” Ans. 4-5. The Examiner concluded that it would have

¹ Our disposition of claims 1, 2, 4-13, 16-22 and 24 depends on the Faram, DeVires, and Krüger references, which are common to all these claims. Accordingly, we have grouped them for purposes of our analysis.

² Throughout this opinion the parenthetical nomenclature refers to the references relied upon by the Examiner as evidence of unpatentability.

been obvious for a person of ordinary skill in the art to modify the device of Faram (1) “to include a control unit as taught by DeVires in order to provide a safe and accurate ventilation support to the patient;” (2) “to include information relative to available modes of operations for respiration as taught by Kruger in order to avoid human error due to technician performing incorrect mode of respiration with the selected breathing tube;” and (3) “to include an alarm signifying improper connection of ventilation equipment due to incorrect modes of respiration etc. as taught by Preveyraud in order to prevent incorrect use of the respiration or ventilation equipment/modes.” *Id.*

According to the Examiner:

[T]he modified Faram reference in view of DeVires, Kruger, and Preveyraud teach the respirator device with the *ability* to determine suitability of a breathing tube with a respiration mode at the respirator (Faram teaches breathing tubes 20 and 21 with memory element 43; DeVires teaches control unit 44; Kruger teaches storing breathing settings/mode of respiration stored on memory element; Preveyraud teaches alarm notification [(]para 0010 and 0032) and further more teaches that operation is not started where the respiration parameters set are not possible (Faram para. 0097 ln. 13-14) as well as providing an alarm (Preveyraud para 0010 and 0032) when the respirator operation is not adapted to use the breathing tube as claimed.

Ans. 14-15. Emphasis added.

Although the Examiner concluded that the controller of Faram, DeVires, and Krüger has the ability to determine whether a breathing tube is suitable for (1) an intended mode of respiration, as per claim 1, or for (2) respiration parameters set on the respirator, as per claim 11, the Examiner provides no other evidence or reasoning that might be construed as support for the Examiner’s conclusion. While (1) Faram’s memory tag 43

determines whether nebulizer 21 is compatible³ with breathing apparatus 1 (*see* App. Br. 16 and Faram, para. [0097]); (2) DeVires's controller controls a valve that controls the flow of gas in a medical ventilator (*see* App. Br. 17 and DeVires, Abstr.); and (3) Krüger's chip card makes available modes of respiration on a respirator (*see* App. Br. 18 and Abstr.), neither Faram, DeVires, Krüger nor their combination discloses "identify[ing] when a breathing tube is suitable or unsuitable for an intended mode of respiration of the respirator based on the information regarding modes of operation stored on the identification tag or memory element," as the Examiner concludes. *See* Ans. 10-11.

At most, modifying the device of Faram's breathing apparatus 1 to include the controller of DeVires and the modes of respiration of Krüger stored on Faram's RFID tag 43, as the Examiner proposes, would result in a breathing apparatus having a controller that operates Faram's breathing apparatus 1 according to the modes of respiration stored on Faram's RFID tag 43. This does not mean that the controller of Faram, DeVires, and Krüger has the ability to determine (identify) whether the breathing tube of Faram is suitable for Krüger's mode of respiration, as per claim 1, or respiration parameters (that define a specific mode of respiration) set on the respirator, as per claim 11. As noted by Appellants, Faram's RFID tag is used only to determine whether nebulizer 21 is compatible (*i.e.*, designed to work) with breathing apparatus 1. *See* Reply Br. 2. Thus, even if breathing tube 11, 21 is designed to work with Faram's breathing apparatus 1, this

³ An ordinary and customary meaning of the term "compatible" is "designed to work with another device or system without modification." *MERRIAM WEBSTER'S COLLEGIATE DICTIONARY* (10th Ed. 1997).

does not mean that it is suitable for Krüger's mode of respiration or respiration parameters. Furthermore, although we appreciate that the controller and RFID tag of Faram, DeVires, and Krüger could be programmed for determining whether the breathing tube of Faram is suitable for Krüger's mode of respiration, as per claim 1, or respiration parameters (that define a specific mode of respiration) set on the respirator, as per claim 11, we note that rejections based on 35 U.S.C. § 103 must rest on a *factual basis*. In making such a rejection, the examiner has the initial duty of supplying the requisite factual basis and may not, because of doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967). In this case, we could not find any portion in either Faram, DeVires, or Krüger, and the Examiner has not pointed to any portion, that would suggest that the controller and RFID tag of Faram, DeVires, and Krüger has the ability to determine whether the breathing tube of Faram is suitable for Krüger's mode of respiration, as per claim 1, or respiration parameters set on the respirator, as per claim 11.

As such, without sufficient evidence to support the Examiner's position, we find that neither Faram, DeVires, Krüger nor their combination discloses providing a controller for (1) "identifying . . . when the breathing tube is not suitable for an intended mode of respiration" or for (2) "identifying a mode of respiration set at the respirator . . . that does not fit the breathing tube," as called for by independent claim 1. For the same reasons, we find that neither Faram, DeVires, Krüger nor their combination discloses a controller for (1) determining whether the breathing tube is suitable or not suitable for respiration parameters set on the respirator or (2)

for changing the respiration parameters set on the respirator to respiration parameters suitable for the breathing tube, as called for by independent claim 11.

Preveyraud discloses an alarm, light alarm 42/sound alarm 44, for detecting disconnection of a ventilator duct. Preveyraud, paras. [0010] and [0032]; *see also* Ans. 5. Anttila discloses a writable RFID tag. Anttila, para. [0073]; *see also* Ans. 6. Finally, Truschel discloses a ventilator system including multiple ventilators. Truschel, col. 6, ll. 26-31; *see also* Ans. 8. Thus, the addition of either, Preveyraud, Anttila, or Truschel does not remedy the deficiencies of Faram, DeVires, and Krüger, as described *supra*.

Accordingly, for the foregoing reasons, we do not sustain the rejections under 35 U.S.C. § 103(a) of independent claims 1 and 11, and their respective dependent claims 2, 4, 12, 16-18, and 21 as unpatentable over Faram, DeVires, Krüger, and Preveyraud; of claims 5-8, 13, 19, 20, and 22 as unpatentable over Faram, DeVires, Krüger, Preveyraud, and Anttila; claim 24 as unpatentable over Faram, DeVires, Krüger, Preveyraud, and Truschel; and claims 9 and 10 as unpatentable over Faram, DeVires, Krüger, Preveyraud, Anttila, and Truschel. *See In re Fine*, 837 F.2d 1071, 1076 (Fed. Cir. 1988).

Claims 25-28

Independent claim 25 requires, *inter alia*, a controller for controlling the operation of a first to be used respirator from a plurality of respirators by using only respiration parameters that are to be set by the breathing tube and not using respiration parameters that must not be set by the breathing tube. App. Br., Clms. App'x.

The Examiner found that the controller of Faram, DeVires, Krüger, Anttila, and Truschel is capable of controlling the operation of one of multiple respirators by “us[ing] only specific respiration parameters.” Ans. 9.

At the outset, we appreciate that the controller of DeVires operates Faram’s breathing apparatus 1, as one of Truschel’s multiple respirators, according to Krüger’s modes of respiration stored on Faram’s RFID tag 43, as modified by Anttila. However, we could not find any portion in either Faram, DeVires, Krüger, Anttila, or Truschel and the Examiner has not pointed to any portion, that would suggest that the controller of Faram, DeVires, Krüger, Anttila, and Truschel is capable of “us[ing] only specific respiration parameters,” namely, “respiration parameters, which are to be set with the breathing tube, and respiration parameters, which must not be set with the breathing tube,” as called for by independent claim 25.

Therefore, the Examiner’s conclusion that the controller of Faram, DeVires, Krüger, Anttila, and Truschel is capable of controlling the operation of one of multiple respirators by “us[ing] only specific respiration parameters” is mere speculation and conjecture. Accordingly, we cannot sustain the rejection of claims 25-28 under 35 U.S.C. § 103(a) as unpatentable over Faram, DeVires, Krüger, Preveyraud, Anttila, and Truschel. *See Fine*, 837 F.2d at 1076.

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SUMMARY

The Examiner's decision to reject claims 1, 2, 4-13, 16-22, and 24-28 is reversed.

REVERSED

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