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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GEOFF CLARK¹

Appeal 2016-008065
Application 13/827,417
Technology Center 3700

Before MICHELLE R. OSINSKI, JEFFREY A. STEPHENS, and
ERIC C. JESCHKE, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE²

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1, 3–6, 8, 9, 11–14, 16–18, and 20.³ We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ Smiths Medical ASD, Inc. (“Appellant”) is the Applicant as provided in 37 C.F.R. § 1.46 and is identified as the real party in interest. Appeal Br. 3.

² This appeal is related to Appeal 2016-002515 in related Application 13/567,122 (“the ’122 application”), which issued as U.S. Patent No. 9,861,383 on January 9, 2018. The Decision in Appeal 2016-002515 was issued on August 29, 2017. The application before us in the present appeal is a continuation-in-part of the ’122 application.

³ Claims 2, 7, 10, 15, and 19 are withdrawn from consideration. Final Act. 1.

THE CLAIMED SUBJECT MATTER

Claims 1 and 9 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter on appeal.

1. A needle assembly, comprising:
 - a hub extending along a longitudinal axis having an open proximal end and a closed distal end;
 - a needle having a distal tip and an aperture at or proximate to the tip, the needle having a proximal end connected to the closed end of the hub to establish a through passage between the aperture of the needle and the open end of the hub;
 - wherein the hub includes a proximal portion including the proximal end, the proximal portion having a non-conventional configuration that prevents it from coupling with a counterpart conventional connector having a conventional configuration but enables it to mate with a special connector having a counterpart configuration complementary to the non-conventional configuration; and
 - wherein the hub further includes a distal portion having two plates positioned at opposite sides thereat in parallel to each other and a partition positioned orthogonal to and separating the two plates from the needle, the respective top edges of the two plates lying substantially co-planarly along an upper plane and the respective bottom edges of the two plates lying substantially co-planarly along a lower plane so that the respective top edges form one rest support and the respective bottom edges form another rest support for the needle hub were the needle hub placed onto a flat surface using the respective top edges or the respective lower edges.

EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Kimball	US 2008/0287919 A1	Nov. 20, 2008
Racz	WO 2008/157376 A1	Dec. 24, 2008

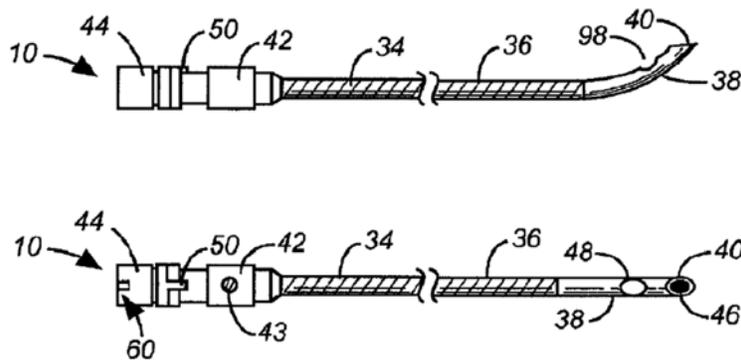
THE REJECTIONS

- I. Claims 1 and 8 stand rejected under 35 U.S.C. § 102(b) as anticipated by Racz. Final Act. 2–3.
- II. Claims 3–6, 9, 11–14, 16–18, and 20 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Racz and Kimball. *Id.* at 4–5.

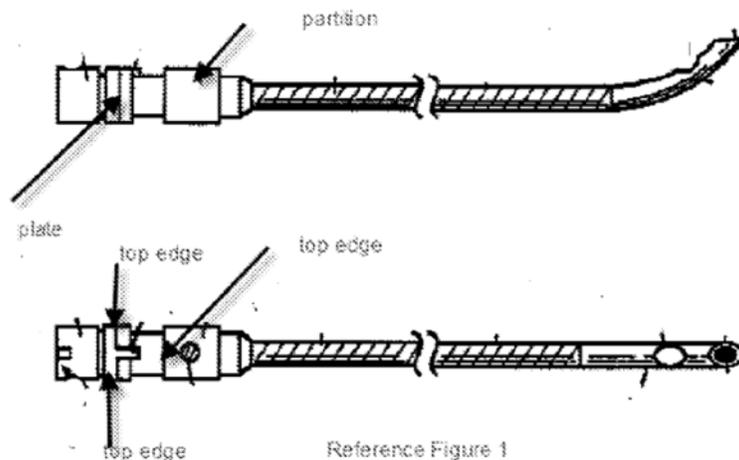
OPINION

Rejection I

The Examiner finds that Racz discloses, *inter alia*, “a distal portion [of a hub] having two plates positioned at opposite sides thereof in parallel to each other.” Final Act. 2. The Examiner finds that the top and bottom edges of the two plates lay substantially co-planarly along an upper and lower plane, respectively, and form rest supports. *Id.* at 2–3. The Examiner includes an annotated reproduction of Figure 1 of Racz to illustrate what the Examiner considers to be the plates (along with their top edges), as set forth in the claims. *Id.* at 3. A relevant portion of Figure 1 of Racz, and the Examiner’s annotated version of Racz’s Figure 1 are reproduced below.



Portion of Figure 1 of Racz



Annotated Version of Portion of Figure 1 of Racz

The reproduced portion of Racz’s Figure 1 depicts “an embodiment of a safety neural injection system [] with a cannula 10 (viewed in both top and side perspectives).” Racz ¶ 59. The annotated figure removes the reference numerals, but includes notations with arrows extending to, *inter alia*, those elements the Examiner considers to be the “plate[s]” with two “top edge[s].” Final Act. 3. The Examiner finds that “Racz shows a rectangular portion surrounding the hub to which 50 is attached” and that “the way the notch[] [50] [is] drawn indicates to the Examiner the[] portion[] [to which 50 is attached] [is] rectangular as opposed to cylindrical as there is no indication of curvature in relation to the notch[.]” Ans. 2. The Examiner, thus, finds the “two sides” of the portion to which 50 is attached are “considered plates.” *Id.*

Appellant argues that the portion to which 50 is attached is a “circular ring structure” and cannot “be construed to be two plates that are positioned at opposite sides of the distal portion in parallel to each other.” Appeal Br. 10 (emphasis omitted).

An Examiner's factual finding regarding what a reference discloses must be supported by a preponderance of the evidence. *See In re Caveney*, 761 F.2d 671, 674 (Fed. Cir. 1985) ("preponderance of the evidence is the standard that must be met by the PTO in making rejections"). In order to satisfy this standard, the evidence must demonstrate that it is more likely than not that the alleged facts are actually true. *See Bosies v. Benedict*, 27 F.3d 539, 542 (Fed. Cir. 1994) (the preponderance of the evidence standard requires the finder of fact to believe that the existence of a fact is more probable than its nonexistence).

The depictions of Racz's cannula are limited to side and top views, which fail to provide sufficient certainty regarding the shape of hub 42, stylet mating hub 44, or the portion to which notch 50 is attached. Moreover, Racz is silent as to the shape of hub 42, stylet mating hub 44, or the portion to which notch 50 is attached. After viewing Figure 1 of Racz, we find that the portion to which notch 50 is attached may be rectangular, as the Examiner proposes, but it instead may be a circular ring structure as proposed by Appellant. As far as we can tell, both scenarios are equally probable. In particular, we do not agree with the Examiner's finding (Ans. 2) that the way the notch is drawn indicates that the portion to which 50 is attached is rectangular. "The Patent Office has the initial duty of supplying the factual basis for its rejection. It may not . . . resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies" in the cited references. *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967); *see In re GPAC, Inc.*, 57 F.3d 1573, 1582 (Fed. Cir. 1995). On these facts, one of ordinary skill in the art can only speculate as to whether the portion to which notch 50 is attached is rectangular, as the Examiner proposes.

If the portion to which 50 is attached is a circular ring structure, the Examiner has not explained how a circular ring structure would meet the limitations of the claim directed to “two plates . . . in parallel to each other.” The Examiner has only explained how a rectangular element would meet the limitations of the claim directed to “two plates . . . in parallel to each other.” Ans. 2. Thus, the Examiner relies on a speculative finding that the portion to which 50 is attached is rectangular, and such speculation is insufficient to support the rejection.

Accordingly, we find that the Examiner erred in finding that Racz discloses two plates positioned at opposite sides of a distal portion of a hub in parallel to each other by improperly relying on a speculative finding that the portion to which 50 is attached is rectangular. We do not sustain the rejection of independent claim 1, or claim 8, which depends therefrom, under 35 U.S.C. § 102(b) as anticipated by Racz.

Rejection II

The Examiner rejects claims 3–6, 9, 11–14, 16–18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Racz and Kimball. Final Act. 4–5. The rejection of these claims relies on the Examiner’s speculative finding that the portion to which 50 is attached is rectangular in connection with finding that Racz discloses two plates positioned at opposite sides of the distal end in parallel to each other. The Examiner does not explain how Kimball might cure this underlying deficiency. Accordingly, we do not sustain the rejection of claims 3–6, 9, 11–14, 16–18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Racz and Kimball.

Appeal 2016-008065
Application 13/827,417

DECISION

The Examiner's decision to reject claims 1, 3-6, 8, 9, 11-14, 16-18, and 20 is reversed.

REVERSED