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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte NED BEDRIO

Appeal 2017-006504
Application 13/921,934
Technology Center 2800

Before CATHERINE Q. TIMM, LINDA M. GAUDETTE,
and MICHAEL G. McMANUS, *Administrative Patent Judges*.

McMANUS, *Administrative Patent Judge*.

DECISION ON APPEAL

The Examiner finally rejected claims 1–13 of Application 13/921,934 under 35 U.S.C. §§ 102(a) and 103(a). Final Act. (dated April 6, 2016) 2–6. Appellant¹ seeks reversal of these rejections pursuant to 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6.

For the reasons set forth below, we AFFIRM-IN-PART.

¹ The Appellant, Advance DX, Inc., is identified as the real party in interest. Appeal Br. 2.

BACKGROUND

The present application generally relates to a device (referred to as a “fluid sample collection card assembly”) for separating and drying a fluid sample. Spec. ¶ 12. The fluid sample collection card assembly includes a case and a tray assembly.

Claim 1 is representative of the pending claims and is reproduced below:

1. A fluid sample collection card assembly comprising:
a case including a tray assembly receiving cavity accessible through a mouth portion of the case; and
a tray assembly, the tray assembly including an absorbent layer supported by a base portion, the base portion including (i) a tray portion configured to be removably received within the tray assembly receiving cavity and (ii) a faceplate portion configured to at least substantially close the mouth when the tray portion is received within the tray assembly receiving cavity.

Appeal Br. 22 (Claims App.).

REJECTIONS

On appeal, the Examiner maintains the following rejections:

1. Claims 1–5, 12, and 13 are rejected under 35 U.S.C. § 102(a)(1) and/or § 102(a)(2) as anticipated by Kushnir². Final Act. 2–4.
2. Claims 6–10 are rejected under 35 U.S.C. § 103 as obvious over Kushnir in view of Pankow³. *Id.* at 5.

² US 2011/0318404 A1, published Dec. 29, 2011.

³ US 8,062,608 B2, issued Nov. 22, 2011.

DISCUSSION

Rejection 1. The Examiner found that Kushnir teaches a fluid sample collection card that teaches all of the limitations of claims 1–5, 12, and 13. *Id.* at 2–4. Kushnir is titled “Wound Dressing, Methods and Apparatus for Making Same and Storage and Use Thereof.” Kushnir INID Code (54). Kushnir generally relates to formation of a layer or sheet of clotted whole blood on a support structure. *Id.* ¶ 34. The clotted whole blood can be applied to a wound or burn on the skin surface. *Id.* ¶ 37.

Claim 1

Appellant argues that Kushnir does not teach a “fluid sample collection card assembly.” Appellant contends that a “fluid sample collection card assembly” is an assembly used to obtain fluid samples for analysis in laboratory and clinical settings. Appeal Br. 4 (citing Spec. ¶¶ 2–11). Appellant asserts that a sheet of wound dressing is not a collection card.

As an initial step, we construe the term “fluid sample collection card assembly” which is found only in the preamble to claim 1. During examination, claim terms must be given their broadest reasonable construction consistent with the Specification. *In re ICON Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007). “If the preamble adds no limitations to those in the body of the claim, the preamble is not itself a claim limitation and is irrelevant to proper construction of the claim.” *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1434 (Fed. Cir. 2000).

Here, the preamble does not add any limitation to those in the body of the claim nor does the term at issue provide antecedent basis for any subsequent limitation. Accordingly, it is not a limitation and does not affect

the scope of the claim. Thus, Appellant’s argument that Kushnir does not satisfy the preamble is insufficient to show error in the Examiner’s determination of anticipation.

Appellant additionally argues that Kushnir does not teach a base supporting an absorbent layer. Appeal Br. 4–6. The Examiner finds that Figure 3 of Kushnir teaches an absorbent layer (absorbent sheet 120) supported by a base (external support 340). Final Act. 3. Figure 3 of Kushnir is reproduced below:

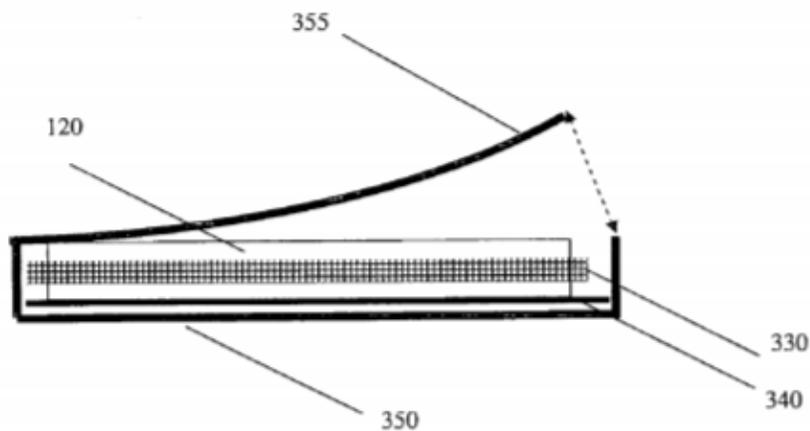


Figure 3, reproduced above, depicts a sterile sheet 120 of clotted whole blood. Kushnir ¶ 161.

Apparently in the alternative, the Examiner additionally finds that Kushnir teaches that the clotted whole blood may be covered with a conventional dressing such as “an absorbent layer (e.g. gauze and/or non woven fabric or similar mesh).” Final Act. 6 (citing Kushnir ¶ 38).

Appellant argues that a sheet of clotted blood (Kushnir sheet 120) is not an absorbent layer. Appeal Br. 5. In regard to the Examiner’s alternative finding, that the absorbent layer (such as gauze) may be equated to the absorbent layer of the claim, Appellant argues that Kushnir does not

teach that the absorbent layer is supported by “any base portion of a tray assembly.” *Id.* at 6.

In regard to provision of an absorbent layer, Kushnir teaches, *inter alia*, as follows:

[0093] According to some exemplary embodiments of the invention there is provided a method of treatment comprising: (a) **providing an absorbent matrix** adapted for covering an area of skin of a subject in need of treatment; (b) permitting an amount of **whole blood to clot on said matrix to form a sheet** of clotted whole blood thereon; and (c) applying the clotted blood-containing dressing on a skin injury.

[0094] Optionally, the blood includes autologous blood from the subject.

[0095] Optionally, **the matrix includes a mesh.**

[0096] Optionally, **the mesh includes gauze.**

Kushnir ¶¶ 93–96 (emphases added). Viewing Figure 3 in light of the foregoing, Kushnir teaches that the mesh structure (330) may be an absorbent layer. This layer appears to be supported by external support (340). Accordingly, Kushnir teaches an absorbent layer supported by a base.

In the alternative, an absorbent layer that covers sterile sheet 120, as taught by Paragraph 38 of Kushnir, may be viewed as an absorbent layer supported by a base portion (340). *See* Answer 4. We find no support for Appellant’s contention that the disclosure of Paragraph 38 is limited by Paragraph 153. Appeal Br. 6

In view of the foregoing, Appellant has failed to show error in the rejection of claim 1.

Claim 2

Claim 2 depends from claim 1 and further requires that “the faceplate portion is configured to abut the case when the tray portion is received

within the tray assembly receiving cavity.” Appeal Br. 22 (Claims App.). The Examiner found that the claimed faceplate is disclosed by Kushnir, Figure 7. Final Act. 3. The Examiner further finds that “the sides of the trays abut the sides of the case and thus an abutment arrangement is achieved. So the faceplate, even if only along the side, does abut the case.” Answer 5.

The claims define the faceplate as “configured to at least substantially close the mouth when the tray portion is received within the tray assembly receiving cavity” (claim 1) and “configured to abut the case” when the tray is in the cavity (claim 2).

The Examiner appears to find that one or more *sides* of the tray (external supports) of Kushnir satisfy the faceplate limitation. The Examiner, however, does not point out any structure of the “tray” configured to close the mouth of the receiving cavity (sample receptacles 750). Accordingly, Appellant has shown reversible error in regard to the rejection of claim 2.

Claim 3

Claim 3 depends from claim 1 and further requires that “the tray portion defines a holder portion located beneath an upper surface of the tray portion; and the absorbent layer is positioned on an upper surface of the holder portion.” Appeal Br. 22 (Claims App.).

The Examiner found that Kushnir’s disclosure of such elements “is best illustrated in figure 3.” Final Act. 3. The Examiner further explained that the “entire packaging material 350 is a case/holder. One of ordinary skill in the art can easily see the absorbent material 120 on an upper surface of a holder in the figure.” Answer 5.

The Examiner's explanation regarding the "case/holder" is somewhat ambiguous as the "holder" is defined to be part of the tray portion while the "case" is a separate structure. *See* Spec. Figs. 2 (depicting case) and 3 (depicting tray assembly). In any case, the Examiner determined external support 340 of Kushnir to be the base portion. (Final Act. 3). The tray portion is defined to be a component of the base portion. *See* claim 1 (Appeal Br. 22 (Claims App.)). The "holder portion" is required to be "beneath an upper surface of the tray portion." There is a portion of Kushnir's packaging material 350 that is spatially lower than the tray portion, but there is no absorbent layer positioned thereon. *See* Kushnir, Fig. 3. Thus, the packaging material does not satisfy the "holder" limitation.

Nor would it be correct to view the support 340 as the "holder." Defining support 340 as the holder would require one to disregard the limitation "holder portion located beneath an upper surface of the tray portion."

Accordingly, Appellant has shown reversible error in regard to the rejection of claim 3.

Claim 4

Claim 4 depends from claim 3 and further requires that the tray assembly include "an insert securing the absorbent layer to the upper surface of the holder portion." Appeal Br. 22 (Claims App.). The Examiner determines that "Figure 3 shows a mesh 330 that is securing the absorbent layer 120 onto the holder 350." Answer 6.

As we have determined, above, that packaging material 350 does not satisfy the "holder" limitation, we reverse the rejection of claim 4 for at least

this reason. Additionally, mesh 330 has not been shown to secure an absorbent layer onto a holder.

Accordingly, Appellant has shown reversible error in regard to the rejection of claim 4.

Claims 5, 12, and 13

Each of claims 5, 12, and 13 depend from claim 4. As we have determined, above, that Kushnir does not teach each limitation of claim 4, we reverse the rejection of claims 5, 12, and 13 for at least the same reasons.

Rejection 2. The Examiner rejected claims 6–10 as obvious over Kushnir in view of Pankow. Final Act. 5. Kushnir is relied upon “as applied to claim 4 above.” *Id.* As we have found that Kushnir does not teach each limitation of claim 4, we reverse the rejection of claims 6–10 for at least the same reasons.

Additionally, the Examiner has indicated that claim 11 is rejected, but has not stated the basis of such rejection. Appeal Br. 20–21; Final Act. 1. Accordingly, the Examiner has not established a prima facie case of unpatentability with regard to claim 11. Claim 14 (added by amendment dated Jan 18, 2016) is pending, but has not been rejected.

CONCLUSION

The rejection of claim 1 as anticipated by Kushnir is affirmed. The rejection of claims 2–5, 12, and 13 as anticipated by Kushnir is reversed. The rejection of claims 6–10 as obvious over Kushnir in view of Pankow is reversed. The rejection of claim 11 is reversed.

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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-IN-PART