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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERNESTO AVELLANET and ROBERT LULO

Appeal 2012-002502
Application 11/452,852
Technology Center 3700

Before DEMETRA J. MILLS, ERIC GRIMES, and STEPHEN WALSH,
Administrative Patent Judges.

WALSH, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the rejection of claims directed to a catheter-based aneurysm embolic system. The Patent Examiner rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b). We affirm, but designate the affirmance a new ground of rejection.

STATEMENT OF THE CASE

Claims 1-11 are on appeal. Claim 1 is representative and reads as follows:

1. A catheter-based aneurysm embolic system for occluding the flow of blood in an aneurysm, said aneurysm embolic system comprising:
a deployment catheter having a lumen extending therethrough and having proximal and distal ends;
an aneurysm embolic device comprising an expandable sealing member which includes a circular joining member, a plurality of reinforcing spokes attached to said circular joining member and extending radially outward from said circular joining member, and a thin circular membrane bonded to said circular joining member and said reinforcing spokes *and an occlusive member comprised of an expandable foam material carried by said sealing member*, and a headpiece attached to the sealing member and retained by the distal end of said deployment catheter *so that when said aneurysm embolic device is placed at the neck of an aneurysm said sealing member may be expanded to seal the neck of the aneurysm and simultaneously permit expansion of said occlusive member within the aneurysm to thereby substantially fill the aneurysm.*

(App. Br. 7, emphasis added.)

The claims stand rejected under 35 U.S.C. § 103(a) as follows:

- I. claims 1-4 and 6-10 in view of Abrams¹ and Jones;²
- II. claims 5 and 11 in view of Abrams, Jones, and Purdy;³ and
- III. claims 1-11 in view of Purdy and Jones.

¹ Robert M. Abrams et al., US 7,128,736 B1, filed April 13, 2000, issued Oct. 31, 2006.

² Michael L. Jones et al., US 5,823,198, issued Oct. 20, 1998.

³ Phillip D. Purdy, US 5,693,067, issued Dec. 2, 1997.

I and II

As the same issue is dispositive for rejections I and II, we will consider them together.

The embolic device forming part of the system defined in claim 1 comprises a sealing member and an occlusive member “carried by said sealing member.” The components are arranged so that “when said aneurysm embolic device is placed at the neck of an aneurysm said sealing member may be expanded to seal the neck of the aneurysm and simultaneously permit expansion of said occlusive member within the aneurysm to thereby substantially fill the aneurysm.” (Claim 1.)

The Examiner found that Abrams described an arrangement of sealing member and occlusive member “such that the aneurysm embolic device is capable of being delivered to the neck of an aneurysm wherein the sealing member is capable of being expanded to seal the neck of the aneurysm and simultaneously permit the occlusive member to be released and fill the aneurysm (column 8, lines 65-67, column 6, lines 1-5).” (Ans. 5.)

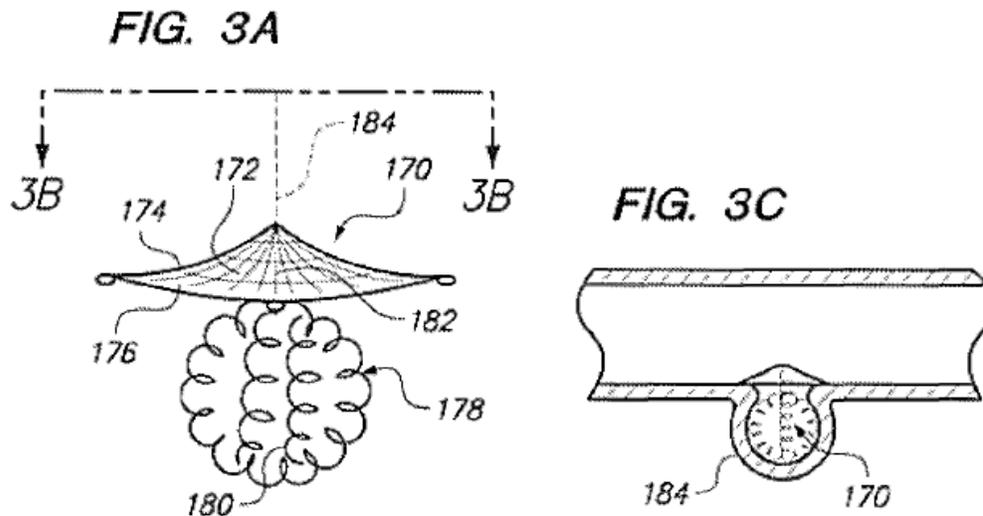
Appellants contend that the cited passages of Abrams do not support the Examiner’s finding. (App. Br. 5.) The Examiner responds that Abrams did disclose a device that included “vaso-occlusive material disposed within the sealing member” (Ans. 8), and contends: “The sealing member of Abrams et al. compresses the occlusive material while in the folded position and when the sealing member is expanded in response to the extending reinforcing spokes, the expandable foam is exposed to body fluid at the same time such that the foam expands together with the sealing member as it opens to an expanded configuration” (*id.* at 9).

We agree with Appellants that columns 6 and 8 do not describe an arrangement capable of simultaneous deployment of the sealing member and occlusive member. However, in the sentence after the one Appellants cite, the Examiner directed attention to additional Abrams teachings:

Abrams et al. discloses the use of one or more occlusion devices such as vaso-occlusive coils (column 5, lines 45-51) and *connecting a soft cage (178) of coils (180) to the embolic device with a connector (182) (Fig. 3) or introducing the coils through a catheter (Figs. 5).*

(Ans. 5 (emphasis added); Final Rej. 3.) The rejection did not further explain its citation of Figure 3.

Abrams' Figures 3A and 3C are reproduced here:



“FIG. 3A shows side view of an aneurysm patch in combination with an ‘anchor’ residable within an aneurysm. . . . FIG. 3C shows the placement of the device depicted in FIG. 3A within an aneurysm.” (Abrams, col. 5, ll. 30-36.)

Abrams described its Figure 3 embodiment as follows:

FIGS. 3A, 3B, and 3C show another variation of the inventive aneurysm closure assembly (170) having a patch portion (172) made up of a number of radially extending members (174) which are joined at their outer ends. The radially extending members (174) are also

joined by a soft fabric (176) which again may be scrim-like. Completing the device is a soft cage (178) made up of a plurality of, e.g., platinum or nickel-titanium coils (180) or wires. A connector (182) connects the soft cage (178) and the patch portion (172) and is situated within the neck[]of the aneurysm after implantation.

(Abrams, col. 8, ll. 17-27.) In Figure 3C, Abrams' "soft cage" is an occlusive member larger than the neck of the aneurysm, shown after expanding to fill the aneurysm. Figure 3C also shows that Abrams' closure assembly, i.e., sealing member, has expanded to seal the neck of the aneurysm. In other words, Abrams' Figure 3 described an embodiment configured to perform as Appellants' system does. Appellants do not dispute the obviousness of replacing Abrams' soft cage coils with Jones' foam, and we agree with the Examiner's reasoning on that point.

Because Abrams' Figure 3 embodiment appears to have the features Appellants dispute, including simultaneous expansion, and would perform the same way if Abrams' coils were replaced with Jones' foam, we will affirm Rejections I and II. However, because our analysis relies on additional evidence, we designate the affirmance of Rejections I and II as a new ground of rejection.

III

The Examiner found that Purdy described a system including an aneurysm embolic device with a sealing member capable of being expanded to seal the neck of an aneurysm and simultaneously permitting "the occlusive member to be released and fill the aneurysm." (Ans. 7.)

Appellants contend:

Purdy is directed to an intravascular occlusion device, and therefore is designed to stop the flow of blood through a blood vessel, and is not a device to treat an aneurysm. Thus, even if one were to substitute an expandable foam for [Purdy's] coil, this modified [Purdy] structure would not result in the claimed invention, which requires simultaneous deployment. In addition, Purdy's coil is an anchoring mechanism, not an embolic coil for treating an aneurysm.

(App. Br. 6.)

After considering the evidence and each party's contentions, we agree with Appellants that the evidence of record does not support this rejection.

37 C.F.R. § 41.50(b)

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellants, **WITHIN TWO MONTHS FROM THE DATE OF THE DECISION**, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

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SUMMARY

We affirm the rejection of claims 1-4 and 6-10 under 35 U.S.C. § 103(a) in view of Abrams and Jones.

We affirm the rejection of claims 5 and 11 under 35 U.S.C. § 103(a) in view of Abrams, Jones, and Purdy.

We reverse the rejection of claims 1-11 under 35 U.S.C. § 103(a) in view of Purdy and Jones.

AFFIRMED

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