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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte B. NICHOLAS ORAY and DANIEL L. MOORADIAN

Appeal 2014-002996
Application 13/366,998
Technology Center 3700

Before CYNTHIA L. MURPHY, BRUCE T. WIEDER, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants¹ appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1–3 and 5–31. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

¹ The Appellants identify the real party in interest as “Baxter International Inc.” (Appeal Br. 3.)

STATEMENT OF THE CASE

The Appellants' invention "relates to surgical fastener, and to buttress materials adapted to be used in combination with such surgical fasteners."

(Spec. 1, lines 7–8.)

Illustrative Claim

1. A surgical fastener buttress material having a first surface and a second surface, wherein the surgical fastener buttress material is in dry form and only one of the first surface and the second surface is an adhesive surface, wherein the surgical fastener buttress material is packaged and provided in a manner that permits the adhesive surface to be aligned with and releasably cover a working surface of a surgical fastener, and wherein the adhesive surface is formulated to have a predetermined adhesive strength when retained upon the working surface of the surgical fastener, the adhesive strength being reduced when the adhesive surface is positioned and hydrated in vivo.

References

Lemelson	US 4,900,303	Feb. 13, 1990
Francis	US 5,752,965	May 19, 1998
Hamilton	US 6,325,810 B1	Dec. 4, 2001
Kochevar	US 2002/0022606 A1	Feb. 21, 2002
Naimark	US 2003/000073979 A1	Apr. 17, 2003
Mooradian	US 2003/0183671 A1	Oct. 2, 2003

Rejections

The Examiner rejects claims 1–3, 5, 6, 8–10, 12, and 14–31 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, and Naimark. (Final Action 3.)

The Examiner rejects claim 7 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Lemelson. (*Id.* at 6.)

The Examiner rejects claim 11 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Hamilton. (*Id.*)

The Examiner rejects claim 13 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Kochevar. (*Id.* at 7.)

ANALYSIS

Independent Claim 1

Independent claim 1 recites “[a] surgical fastener buttress material” that has “an adhesive surface” and that “is in dry form.” (Appeal Br., Claims App.) The Examiner determines that such a surgical fastener buttress material would have been obvious over the combined teachings of Francis, Mooradian, and Naimark. (*See* Final Action 3–4.)

The Appellants argue that the Examiner’s rejection is deficient because Francis “teaches away” from the claimed buttress material. (*See* Appeal Br. 5–7.) This argument relies upon the following paragraph in Francis:

In the preferred embodiment of the present invention, the adhesive 16 is a tacky liquid substance which may include, but is not necessarily limited to, hydroxypropylmethyl cellulose, propylene glycol, and water. Due to the liquid nature, the adhesive 16 is to be applied to the first and second articles of pledget material 12, 14 while the first and second articles of pledget material 12, 14 are retained within the receiving area 40 immediately prior to the particular medical procedure. When used in conjunction with treated bovine pericardium, the use of such a tacky liquid substance serves several important functions. First, the water within the adhesive 16 is drawn into the treated bovine pericardium, thereby increasing the pliability and flexibility of the first and second articles of pledget material 12, 14. This allows the first and second articles of pledget material 12, 14 to more readily conform to the shape and

contours of the apposed working surfaces when the surgical fastener applying device is clamped down onto the first and second articles of pledget material 12, 14. Another benefit to using a liquid-based adhesive is that, by softening the first and second articles of pledget material 12, 14, the adhesive 16 reduces the likelihood that the first and second articles of pledget material 12, 14 will experience cracking when surgical fasteners are forced to penetrate therethrough.

Francis (col. 11, lines 21–44.) According to the Appellants, this paragraph indicates that “dried buttresses will crack,” and, “[b]ecause cracking is a serious problem in the bioimplant arts, it follows that Francis’s statement would lead one of ordinary skill in the art away from the claimed invention.” (Appeal Br. 5, 7.)

We are not persuaded by the Appellants’ arguments because they do not challenge the Examiner’s finding that “the relied upon text actually implies that the buttress material is in a ‘dry form’ prior to the liquid-based adhesive ‘softening’ the material.” (Answer 3.) For example, Francis discloses that “the water within the adhesive 16 is drawn into the [pledget material].” (Francis, col. 11, lines 31–32.) Such “drawing in” of water would seemingly be best accomplished by the pledget material being provided in a dry, rather than hydrated, form. As such, we agree with the Examiner’s implication that Francis does not teach away from providing the pledget material in a dry form. (*See* Final Action 2.)

Additionally, the Appellants’ arguments do not take into consideration the entirety of Francis’s teachings and particularly its disclosure of alternate adhesive arrangements:

notwithstanding the fact that the preferred embodiment described above calls for a liquid-based adhesive to be applied

immediately prior to using the retainer assembly, it is to be readily understood that a wide variety of different adhesives may be employed including but not limited to contact adhesives, such as polyacrylamides and natural gum rubbers applied during the manufacturing process, and hydrogels and other similar compounds which may be applied at the time of use.

(Francis, col. 16, lines 49–57.) The Appellants do not adequately address why, if Francis is truly criticizing, discrediting, or otherwise discouraging the investigation into buttress material without its preferred liquid-based adhesive, other adhesives (e.g., polyacrylamides and natural gum rubbers applied during the manufacturing process) are specifically listed as suitable candidates.

The Appellants do not otherwise argue that the Examiner errs in the rejection of independent claim 1 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, and Naimark, and thus we sustain this rejection.

Claims 2, 3, 5, 6, 8–10, 12, and 14–31

The Appellants do not argue these claims separately from independent claim 1 (*see* Appeal Br. 3–7) and so they fall therewith. Thus, we sustain the Examiner’s rejection of claims 2, 3, 5, 6, 8–10, 12, and 14–31 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, and Naimark.

Claims 7, 11, and 13

The Appellants argue only that the additional prior art references relied upon to reject these claims do not remedy the above-discussed alleged deficiency in the Examiner’s rejection of independent claim 1. (*See* Appeal Br. 7–8.) As the Appellants do not establish that the Examiner’s rejection of independent claim 1 is deficient, we are not persuaded by these arguments.

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Thus, we sustain the Examiner's rejection of claim 7 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Lemelson; we sustain the Examiner's rejection of claim 11 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Hamilton; and we sustain the Examiner's rejection of claim 13 under 35 U.S.C. § 103(a) as unpatentable over Francis, Mooradian, Naimark, and Kochevar.

DECISION

We AFFIRM the Examiner's rejections of claims 1–3 and 5–31.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED