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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte M. JASON BROOKE and ANDREA ACUNA
(APPLICANTS: CARDIAC PACEMAKERS)

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Appeal 2016-006009
Application 13/869,741[1]
Technology Center 3700

_____

Before DONALD E. ADAMS, TAWEN CHANG,
and TIMOTHY G. MAJORS, *Administrative Patent Judges.*

ADAMS, *Administrative Patent Judge.*

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134(a) involves claims 21–23, 25–30, 32–35, 37–42, 44–50, 52–57, and 59–62 (App. Br. 1). Examiner entered rejections under 35 U.S.C. § 101; 35 U.S.C. § 102(b) and (e); 35 U.S.C. § 103; and obviousness-type double patenting. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] Appellants identify the real party in interest as "Cardiac Pacemakers, Inc. [] a wholly-owned subsidiary of Boston Scientific Corp." (App. Br. 2.)

STATEMENT OF THE CASE

Appellants' disclosure "relates generally to cardiac devices and methods[] and, more particularly, to selection of one or more electrode combinations from a plurality of electrodes" (Spec. 1: 14–15). Claim 21 is representative and reproduced below:

21. A method, comprising:

establishing a programmable parameter and a plurality of values of the parameter to be compared;

enabling a module to perform a measurement for each of the plurality of values and related to energy expenditure of a battery of an implantable medical device operating according to each of the plurality of values;

implementing a processor to compute an energy expenditure for each of the plurality of values using the measurements; and

generating a graphical user interface displaying information corresponding to the computed energy expenditure for the plurality of values.

(App. Br. 50.)

The claims stand rejected as follows:

Claims 21–23, 25–30, 32, 45–50, 52–57, and 59 stand rejected under 35 U.S.C. § 101, as directed to non-statutory subject matter.[2]

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[2] Examiner did not include claims 33 and 60 in the statement of this rejection (see Ans. 4–6). Therefore, we have not included claims 33 and 60 in our deliberations (cf. Reply Br. 2 ("The Answer's inclusion of claims 33 and 60 by reference in the discussion of the § 101 rejection[] is believed to be in error").

Claims 21, 33, 45, 46, and 60 stand rejected under 35 U.S.C. § 102(b) as anticipated by Armstrong.[3]

Claims 21, 28–30, 32, 33, 40–42, 44, and 45 stand rejected under 35 U.S.C. § 102(b) as anticipated by North.[4]

Claims 21–23, 25, 33–35, 37, 45, 46, 48–50, 52, 60, and 62 stand rejected under 35 U.S.C. § 102(b) as anticipated by Russie.[5]

Claims 21, 27, 28, 33, 39, 40, 45–47, 54–57, and 59–61 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Armstrong and North.

Claims 26, 28, and 53 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Russie and Freeberg.[6]

Claims 21–23, 25–30, 32–35, 37–42, 44–50, 52–57, and 59–62 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of Brooke.[7, 8]

Statutory Subject Matter:

<div align="center">ISSUE</div>

Does the evidence of record support Examiner's finding that Appellants' claimed invention is directed to non-statutory subject matter?

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[3] Armstrong et al., US 2006/0025829 A1, published Feb. 2, 2006.
[4] North et al., US 2005/0177206 A1, published Aug. 11, 2005.
[5] Russie, US 2007/0179549 A1, published Aug. 2, 2007.
[6] Freeberg, US 2006/0074454 A1, published Apr. 6, 2006.
[7] Brooke et al., US 9,539,429 B2, issued Jan. 10, 2017.
[8] Application No. 13/925,413 issued as Brooke, therefore, this rejection is no longer provisional (*see* Ans. 3).

FACTUAL FINDINGS (FF)

FF 1.   Examiner finds that Appellants' claimed invention is "directed to an abstract idea" (Ans. 4; *see id.* at 5 and 13–14).

FF 2.   Examiner finds that Appellants' independent

> [c]laims [] involve the steps of "establishing", "enabling" and "implementing" which can be broadly construed as steps of making available or making capable. The step of "establishing a programmable parameter" could simply be a mental, intangible step of thinking of a parameter. The step of "enabling a module to perform" could simply be making said "module" available for potentially performing a measurement. An actual measurement is not required. The step of "implementing a processor to compute" again could simply be making a processor available so it could possibly compute. The actual computing step is not required. Lastly, the generation of a GUI could simply be intangible data since a GUI is not a physical structure but a data construct implemented via software.

(Ans. 13.)

FF 3.   Examiner finds that the "establishing, enabling and implementing [steps of Appellants' claimed invention do] not require any actual steps to be performed and can only involve simply making available the particular structures of a module and a processor" (Ans. 4; *see id.* (explaining that "[t]he module and processor do not perform any action but instead are made available to potentially be able to perform an action" and "nothing is transformed to a different state or thing")).

FF 4.   Examiner finds that "the processor and module, are generically recited [in Appellants' claims] such that they cover any machine capable of performing the claimed steps" (Ans. 4; *see id.* at 5 ("the claims only require a generic computer, i.e. processor, to perform generic computer functions, i.e. processing"); *see also id.* at 13).

FF 5.   Examiner finds that "[d]etermining energy expenditure values of an implantable medical device from stored parameters does not inherently improve any technological field or computer and only tangentially relates the computation to implantable medical devices" (Ans. 5).

FF 6.   Examiner finds that "[t]he generating step [of Appellants' claims] is merely a data gathering step which fails to amount to significantly more than the abstract idea of the claim" (Ans. 4; *see id.* at 5–6 ("To add 'significantly more', [Appellants'] claims must recite using th[e] computed data in an active method step for a particular purpose other than generally displaying data"); *id.* at 13 ("'obtaining and comparing intangible data', 'collecting and comparing known information', 'comparing new and stored information and using rules to identify options', and 'data recognition and storage' . . . [are] abstract ideas")).

ANALYSIS

The scope of 35 U.S.C. § 101 "is subject to an implicit exception for 'laws of nature, natural phenomena, and abstract ideas,' which are not patentable." *Intellectual Ventures I LLC v. Capital One Financial Corp.*, 850 F.3d 1332, 1338 (Fed. Cir. 2017), citing *Alice Corp. Pty. Ltd. v. CLS Bank Int'l.*, 134 S. Ct. 2347, 2355 (2014).

> To determine whether the exception applies . . . a court must determine: (1) whether the claim is directed to a patent-ineligible concept, i.e., a law of nature, a natural phenomenon, or an abstract idea [(the "abstract idea" step)]; and if so, (2) whether the elements of the claim, considered "both individually and 'as an ordered combination,'" add enough to "'transform the nature of the claim' into a patent-eligible application [(the 'inventive concept' step)]."

(*Intellectual Ventures*, 850 F.3d at 1338, citing *Alice Corp.*, 134 S. Ct. at 2355).

With regard to the "abstract idea" step, we agree with Examiner's finding that Appellants' claimed invention is "directed to an abstract idea" (FF 1). Appellants claims require: performance of a measurement for each of a plurality of values, computation of an energy expenditure for each of the plurality of values, and display of information corresponding to the computed energy expenditure for the plurality of values (*see, e.g.*, App. Br. 50; *see generally* FF 1, 2, and 6). Stated differently, Appellants' claims involve the collection, manipulation, and display of data, which is an abstract idea. *See Intellectual Ventures*, 850 F.3d at 1340 ("an invention directed to collection, manipulation, and display of data was an abstract process"); *see generally id.* at 1340–41. Thus, we find that Appellants' claims are "directed to a patent-ineligible concept," specifically an abstract idea. For the foregoing reasons, we disagree with Appellants' contention that Examiner fails to articulate "what the alleged 'abstract idea' is" (App. Br. 9; *see id.* at 9–12; *see also* Reply Br. 3). *Cf. Intellectual Ventures*, 850 F.3d at 1340–41; *see also* Ans. 13–14.

Similarly, we are not persuaded by Appellants' contention that Examiner failed "to articulate any reasons as to why the limitations in the claims fail to amount to 'significantly more' than an abstract idea" (App. Br. 13; *see id.* at 13–15). According to Appellants, their

> claim limitations recite a specific application, confined to a particular technological environment, that improves the functioning of an implantable device and a display device by measuring and proving more meaningful device information (e.g., energy expenditure information), such as to a clinician or caregiver who is in a position to make informed programming

decisions about the medical device system and a patient's health.

(App. Br. 14.) As Examiner explains, notwithstanding Appellants' contention to the contrary, Appellants' "claims themselves [do] not require any use of [] data for a purpose that can be considered improving a technological field"; to the contrary, an "improvement to [a technological] field would not exist until the data is actually specifically applied to that field" (Ans. 15). More specifically, Examiner finds that "[d]etermining energy expenditure values of an implantable medical device from stored parameters does not inherently improve any technological field or computer and only tangentially relates the computation to implantable medical devices" (FF 5). *See generally Intellectual Ventures*, 850 F.3d at 1341–1342.

As Examiner explains, Appellants' "claims only require a generic computer, i.e. processor, to perform generic computer functions, i.e. processing" (FF 4) and "nothing [in Appellants' claims] is transformed to a different state or thing" (FF 3). Thus, when the elements of Appellants' claims are considered "both individually and 'as an ordered combination,'" the claim elements fail to add enough to "'transform the nature of the claim' into a patent-eligible application." *Intellectual Ventures*, 850 F.3d at 1338; *see id.* at 1341–1342.

For the foregoing reasons, we are not persuaded by Appellants' contention that their claimed invention is directed to the "problem with configuring an implantable device for delivery of electrical therapy[, which] includes assessing the many electrode pairs that are available for therapy delivery in a multi-electrode system, including determining one or more

parameters that improve device longevity without sacrificing a therapy's efficacy" (App. Br. 12).

CONCLUSION OF LAW

The evidence of record supports Examiner's finding that Appellants' claimed invention is directed to non-statutory subject matter.

The rejection of claim 21 under 35 U.S.C. § 101, as directed to non-statutory subject matter. Claims 22, 23, 25–30, 32, 45–50, 52–57, and 59 fall with claim 21.[9]

Anticipation:

ISSUE

Does the preponderance of evidence on this record support Examiner's finding that Armstrong, North or Russie teaches Appellants' claimed invention?

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[9] We recognize Appellants' contention that "[c]laims 45 and 46 include recitations similar to those discussed with respect to claim 21," but find that Appellants' contention merely points out what the claims recite and, therefore, is not considered an argument for the separate patentability of claims 45 and 46. App. Br. 14; *see* Manual of Patent Examining Procedure § 1205.02. Appellants' Reply Brief, however, presents different arguments relating to claims 45 and 46 (Reply Br. 2–3; *see also id.* at 4 ("The Answer [] erroneously considers the independent claims as a group when, instead, each of the independent claims has unique recitations and each of the independent claims should be analyzed independently")). We have not considered the new arguments presented in Appellants' Reply Brief. *See Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (informative) (Appellants fail to "explain what 'good cause' there might be to consider the new argument. On this record, [Appellants'] new argument is belated.").

FACTUAL FINDINGS (FF)

FF 7. Armstrong "relates generally to implantable medical devices, and more particularly to methods, apparatus, and systems for monitoring power consumption and impedance characteristics relating to implantable medical devices" (Armstrong ¶ 2).

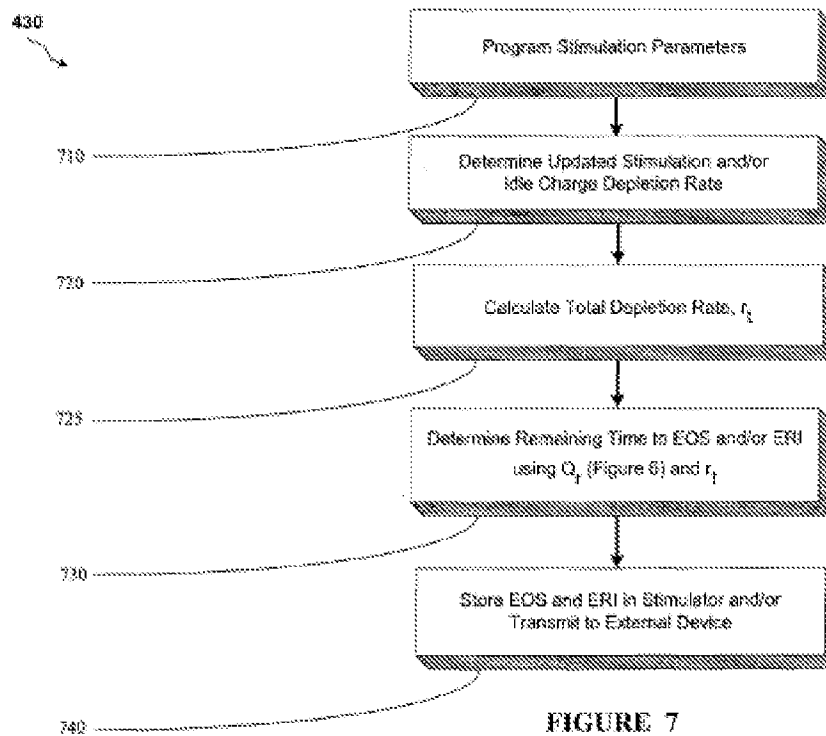FF 8. Armstrong's Figure 7 is reproduced below:

FIGURE 7

Armstrong's "**FIG. 7** [illustrates] a [] detailed flow chart depicting the calculation of the time of the end of service (EOS) and/or elective replacement indicator (ERI) signals, [for an implantable medical device] . . ." (Armstrong ¶ 75; Ans. 6).

FF 9. Armstrong's implantable medical device (IMD) "is programmed for delivering to the patient electrical pulses having predetermined parameters (step **710**)," wherein the stimulation parameters may be changed, *inter alia,*

"to optimize the therapy delivered by the IMD" (Armstrong ¶ 75; *see* Ans. 6).

FF 10. Armstrong discloses that

> [w]hen a change in one or more stimulation parameter settings is implemented (whether by programming or accessing data from memory), the IMD [] and/or the external unit [] may determine an updated stimulation period current usage rate r_s associated with the new parameter settings, and subsequent updates to the total charge consumed will be based upon the new stimulation period current usage rate (step **720**).

(Armstrong ¶ 75; *see* Ans. 6.)

FF 11. Examiner finds that Armstrong discloses the transmission of "information corresponding to the computed energy expenditure (such as remaining charge, end of service or elective replacement indicators) for the plurality of parameter values, wherein the data is presented to a user [], which is commonly understood in the art of external programmers to be a graphical display" (Ans. 6–7, citing Armstrong ¶¶ 75 and 78).

FF 12. North "relates to implantable neurostimulators, and more particularly to programming of implantable neurostimulators" (North ¶ 2).

FF 13. North's implantable neurostimulator (INS) "delivers neurostimulation according to a program," which "may include values for a number of parameters, and the parameter values define the neurostimulation therapy delivered according to that program" (North ¶ 26; *see* Ans. 7).

FF 14. North's INS is associated with a programming device comprising a display that, *inter alia*, provides the user with a graphical user interface (North ¶ 27; *see id.* ¶¶ 21 and 47; *see* Ans. 7).

FF 15. North discloses that

> [a] clinician [] may use [the] programming device [] to program neurostimulation therapy for [a] patient[, wherein] [i]n some

embodiments, the clinician specifies programs by selecting program parameter values, tests the specified programs on [a] patient [], and receives feedback, e.g., rating information, for each of the tested programs from the patient.

(North ¶ 28; *see* Ans. 7.)

FF 16. North discloses that the

programming device [] estimates a battery drain rate for each of the programs tested based on the program parameters. In some embodiments, programming device [] presents the estimated battery drain rates for programs tested during the programming session. In other embodiments, programming device [] further estimates a battery longevity for each of the tested programs, e.g., estimates a length of time that INS [] will be able to deliver neurostimulation according to the program before INS [] must be explanted and replaced due to battery depletion. The estimated battery longevity may be based on the estimated battery drain rates. Programming device [] may present the battery longevities to the clinician in addition to or instead of presenting the battery drain rates. By presenting one or both of the battery drain rates and longevities, programming device [] allows the clinician to consider battery longevity when selecting one or more programs, and to select programs from among those tested that provide favorable drain rates and longevities. In this manner, the clinician may take into account not only the efficacy and side effects associated with a particular neurostimulation program, but also power consumption.

(North ¶ 32; *see also id.* ¶ 47; *see* Ans. 7.)

FF 17. North discloses a

processor [that] alternatively or additionally estimates the load based on device configuration information, such as an INS type, lead type, and/or electrode locations. [The] [p]rocessor [] may receive the device configuration information from the clinician via user interface [], and may identify components of the total load presented to the battery from look-up tables stored in memory [] based on the received device configuration

> information. In other embodiments, to achieve greater accuracy in the drain rate estimate, [the] processor [] may direct [the] INS [] to measure, rather than estimate, the impedance presented by each of electrodes [] coupled thereto, and receive the measured impedance values via telemetry circuit []. [The] [p]rocessor [] may then determine the load for a particular program based on the measured impedances for the anodes and cathodes selected for that program using the formula for parallel loads illustrated above. In exemplary embodiments, [the] processor [] directs [the] INS [] to measure impedances before testing of programs [].

(North ¶ 45; *see* Ans. 19.)

FF 18. Russie "relates generally to systems and methods for monitoring, configuring and managing implantable medical devices [(IMDs)], and more particularly, to systems and methods for monitoring and managing battery longevity of the [IMDs]" (Russie ¶ 2).

FF 19. Russie discloses "a method for monitoring and/or managing battery longevity for an IMD battery . . .[, which] comprises the steps of[, *inter alia,*] . . . displaying and/or analyzing IMD parameters or settings that may be causing the sub-optimal longevity . . . and [] adjusting parameters to perhaps improve the IMD battery longevity" (Russie ¶ 39; *see id.* ¶¶ 40–50 (disclosing various calculations that may be involved in determining battery longevity); *see also* Ans. 8 and 20–21).

FF 20. Russie discloses an IMD in association with a "user interface display screen [that] shows additional detail about battery status," such as "a longevity calculator [] that can display (and modify) IMD parameters that may affect battery longevity" (Russie ¶ 52; *see generally* Ans. 21).

FF 21. Russie discloses that a

> physician and/or clinician can identify the parameters and use the longevity calculator or other user interface to determine

> how best to optimize or improve remaining battery longevity.
> That is, a physician can modify IMD parameter settings using
> the longevity calculator or other interface to determine how
> changing parameters will affect battery longevity.

(Russie ¶ 57; *see generally* Ans. 21.)

ANALYSIS

The rejection over Armstrong:

Examiner finds that Armstrong anticipates Appellants' claimed invention (Ans. 6–7). Appellants contend, however, that Examiner failed to establish that Armstrong teaches "a measurement of an 'energy expenditure of a battery for each of [a] plurality of values" or a "graphical user interface for 'displaying information corresponding to the computed energy expenditure for the plurality of values'" (App. Br. 17 (emphasis removed); *see id.* at 18–25).

In response, Examiner reasons that Armstrong's disclosed method "is certainly capable of and[,] therefore[,] enabled to perform measurements for each of the plurality of values," because, "*in theory*, Armstrong teaches a device that can determine an energy expenditure for a plurality of values *assuming* a plurality of different values are selected over the life of the device" (Ans. 16 (emphasis added); FF 7–11). We are not persuaded.

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). "The mere fact that a certain thing may result from a given set of circumstances is not sufficient" to establish a prima facie case of anticipation. *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations and internal quotation marks omitted).

The rejection over North:

Examiner finds that North anticipates Appellants' claimed invention (Ans. 7). Appellants contend, however, that North, as relied upon by Examiner, fails to

> teach "enabling a module to perform a measurement for each of the plurality of values and related to energy expenditure of a battery of an implantable medical device operating according to each of the plurality of values", and "implementing a processor to compute an energy expenditure for each of the plurality of values using the measurements" . . . .

(App. Br. 27 (emphasis removed); *see generally id.* at 27–31.)

> In response, Examiner asserts that

> North discloses utilizing battery drain rates in estimating battery longevity (par. [0032]) wherein the battery drain rates are calculated using lead impedance measurements (par. [0045]). Therefore[,] for each program that has a plurality of values and electrode configurations, a lead impedance measure is obtained and [used in the] calculation of battery drain rates, which in turn is used to determine battery longevity.

(Ans. 19.) We are not persuaded. Examiner failed to establish that North teaches the performance of a measurement for *each* of a plurality of values and related energy expenditure of a battery of an implantable medical device operating according to *each* of the plurality of values. At best, Examiner established that North teaches the selection of a neurostimulation program by selecting *program parameter values*, wherein the specified program is tested, and a programming device estimates the battery drain rate for each of the programs tested based on *the program parameters*, not each individual parameter, selected for each program (FF 12–17).

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The rejection over Russie:

Examiner finds that Russie anticipates each of Appellants'
independent claims 21, 33, 45, 46, and 60 (Ans. 8; *see generally* FF 18–21).
Specifically, Examiner finds that

> Russie discloses establishing, with a programmer, a plurality of
> programmable parameter values (par. [0032-0033]); performing
> a measurement for each of the values; calculating an energy
> expenditure for each of the measured values (par. [0039-0049]);
> and displaying the energy expenditure on a graphical user
> interface (par. [0050]).

(Ans. 8 (alteration original).) In this regard, Examiner finds that "energy
expenditure and expected battery longevity are calculated by [Russie's]
system using measured current values," wherein

> the algorithm for calculating battery longevity . . . can be used
> iteratively as parameters are altered by an external programmer
> [and] [a]s the parameters are altered, the calculations are
> updated and displayed to a user []. [In] other words, the system
> of Russie is capable of calculating energy expenditure for each
> of a plurality of *parameter sets*.

(Ans. 21 (emphasis added); *see also id.* ("Russie discloses calculating
battery longevity for a *parameter set* [] and re-calculating battery longevity
when a single parameter is adjusted in order to determine how battery
longevity is affected" (emphasis added)).)

As Appellants explain, however, "[n]one of the cited portions of
Russie[, as relied upon by Examiner,] is understood to disclose [Appellants']
claimed 'measurement for each of the plurality of values'" (App. Br. 32; *see
also id.* at 32–35). Examiner has, at best, established that Russie discloses a
method wherein individual parameters of a *parameter set* may be adjusted to
determine how any such modification of a *parameter set* affects battery
longevity (*see* Ans. 21). Examiner has not, however, established that Russie

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teaches, *inter alia*, a "measurement *for each* of the plurality of values," such as each of the plurality of parameters in a parameter set (*see* App. Br. 32–35 (emphasis added)).

CONCLUSION OF LAW

The preponderance of evidence on this record fails to support Examiner's finding that Armstrong, North or Russie teaches Appellants' claimed invention.

The rejection of claims 21, 33, 45, 46, and 60 under 35 U.S.C. § 102(b) as anticipated by Armstrong is reversed.

The rejection of claims 21, 28–30, 32, 33, 40–42, 44, and 45 under 35 U.S.C. § 102(b) as anticipated by North is reversed.

The rejection of claims 21–23, 25, 33–35, 37, 45, 46, 48–50, 52, 60, and 62 under 35 U.S.C. § 102(b) as anticipated by Russie is reversed.

Obviousness:

Does the preponderance of evidence relied upon by Examiner support a conclusion of obviousness?

FACTUAL FINDINGS (FF)

FF 22. Examiner finds that Russie "fails to disclose automatically selecting a pacing vector having a minimum capture threshold and therefore minimum associated energy expenditure," and relies on Freeberg to make up for this deficiency in Russie (Ans. 12).

ANALYSIS

The combination of Armstrong and North:

Based on the combination of Armstrong and North, Examiner concludes that, at the time Appellants' invention was made, it would have

been prima facie obvious "to modify the device in the Armstrong reference
to include a GUI as the particular presentation means, as taught and
suggested by North, for the purpose of allowing a physician to select
parameters that provide lower drain rates and higher battery longevity" (Ans.
10–11; *see generally id.* at 10; FF 7–17). As Examiner makes clear,
Examiner's sole reason for relying upon North is limited to North's
disclosure of "a GUI as the particular presentation means" (Ans. 24).
Examiner's rationale, however, fails to establish that the combination of
Armstrong and North makes up for the deficiencies in each reference as
discussed above. Therefore, we agree with Appellants' contention that
"[n]either of Armstrong and/or North, alone or in combination, discloses all
elements of [Appellants'] claims" (App. Br. 40–41).

The combination of Russie and Freeberg:

   Appellants' claims 26, 38, and 53 ultimately depend from Appellants'
independent claims 21, 33, and 46, respectively.

   Based on the combination of Russie and Freeberg, Examiner
concludes that, at the time Appellants' invention was made, it would have
been prima facie obvious "to modify the device in [] Russie [] to include
automatically selecting the electrode combination exhibiting the lowest
capture threshold, as taught and suggested by Freeberg, for the purpose of
minimizing energy expenditure in the cardiac device" (Ans. 12; *see* FF 18–
22). Examiner, however, fails to establish that Freeberg makes up for the
deficiency in Russie as discussed above (*see* App. Br. 47–48 ("Freeberg fails
to remedy the deficiencies described [in the rejection under 25 U.S.C.

§ 102(e)] with respect to Russie")). To the contrary, "Examiner contends
[that] the previous response with respect to Russie under 35 U[.]S[.]C[.] [§]
102 address[es] [Appellants'] arguments" (Ans. 26). We are not persuaded
for the reasons set forth above.

CONCLUSION OF LAW

The preponderance of evidence relied upon by Examiner fails to
support a conclusion of obviousness.

The rejection of claims 21, 27, 28, 33, 39, 40, 45–47, 54–57, and 59–
61 under 35 U.S.C. § 103(a) as unpatentable over the combination of
Armstrong and North is reversed.

The rejection of claims 26, 28, and 53 under 35 U.S.C. § 103(a) as
unpatentable over the combination of Russie and Freeberg is reversed.

Obviousness-type Double Patenting:

Does the preponderance of evidence relied upon by Examiner support
a conclusion of obviousness-type double patenting?

ANALYSIS

Examiner finds that the claims on Appeal are not patentably distinct
from the claims of Brooke (Ans. 3). Appellants state that "[t]his rejection is
not being appealed" (App. Br. 48). Therefore, we summarily affirm the
rejection.

CONCLUSION OF LAW

The preponderance of evidence relied upon by Examiner supports a
conclusion of obviousness-type double patenting. The rejection of claim 21
under the judicially created doctrine of obviousness-type double patenting as
being unpatentable over the claims of Brooke is affirmed. Claims 22, 23,

25–30, 32–35, 37–42, 44–50, 52–57, and 59–62 are not separately argued and fall with claim 21.

TIME PERIOD FOR RESPONSE

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

AFFIRMED