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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/855,487	04/02/2013	Fred Chapman	PB 0010120_USN2_7257-0331	4915
96139	7590	11/21/2016	EXAMINER HELLER, TAMMIE K	
MARGER JOHNSON -PHYSIO -CONTROL, INC. 888 SW 5th Avenue, Suite 1050 PORTLAND, OR 97204			ART UNIT	PAPER NUMBER
			3766	
			NOTIFICATION DATE	DELIVERY MODE
			11/21/2016	ELECTRONIC

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* FRED CHAPMAN, ROBERT G. WALKER, and  
RONALD EUGENE STICKNEY

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Appeal 2014-008096  
Application 13/855,487  
Technology Center 3700

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Before CHARLES N. GREENHUT, MICHAEL C. ASTORINO, and  
WILLIAM A. CAPP, *Administrative Patent Judges*.

CAPP, Administrative Patent Judge.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the final rejection, under 35 U.S.C. § 102(b), of claims 1, 2, 4, 5, and 10–18 as anticipated by Myklebust (US 6,351,671 B1, iss. Feb. 26, 2002) and claims 1, 2, and 4–18 as anticipated by Kramer (US 5,405,362, iss. Apr. 11, 1995). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

## THE INVENTION

Appellants' invention relates to cardiac defibrillators. Spec. ¶ 1.  
Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A defibrillator, comprising:
  - means for selecting a CPR treatment protocol from a plurality of stored CPR treatment protocols, the selected CPR treatment protocol including at least a number of CPR chest compressions;
  - means for communicating the number of CPR chest compressions; and
  - means for performing an ECG analysis, and wherein the selected CPR treatment protocol includes an initial number of chest compressions prior to an initial ECG analysis.

## OPINION

### *Prior Related Proceedings*

The instant application is a division of U.S. non-provisional application number 11/095,305 (the "Parent Application"). The Parent Application came before the Board on appeal and resulted in a decision that affirmed-in-part the Examiner's rejection of pending claims under the same Myklebust relied on by the Examiner in the instant appeal. *See Ex parte Chapman*, 2012 WL 4842869 (BPAI) (hereinafter the "2012 Decision").

In the 2012 Decision, we reviewed the Myklebust reference and made the following finding of fact:

[T]here is no disclosure that Myklebust delivers chest compression instructions that include an initial number of chest compressions prior to performing an initial ECG analysis.

2012 Decision, 2012 WL at \*5. Based on this finding, we reversed the Examiner's rejection of claim 4 of that application. *Id.* After the appeal, claims 2 and 4 of that application were amended and re-written in

independent form that included limitations directed to an initial number of chest compressions prior to performing an initial ECG analysis, and were allowed to issue. *See* Parent Application, Amendment Following Board Decision; *see also* US 8,433,407.

In the instant case, independent claims 1, 10, and 15, each contain a limitation directed to a CPR protocol that includes an initial number of chest compressions prior to an initial CPR analysis. Claims App. The Examiner rejected these claims as anticipated by Myklebust. Final Action 2–3. According to the Examiner, a “new reading” of Myklebust subsequent to the 2012 Decision, reveals that Myklebust discloses the claimed subject matter, thereby justifying the final rejection. *Id.* at 6. This appeal follows.

*Anticipation by Myklebust*

Appellant argues that Myklebust fails to disclose the limitations in claims 1, 10, and 15 directed to an initial number of chest compressions prior to an initial ECG analysis. Appeal Br. 11. In response, the Examiner states that the “new reading” of Myklebust reveals the following disclosure.

The data collected, such as ECG, ventilation data, CPR information and other measured data regarding the condition of the patient and the activities carried out on the patient during treatment may, instead of being transferred to a communication center or in addition to the transfer, be stored in a memory 19, from which the data may later be retrieved via e.g. a PC for further evaluation of the CPR that has been performed.

Myklebust, col. 6, ll. 1–8; Ans. 2. In reply, Appellants argue that the passage of Myklebust recited by the Examiner is silent regarding when the ECG is performed. Reply Br. 2. We agree.

We have reviewed the column 6 passage related to the Examiner’s “new reading” of Myklebust. This passage, in our opinion, cannot be

reasonably interpreted as a positive teaching of a CPR protocol where an initial number of chest compressions are necessarily given before an initial ECG analysis.

Accordingly, the Examiner's findings of fact are not supported by a preponderance of the evidence and we do not sustain the anticipation rejection of claims 1, 10, and 15 over Myklebust, neither do we sustain the rejection of claims 2, 4, 5, 11–14, and 16–18 that depend therefrom.

*Anticipation by Kramer*

*Claims 1, 2, 4, and 5*

The Examiner finds that Kramer discloses all of the elements of claim 1. Final Action 4. In particular, the Examiner finds that Kramer discloses means for selecting a CPR treatment protocol that includes a number of CPR chest compressions and means for communicating the number of CPR compressions. *Id.* The Examiner also finds that Kramer discloses a CPR protocol that provides for an initial number of chest compressions prior to an initial ECG analysis. *Id.*

Appellants traverse the Examiner's rejection by arguing that Kramer does not communicate "the number" of CPR compressions as claimed in claim 1. Appeal Br. 15. Appellants argue that Kramer merely tells a user to start or continue CPR, but does not communicate a number of chest compressions. *Id.*

In response, the Examiner states that Kramer's portable console 245 is considered to be the "means for communicating the number of CPR chest compressions" because the console visually and audibly delivers instructions to a user according to the prompts illustrated in Figures 18A–I. Ans. 6. According to the Examiner, these prompts include beginning or continuing

CPR, such as what is shown in block 440 of Figure 188, which instructs a user to continue CPR for 45–60 seconds. *Id.* The Examiner reasons that the Kramer’s portable console 245 communicates that CPR chest compressions should be started or continued for a set period of time and this disclosure is sufficient to satisfy the claim limitations directed to “a number” and “the number” of chest compression. *Id.*

The dispute between Appellants and the Examiner centers on the meaning of “a number” and “the number” of chest compressions. Essentially, Appellants contend that it refers a specific, discrete number while the Examiner construes it as merely referring to a plurality, i.e., some indeterminate number greater than one. Ans. 6.

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under the broadest reasonable interpretation standard, claim terms are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Even under the broadest reasonable interpretation, the Board's construction “cannot be divorced from the specification and the record evidence,” *In re NTP, Inc.*, 654 F.3d 1279, 1288 (Fed. Cir. 2011).

Words often have different meanings to different people and in different contexts. *See Ferguson Beauregard v. Mega Sys., LLC*, 350 F.3d 1327, 1338 (Fed. Cir. 2003). The person of ordinary skill in the art is deemed to read the claim term in the context of the particular claim in which the disputed term appears. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1313

(Fed. Cir. 2005). Similarly, the person of ordinary skill in the art is also deemed to read the claim term in the context of the specification. *Id.* Construing individual words of a claim without considering the context in which those words appear is not reasonable. *Trivascular, Inc. v Samuel*, 812 F.3d 1056, 1062 (Fed Cir. 2016). Instead, it is the “use of the words in the context of the written description and customarily by those of skill in the relevant art that accurately reflects both the ‘ordinary’ and ‘customary’ meaning of the terms in the claims.” *Ferguson*, 350 F.3d at 1338.

Turning first to the context of the surrounding claim language, we note that the first limitation is directed to a means for selecting a CPR protocol, where the selected protocol includes “a number” of CPR chest compressions. Claims App. claim 1. The second limitation is directed to a means for communicating “the number” of chest compressions. The surrounding context indicates that “the number” in the second limitation is the same number as “a number” in the first limitation.

The following passages from Appellants’ Specification further inform our understanding.

A defibrillator is disclosed that specifies treatment protocols in terms of number of chest compressions instead of time intervals.

Spec. ¶ 7.

The invention described herein is a method and apparatus that includes an algorithm that makes it possible to specify treatment protocols in terms of number of chest compressions instead of time intervals.

*Id.* ¶ 20.

The CPR treatment protocols described herein are specified in terms of numbers of chest compressions and communicated to the user in that fashion. With this approach, the defibrillator

**105** instructs the user to deliver a certain number of chest compressions, rather than provide CPR for a certain time interval.

*Id.* ¶ 31. In view of the foregoing, we interpret the “a number” and “the number” terms in claim 1 to refer to a “certain number” and not merely an indeterminate number greater than one, i.e., a plurality of compressions.

We have reviewed Figure 18B relied on by the Examiner as satisfying the “number” limitations of claim 1. Kramer, Fig. 18B. We have also reviewed the associated disclosure in column 12 of Kramer. Kramer, col. 12, ll. 9–20. Block 440 merely calls for, under certain circumstances, for a first responder to continue CPR for an interval of time. *Id.* In the specific instance of Block 440, the interval can vary from between 45 and 60 seconds. *Id.* Thus, the precise number of chest compressions that would be administered under Block 440 could vary depending on whether CPR is continued for as little as 45 seconds or as much as 60 seconds. The number of chest compressions could also vary based on the rate at which CPR is administered, i.e., chest compressions per unit of time.

In view of the foregoing discussions, we determine that the Examiner errs in finding that Kramer satisfies the “a number” and “the number” limitations of claim 1 and we do not sustain the rejection of claim 1 as anticipated by Kramer, nor do we sustain the rejection of claims 2, 4, and 5 that depend therefrom.

#### *Claims 6–9*

Claim 6 is an independent claim. Claims App. Like claim 1, claim 6 has a limitation directed to communicating a number of chest compressions. Claims App. The Examiner finds that Kramer satisfies this limitation. Final Action 5.

In traversing the rejection, Appellants rely on the same arguments as those asserted against the rejection of claim 1. Appeal Br. 14–15. The Examiner responds using the same reasoning and analysis as for claim 1 with respect to the “number” of chest compressions required by the claim.

Although claims 1 and 6 differ in claim language and scope, we, nevertheless, determine that the “number” limitation in claim 6 requires communication of a certain, specific number. Thus, for essentially the same reasons discussed above with respect to the anticipation rejection of claim 1, claim 6 is patentably distinguishable from Kramer, which merely directs continuation of CPR treatment for an interval of time.

We do not sustain the anticipation of rejection of claim 6 over Kramer, nor do we sustain the rejection of claims 7–9.

*Claims 10–14*

Claim 10 is an independent claim. Claims App. As with claim 1, claim 10 contains a limitation directed to a CPR treatment protocol including an initial number of chest compressions prior to an initial ECG analysis. *Id.* The Examiner finds this limitation met by Kramer. Final Action 4 (citing Kramer, Fig. 18A).

Appellants argue that Kramer does not disclose the “initial number” limitation of claim 10. Appeal Br. 16. In particular, Appellants assert that blocks 315–345 in Figure 18A are steps that a first responder would take without the assistance of an expert system. *Id.*

In response, the Examiner states Kramer’s blocks 315–345 are part of the treatment and diagnostic algorithms encompassed by the expert system of Kramer. Ans. 8.

We have reviewed Figure 18A of Kramer, together with the following teaching disclosure in Kramer's specification.

The interactive nature of this expert system is illustrated by block **300**, depicting an assessment of a patient's responsiveness by a first response and by block **360** depicting various instructions or prompts generated by the expert system to the first responder regarding treatment to be administered to a patient. The assessments depicted by blocks **315–345** in FIG. 18A, reflect action that a first responder would be trained to take without the assistance of an expert system. Block **350** depicts the attachment of measuring devices of the present invention such that the expert system can perform the analysis and provide the instructions depicted in block **360**. The various dysrhythmias that may be diagnosed by the expert system are depicted at blocks **361–367** of FIG. 18A. Each of these dysrhythmias is shown in greater detail in FIGS. 18B-18I.

Kramer, col. 11, l. 61 – col. 12, l. 9. In our opinion, the disclosure regarding Block 350 depicting the attachment of the measuring devices so that the expert system can perform the analysis and provide instructions indicates that the steps that precede block 350 are performed prior to attachment of the measuring devices. Viewed in this light, the Examiner errs in finding that blocks 315–345 are performed by Kramer's expert system.

Accordingly, we do not sustain the Examiner's anticipation rejection of claim 10 over Kramer, nor do we sustain the rejection of claim 11–14 that depend therefrom.

#### *Claims 15–18*

Claim 15 is an independent claim. Claims App. As with claims 1 and 10, claim 15 contains a limitation directed to a CPR treatment protocol including an initial number of chest compressions prior to an initial ECG analysis. *Id.*

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Our disposition of the claim 15 rejection follows our analysis and treatment of the claim 10 rejection over Kramer above. For essentially the same reasons expressed above, we do not sustain the anticipation rejection of claim 15 over Kramer, nor do we sustain the rejection of claims 16–18 that depend therefrom.

#### DECISION

The decision of the Examiner to reject claims 1, 2, 4, 5, and 10–18 as anticipated by Myklebust is reversed.

The decision of the Examiner to reject claims 1, 2, and 4–18 as anticipated by Kramer is reversed.

REVERSED