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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTOPHER HENDERSON, STEPHEN BAINES,
and ROBERT GRAYBILL

Appeal 2017-002725
Application 13/246,060
Technology Center 3600

Before NINA L. MEDLOCK, AMEE A. SHAH, and
MATTHEW S. MEYERS, *Administrative Patent Judges*

SHAH, *Administrative Patent Judge*.

DECISION ON APPEAL¹

The Appellants² appeal under 35 U.S.C. § 134(a) from the Examiner’s final decision rejecting claims 1–3, 6–13, and 15–20. The Appellants’ representative appeared telephonically for Oral Argument on January 31, 2019. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Throughout this opinion, we refer to the Appellants’ Appeal Brief (“Appeal Br.,” filed Aug. 22, 2016), Reply Brief (“Reply Br.,” filed Dec. 12, 2016), and Specification (“Spec.,” filed Sept. 27, 2011), and to the Examiner’s Answer (“Ans.,” mailed Oct. 11, 2016) and Final Office Action (“Final Act.,” mailed May 22, 2015).

² According to the Appellants, the real party in interest is MDX Medical, Inc. Appeal Br. 1.

STATEMENT OF THE CASE

The Appellants' invention "relates to cost comparison tools, and more particularly, to a cost comparison tool configured to help users understand the cost variation by procedure that exists within a healthcare system."

Spec. ¶ 2.

Claims 1, 15, and 18 are the independent claims on appeal. Claim 1 (Claims App. 2–3)) is illustrative of the subject matter on appeal, and is reproduced below (with added bracketing for reference):

1. A method, carried out by a networked computer based health care provider ranking system including a database having user information stored therein relating to a health care service consumer, for providing an incentive for the health care service consumer for using a particular health care service provider, selected from a ranked listing of health care service providers, to perform a medical procedure, the method comprising:

[(a)] receiving, by the networked computer based health care provider ranking system, a user identification for the health care service consumer;

[(b)] acquiring, by the networked computer based health care provider ranking system, a user demographic information data set corresponding to the health care service consumer;

[(c)] receiving, by the networked computer based health care provider ranking system, a medical procedure selected for the health care service consumer;

[(d)] generating, by the networked computer based health care provider ranking system based upon the user demographic information data set and the medical procedure selected for the health care service consumer, a ranking of health care service providers for performing the medical procedure, wherein the ranking includes the particular health care service provider for which the incentive is provided;

[(e)] storing as an entry in the database, by the networked computer based health care provider ranking system after the

generating, the ranking of health care service providers for performing the medical procedure;

[(f)] confirming, by the networked computer based health care provider ranking system, completion of the medical procedure, on the health care service consumer, by the particular health care service provider, wherein the confirming includes comparing data generated as a result of completing the medical procedure to information relating to the ranking; and

[(g)] issuing in response to the confirming, by the networked computer based health care provider ranking system, the incentive to a designated recipient,

[(h)] wherein the particular health care service provider is a medical facility,

[(i)] wherein the medical procedure is associated with at least two distinct codes based upon procedure complexity, and

[(j)] wherein the ranking of health care service providers for performing the medical procedure is determined, at least in part, by a weighted average reimbursement to ones of the health care service providers for the medical procedure associated with at least two distinct codes, the weighted average reimbursement for one of the health care service providers being a function of:

a quantity of a provider-type sub-component of the medical procedure performed and a contractual allowed reimbursement amount for the provider-type sub-component for each of the at least two distinct codes based upon procedure complexity.

THE REJECTION

Claims 1–3, 6–13, and 15–20 stand rejected under 35 U.S.C. § 101 as being directed to a judicial exception without significantly more.

ANALYSIS

The Appellants argue claims 1–3, 6–13, 15, 17, 18, and 20 as a group. *See, e.g.*, Appeal Br. 8, 12. We select claim 1 from the group, with claims 2, 3, 6–13, 15, 17, 18, and 20 standing or falling therewith. *See* 37 C.F.R. § 41.37(c)(1)(iv).

An invention is patent-eligible if it claims a “new and useful process, machine, manufacture, or composition of matter.” 35 U.S.C. § 101. However, the Supreme Court has long interpreted 35 U.S.C. § 101 to include implicit exceptions: “[l]aws of nature, natural phenomena, and abstract ideas” are not patentable. *E.g., Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014).

In determining whether a claim falls within an excluded category, we are guided by the Supreme Court’s two-step framework, described in *Mayo* and *Alice*. *Id.* at 217–18 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 75–77 (2012)). In accordance with that framework, we first determine what concept the claim is “directed to.” *See Alice*, 573 U.S. at 219 (“On their face, the claims before us are drawn to the concept of intermediated settlement, *i.e.*, the use of a third party to mitigate settlement risk.”); *see also Bilski v. Kappos*, 561 U.S. 593, 611 (2010) (“Claims 1 and 4 in petitioners’ application explain the basic concept of hedging, or protecting against risk.”).

Concepts determined to be abstract ideas, and thus patent ineligible, include certain methods of organizing human activity, such as fundamental economic practices (*Alice*, 573 U.S. at 219–20; *Bilski*, 561 U.S. at 611); mathematical formulas (*Parker v. Flook*, 437 U.S. 584, 594–95 (1978)); and mental processes (*Gottschalk v. Benson*, 409 U.S. 63, 69 (1972)). Concepts

determined to be patent eligible include physical and chemical processes, such as “molding rubber products” (*Diamond v. Diehr*, 450 U.S. 175, 192 (1981)); “tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores” (*id.* at 184 n.7 (quoting *Corning v. Burden*, 56 U.S. 252, 267–68 (1854))); and manufacturing flour (*Benson*, 409 U.S. at 69 (citing *Cochrane v. Deener*, 94 U.S. 780, 785 (1876))).

In *Diehr*, the claim at issue recited a mathematical formula, but the Supreme Court held that “[a] claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula.” *Diehr*, 450 U.S. at 176; *see also id.* at 192 (“We view respondents’ claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula.”). Having said that, the Supreme Court also indicated that a claim “seeking patent protection for that formula in the abstract . . . is not accorded the protection of our patent laws, . . . and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.” *Id.* (citing *Benson* and *Flook*); *see, e.g., id.* at 187 (“It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.”).

If the claim is “directed to” an abstract idea, we turn to the second step of the *Alice* and *Mayo* framework, where “we must examine the elements of the claim to determine whether it contains an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.” *Alice*, 573 U.S. at 221 (quotation marks omitted). “A claim that recites an abstract idea must include ‘additional features’ to

ensure ‘that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].’” *Id.* (quoting *Mayo*, 566 U.S. at 77). “[M]erely requir[ing] generic computer implementation[] fail[s] to transform that abstract idea into a patent-eligible invention.” *Id.*

Alice/Mayo Step One

Under the first step of the *Alice/Mayo* framework, the Examiner determines that claim 1 is “directed to an abstract idea of providing healthcare using fundamental economic practices (e.g., determining reimbursement amounts, providing incentives for consumers) and categories to organize, store, and transmit information” (Final Act. 2), “through mathematical correlations” (Ans. 2). The Appellants disagree (*see* Appeal Br. 8–10) and contend that the claim “defines a particular output ranking of service providers for *a particular medical procedure that is associated with at least two codes based upon complexity*” (*id.* at 9) and “addresses a particular problem of being unable to know, at the time of approval of a particular provider, whether the medical procedure will be classified by the medical service provider at a higher/lower complexity” (*id.*). We are not persuaded by the Appellants’ argument that the Examiner erred in determining that claim 1 is directed to an abstract idea.

The Federal Circuit has explained that “the ‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the [S]pecification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)). The question is whether the claims as a whole

“focus on a specific means or method that improves the relevant technology” or are “directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314 (Fed. Cir. 2016).

The Specification, including the claims, provides evidence as to what the claimed invention is directed. The Title of the Specification provides for a “METHOD AND APPARATUS FOR THE COMPARISON OF HEALTH CARE PROCEDURE COSTS BETWEEN PROVIDERS,” and the Specification similarly provides that the invention “relates to cost comparison tools, and more particularly, to a cost comparison tool configured to help users understand the cost variation by procedure that exists within a healthcare system” (Spec. ¶ 2). In the Background of the Invention section, the Specification discusses that prior art “medical cost comparison information is based upon a simplistic build up of the various costs associated with the procedure” (*id.* ¶ 4) and that prior art systems “fail to capture all of the specific cost elements delivered during the procedure and present[] the consumer with an ‘apples’ to ‘apples’ cost comparison across various facilities for the particular procedure requested” (*id.*). The invention addressed this problem with “techniques for providing consumers (patients) with supporting data in order to compare cost for like procedures within a geographical area.” *Id.* ¶ 5.

Claim 1 provides for a method for providing an incentive for a health care service consumer for using a particular health care service provider comprising limitations of: (a) receiving a user identification for the consumer; (b) acquiring a user demographic information data set corresponding to the consumer; (c) receiving a selected medical procedure

for the consumer; (d) generating a ranking of health care service providers for performing the medical procedure based upon the information data set and procedure selected; (e) storing the ranking of providers including the particular provider for which the incentive is provided; (f) confirming completion of the medical procedure by comparing data generated to information relating to the ranking; and (g) issuing in response to the confirming the incentive to a designated recipient, (h) wherein the particular provider is a medical facility, (i) wherein the medical procedure is associated with at least two distinct codes based upon procedure complexity, and (j) wherein the ranking is determined, at least in part, by a weighted average reimbursement that is a function of: a quantity of a provider-type sub-component of the medical procedure performed and a contractual allowed reimbursement amount for the provider-type sub-component for each of the at least two distinct codes based upon procedure complexity. *See* Claims App. 2–3. The method is “carried out by a networked computer based health care provider ranking system including a database having user information stored therein relating to a health care service consumer.” *Id.* at 2. The system is “an automated system” that “may be a computer server system” and can receive input and access a “worldwide distributed computer network (such as the internet).” Spec. ¶ 27. No further details on the system are provided.

In light of the Specification’s description of the problem and solution, the purported advance over the prior art by the claimed invention is a way, using a generic computer, to provide an incentive/reward for using a particular service provider. Here, claim 1 involves nothing more than receiving data, generating data using a mathematical process/calculating,

storing the resulting data, comparing data, and providing an incentive based on the generated and compared data. In that context, we find supported the Examiner's characterization of the claim as a method of organizing human activity, i.e., a fundamental economic practice, of marketing/sales behaviors involving a mathematical concept, an abstract idea. *See, e.g., Kroy IP Holdings, LLC v. Safeway, Inc.*, 107 F.Supp.3d 677, 690 (E.D. Tex. 2015), *aff'd*, 639 F. App'x 637 (Fed. Cir. 2016) ("Incentive award programs designed to encourage sales of products and services have been familiar aspects of marketing for many years, as the [7,054,830] patent itself acknowledges."), *OIP Tech., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015) (optimizing a product price for sale is a fundamental economic concept).

We find unpersuasive the Appellants' arguments that the claim is not directed to an unpatentable abstract idea because it "addresses a particular problem of being unable to know, at the time of approval of a particular provider, whether the medical procedure will be classified by the medical service provider at a higher/lower complexity" (Appeal Br. 10) and "*address[es] a particular problem* arising from attempting to implement the general idea of ranking medical service providers for the specified medical procedure based, at least in part, upon the reimbursement cost of the procedure (i.e. the amount paid to the medical service provider by the insurance carrier" (*id.* at 10–11). Rather, we determine that the claim does not "apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception," i.e., the claim does not "integrate the judicial exception into a practical application."

2019 REVISED PATENT SUBJECT MATTER ELIGIBILITY GUIDANCE, 84 Fed. Reg. 50, 55 (Jan. 7, 2019) (“2019 Revised Guidance”). The claim recites a generic computer system that performs the functions of the abstract idea, i.e., receiving data, generating data using a mathematical calculation, storing the resulting data, comparing data, and providing an incentive, without particularity.³ As our reviewing courts have made clear, the addition of a generic computer or other conventional technology does not improve the computer so as to transform an abstract idea into a patent-eligible application. *See Alice*, 573 U.S. at 225–26 (“the claims at issue amount to ‘nothing significantly more’ than an instructions to apply the abstract idea of intermediated settlement using some unspecified, generic computer.”). Further, the problems of “being unable to know, at the time of approval of a particular provider, whether the medical procedure will be classified by the medical service provider at a higher/lower complexity” and “ranking medical service providers for the specified medical procedure based, at least in part, upon the reimbursement cost of the procedure” (Appeal Br. 10–11) are not problems “necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.” *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1257(Fed. Cir. 2015). And, the purported solution requires a generic computer system operating in its ordinary capacity.

³ We acknowledge that some of these considerations may be properly evaluated under Step 2 of *Alice* (Step 2B of Office guidance). Solely for purposes of maintaining consistent treatment within the Office, we evaluate it under Step 1 of *Alice* (Step 2A of Office guidance). *See* 2019 Revised Guidance, 84 Fed. Reg. at 55.

Here, it is clear from the Specification that the claims focus on an abstract idea, and not on any improvement to computer technology and/or functionality. The purported improvement of generating the ranking “using a *weighted average reimbursement*” and “for a *particular medical procedure that is associated with at least two codes based upon complexity*” (Appeal Br. 10; *see also* Reply Br. 7) is simply an elaboration of the abstract idea using conventional technology operating in a conventional manner to make calculations. *See Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 715–16 (Fed. Cir. 2014) (An elaboration of an abstract idea does not transform the abstract idea into patent-eligible subject matter.); *cf.* Reply Br. 10 (arguing that “Appellants’ claimed invention is more detailed and more narrowly focused through the specific elements recited in the ‘wherein’ clauses appended to Appellants’ claim 1.”). The Specification provides no discussion of any technological benefits or improvements contemplated at the time of the invention.

Finally, we disagree with the Appellants’ contention that the Examiner “does not provide a proper showing that the claimed invention is indeed directed to an ‘abstract idea’” because the “Answer does not specifically link any of the listed general operations to any of the paraphrased elements of Appellants’ claim 1.” Reply Br. 5–6. The Examiner considers the claim limitations in making the determination that the claim is directed to an abstract idea, and specifically references the claim limitations. *See* Ans. 2–3.

Thus, we are not persuaded of error in the Examiner’s determination that claim 1 is directed to an abstract idea.

Alice/Mayo Step Two

The second step is to “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*, 573 U.S. at 221 (alteration in original) (quoting *Mayo*, 566 U.S. at 72–73).

Under the second step of the *Alice/Mayo* framework, we agree with and find supported the Examiner’s determination that the elements of claim 1, individually or as an ordered combination, do not amount to significantly more than the abstract idea. *See* Final Act. 2–3; Ans. 4–5. We are not persuaded by the Appellants’ arguments to the contrary. *See* Appeal Br. 10–12; Reply Br. 6–7.

For the reasons discussed above, claim 1 is not significantly more than the abstract idea because it purportedly recites a particular solution to the “*particular problem* arising from attempting to implement the general idea of ranking medical service providers for the specified medical procedure based, at least in part, upon the reimbursement cost of the procedure (*i.e.* the amount paid to the medical service provider by the insurance carrier.)” Appeal Br. 10–11; *see also* Reply Br. 8 (arguing that the “specific sequence of operations . . . that facilitate rendering a ranking (in a way that addresses a particularized problem arising from multiple complexity levels being assigned to a same medical procedure) that guides the determination/issuance of incentives to healthcare service consumers”).

To the extent the Appellants argue that the claim contains an inventive concept because it is novel over the prior art (*see* Appeal Br. 11–12; Reply Br. 6), we note that an abstract idea does not transform into an inventive

concept just because the prior art does not disclose or suggest it. *See Mayo*, 566 US at 78. “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2117 (2013). Indeed, “[t]he ‘novelty’ of any element or steps in a process, or even of the process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.” *Diehr*, 450 U.S. 188–89; *see also Mayo*, 566 US at 78 (rejecting “the Government’s invitation to substitute §§ 102, 103, and 112 inquiries for the better established inquiry under § 101”). “It 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).

The Appellants further argue that

Given the particularized nature of Appellants’ claims that are directed to addressing a very specific problem arising from ranking medical service providers based upon the cost of performing a medical procedure, there is no danger of Appellants’ [sic] obtaining a monopoly over the general idea of ranking medical service providers for a particular medical procedure.

Appeal Br. 11; *see also* Reply Br, 6–7. Although the Supreme Court has described “the concern that drives this exclusionary principle [i.e., the exclusion of abstract ideas from patent eligible subject matter] as one of preemption” (*see Alice*, 573 U.S. at 216), characterizing preemption as a driving concern for patent eligibility is not the same as characterizing preemption as the sole test for patent eligibility. “The Supreme Court has

made clear that the principle of preemption is the basis for the judicial exceptions to patentability” and “[f]or this reason, questions on preemption are inherent in and resolved by the § 101 analysis.” *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (citing *Alice*, 134 S. Ct. at 2354). Although “preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.” *Id.*; see also *Two-Way Media Ltd. v. Comcast Cable Commc’ns., LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (“where a patent’s claims are deemed only to disclose patent ineligible subject matter under the *Alice* framework, as they are in this case, preemption concerns are fully addressed and made moot.”).

We are not persuaded of error by the Appellants’ argument that the “wherein clauses,” limitations (h), (i), and (j), of claim 1 “are NOT well-understood, routine and conventional activities previously known in the pertinent industry.” Reply Br. 6. Limitation (h) simply narrows the data of the type of service provider, limitation (i) narrows the data of the medical procedure, and limitation (j) provides that the ranking is determined by a weighted average reimbursement being a function of quantity data and amount data. See Claims App, 2–3. Calculating a weighted average based on data and comparing that weighted average to other averages constitutes basic math that one of ordinary skill or a generically programmed computer can accomplish. See *SkillSurvey, Inc. v. Checkster LLC*, 178 F. Supp. 3d 247, 259 (E.D. Pa. 2016), *aff’d*, 683 F. App’x 930 (Fed. Cir. 2017); see also *Alice*, 573 U.S. at 226 (nearly every computer is capable of performing basic calculations). And ranking data, such as the providers here, constitutes sorting data based on the results of the analysis. Receiving, storing,

comparing, analyzing data (such as by calculations), and sorting the results of the analysis (such as by ranking) are well-understood, routine, and conventional functions of the generic computing system claimed. *See, e.g., Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354–55 (Fed. Cir. 2016) (gathering, sending, monitoring, analyzing, selecting, and presenting information does not transform the abstract process into a patent-eligible invention); *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1334 (Fed. Cir. 2015) (arranging a hierarchy, storing, retrieving, sorting, eliminating, and determining data are well-understood, routine, conventional activities).

Unlike the claims found non-abstract in *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016), the claim here uses generic computer technology to perform data retrieval, storage, comparison, and analysis/calculation and does not recite an improvement to a particular computer technology. *See id.* at 1314–15 (finding claims not abstract because they “focused on a specific asserted improvement in computer animation”); *cf.* Reply Br. 8. The Appellants provide no further arguments how the claim is similar such as why the claim’s particular arrangement and/or integration of elements is a technical improvement or is a “non-conventional and non-generic arrangement of known, conventional pieces.” *BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016); *cf.* Reply Br. 9.

To the extent the Appellants argue that the Examiner does not provide sufficient evidence that the claim fails to add significantly more than the

abstract idea (Reply Br. 10), we disagree.⁴ The Examiner cites to the Specification, including the claim, as support that the claim is implemented by a generic computer operating in its ordinary capacity to perform well-understood, routine, and conventional operations. *See* Ans. 4.

Thus, we are not persuaded of error in the Examiner's determination that claim 1 fails to recite significantly more than the abstract idea.

Based on the foregoing, we sustain the Examiner rejection under 35 U.S.C. § 101 of claim 1 and of claims 2, 3, 6–13, 15, 17, 18, and 20, which fall with claim 1.

We find unpersuasive the Appellants' argument that the Examiner's rejection of dependent claims 16 and 19 is in error because "claims 16 and 19 provide yet greater focus on how a cost value is rendered and provide[] yet additional space for others to provide alternative ways to generate a cost-based ranking of medical service providers for a particular medical procedure." Appeal Br. 12; Reply Br. 11. As discussed above, an elaboration of the abstract idea, i.e., using specific data, using conventional technology operating in a conventional manner to make calculations does not make a claim patent-eligible under § 101.

Thus, we sustain the Examiner rejection under 35 U.S.C. § 101 of claims 16 and 19.

⁴ The Appellants' reliance on the Board opinion, *In re Barous*, is unpersuasive. In any event, we would not be bound by a non-precedential decision of the Board.

Appeal 2017-002725
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DECISION

The Examiner's rejection of claims 1–3, 6–13, and 15–20 under 35 U.S.C. § 101 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