



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/526,498	09/29/2005	Bernard Bene	5648-32	7337
23117	7590	02/15/2013	EXAMINER	
NIXON & VANDERHYE, PC 901 NORTH GLEBE ROAD, 11TH FLOOR ARLINGTON, VA 22203			BASS, DIRK R	
			ART UNIT	PAPER NUMBER
			1779	
			NOTIFICATION DATE	DELIVERY MODE
			02/15/2013	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PTOMAIL@nixonvan.com
clm@nixonvan.com
pair_nixon@firsttofile.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BERNARD BENE, GEORGES VANTARD,
and CARL W. REITZ

Appeal 2011-013249
Application 10/526,498
Technology Center 1700

Before EDWARD C. KIMLIN, TERRY J. OWENS, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 4, 6-17, 20-25, 27-44, 60, and 62. We have jurisdiction under 35 U.S.C. § 6(b). Claim 60 is illustrative:

60. A controller for a blood treatment equipment, said equipment comprising at least a treatment unit including a semipermeable membrane separating the treatment unit in a first compartment for the circulation of blood and in a second compartment for the circulation of a treatment liquid, the controller being configured to:

receive one or more entries of measured information measured during the course of a treatment procedure,

determine at time intervals during treatment:
a parameter selected from the group consisting of an instantaneous clearance K_{T_i} measured at an elapsed treatment time T_i and a dialysance value D_{T_i} measured at an elapsed treatment time T_i ; and
an effective total dialysis dosage $K*T_{T_i}$ value which has been delivered at the elapsed treatment time T_i ,
wherein the controller is also configured to compare said calculated dialysis dose $K*T_{T_i}$ to at least a total dialysis dosage value $K*T_p$ to be achieved at the end of the treatment and to generate at least one output control signal responsive to said comparison for automatically controlling one or more operations performed by the equipment, the controller also being configured to determine at least one timing selected from the group consisting of an estimated remaining treatment procedure time T_{tr} and an estimated total treatment time T_{tot} required for achieving said prescribed total dialysis dosage value KT_p .

The Examiner relies upon the following references in the rejection of the appealed claims:

Sternby	US 6,258,027 B1	Jul. 10, 2001
Goux et al. (Goux)	US 6,110,384	Aug. 29, 2000

The appealed claims stand rejected under 35 U.S.C. § 102(b) as being anticipated by either Sternby or Goux.

We have thoroughly reviewed the respective positions advanced by Appellants and the Examiner. In so doing, we find ourselves in agreement with Appellants that the Examiner's rejections are not sustainable.

The Examiner acknowledges that neither Sternby nor Goux expressly describes a controller that is programmed to perform the claimed functions. The Examiner maintains, however, that each of the references is implicitly capable of manipulating the data from the sensor readings to determine the progress of the blood treatment. The Examiner further states that the

equations, data manipulations and data collection in the appealed claims appear to be similar expressions as in the references. In addition, the Examiner finds that the various manipulations carried out by the claimed controller do not define structural components of the product, and, therefore, do not structurally limit the claimed apparatus (*see* Ans. 12, second para.). Significantly, the Examiner explains that “[l]imitations regarding the function and use of the claimed apparatus were not considered when examining the claims” (Ans. 12, last para.).

We agree with Appellants that the recited functions of the claimed controller define the claimed controller and must be considered and given weight in determining whether the cited references describe the claimed invention. The Examiner mistakenly sites the Manual of Patent Examining Procedure (MPEP) in stating that “data structures ‘do not define any structural and functional interrelationship between the data structure and other claimed aspects of the invention which permit the data structure’s functionality to be realized’” (Ans. 12, first full para.). However, as pointed out by Appellants, the section of the MPEP quoted by the Examiner relates to whether the claimed invention qualifies as statutory subject matter. In the present case, the Examiner acknowledges that the claimed subject matter is statutory by stating that “the examiner considers the functional descriptive material to be statutory since it is embodied in a product claim, i.e., controller” (Ans. 12, first para.). Consequently, the burden is on the Examiner to demonstrate that the applied references describe, within the meaning of Section 102, the claimed functions of the controller, such as determining at time intervals during treatment a parameter selected from the

Appeal 2011-013249
Application 10/526,498

group consisting of an instantaneous clearance measured at an elapsed time and a dialysance value measured at an elapsed treatment time, etc. This the Examiner has not done and, therefore, has committed reversible error.

Accordingly, based on the foregoing, we are constrained to reverse the Examiner's rejections.

REVERSED

cam