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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte FATEMA S. AL-THALLAB

Appeal 2011-006839
Application 11/370,045
Technology Center 3700

Before FRANCISCO C. PRATS, STEPHEN WALSH,
and SHERIDAN K. SNEDDEN, *Administrative Patent Judges*.

SNEDDEN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to nursing device for feeding infants with a cleft lip or cleft palate. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Claims 1, 3, 5 and 10 are on appeal. Claim 1, the only independent claim on appeal, is representative and reads as follows (emphasis added):

1. A nursing device for feeding infants with a cleft lip or cleft palate, said device comprising:

an upper portion including a clear or transparent bottle having an opening at an upper end thereof and a closed bottom portion for containing a supply of liquid;

a nipple and means for maintaining said nipple in sealing engagement with said opening in said bottle, and in which said nipple includes a thin soft rubber shield constructed and dimensioned to cover the defect of an infant's mouth to thereby prevent liquid leakage due to a cleft lip or cleft palate;

a submersible rotary pump disposed in said bottom portion of said bottle and a tubular member passing through said nipple from a forward opening in said nipple and connected to said submersible rotary pump for *delivering a pre-selected volume of liquid from the bottle and through the nipple for feeding a [sic] infant*;

a lower portion of said device isolated from said fluid containing closed bottom portion and including a housing, a motor disposed within said housing and a magnetic coupling for driving said pump in response to rotation of said motor;

a programmable timer for selecting an amount of liquid to be delivered to an infant in a cycle and *regulating the volume of liquid pumped and the length of pauses between pumping* for each feeding cycle and in which said timer includes a visual display to illustrate the relative volume of liquid pumped and timed intervals in a feeding cycle in said lower portion of said device;

a first knob for adjusting the volume of liquid pumped and a second knob for adjusting the time for a pause and an LED display for indicating the volume of liquid pumped and length of a pause disposed in said lower portion of said device; and

a battery for powering said motor and means for connecting said battery to a charger.

The claims stand rejected as follows:

- I. Claims 1 and 10 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Goldie,¹ Sklar,² Epp,³ Turner,⁴ Ruth,⁵ Jackson,⁶ Clegg,⁷ and Hakky.⁸
- II. Claims 3 and 5 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Goldie, Sklar, Epp, Turner, Ruth, Jackson, Clegg, Hakky, and Guss.⁹

The same issue is dispositive for each of the rejections.

Issue

The Examiner finds that the device of the rejected claims differs from Goldie's device in that Goldie:

- 1) "does not specifically disclose [transparent] material for the bottle" (Ans. 5);
- 2) "does not teach the nipple to include a rubber sealing means for covering the roof of an infant's mouth" (*id.*);

¹ Goldie et al., US 2008/0039778 A1, published Feb.14. 2008.

² Sklar, US 5,531,338, issued Jul. 2, 1996.

³ Epp, US 4,856,663, issued Aug. 15, 1989.

⁴ Turner et al., (U.S. 4,966,580), issued Oct. 30, 1990.

⁵ Ruth et al., US 2004/0188372 A1, published Sep. 30, 2004.

⁶ Jackson et al., US 4,884,013, issued Nov. 28, 1989.

⁷ Clegg et al., US 5,853,387, issued Dec. 29, 1998.

⁸ Hakky et al., US 6,023,639, issued Feb. 8, 2000.

⁹ Guss, US 4,994,076, issued Feb. 19, 1991.

- 3) “does not teach a magnetic coupling for driving the pump or a timer” (*id.*); and
- 4) “does not teach ... regulating the volume of liquid and length of pauses between each feeding cycle” (*id.*); and
- 5) “does not specifically disclose that the battery is rechargeable” (*id.*) at 7).

However, the Examiner finds that it would have been obvious to modify the device of Goldie with the teachings of Sklar, Epp, Turner and Jackson because:

- 1) Sklar teaches using a transparent bottle “allow the user to view the liquid level inside the bottle” (*id.* at 5);
- 2) “Epp teaches infants with cleft lips/palates are unable to properly suck from a normal nipple and using a nipple with a seal, which can be used with convention[al] bottles, allows for infants to be able to properly swallow and suck during feeding” (*id.*);
- 3) Turner discloses the successful use of a magnetic coupling to drive a peristaltic pump (*id.* at 6);
- 4) Turner discloses “a programmable timer control to regulate the length of pauses between feeding cycles and the volume of liquid pumped” that “allow[s] the user proper time to swallow” (*id.*); and
- 5) Jackson discloses that the use of rechargeable batteries “is an art recognized means for powering a device, specifically a pump used for feeding, and further using a rechargeable battery increases the portability of the device” (*id.* at 7).

Appellants contend that “there is a major difference between Applicant’s device which deals with children having a cleft lip or cleft pallet and with premature infants” (App. Br. 7) and that “[t]his difference is significant and the reason why it is not obvious to combine the references in the manner suggested by the Examiner as precluding patent coverage to Applicant” (*id.* at 8). First, “Goldie mentions that in his device, the fluid will not be delivered to the baby except when the infant’s intraoral sucking pressure and amplitude both simultaneously satisfy the respective threshold values” (*id.*). “By contrast in Applicant’s device the mother only adjusts the desired volume to be given in a measured time so it is much more simple to give the baby the food then calculating the inspired breath or intraoral pressure or to measure the breath to breath amplitude” (*id.* at 8-9).

Appellants further contend that “if you take Goldie’s device as incorporated in a transparent bottle it will not be the same as Applicant’s device because Goldie is dealing with a different group of babies where they have different requirements and this is well know[n] in pediatric or neonatal practices” (*id.* at 9).

Appellants further contend that “a sealed nipple will complicate the issue with a preterm baby that has [poor] sucking and, with some of them, the sucking reflex is not even established (preterm babies delivered before 32 weeks of gestation), so the sealed nipple will not work, but will complicate the sucking process which is already very poor or even not developed. By contrast in Applicant's device it is added to help, but is not the complete solution for the cleft pallet babies” (*id.* at 10).

The issue presented is:

Does the evidence of record support the Examiner's findings that cited prior art renders the nursing device of claim 1 obvious?

Findings of Fact

The following findings of fact ("FF") are supported by a preponderance of the evidence of record.

FF1. Goldie discloses a computer controlled bottle device having an opening at an upper end of the bottle and a closed bottom portion for containing a supply of liquid (*see e.g.*, Goldie 3, ¶¶ [0023] and [0025] and Figures 2 and 4).

FF2. The bottle of Goldie is fitted with a nipple (*id.*).

FF3. Sklar discloses a bottle "formed of a material that is either transparent or translucent so that the level of liquid contained therein is easily viewed from outside the container, such as glass, polyethylene or polypropylene" (Sklar col. 3, ll. 6-8).

FF4. Epp discloses a device to allow an infant with cleft palate and/or cleft lip to effectively suck by mouth, typically comprising a solid duckbill shaped shield, that "acts to seal the cleft palate while keeping the nipple from collapsing into the cleft palate and cleft lip to allow the infant to suck liquids from a bottle" (Epp, Abstract).

FF5. Epp discloses that the nipple and shield may be formed of latex rubber (*id.* at col. 4, ll. 55-60.)

FF6. Turner "teaches an oral feeding device which uses a motor and a peristaltic pumping system which incorporates a solenoid to drive the pump" (App. Br. 10; *see also*, Turner col. 4, ll. 36-40).

FF7. Turner discloses that “[i]t is desirable that there be a minimum delay between the termination of delivery of one bolus and the commencement of delivery of the next bolus” (Turner col. 5, ll. 14-16).

FF8. Jackson discloses the use of rechargeable batteries in a device using pumps to deliver medical fluids (*see e.g.*, Jackson, col. 3, ll. 50-55).

Principles of Law

“A patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR Int’l v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). However, a prima facie conclusion of obviousness may be supported by a showing that a combination of familiar elements according to known methods yields no more than predictable results. *Id.* at 401; citing *United States v. Adams*, 383 U.S. 39, 40 (1966). Furthermore, the Supreme Court has emphasized that “the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418. “If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 417.

An attorney argument is not evidence unless it is an admission, because “[a]n assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a prima facie case of obviousness.” *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (citations omitted). *See also, In re Pearson*, 494 F.2d 1399,

1405 (CCPA 1974) (“Attorney argument in a brief cannot take the place of evidence.”)

“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole.” *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

Analysis

We find that the Examiner has set forth a prima facie case of obviousness that has not been adequately rebutted by Appellant. The Examiner has provided a rational basis for combining the cited references, where the proposed modifications address each disputed element of claim 1 (Ans. 5-7) and are supported by the findings of fact (FF1-FF5). The fact that Goldie discloses a nursing device suitable for pre-term babies does not persuade us that the device could not be adapted for use with a child having a cleft lip such as, for example, with reliance on the disclosure of Epp and Turner (*see e.g.*, Ans. 9; FF4). Appellants have not presented any evidence to establish that the references are incapable of being combined as set forth by the Examiner. *See e.g., Pearson* at 1405. We thus find that the Examiner has expressed a proper reason for the combination of the cited references, namely, the combination of familiar elements in a manner that yields no more than predictable results (*see*, Ans. 4-8). *KSR* at 401.

Appellants additional arguments address the cited reference individually, not the combined teachings of the references, and thus fail to persuade us that the subject matter of claim 1 is non-obvious. *See e.g.*,

Merck at 1097. For example, Appellants contend that “[t]he Turner device needs the hospital setting, while Applicant’s device is for a caregiver and mother and to be used at home” (*id.* at 11). Furthermore, “[i]n the Turner device, the baby needs to suck to operate the system. It will not work until the patient sucks and then upon sucking the system will open the valve.” (*Id.*) However, the Examiner has found that the device of Goldie is suitable for use with infants having a cleft lip or cleft palate when combined with the Epp device, where the Epp device would allow such infants to effectively suck by mouth (Ans. 5; FF4). We find no language in claim 1 limiting the use of the device to a hospital setting and find no evidence of record supporting the notion that the device suggested by the combination of references is incapable of operating in the manner set forth by the Examiner. We therefore affirm the Examiner’s conclusion of obviousness.

Conclusion of Law

The preponderance of evidence on this record supports the Examiner’s findings that the combination of references renders claim 1 obvious. Claim 10 fails with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

As to the remaining obviousness rejections, whether Goldie, Sklar, Epp, Turner and Jackson are properly combined by the Examiner in order to establish a prima facie case of obviousness is the issue in each of the rejections on appeal. We therefore also affirm the remaining obviousness rejection for the reasons given above.

SUMMARY

We affirm all rejections on appeal.

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

AFFIRMED

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