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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CLIFTON D. CROAN

Appeal 2017-002367
Application 12/038,650[1]
Technology Center 3600

Before BRUCE T. WIEDER, AMEE A. SHAH, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1–28. We have jurisdiction under 35 U.S.C. § 6(b). Oral arguments were presented December 6, 2018.

We AFFIRM.

CLAIMED SUBJECT MATTER

Appellant's invention relates to "evaluating healthcare treatment of a patient." (Spec. ¶ 6.)

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[1] According to Appellant, the real party in interest is Enigami Systems, Inc. (Appeal Br. 3.)

Claims 1, 18, 25, and 26 are the independent claims on appeal.

Claim 1 is illustrative. It recites:

> 1. A method for evaluating healthcare treatment of a patient provided by a caregiver, comprising:
>
> establishing one or more symptoms corresponding to a diagnosis for the patient;
>
> establishing a weight for each symptom;
>
> periodically collecting data from the patient relating to patient self-assessment of the one or more symptoms;
>
> processing with a computer the collected patient self-assessment of the one or more symptoms data to measure progress of treatment including taking into account the weight established for each symptom;
>
> reporting the identity of a caregiver that provided treatment for the patient and the measured progress of treatment of the patient, based on the collected patient self-assessment of the one or more symptoms data, to a utilization review entity that performs database based utilization review of the caregiver that provided treatment to the patient, wherein the utilization review is based at least in part upon the collected data from the patient relating to patient self-assessment of the one or more symptoms;
>
> reporting the identity of the caregiver that provided treatment for the patient and the measured progress of treatment of the patient, based on the collected patient self-assessment of the one or more symptoms data, to a healthcare organization that determines a relative position of the caregiver in relation to the peer group of the caregiver in treating a condition including a caregiver performance rating.

REJECTIONS

Claims 1–28 are rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.[2]

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[2] The Examiner states that "[c]laims 1–27 are rejected under 35 U.S.C. 101." (Final Action 2.) We treat the omission of dependent claim 28 as a

Claims 1–3, 7, 8, 11–13, 15–17, 25, and 27 are rejected under 35 U.S.C § 103(a) in view of Salgado (US 2007/0226012 A1, pub. Sept. 27, 2007), Chao (US 2006/0241974 A1, pub. Oct. 26, 2006), and Dean (US 2006/0178569 A1, pub. Aug. 10, 2006).

Claims 18, 19, and 23 are rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Weinert (US 2008/0177149 A1, pub. July 24, 2008), and Chao.

Claims 4–6 and 28 are rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Chao, and Rapaport (US 2009/0055220 A1, pub. Feb. 26, 2009).

Claims 9, 10, and 14 are rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Chao, and Zakim (US 7,379,885 B1, iss. May 27, 2008).

Claim 24 is rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Weinert, Chao, and Zakim.

Claim 20 is rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Weinert, Chao, and Brown (US 2009/0112624 A1, pub. Apr. 30, 2009.)

Claims 21 and 22 are rejected under 35 U.S.C § 103(a) in view of Salgado, Dean, Weinert, Chao, and Alpsten (US 2007/0280431, pub. Dec. 6, 2007).

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typographical error and note that Appellant similarly treats this as a typographical error by addressing the rejection as including claim 28. (*See* Appeal Br. 13.)

ANALYSIS

The § 101 rejection

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101. Section 101, however, "contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014) (quoting *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013)).

Alice applies a two-step framework, earlier set out in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), "for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts." *Alice*, 134 S. Ct. at 2355.

Under the two-step framework, it must first be determined if "the claims at issue are directed to a patent-ineligible concept." *Id.* If the claims are determined to be directed to a patent-ineligible concept, e.g., an abstract idea, then the second step of the framework is applied to determine if "the elements of the claim . . . contain[] an 'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application." *Id.* at 2357 (citing *Mayo*, 566 U.S. at 72–73, 79).

With regard to step one of the *Alice* framework, the Examiner determines that the claims are "directed to the abstract idea of using patient symptom information to assess treatment progress." (Final Action 2.) The Examiner also determines that "the claims are directed to the abstract idea of

"using categories to organize, store, and transmit information." (Answer 3–4.)

Appellant disagrees and argues that "the claims are not similar to a concept identified by the courts as abstract." (Reply Br. 3, emphasis omitted.)

Under step one of the *Alice* framework, we "look at the 'focus of the claimed advance over the prior art' to determine if the claim's 'character as a whole' is directed to excluded subject matter." *Affinity Labs of Texas, LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1257 (Fed. Cir. 2016) (quoting *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016)).

The Specification provides evidence as to what the claimed invention is directed. In this case, the Specification discloses that the invention relates to "evaluating healthcare treatment of a patient." (Spec. ¶ 6.) Claim 1 provides further evidence. Claim 1 recites "[a] method for evaluating healthcare treatment of a patient . . . comprising: establishing one or more symptoms," "establishing a weight for each symptom," "collecting data from the patient," "processing . . . the collected patient . . . data," and reporting data. In other words, claim 1 is directed to establishing data, collecting data, processing data, and reporting data.

Although we and the Examiner describe, at different levels of abstraction, to what the claims are directed, it is recognized that "[a]n abstract idea can generally be described at different levels of abstraction." *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1240 (Fed. Cir. 2016). That need not and, in this case does not, "impact the patentability analysis." *Id.* at 1241.

As an initial matter, we note that we have treated claims related to assessing patient treatment and determining the efficacy of a treatment, i.e., the response, as abstract. *See In re Grams*, 888 F.2d 835 (Fed. Cir. 1989); *see also In re Meyer*, 688 F.2d 789 (CCPA 1982). Indeed, *Mayo* itself determined that a claim reciting "[a] method of optimizing therapeutic efficacy for treatment" did not recite patent-eligible subject matter. *See Mayo*, 566 U.S. at 74.

More particularly, "we have treated collecting information, including when limited to particular content (which does not change its character as information), as within the realm of abstract ideas." *Elec. Power Grp.*, 830 F.3d at 1353. "In a similar vein, we have treated analyzing information by steps people go through in their minds, or by mathematical algorithms, without more, as essentially mental processes within the abstract-idea category." *Id.* at 1354. Here, the limitations recited in claim 1 could be performed by a person using a pencil and paper, or with ordinary mental steps.[3] *See id.* at 1355. "And we have recognized that merely presenting the results of abstract processes of collecting and analyzing information, without more (such as identifying a particular tool for presentation), is abstract as an ancillary part of such collection and analysis." *Id.* at 1354. "Here, the claims are clearly focused on the combination of those abstract-idea processes." *Id.*

Moreover, the limitations of claim 1 do not recite implementation details. Instead, they recite functional results to be achieved. In other words, claim 1 does not recite "a particular way of programming or

[3] Claim 1 refers to a computer only for the generic purpose of processing data, i.e., "processing . . . the collected patient self-assessment."

designing the software . . . , but instead merely claim[s] the resulting [method]." *Apple, Inc.*, 842 F.3d at 1241. "Indeed, the claim language here provides only a result-oriented solution, with insufficient detail for how a computer accomplishes it. Our law demands more." *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 850 F.3d 1332, 1342 (Fed. Cir. 2017).

In view of the above, we agree with the Examiner that claim 1 is directed to an abstract idea.

Step two of the *Alice* framework has been described "as a search for an ' "inventive concept" '—*i.e.*, an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'" *Alice*, 134 S. Ct. at 2355 (citing *Mayo*, 566 U.S. at 72–73).

Appellant argues that the reporting elements of claim 1 are not "well-understood, routine, and conventional activities previously known in the pertinent industry." (Appeal Br. 14–16.) We do not find this argument persuasive. Rather, we agree with the Examiner that

> it is the additional elements (i.e. generic computer hardware) that have been identified as performing routine and conventional functions. For example the only additional element recited in claims 1, 25, and 26 is a "computer" that processes the collected symptom data to measure progress. This "computer["] is recited at the highest degree of generality and merely serves to link the abstract idea to a particular technological environment. This type of measurement (i.e. comparing previously collected values to currently collected values) is a routine, conventional, and well-understood activity of any general purpose computer. Claim 18 similarly recites a "data processing system" at a high degree of generality that merely server [sic] to link the abstract idea to a particular technological environment. Furthermore, Appellant's specification identifies conventional hardware for implementing the above described functionality (see paragraph 0021).

(Answer 5.) To the extent Appellant argues that the Examiner made an unsupported finding of fact that it was well-understood to use a computer to not only process data, but to also collect and report data, we do not find this argument persuasive of reversible error. (*See* Reply Br. 16.) As discussed above, *Alice* and *Electric Power* would support such a finding. *See Alice*, 134 S. Ct. at 2359; *see also Elec. Power Grp.*, 830 F.3d at 1355.

Also, "[i]t has been clear since *Alice* that a claimed invention's use of the ineligible concept to which it is directed cannot supply the inventive concept that renders the invention 'significantly more' than that ineligible concept." *BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1290 (Fed. Cir. 2018).

Appellant argues that "the Examiner made the same mistake as the district court in [*BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016)] -- he failed to consider the claim as an ordered combination." (Reply Br. 5.)

In *BASCOM*, the court determined that "an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces." *BASCOM*, 827 F.3d at 1350. Specifically, "[t]he inventive concept described and claimed in the '606 patent is the installation of a filtering tool at a specific location, remote from the end-users, with customizable filtering features specific to each end user." *Id.* at 1350. The Federal Circuit determined that this "particular arrangement of elements is a technical improvement over prior art ways of filtering." *Id.* Appellant does not indicate what element(s) in claim 1 correspond to, e.g., the "filtering tool at a specific location, remote from the end-users," nor does Appellant

indicate how the claimed arrangement of steps is a technical improvement over the prior art. Therefore, we do not find this argument persuasive.

Considered as an ordered combination, the instructions in claim 1 add nothing that is not already present when the steps are considered separately. The claims do not, for example, purport to improve the functioning of a computer. Nor do they effect an improvement in any other technology or technical field. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea. That is not enough to transform an abstract idea into a patent-eligible invention.

Appellant further argues that "[t]he claims should be analyzed under the streamlined analysis because they do not seek to tie-up an abstract idea." (Reply Br. 8, emphasis omitted.)

We understand this argument to be rooted in preemption. However, preemption is not a separate test.

> To be clear, the proper focus is not preemption *per se*, for some measure of preemption is intrinsic in the statutory right granted with every patent to exclude competitors, for a limited time, from practicing the claimed invention. *See* 35 U.S.C. § 154. Rather, the animating concern is that claims should not be coextensive with a natural law, natural phenomenon, or abstract idea; a patent-eligible claim must include one or more substantive limitations that, in the words of the Supreme Court, add "significantly more" to the basic principle, with the result that the claim covers significantly *less*. *See Mayo* 132 S. Ct. at 1294 [566 U.S. at 72–73].

CLS Bank Int'l v. Alice Corp. Pty. Ltd., 717 F.3d 1269, 1281 (Fed. Cir. 2013) (Lourie, J., concurring), *aff'd*, 134 S. Ct. 2347 (2014). Moreover, "[w]here a patent's claims are deemed only to disclose patent ineligible subject matter under the *Mayo* framework, as they are in this case,

preemption concerns are fully addressed and made moot." *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015). In other words, "preemption may signal patent ineligible subject matter, [but] the absence of complete preemption does not demonstrate patent eligibility." *Id.*

Appellant seeks to analogize claim 1 to "Example 21 of the July 2015 Examples."[4] (Appeal Br. 17.) In particular, Appellant argues that, in view of Example 21, "a claim that confines an abstract idea to a particular useful application is reciting patent eligible subject matter" and that "claim 1 is such a particularized useful application."

However, the Update simply presents hypothetical examples. (*See* Update Appendix 1.) Also, claim 2 in Example 21 recites "[a] method of distributing stock quotes over a network to a remote subscriber computer" including the steps of

> transmit[ing] the formatted stock quote alert over a wireless communication channel to a wireless device associated with a subscriber based upon the destination address and transmission schedule,
>
> wherein the alert activates the stock viewer application to cause the stock quote alert to display on the remote subscriber computer and to enable connection via the URL to the data source over the Internet when the wireless device is locally connected to the remote subscriber computer and the remote subscriber computer comes online.

(*Id.* at 3.) The Update Appendix explains that

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[4] *See July 2015 Update: Subject Matter Eligibility* (July 2015) (available at https://www.uspto.gov/sites/default/files/documents/ieg-july-2015-update.pdf); s*ee also July 2015 Update Appendix 1: Examples* (July 2015) (available at https://www.uspto.gov/sites/default/files/documents/ieg-july-2015-app1.pdf) ("Update Appendix").

> [t]he claimed invention addresses the Internet-centric challenge of alerting a subscriber with time sensitive information when the subscriber's computer is offline. This is addressed by transmitting the alert over a wireless communication channel to activate the stock viewer application, which causes the alert to display and enables the connection of the remote subscriber computer to the data source over the Internet when the remote subscriber computer comes online.

(*Id.* at 4.)

Claim 1 in Example 21 is similar to claim 2 except that Claim 1 lacks the stock viewer application; and, thus, does not address "the Internet-centric challenge of alerting a subscriber . . . when the subscriber's computer is offline" or "enable[] the connection of the remote subscriber computer to the data source over the Internet when the remote subscriber computer comes online." Claim 1 in Example 21 is described as patent ineligible. (*Id.* at 3–4.) Appellant does not persuasively argue why establishing symptoms and a weight for each symptom, collecting data from a patient, and processing and reporting the data, is analogous to addressing "the Internet-centric challenge of alerting a subscriber . . . when the subscriber's computer is offline" and, in particular, "enables the connection of the remote subscriber computer to the data source over the Internet when the remote subscriber computer comes online." (*See id.* at 4.)

Nor does Appellant persuasively argue why Appellant's claim 1 is analogous to claim 2 in Example 21, but not analogous to claim 1 in Example 21.

Appellant also seeks to analogize claim 1 to the claims in *Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016).

(Reply Br. 12–13.) Specifically, Appellant argues that "Appellant's claims are clearly more detailed and narrowly tailored than claim 1 of AMDOCS. Thus, the Appellant's claims are clearly confined to a particularly useful applications." (*Id.* at 13.) We do not find this argument persuasive.

Claim 1 of *Amdocs* recites "computer code for using the accounting information with which the first network accounting record is correlated to *enhance* the first network accounting record." *Amdocs*, 841 F.3d at 1299 (emphasis added). In an earlier opinion, *Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 761 F.3d 1329 (Fed. Cir. 2014) ("*Amdocs I*"), the court had "construed 'enhance' as meaning 'to apply a number of field enhancements in a distributed fashion.' [*Amdocs I*] at 1340. We took care to note how the district court explained that '[i]n this context, "distributed" means that the network usage records are processed close to their sources before being transmitted to a centralized manager.' [*Amdocs I*] at 1338." *Amdocs*, 841 F.3d at 1300.

Here, Appellant does not explain what limitation(s) in claim 1 correspond to the claim element "to enhance the first network accounting record," and more "narrowly tailor[]" the claim when the term "enhance" is properly construed. (*See* Reply Br. 13.)

Additionally, Appellant seeks to analogize the claims to those in, e.g., *Thales Visionix, Inc. v. United States*, 850 F.3d 1343 (Fed. Cir. 2017) and *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018). (Supp. Br. 5–7.[5]) We disagree. Appellant conflates the technical

[5] "Supp. Br." refers to the supplemental brief Appellant filed on December 3, 2018. In filing the supplemental brief, Appellant cited MPEP

improvements in *Thales*, i.e., the use of sensors in a non-conventional manner to reduce measurement errors (*Thales*, 850 F.3d at 1348–49), and *Finjan*, i.e., the behavior-based virus scan that improved computer functionality (*Finjan*, 879 F.3d at 1304–05), with the claimed improvement to a method for assessing healthcare treatment that uses a generic computer to perform a generic computer function, i.e., processing data. *See, e.g.*, *Alice*, 134 S. Ct. at 2359.

Appellant also seeks to analogize the claims to those in *Ancora Technologies, Inc. v. HTC America, Inc.*, 908 F.3d 1343 (Fed. Cir. 2018). (Supp. Br. 9–10.) Specifically, Appellant argues that in *Ancora*, "the Federal Circuit once again emphasized the focus on a particular type of data being used" and that "Appellant's claims are similar in that patient symptom data is being utilized – not all forms of data." (*Id.*) We disagree. Unlike Appellant's claims, "[t]he claimed method [in *Ancora*] specifically identifies how that functionality improvement is effectuated in an assertedly unexpected way: a structure containing a license record is stored in a particular, modifiable, non-volatile portion of the computer's BIOS." *See Ancora*, 908 F.3d at 1348. In other words, in *Ancora*, "[t]he asserted

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§ 1205.02 as permitting such supplemental briefing. (Supp. Br. 1.) MPEP § 1205.02 states that "[e]xcept as provided for in §§ 41.41, 41.47 and 41.52, any argument or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal." It further states that "[t]his sentence is not intended to preclude the filing of a supplemental brief or document if new authority should become available or relevant after the brief or reply brief is filed." However, MPEP § 1205.02 does not itself authorize the filing of a supplemental brief. Board authorization for supplemental briefing should be obtained under 37 C.F.R. § 41.50(d) prior to filing. In this instance, however, we will consider Appellant's supplemental brief.

innovation of the patent relates to where the license record is stored . . . . The inventive method uses a modifiable part of the BIOS memory—not other computer memory—to store the information that can be used." *Id.* The asserted innovation in *Ancora* is not, as Appellant argues, the type of data that is stored. Therefore, we do not find Appellant's argument persuasive.

Appellant's other arguments have been considered but are not deemed persuasive of reversible error.

Independent claims 18, 25, and 26 contain similar language and Appellant makes similar arguments. (*See* Appeal Br. 8–13 and 19–27.) Therefore, for similar reasons, we are not persuaded of reversible error. The dependent claims are not separately argued and fall with the independent claims. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The § 103(a) rejections

Double-counting

The Examiner finds that Salgado discloses "establishing a weight for each symptom (see paragraph 0020)" and "periodically collecting data from the patient relating to patient self-assessment of the one or more symptoms (see paragraph 0020)." (Final Action 3.) Specifically, the Examiner finds that the

> step of selecting which symptoms will be used in calculating a composite score, as disclosed at paragraph 0020 of Salgado, is encompassed by the broad limitation of establishing a weight for each symptom. This is because the act of selecting certain symptoms for calculating the composite score amounts to assigning those symptoms a "weight" of 1 and assigning the non-selected symptoms as "weight" of 0.

(Answer 8.)

Appellant disagrees and argues that "the Examiner is double-counting the portion of Salgado that discusses "*establishing one or more symptoms corresponding to a diagnosis for the patient*" and the additional claim limitation of "*establishing a weight for each symptom*" (Reply Br. 22), and that "[t]he same portion of the Salgado reference cannot be used to teach both "establishing a weight for each symptom" and "patient self-assessment of the one or more symptoms." (*Id.*; *see also* Appeal Br. 28–31.)

We agree that "[w]here a claim lists elements separately, 'the clear implication of the claim language' is that those elements are 'distinct component[s]' of the patented invention." *Becton, Dickinson and Co. v. Tyco Healthcare Grp, LP*, 616 F.3d 1249, 1254 (Fed. Cir. 2015), quoting *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed. Cir. 2004); *see also* Appeal Br. 20–21. However, we are not persuaded of error.

Claim 1 recites, "establishing one or more symptoms corresponding to a diagnosis for the patient; establishing a weight for each symptom; [and] periodically collecting data from the patient relating to patient self-assessment of the one or more symptoms."

Salgado discloses "[a] method for diagnosing, assessing, and determining of [sic] the efficacy of a treatment regimen for chronic rhinosinusitis." (Salgado, Abstract.) In particular, Salgado discloses an invention that "in its basic form is a method to numerically score and report symptoms of chronic rhinosinusitis wherein the scores are representative of the presence and/or severity of the chronic rhinosinusitis symptoms." (*Id.* ¶ 19.) In particular, the method of Salgado comprises

> (a) conducting at least two interviews of one or more a patients over the duration of a treatment regimen to collect patient-reported information specific to clinical severity of one or more of a plurality of symptoms related to chronic rhinosinusitis; (b) the at least two interviews comprising one or more patients assigning an individual symptom score for each of the one or more symptoms within the plurality of symptoms at the time of said interviews; (c) selecting two or more individual symptoms of plurality [sic] of symptoms for use in calculating a composite score which reflects clinical status of said chronic rhinosinusitis in said one or more patients at the time said interview was conducted.

(*Id.* ¶ 20.)

In other words, Salgado discloses a first patient interview in which a patient reports the severity of symptoms, i.e., at least establishes one or more symptoms. The patient assigns a score for each symptom, e.g., a value of "1" for a first reported symptom, and a value of "1" for a second reported symptom. Salgado also discloses a second interview, i.e., "at least two interviews . . . over the duration of a treatment regimen." (*Id.*) Once again, the patient assigns a score for each symptom, e.g., a value of "1" for the aforementioned first reported symptom, and, now, a value of "0" for the aforementioned second reported symptom. That is, a weight is established for each symptom, and the weight for each symptom may vary over time, i.e., the progress of treatment is measured over time. Therefore, we are not persuaded that the Examiner is impermissibly "double-counting."

Alternatively, the Examiner finds that "the assigning of an individual symptom score to each symptom, as disclosed at paragraph 0020 of Salgado, could also be considered, and is encompassed by, the broad limitation of establishing a weight for each symptom." (Answer 9.)

In other words, Salgado discloses collecting both symptom and severity of symptom information from patients. That is, Salgado discloses "assigning an individual symptom score [(a weight)] for each of the one or more symptoms within the plurality of symptoms [(established symptoms)] at the time of said interviews." (Salgado ¶ 20.) Therefore, for this reason also, we are not persuaded that the Examiner is impermissibly "double-counting."

Appellant presents similar arguments for independent claim 25. (*See* Appeal Br. 41–44.) For similar reasons, we are not persuaded of error.

Processing by a computer

Appellant also argues that claim 1 recites "processing with a computer the collected patient self-assessment," and that the disclosure in Salgado that "the present invention can be embodied as a method, data processing system, or computer program product" (Salgado ¶ 95), is a "broad-brush statement[]" that does "not provide the express level of detail required for a finding of obviousness." (Reply Br. 23; *see also* Appeal Br. 31–32.)

We disagree. Salgado teaches that "the present invention can be embodied as a . . . computer program product" (Salgado ¶ 95), i.e., that the invention of Salgado can be processed by a computer. And Salgado teaches that the invention includes processing the collected patient self-assessment data, i.e., "selecting two or more individual symptoms . . . for use in calculating a composite score which reflects clinical status of said chronic rhinosinusitis in said one or more patients" and "calculating a composite score" (*id.* ¶ 20). (*See* Answer 9–10.) In short, Appellant's arguments do not persuade us that that the Examiner committed reversible error.

Appellant presents similar arguments for independent claims 18 and 25. (*See* Appeal Br. 36–37, 44–45.) For similar reasons, we are not persuaded of error.

Reporting the progress of treatment

Appellant argues "that the cited combination of references [does not] teach[] the claim element "reporting . . . the measured progress of treatment." (Appeal Br. 32, emphasis omitted.) In particular, Appellant argues that neither "Chao by itself or in combination with the other references teaches the claim limitation 'reporting . . . the measured progress of treatment.'" (Reply Br. 24, emphasis omitted; *see also* Appeal Br. 32–35.) "The Chao reference has absolutely no interest in progress of treatment based on the patient's self-assessment of symptoms. (Reply Br. 24.) We do not find this argument persuasive of reversible error.

Paragraph 19 of Salgado teaches that the disclosed invention "is a method to numerically score and report symptoms of chronic rhinosinusitis." (Salgado ¶ 19.) And paragraph 20 of Salgado teaches determining the measured progress of treatment based on the information reported by patients during interviews. (*See supra*; *see also* Salgado ¶ 20.) Therefore, we agree with the Examiner's finding that "Salgado teaches reporting the measured progress of treatment." (Final Action 3–4.)

With regard to reporting to a utilization review entity, the Examiner finds that

> Dean teaches collecting patient self-assessment of one or more symptoms (see paragraph 0017; patient records the patient's symptoms on the interview instrument); *and reporting the self-assessment of the one or more symptoms to a utilization review*

> *entity* that performs utilization review based at least in part upon the collected data from the patient relating to patient self-assessment of the one or more symptoms (see paragraph 0052; collected data is reported to private or public insurers to determine to what extent charges incurred by the patient are reimbursable). It would have been obvious to one of ordinary skill in the art at the time of the invention to add this type of reporting to the system of Salgado for the purpose of providing adequate documentation of symptoms to third party payors (see paragraph 0007 of Dean).

(Final Action 4–5, emphasis added.) In view of Salgado's teaching of reporting the measured progress of treatment based on patients' self-assessments, and Dean's teaching of reporting self-assessments to a utilization review entity (*supra*), we agree with the Examiner that it would have been obvious "to add [Dean's] type of reporting to the system of Salgado." (*See* Final Action 4–5.)

Appellant presents similar arguments for independent claims 18 and 25. (*See* Appeal Br. 37–40, 45–48.) For similar reasons, we are not persuaded of error.

Healthcare organization that determines the relative position of the caregiver

Appellant argues that the cited portions of Chao (paragraphs 50, 51, and 70), "fail[] to teach the claim limitation 'healthcare organization that determines a relative position of the caregiver in relation to the peer group of the caregiver in treating a condition including a caregiver performance rating.'" (Reply Br. 31, emphasis omitted; *see also* Appeal Br. 35–36.)

The Examiner, however, determines "that this limitation is recited as an intended use of the reported information in the claim." (Answer 11.) "An intended use or purpose usually will not limit the scope of the claim

because such statements usually do no more than define a context in which the invention operates." *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1345 (Fed. Cir. 2003). Appellant does not respond to this determination and, thus, we are not persuaded of error.

Regardless, the Examiner also finds, and we agree, that

> Chao teaches the system is "operable to compare the peer averages, which are calculated based on a composite of cases matching Cardiologist A's cases, with Cardiologist A's average to determine if he is doing better or worse than his peer and highlight the comparison results accordingly on a display" (see paragraph 0050). Furthermore, Chao teaches that the performance evaluation is converted to an average percentage (see paragraph 0051). Therefore, Chao clearly teaches a healthcare organization determining a relative position of a caregiver in relation to a peer group of the caregiver in treating a condition including a caregiver performance rating as claimed.

(Answer 11.) Additionally, paragraph 6 of Chao discloses that "[a] need exists for a comprehensive, automated system and method for accurately peer profiling the performance of an individual . . . employed by an organization." (Chao ¶ 6.) And, the Examiner determines that "[i]t would have been obvious to one of ordinary skill in the art at the time of the invention to add this type of reporting to the system of Salgado for the purpose of accurately comparing physician performance to peer profiles (see paragraph 0006 of Chao)." (Final Action 4.)

Appellant disagrees and argues that "the Chao reference is concerned with financial metrics rather than how well a caregiver treats a particular condition. The peer review that Chao discusses is how efficiently a physician uses hospital resources -- not how effective a caregiver is in treating a particular condition." (Reply Br. 32.)

We do not find this argument persuasive. As an initial matter, we note that the claim language is broad enough to encompass both the symptomatic and financial evaluations of caregiver performance, e.g., "the utilization review is based at least *in part* upon the collected data from the patient." (*See* Claim 1, emphasis added.)

Moreover, Chao merely adds a familiar element (comparing or ranking) to the combination (reporting the measured progress of treatment) according to a known method. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results."); *see also* Final Action 4. In view of the above, we are not persuaded of error.

Appellant presents similar arguments for independent claim 18. (*See* Appeal Br. 40–41.) For similar reasons, we are not persuaded of error.

Improper rationale for combining references

Appellant argues:

> The Examiner's Answer Brief asserts that the motivation to combine the references comes from the Chao reference. However, as has previously been discussed, Chao is focused on economics. Chao does not care about patient self-assessment of symptoms or the effectiveness of a caregiver in treating a patient. Therefore, the assertion that Chao would be motivated to look to Salgado is truly a hindsight approach. Such an approach is impermissible.

(Reply Br. 33; *see also* Appeal Br. 48–54.)

The Examiner determines that

> the prior art itself clearly states that a need exists for "accurately peer profiling the performance of an individual or other entity

> employed by an organization" (see paragraph 0006 of Chao). In the case of Chao, that individual is clearly a healthcare provider and the organization is clearly a healthcare organization. As previously set forth, Salgado is directed to a healthcare provider providing treatment to a patient and evaluating the progress of the treatment. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to look from Salgado to the teachings of Chao for the aforementioned reasons.

(Answer 12.)

Salgado discloses "[a] method for diagnosing, assessing, and determining of [sic] the efficacy of a treatment regimen." (Salgado, Abstract.) Specifically, Salgado discloses analyzing the collected patient information "to determine the efficacy of the treatment regimen" (*id.* ¶ 20), and using the collected information "for later analysis of the total sinus symptom scores from a patient population" (*id.* ¶ 95). Chao discloses a method for "peer profiling the performance of an individual," e.g., a physician providing treatment. (Chao ¶¶ 6, 50.) In particular, Chao discloses sorting collected patient case information by severity level "to compare the peer averages, which are calculated based on a composite of cases matching Cardiologist A's cases, with Cardiologist A's averages to determine if he is doing better or worse than his peer." (*Id.* ¶ 50.)

"Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the element in the manner claimed." *KSR Int'l Co.*, 550 U.S. at 420. Here, Chao discloses the known problem of "accurately peer profiling the performance of an individual," and the use of patient case information to do so. (Chao ¶ 6; *see also id.* ¶50.) Salgado discloses collecting and using patient case information to determine the efficacy of

treatment. (*See, e.g.*, Salgado ¶¶ 20, 95; *see also id.*, Abstract.) In view of the above, we are not persuaded that the Examiner erred in determining that "it would have been obvious to one of ordinary skill in the art at the time of the invention to look from Salgado [(using patient case information to evaluate caregiver provided treatment)] to the teachings of Chao [(using patient case information to evaluate a caregiver providing treatment)] for the aforementioned reasons." (*See* Answer 12.)

Appellant also argues that "[t]he Office also does not explain how nor why a Chao's system of reviewing physicians for fiscal performance . . . would be combinable with the rhinosinusitis system of Salgado." (Appeal Br. 52.) However, "[t]he test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference." *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Rather, the test is "whether the claimed invention[is] rendered obvious by the teachings of the prior art as a whole." *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985). For the reasons discussed above, we do not find this argument persuasive of error.

With regard to Dean, Appellant argues that combination of Salgado and Dean is improper because "Dean shows no interest in reporting self-assessment of symptoms to third party payors" (Appeal Br. 53), and "Salgado shows no interest in reporting to a utilization review entity" and that "there is no reason to do so" (Reply Br. 33–34).

We disagree. Dean discloses "an interview instrument implemented as a computer program, generating a screen display, and accessible and used by either or both of the clinician and the patient to record and track the symptoms." (Dean ¶ 17; *see also id.* Abstract.) Dean also discloses that "in

some instances the interview instrument may be reviewed by a third party" such as "private or public insurers" and "regulatory agencies charged with reviewing quality of patient care." (*Id.* ¶ 52; *see also id.* ¶ 7.) Thus, contrary to Appellant's assertion, Dean discloses reporting the interview instrument, including patient-recorded symptoms, to third party payors. Therefore, we do not find Appellant's argument persuasive of error.

Prima facie case

Appellant argues that the Examiner did not present a prima facie case of obviousness for claims 1–25, 27, and 28. (*See* Appeal Br. 28, 36, 41.)

The USPTO carries its procedural burden of establishing a prima facie case when its rejection satisfies the requirements of 35 U.S.C. § 132 by notifying the applicant of the reasons for rejection, "together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application." *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (brackets in original, quoting 35 U.S.C. § 132(a)). Particularly in view of Appellant's response to the Examiner's stated reasons for the obviousness rejections, we do not agree that the Examiner did not notify Appellant of the reasons for the rejection.

DECISION

The Examiner's rejection of claims 1–28 under 35 U.S.C. § 101 is affirmed.

The Examiner's rejections of claims 1–25, 27, and 28 under 35 U.S.C. § 103(a) 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED