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MILLER IP GROUP, PLC MI4 SPINE, LLC 42690 WOODWARD AVE. SUITE 300 BLOOMFIELD HILLS, MI 48304			KAMIKAWA, TRACY L	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MIGUELANGELO J. PEREZ-CRUET and
JOHN R. PEPPER

Appeal 2015-001910
Application 13/226,320¹
Technology Center 3700

Before JOHN C. KERINS, STEFAN STAICOVICI, and LEE L. STEPINA,
Administrative Patent Judges.

STAICOVICI, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Miguelangelo J. Perez-Cruet and John R. Pepper (Appellants) appeal under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1, 2, 10, 12, 15, 16, and 20.² We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

¹ According to Appellants, the real party in interest is MI4Spine, LLC. Appeal Br. 3 (filed July 31, 2014).

² Claims 4, 8, 9, 11, 13, 14, and 17–19 are canceled, and claims 3 and 5–7 are withdrawn from consideration. *Id.*

SUMMARY OF DECISION

We REVERSE.

INVENTION

Appellants' invention relates to a laminar plate "that reconstructs or supports the lamina of a vertebra after it has been removed during spinal surgery and prevents bone growth material from entering the spinal canal." Spec. para. 12.

Claims 1 and 20 are independent. Claim 1 is illustrative of the claimed invention and reads as follows:

1. A laminar plate for bracing a vertebra at a location where lamina bone has been removed by spinal surgery, wherein the removed lamina bone creates an opening in the vertebra exposing a spinal canal, said plate comprising a center plate portion, a first end portion at a first end of the center plate portion and a second end portion at a second end of the center plate portion so that the plate is only a single continuous plate member, wherein at least one of the first end portion and the second end portion of the plate is angled other than 180° relative to the center plate portion, and wherein the first end portion is configured to be coupled to a spinous process of the vertebra or proximate thereto and the second end portion is configured to be coupled to a facet of the vertebra or proximate thereto, and wherein the continuous plate member is shaped and configured to be attached to the vertebra so that the center plate portion is recessed within the opening and positioned at a location within the vertebra that is more inward toward the spinal canal than the first and second end portions such that the first and second end portions are angled from the center plate portion away from the spinal canal, said plate member being effective to accept and hold a bone graft material on a surface of the plate member opposite from the spinal canal.

THE REJECTIONS

The following rejections are before us for review:

I. The Examiner rejected claims 1, 2, 10, 15, 16, and 20 under 35 U.S.C. § 102(e) as being anticipated by Slivka (US 2010/0152854 A1, pub. June 17, 2010).

II. The Examiner rejected claim 12 under 35 U.S.C. § 103(a) as being unpatentable over Slivka.

ANALYSIS

Rejection I

The Examiner finds that Slivka discloses “a laminar plate (1) for bracing a vertebra at a location where lamina bone has been removed by spinal surgery . . . [including] a center plate portion (U-shaped portion 7), a first end portion (3) . . . and a second end portion (5)” and that “the first and second end portions are each angled other than 180° relative to the center plate portion, as each end portion (3, 5) extends at an angle away from the U-shaped center plate portion (U-shaped portion 7).” Final Act. 3–4 (citing Slivka paras. 41, 87, 88 and Figs. 2, 6).

Appellants assert that “all of the embodiments discussed by Slivka refer to the implant as being a balloon, a compressible device, an expandable device, etc.,” and that “Figure 3 [of Slivka] shows the implant hanging down like a deflated balloon.” Appeal Br. 8. Appellants argue that “no definition for a plate includes a fillable balloon like device,” and thus, the expandable device of Slivka “cannot be considered a plate having a center plate portion and first and second end portions defining a continuous plate member, as claimed.” *Id.*

The Examiner responds that “under broadest reasonable interpretation, a plate in the context of orthopedic surgery requires only a structure lending support to underlying or neighboring bone.” Ans. 4. The Examiner “submits that Slivka’s implant, under broadest reasonable interpretation, may be considered a plate due to its support of the neighboring lamina bone, in particular in its final hardened shape.” *Id.* The Examiner points out that “Slivka’s implant provides more definitive structure than a balloon,” and that “Slivka shows a final form of the implant in Fig. 2 (and, as argued by Appellants, in Fig. 7), which form meets the structural limitations of the plate as claimed (e.g. a center plate portion and first and second end portions defining a continuous plate member).” *Id.* at 5.

In reply, Appellants argue that “filling a balloon with a hardenable material does not make the balloon a plate.” Reply Br. 1. Appellants, thus, assert that “it is not reasonable for the Examiner to assert that . . . [Slivka’s] balloon is a plate.” *Id.*

The Examiner does not provide evidence to support the position that a person of ordinary skill in the art of orthopedic surgery would understand the term “plate” to mean “a structure lending support to underlying or neighboring bone.” Accordingly, it is appropriate to consult a general dictionary definition of the word “plate” for guidance in determining the ordinary and customary meaning of the claim term as viewed by a person of ordinary skill in the art when reading the term in light of Appellants’ Specification. *See Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010). In this case, an ordinary and customary meaning of the term “plate” is “a smooth flat thin piece of material.” *Merriam Webster’s Collegiate Dictionary* (11th ed. 2005). Such an interpretation is consistent

with Appellants' Specification, which describes laminar plate 48 as "primarily a flat elongated plate member having a bend at each end." Spec. para. 41; *see also id.* at Fig. 7. As such, in the instant case, an ordinary and customary meaning of the term "plate," when read in light of the Specification, is "a flat thin piece of material."

In contrast, Slivka discloses expandable laminoplasty implant 1 as having first and second end portions 3, 5 extending from intermediate portion 7 that includes "a concave side 17 [bottom] and an opposed convex side 19 [top]," as well as "first 8 and second 10 endfaces," and "caudal and cephalad sides 12, 14" that together define an enclosed cavity 9. Slivka, paras. 37–39, Figs. 1 and 2. As such, intermediate portion 7 of Slivka is box-shaped, and end portions 3, 5 extend from endfaces 8, 10 of the box. *See id.*, Fig. 1. Although we appreciate that Slivka's box-shaped structure with extending ends 3, 5 may lend support in its hardened state to underlying or neighboring bone (*see* Slivka, Fig. 7), nonetheless, as a box-shape is not flat and thin, a person of ordinary skill in the art would not reasonably interpret Slivka's box-shaped structure 7 as a "plate." Therefore, we agree with Appellants that when reading the term "plate," in light of Appellants' Specification, Slivka's intermediate portion 7 with extending ends 3, 5 does not constitute a "plate" having bent end portions, as called for by independent claims 1 and 20. *See* Appeal Br. 8.

In conclusion, for the foregoing reasons, we do not sustain the rejection of claims 1, 2, 10, 15, 16, and 20 under 35 U.S.C. § 102(e) as being anticipated by Slivka.

Rejection II

The Examiner's modification of Slivka does not remedy the deficiencies of Slivka as described *supra*. See Final Act. 7. Accordingly, for the same reasons discussed above, we also do not sustain the rejection under 35 U.S.C. § 103(a) of claim 12 as unpatentable over Slivka.

SUMMARY

The Examiner's decision to reject claims 1, 2, 10, 15, 16, and 20 under 35 U.S.C. § 102(e) as anticipated by Slivka is reversed.

The Examiner's decision to reject claim 12 under 35 U.S.C. § 103(a) as unpatentable over Slivka is reversed.

REVERSED