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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GEORGE J. HAIDUKEWYCH

Appeal 2015-003016
Application 13/068,397
Technology Center 3700

Before WILLIAM A. CAPP, MICHAEL L. WOODS, and
ARTHUR M. PESLAK, *Administrative Patent Judges*.

WOODS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

George J. Haidukewych (“Appellant”) seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1–23. Appeal Br. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

Appellant's invention relates to "a fixation clamp to stabilize a bone fracture." Spec. 2, ll. 2–3. Claims 1 and 11 are independent and claim 1 is reproduced below with emphasis to a certain claim limitation at issue in this appeal.

1. A fixation clamp to stabilize a bone fracture, comprising:

a first arcuate clamp member defining a first concave inner surface shaped to correspond to an exterior surface of a shaft portion of a long bone;

a second arcuate clamp member movably coupled to the first arcuate clamp member and defining a second concave inner surface shaped to correspond to the exterior surface of the shaft portion of the bone;

a biasing element biasing the first and second arcuate clamp member away from one another to receive the bone therebetween; and

an adjustment device moving the first and second arcuate members toward one another to tighten the first and second arcuate members around the shaft portion of the bone.

Appeal Br. 8 (Claims App.) (emphasis added).

THE REJECTIONS

I. Claims 1–7, 11–17, 22, and 23 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Rogers (US 2,460,470, issued Feb. 1, 1949) and Bonvallet (US 2003/0225416 A1, published Dec. 4, 2003). Final Act. 2.

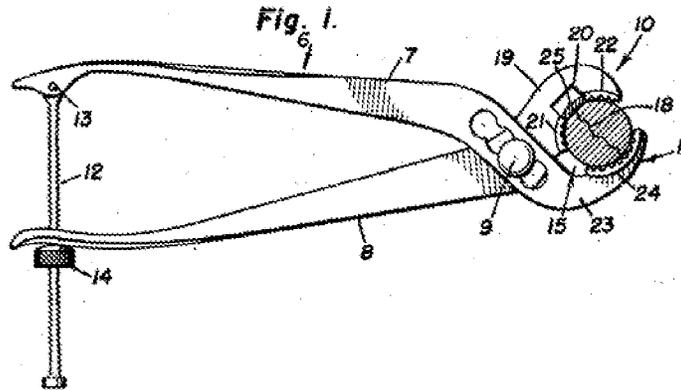
II. Claims 8–10 and 18–21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Rogers, Bonvallet, and Judet (US 4,263,904, issued Apr. 28, 1981). Final Act. 6.

ANALYSIS

*Rejection I: Claims 1–7, 11–17, 22, and 23 as
Unpatentable over Rogers and Bonvallet*

Appellant contests the rejection of claims 1–7, 11–17, 22, and 23 collectively as a group. *See* Appeal Br. 6. In accordance with 37 C.F.R. § 41.37(c)(1)(iv), we select claim 1 as the representative claim to decide the appeal of the rejection, with claims 2–7, 11–17, 22, and 23 standing or falling with claim 1.

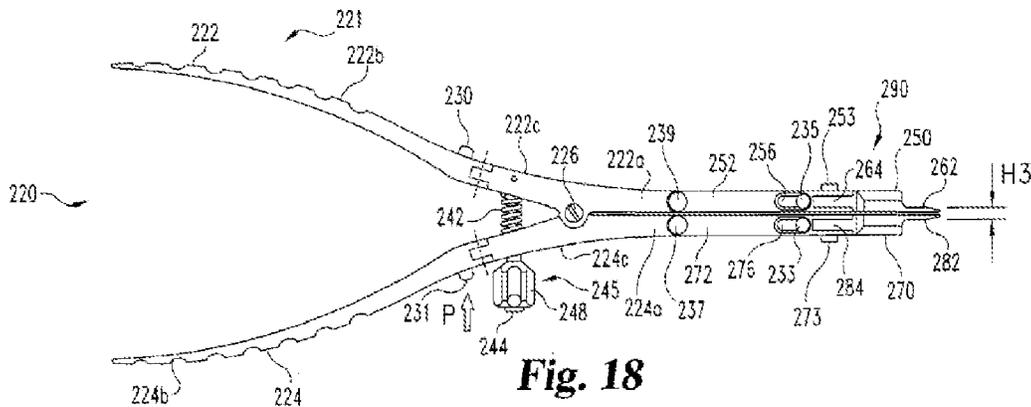
In rejecting claim 1, the Examiner relies on Rogers’ forceps as satisfying the claimed “fixation clamp,” comprising, *inter alia*, “first arcuate clamp member” 10 defining a “first concave inner surface” 22 shaped to correspond to an exterior surface of a bone, and “second arcuate clamp member” 11 defining a “second concave inner surface” 24 also shaped to correspond to an exterior surface of a bone. Final Act. 2–3 (citing Rogers, Fig. 1). To illustrate these findings, we reproduce Rogers’ Figure 1, below:



As disclosed by Rogers, Figure 1 depicts “pliers-like forceps” including handles 7, 8 pivotally connected at 9 and terminating at clamping jaws 10, 11, which are “arcuately curved to conform to the bone structure” 22, 24. *See* Rogers; col. 2, ll. 21–25, 44–48, col. 3, ll. 7–14. As explained

by the Examiner, “[w]ere the handles of Rogers biased apart, the clamp members would be biased away from one another.” Final Act. 3.

The Examiner also finds, however, that Rogers does not disclose the claimed biasing element, and instead relies on Bonvallet’s disclosure of a “biasing element” 242 for biasing the handles apart. Final Act. 3 (citing Bonvallet, Fig. 18). To illustrate this finding, we reproduce Bonvallet’s Figure 18, below:



As disclosed by Bonvallet, Figure 18 depicts spreader assembly 290 including spring member 242 extending between handles 222, 224, where spring member 242 biases handles 222, 224 away from another so that spreader assembly 290 “is biased to a normally closed position.” Bonvallet ¶ 99.

Notably, spreading Bonvallet’s handles 222, 224 apart *closes* the spreader assembly, whereas spreading Rogers’ handles 7, 8 apart *opens* clamping jaws 10, 11.

In satisfying the claimed biasing member, the Examiner reasons that

It would have been obvious to one with ordinary skill in the art at the time of the invention to substitute the adjustment device and biasing member of Bonvallet for the adjustment means 12 of Rogers. One would have done so to provide [Rogers’] handles in an open position for the surgeon, which

can be adjustably moved to provide a grip about the bone portions. The biasing member would take up any slack in the tool prior to the clamp portions being passed about the bone portions.

Final Act. 3. The Examiner further explains that “[t]he combination was being made such that the holding end of [Rogers’] handles would be biased apart . . . [and] that this would make the Rogers clamp prepared for the surgeon’s use without his needing to open the handles prior to use.” Adv. Act. 2.

In contesting the rejection, Appellant presents several arguments, which we address separately, below.

First, Appellant argues that neither Rogers nor Bonvallet “show or suggest a biasing element biasing ‘first and second arcuate clamp member away from one another to receive the bone therebetween,’” as recited in the claim. Appeal Br. 4. Appellant asserts that Bonvallet instead discloses a biasing member (spring member 242) that “biases hands 222, 224 away from one another so that the spreader assembly 290 of spreader instrument 220 is biased to a normally closed position,” which is contrary to the explicit claim language. *Id.* (citing Bonvallet ¶ 99).

Appellant’s first argument is not persuasive, as nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

In the present case, the Examiner does not rely on either Rogers or Bonvallet for individually disclosing a biasing element for biasing clamps away from one another, as called for in the claim. Final Act. 3. Instead, the Examiner admits that Rogers does not disclose a biasing element (*id.*) and

further acknowledges that Bonvallet’s spring biases the clamps to a normally-closed position (Adv. Act. 2 (“[w]hile it may be true when viewing Bonvallet on its own that the bias causes the working end to be closed . . .”). Importantly, the Examiner explains that “[w]ere the handles of Rogers biased apart, the clamp members would be biased away from one another.” Final Act. 3. The Examiner’s finding with respect to Rogers is correct. Unlike in Bonvallet—where spreading handles 222, 224 apart spreads its clamp members away from one another (*see, e.g.*, Bonvallet ¶ 99)—the operation of Rogers’ forceps is just the opposite. In particular, in Rogers, as handles 7, 8 are spread apart, jaws 10, 11 are *also* spread apart. *See, e.g.*, Rogers, Figs. 1, 4. To achieve these differing operations, Bonvallet’s instrument relies on multiple pivoting pins and articulations, while Rogers’ instrument relies on a single pin and single articulation. *Compare* Bonvallet, Figs. 18, 19, *with* Rogers, Figs. 1, 4. Accordingly, adding Bonvallet’s spring to Rogers’ forceps such that Rogers’ handles are biased apart, as the Examiner proposes, would satisfy the claimed limitation of a “biasing element biasing the first and second arcuate clamp member away from one another to receive the bone therebetween.”

Second, Appellant also argues the Examiner’s combination is based on impermissible hindsight, as Rogers’ device already has retaining nut 14 and retaining screw 12 to move clamping jaws 10, 11 to a desired position, and that adding a biasing element would “provide no additional functionality.” Appeal Br. 5 (citations omitted). Appellant again points out that Bonvallet biases the instrument in “a normally closed position,” and that there is no reason for providing Rogers’ device, which already has an

adjustment mechanism (i.e., retaining nut *14*) with Bonvallet's biasing element. Reply Br. 4.

Appellant's second argument is not persuasive, as Appellant's hindsight argument is of no moment where, as here, the Examiner provided a sufficient, non-hindsight reason to combine the references. *See In re Cree*, 818 F.3d 694, 702, n.3 (Fed. Cir. 2016).

In the present case, the Examiner explains that combining Bonvallet's spring to Rogers' device—so that Rogers' handles are biased apart—“would make [] Rogers clamp prepared for the surgeon's use without his needing to open the handles prior to use.” Adv. Act. 2; *see also* Final Act. 3. Here, the Examiner's reasoning is adequately articulated with rational underpinnings. Furthermore, we disagree with Appellant's assertion that the proposed modification “would provide no additional functionality” simply because of the presence of Rogers' retaining nut *14* and retaining screw *12*. *See* Appeal Br. 4–5. Rather, and as explained correctly by the Examiner, Rogers' retaining screw *12* and retaining nut *14* only limit “how wide the tool is capable of opening” and that “the surgeon [still] has to manually open [] Rogers tool prior to attachment to the bone.” Ans. 8. Accordingly, the additional functionality that the Examiner's modification provides will allow a surgeon to use the forceps in a biased-to-open position, which is an improvement over Rogers' unbiased tool. *See id.* at 7 (“the proposed modification took Rogers' tool and improved upon it by providing the tool to the surgeon in a biased-to-open position.”).

Accordingly, we sustain the rejection of claim 1, and claims 2–7, 11–17, 22, and 23, which fall with claim 1, under 35 U.S.C. § 103(a) as unpatentable over Rogers and Bonvallet.

*Rejection II: Claims 8–10 and 18–21 as
Unpatentable over Rogers, Bonvallet, and Judet*

In contesting this rejection, Appellant relies only on the same arguments discussed *supra* with respect to Rejection I. *See* Appeal Br. 6–7.

For the same reasons we sustain Rejection I, we also sustain the rejections of claims 8–10 and 18–21 under 35 U.S.C. § 103(a) as unpatentable over Rogers, Bonvallet, and Judet.

SUMMARY

The rejection of claims 1–7, 11–17, 22, and 23 under 35 U.S.C. § 103(a) as unpatentable over Rogers and Bonvallet is affirmed.

The rejection of claims 8–10 and 18–21 under 35 U.S.C. §103(a) as unpatentable over Rogers, Bonvallet, and Judet is affirmed.

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