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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/528,737	09/28/2006	Stephen J. Brown	7553.00026 / 06-0492	7750
60683	7590	11/04/2016	EXAMINER	
Robert Bosch LLC 1800 W. Central Road Mount Prospect, IL 60056			PAULS, JOHN A	
			ART UNIT	PAPER NUMBER
			3626	
			MAIL DATE	DELIVERY MODE
			11/04/2016	PAPER

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* STEPHEN J. BROWN

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Appeal 2014-008061<sup>1</sup>  
Application 11/528,737<sup>2</sup>  
Technology Center 3600

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Before BIBHU R. MOHANTY, MEREDITH C. PETRAVICK, and  
NINA L. MEDLOCK, *Administrative Patent Judges*.

MEDLOCK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–6 and 8–23. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> Our decision references Appellant's Appeal Brief ("App. Br.," filed April 9, 2014) and Reply Brief ("Reply Br.," filed June 30, 2014), and the Examiner's Answer ("Ans.," mailed April 30, 2014) and Final Office Action ("Final Act.," mailed October 10, 2013).

<sup>2</sup> Appellant identifies Robert Bosch Healthcare Systems, Inc. as the real party in interest. App. Br. 2.

## CLAIMED INVENTION

Appellant's invention "relates generally to a modular interactive development system and method for reporting on patient management, and in particular to an automated content delivery program able to connect remote users across independent platforms to a central database of libraries whereby a patient's health can be scored dynamically" (Spec. 1, ll. 10–15).

Claims 1, 12, and 17 are the independent claims on appeal. Claim 1, reproduced below, is illustrative:

1. A method for managing a health related condition of an individual, comprising the steps of:

selecting a plurality of dialogs from at least one library, said dialogs comprising one or more question dialogs and one or more answer dialogs, wherein (A) each of said question dialogs comprises (i) a question related to at least one of (a) a health related symptom, (b) a health related behavior and (c) a health related knowledge of said individual and (ii) a plurality of possible answer options, (B) said question dialogs are based on patient specific information, and (C) each of said answer dialogs comprises information from said library corresponding to said plurality of possible answer options;

assembling said dialogs with a computer program running on a computer;

delivering said dialogs as assembled to one or more of said individuals;

transferring said dialogs to one or more terminals corresponding to said one or more of said individuals, wherein said terminals are remote from said computer; and

automatically generating a report containing a current condition and condition trends of said one or more of said individuals based upon selections of said possible answer options communicated from said terminals to said computer.

## REJECTIONS

Claims 9, 17, 19, and 20 are rejected under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter that Appellant regards as the invention.

Claims 1–6 and 8–23 are rejected under 35 U.S.C. § 102(a) as anticipated by Iliff (US 6,234,964 B1, pub. May 22, 2001).

## ANALYSIS

### *Indefiniteness*

Independent claim 17 is directed to a method for managing a health related condition, and recites that the method comprises, *inter alia*, “the step[ ] of identifying a particular individual among a plurality of individuals by filtering said individuals with at least one of a plurality of factors of said health related condition.” Claim 9 depends from independent claim 1, and recites that the method of claim 1 further comprises a substantially similar step.

Claim 19 depends from independent claim 17, and recites that “said factors [of said health related condition] comprise at least one among (i) a plurality of factors related to a level of risk (ii) a plurality of factors related to an aspect of care and (iii) a plurality of factors related to an expression of risk.” Claim 20 depends from claim 19, and recites that the factors related to an expression of risk comprise at least one among “(i) a plurality of health related symptom factors reportable by said individuals, (ii) a plurality of health related behavior factors of said individuals and (iii) a plurality of health related knowledge factors of said individuals.”

In rejecting claims 9, 17, 19, and 20 under 35 U.S.C. § 112, second paragraph as indefinite, the Examiner questions “how a particular individual [among a plurality of individuals] can be identified based on a single health condition” (Final Act. 2). The Examiner asserts that “if a plurality of patients are filtered based on a diagnosis . . . all patients with that diagnosis would be identified;” the Examiner, thus, reasons that “[o]nly in the case where a particular patient has a diagnosis (or other factor) that is unique to the plurality of patients is it possible to identify a particular patient based on this filtering” (*id.*). Yet that without more, does not mean that the claims are indefinite. The Examiner does not dispute, for example, that if there are only two individuals, i.e., a plurality of individuals, each having a different factor, it is possible to identify a particular individual using only one factor of a health related condition (Ans. 2).

The Examiner has not established here that a person of ordinary skill in the art would not understand what is claimed when the claims are read in light of the Specification. As such, the Examiner has not established a prima facie case of indefiniteness. *See Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.”).

Therefore, we do not sustain the Examiner’s rejection of claims 9, 17, 19, and 20 under 35 U.S.C. § 112, second paragraph.

*Anticipation*

*Independent Claim 1 and Dependent Claims 2–4, 6, 8, 10, and 11*

We are not persuaded by Appellant’s argument that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 102(b) because Iliff does not disclose “transferring said dialogs [as assembled] to one or more [remote] terminals corresponding to said one or more of said individuals,” as recited in claim 1 (App. Br. 9–12). Instead, we agree with the Examiner that Iliff discloses the argued limitation (*see* Ans. 3–4 (citing Iliff, col. 8, ll. 57–67; col. 32, ll. 3–6)).

Iliff is directed to a system and method for automated patient disease management, and discloses that the system uses periodic interactive dialogs with the patient to obtain health state measurements, evaluate and assess the progress of the patient’s disease, review and adjust therapy to optimal levels, and give the patient medical advice for administering treatment and handling symptom flare-ups and acute episodes of the disease (Iliff, Abstract). Iliff, thus, discloses that the system selects a question to be asked and outputs the question to the patient together with a set of possible responses (*id.* at col. 32, ll. 3–6). Iliff discloses that a telephone number may be provided so that the system may be accessed by telephone; alternatively, an appropriate web address is provided so that the user may access the system via the Internet using the user’s computer (*id.* at col. 8, ll. 41–67).

Appellant acknowledges that a user’s computer, as disclosed in Iliff, can be reasonably described as a remote terminal (App. Br. 10). But Appellant argues that accessing a system via a remote terminal, as disclosed in Iliff is “not the same as transferring each of the dialogues which are assembled to a remote terminal” (*id.* at 10). In this regard, Appellant

interprets Iliff's "medical diagnostic script file" as "the equivalent in Iliff to the 'dialogues' of claim 1" (*id.*). And Appellant argues that although Iliff discloses that portions of the script file are successively transferred to the remote terminal, as needed based on the user's response, Iliff does not disclose that the entire medical diagnostic script file is transferred to the remote terminal (*id.* at 10–12).

Appellant's argument is not persuasive of Examiner error at least because it is not commensurate with the scope of claim 1. As the Examiner observes, claim 1 requires "selecting one or more questions/answers from a library related to the health of the user/patient/individual based on user/patient/individual specific information; [and] assembling and delivering/transferring the selected questions/answers" (Ans. 4). There is nothing in the claim language that precludes an iterative approach, nor does the claim preclude the selection of only one question/answer and then selecting the next question/answer based on the response (*id.*).

Responding to the Examiner's Answer, Appellant charges in the Reply Brief that the Examiner has misconstrued claim 1 (Reply Br. 2–3). Citing a number of definitions of the word, "as," Appellant asserts that "the only one that makes sense for the phrase 'delivering said dialogs as assembled' is 'in the same manner or way'" (*id.* at 2). Appellant argues that, by requiring the dialogs to be delivered "as assembled," i.e., in the same manner that the dialogs are assembled, claim 1 requires all of the dialog to be delivered, as an assembled group, at the same time (*id.* at 2–3). Yet we fail to see why, and Appellant does not adequately explain why, delivering the dialogs "in the same manner" as assembled requires, of necessity, that the dialogs be delivered at the same time.

Appellant discloses in the Specification that “each dialog contains questions related to signs and symptoms, behaviors and knowledge with answers categorized as high, medium or low risk answers” and further discloses that “logical branching within a dialog is driven by patient answers.” In our view, the dialogs are delivered “in the same manner as assembled,” i.e., delivered with the same question/answer combinations and according to the same logical branching, whether the dialogs are delivered at the same time or alternatively delivered using an iterative approach.

We also are not persuaded by Appellant’s further argument that Iliff does not disclose “automatically generating a report containing a current condition and condition trends of said one or more of said individuals based upon selections of said possible answer options communicated from said terminals to said computer,” as recited in claim 1 (App. Br. 12–18).

Appellant notes that “Iliff discloses [at column 12, lines 39–41] that a user is allowed to *optionally request* a summary of a consultation to be sent to a care provider,” and argues that “[a]n *option* to generate a report is not an automatic report” (*id.* at 12). Yet there is nothing in claim 1 that requires the report to be generated without user intervention or initiation.

Iliff discloses that its disease management system performs disease management in a “fully automated manner” (Iliff, col. 12, ll. 57–64). Thus, when a user optionally requests that a summary of a consultation, i.e., a report, be sent to his/her healthcare provider, that report is “automatically generated,” i.e., the report is generated by the disease management system, which, as disclosed in Iliff, operates in a fully automated manner.

In view of the foregoing, we sustain the Examiner's rejection of claim 1 under 35 U.S.C. § 102(a). We also sustain the Examiner's rejection of dependent claims 2–4, 6, 8, 10, and 11, which are not argued separately except based on their dependence from claim 1 (App. Br. 18).

*Dependent Claim 5*

Claim 5 ultimately depends from claim 1, and recites that dialogs further comprise, *inter alia*, “one or more filler dialogs.” In rejecting claim 5 as anticipated by Iliff, the Examiner notes that Iliff asks a plurality of questions in a session, and the Examiner interprets “filler dialogs” to include “[a]ny question that occurs between two other questions.” The Examiner, thus, reasons that “[s]ince Iliff asks the next questions based on previous answers, it is inherent that one of these questions may be skipped” (Final Act. 5–6 (citing Iliff, col. 9, ll. 13–30; col. 13, ll. 36–55)).

Appellant argues that the Examiner has misconstrued claim 5, and that the term “filler dialog” is defined in paragraph 32 of Appellant's Specification as “trivia type dialogs, entertainment dialogs etc.” (App. Br. 19). Yet rather than defining the term “filler dialog,” the Specification provides non-limiting examples only:

Options are to force the scheduler to include the dialog block 744, or to assign dialogs as fillers, block 746. The later could be the case, for example, with trivia type dialogs, entertainment dialogs etc.

Spec. ¶ 32.

Appellant further argues for the first time in the Reply Brief that the term “filler,” as used in paragraph 32 of the Specification, refers to a dialog that is different from, and has a lower priority than, a required dialog and that questions within a program that are skipped, as a result of logical

branching, are not “filler dialogs” that are included or omitted from the program by the scheduler based upon a priority scheme (Reply Br. 3–4). That argument is untimely, and is waived here in the absence of any showing of good cause why the argument could not have been timely presented in Appellant’s Appeal Brief. *See In re Hyatt*, 211 F.3d 1367, 1373 (Fed. Cir. 2000) (noting that an argument not first raised in the brief to the Board is waived on appeal); *Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (informative) (explaining that arguments and evidence not timely presented in the Principal Brief, will not be considered when filed in a Reply Brief, absent a showing of good cause explaining why the argument could not have been presented in the Principal Brief); *Ex parte Borden*, 93 USPQ2d 1473, 1477 (BPAI 2010) (informative) (“Properly interpreted, the Rules do not require the Board to take up a belated argument that has not been addressed by the Examiner, absent a showing of good cause.”).

We are not persuaded, on the present record, that the Examiner erred in rejecting claim 5 under 35 U.S.C. § 102(a). Therefore, we sustain the Examiner’s rejection.

*Dependent Claim 9*

We are persuaded by Appellant’s argument that the Examiner erred in rejecting claim 9 under 35 U.S.C. § 102(b) because Iliff does not disclose “identifying a particular individual among a plurality of said individuals by filtering said individuals using at least one of a plurality of factors of said health related condition,” as recited in claim 9 (App. Br. 21–23).

The Examiner cites column 7, line 67 through column 8, line 10 of Iliff as disclosing the argued limitation (Final Act. 7). However, that portion of Iliff merely discloses identifying a patient registered with the system by prompting the patient or the patient's assistant for an identification number.

We agree with Appellant that an identification number is not a factor of a health-related condition, i.e., an element contributing to health, as called for in claim 9 (App. Br. 21–22). Therefore, we do not sustain the Examiner's rejection of claim 9 under 35 U.S.C. § 102(a).

*Independent Claim 12 and Dependent Claims 13, 15, and 16*

Appellant argues that claim 12 is allowable for the same reasons set forth with respect to claim 1 (App. Br. 23–24). We are not persuaded for the reasons set forth above that the Examiner erred in rejecting claim 1 under 35 U.S.C. § 102(a). Therefore, we sustain the Examiner's rejection of claim 12 under 35 U.S.C. § 102(a). We also sustain the rejection of dependent claims 13, 15, and 16, which are not argued separately except based on their dependence from claim 12 (*id.* at 24).

*Dependent Claim 14*

We are persuaded by Appellant's argument that the Examiner erred in rejecting claim 14 under 35 U.S.C. § 102(a) because Iliff does not disclose "identifying said particular individual by filtering a plurality of names of said individuals," as recited in claim 14 (App. Br. 24–26).

The Examiner cites column 7, line 67 through column 8, line 10 of Iliff as disclosing the argued limitation (Final Act. 7). However, as described above with respect to claim 9, that portion of Iliff discloses identifying a patient registered with the system by prompting the patient or the patient's assistant for an identification number.

We agree with Appellant that an identification number is not the same as a name of an individual (App. Br. 25). Therefore, we do not sustain the Examiner's rejection of claim 14 under 35 U.S.C. § 102(a).

*Independent Claim 17 and Dependent Claims 18 and 21*

Appellant argues that claim 17 is allowable for the same reasons set forth with respect to claims 5 and 12 (App. Br. 26–27). We are not persuaded for the reasons set forth above that the Examiner erred in rejecting either of claims 5 and 12 under 35 U.S.C. § 102(a). Therefore, we sustain the Examiner's rejection of claim 17 under 35 U.S.C. § 102(a). We also sustain the rejection of dependent claims 18 and 21, which are not argued separately except based on their dependence from claim 17 (*id.* at 27).

*Dependent Claims 19 and 20*

Claim 19 depends from independent claim 17, and recites that factors of a health related condition used to identify a particular individual among a plurality of individuals, as recited in claim 17, “comprise at least one among (i) a plurality of factors related to a level of risk[;] (ii) a plurality of factors related to an aspect of care[;] and (iii) a plurality of factors related to an expression of risk.”

We are not persuaded by Appellant's argument that the Examiner erred in rejecting claim 19 under 35 U.S.C. § 102(a) (App. Br. 27–30). Instead, we agree with the Examiner that Iliff discloses the claimed subject matter at column 16, lines 28–55 (Final Act. 14–15).

Iliff discloses a process at column 16, lines 28–55 of Iliff in which a patient is asked whether she is having any significant symptoms; if the answer is “yes,” a table look-up is performed to determine whether the reported symptom is related to the disease for which the patient is being

managed. Iliff, thus, identifies patients with and without significant related symptoms.

Appellant argues that the Iliff process does not meet the claim language because “the ‘filtering’ described in column 16[,] lines 28–55 occurs *after* a patient has been specifically identified” (App. Br. 29). Appellant, thus, asserts that “[a] process wherein an individual is uniquely identified, and is then somehow ‘filtered’ to once again uniquely identify the individual is not the same as filtering a group of individuals to identify a specific one of the individuals using one or more of a level of health risk, an aspect of care, and an expression of risk” (*id.*).

The difficulty with Appellant’s argument is that it is not commensurate with the language of claim 19. In our view, the filtering process disclosed in Iliff meets the language of the claim under a broadest reasonable interpretation. Iliff discloses filtering patients according to their symptoms and describes that this process, when completed, “has . . . identified patients with and without significant related symptoms” (Iliff, col. 16, ll. 54–55).

In view of the foregoing, we sustain the Examiner’s rejection of claim 19 under 35 U.S.C. § 102(a). We also sustain the rejection of claim 20, which is not argued separately except based on its dependence from claim 19 (App. Br. 30).

DECISION

The Examiner's rejection of claims 9, 17, 19, and 20 under 35 U.S.C. § 112, second paragraph, is reversed.

The Examiner's rejections of claims 1-6, 8, 10-13, and 15-23 under 35 U.S.C. § 102 (a) is affirmed.

The Examiner's rejection of claims 9 and 14 under 35 U.S.C. § 102(a) is reversed.

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-IN-PART