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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RANDELL L. WERNETH, CHRISTOPHER G. KUNIS, HAKAN
ORAL, FRED MORADY, and J. CHRISTOPHER FLAHERTY

Appeal 2017-002413
Application 14/162,934¹
Technology Center 3700

Before DONALD E. ADAMS, RICHARD M. LEBOVITZ, and
DAVID COTTA, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims directed to a method of treating cardiac arrhythmia. The Examiner rejected the claims as unpatentable under 35 U.S.C. § 103 and under the judicially created doctrine of obviousness-type double patenting under § 101. We have jurisdiction under 35 U.S.C. § 6(b). The §§ 103 and 101 rejections are affirmed.

¹ The Appeal Brief (“Appeal Br.”) 3 lists Medtronic Ablation Frontiers LLC as the real-party-in-interest.

STATEMENT OF THE CASE

Claims 1–20 stand finally rejected by the Examiner as follows
(Examiner’s Answer (“Ans.”) 2):

Claims 1–8, 10, and 12–15 under pre-AIA 35 U.S.C. § 103(a) as obvious in view of Skarda (US Pat. Appl. Publ. 2003/0009095 A1, published Jan. 9, 2003), Haissaguerre (US Pat. 5,916,213, issued June 29, 1999), and Swartz (US 5,575,766, issued Nov. 19, 1996).

Claim 9 under pre-AIA 35 U.S.C. § 103(a) as obvious in view of Skarda, Haissaguerre, and Swartz, further in view of Werneth (US Pat. Appl. Publ. 2006/0089637 A1, published Apr. 27, 2006).

Claim 11 under pre-AIA 35 U.S.C. § 103(a) as obvious in view of Skarda, Haissaguerre, and Swartz, further in view of Koblish (US Pat. Appl. Publ. 2002/0087208 A1, published July 4, 2002).

Claims 16–18 under pre-AIA 35 U.S.C. § 103(a) as obvious in view of Skarda, Haissaguerre, and Swartz, further in view of Belef (US Pat. 6,475,226 B1, issued Nov. 5, 2002).

Claims 19 and 20 under pre-AIA 35 U.S.C. § 103(a) as obvious in view of Skarda, Haissaguerre, and Swartz, further in view of Burnside (US 6,071,281, issued June 6, 2000).

Claims 1–20 under 35 U.S.C. under § 101 on the ground of non-statutory obviousness-type double patenting over claims 1–80 of US Patent No. 8,642,704.² Appellants do not address the Examiner’s double patenting rejection. We therefore summarily affirm the obviousness-type double

² The double-patenting rejection appears in the Final Action by the Examiner, but was not repeated in the Examiner’s Answer. However, the Examiner did not indicate the rejection was withdrawn.

patenting rejection. *See* Manual of Patent Examining Procedure § 1205.02 (“If a ground of rejection stated by the examiner is not addressed in the appellant’s brief, that ground of rejection will be summarily sustained by the Board.”).

Claim 1, the only independent claim on appeal, is reproduced below.

1. A systemic method of treating cardiac arrhythmia, the method comprising:
 - (a) accessing a left atrium of a heart of a patient;
 - (b) ablating tissue surrounding one or more pulmonary veins;
 - (c) ablating septal tissue; and
 - (d) ablating left atrial wall tissue,(a), (b), and (c) being performed before (d).

DISCUSSION

The Examiner found that Skarda describes a method of treating cardiac arrhythmia comprising steps (a), (b), and (d) of claim 1. Final Act. 2. The Examiner found that Skarda does not describe ablating septal tissue as in step (c) of the claim or the recited order of steps. *Id.* at 3. However, the Examiner found that Haissaguerre discloses “ablating arrhythmogenic sites which can include atrial wall tissue, tissue around the pulmonary vein orifices and septal tissue.” *Id.* The Examiner further found that Swartz describes a method of treating cardiac arrhythmia and that any order of ablation/treatment steps maybe used:

Swartz discloses a method of treating cardiac arrhythmia in the left atrium and teaches the steps of ablating the septal wall (track 8, fig. 2), the atrial wall (track 1) and around the pulmonary vein orifices for separating all the pulmonary veins (tracks 2-4). Swartz teaches that the order of the procedure is determined by the individual medical practitioner (col. 10 lines 44-47). Therefore, at the time of the invention, it would have been obvious to one of ordinary skill in the art to treat any area identified by Skarda-Haissaguerre to be an arrhythmogenic site

in any order, as taught by Swartz, to produce the predictable result of treating a cardiac arrhythmia.

Final Act. 3.

Appellants contend that the “the field of cardiac ablation involves infinite combinations of techniques, equipment, and operating conditions that can produce very different results in different patients” and thus “motivation to optimize cannot be established by the cited references.” Appeal Br. 11. Appellants further contend that “the claimed sequence has been found to have *unexpected results* where it was previously believed that no particular sequence produced beneficial results whatsoever, not even an additive effect.” *Id.* at 12. Appellants also contend that “the combination of references fails to provide any kind of motivation to experiment to find an optimized order of steps, such as the order the steps as claimed” because the order of ablation steps was not recognized as a result-effective variable. *Id.* at 13.

We are not persuaded by Appellants’ arguments that the Examiner erred in rejecting the claims.

First, Swartz provides a reason to have utilized the steps in the claimed order because Swartz teaches that any order of steps can be used as determined by the medical practitioner. Swartz, col. 10, ll. 42–47. Appellants did not provide persuasive arguments or evidence that the claimed order of steps is not suggested by the combination of Skarda, Haissaguerre, and Swartz as stated by the Examiner.

Second, Appellants have not directed us to objective evidence to substantiate their assertion of unexpected results.

An applicant cannot prove unexpected results with attorney argument and bare statements without objective evidentiary

support. See *In re Lindner*, 59 C.C.P.A. 920, 457 F.2d 506, 508 (CCPA 1972); *In re Geisler*, 116 F.3d 1465 (Fed. Cir. 1997) (“attorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness”); *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995) (“It is well settled that unexpected results must be established by factual evidence. Mere argument or conclusory statements ... [do] not suffice.”) (quoting *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984)).
CFMT, Inc. v. Yieldup Intern. Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003).

Appellants contend there was no reason to change the order of the steps because the steps were not recognized as result-effective. Appeal Br. 12–13. However, the Examiner found that Swartz teaches that the order of steps in the ablation procedure is determined by the medical practitioner:

This [ablation] procedure is then continued until there has been a full and completion ablation of all preselected ablation tracks in the heart. The choice of which shaped catheter to use first and in what order is, of course, determined by the individual medical practitioner.

Swartz, col. 10, ll. 42–47

Appellants did not dispute this finding. Appellants argue that the steps were not recognized as result-effective, implying that the order of the steps would have an effect on the result. However, Appellants have not directed us to evidence that varying the order of steps changed the result. *Geisler*, 116 F.3d 1465. Consequently, because Swartz teaches that the any order may be used, absent evidence that the claimed order produces an unexpected result or otherwise affects the ablation procedure in a way which would not be predicted by one of ordinary skill in the art, we conclude that that Appellants’ argument is insufficient to establish patentability for the claimed method.

Appeal 2017-002413
Application 14/162,934

For the foregoing reasons, we affirm the rejection of independent claim 1 as unpatentable in view of Skarda, Haissaguerre, and Swartz. Appellants did not provide separate arguments for the remaining rejections or any of the dependent claims, other than to indicate that the dependent claims recite additional limitations. Appeal Br. 13–14. However, pointing out that a dependent claim contains a limitation not found in the independent is not explanation of how that limitation makes the claim patentable in view of the cited prior art. *See* 37 C.F.R. § 41.37(c)(1)(iv). Consequently, the rejections of claims 2–20 are fall with claim 1.

TIME PERIOD

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