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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RODERICK A. HYDE, ERIC C. LEUTHARDT,
ROBERT W. LORD, CLARENCE T. TEGREENE, and
LOWELL L. WOOD JR.

Appeal 2017-008662
Application 14/182,201¹
Technology Center 3600

Before HUNG H. BUI, NABEEL U. KHAN, and PHILLIP A. BENNETT,
Administrative Patent Judges.

BENNETT, *Administrative Patent Judge.*

DECISION ON APPEAL
STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 41–70. Claims 1–40 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellants’ Brief (“Br.”) identifies Gearbox, LLC, as the real party in interest. Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to programmable dispensing of consumable compositions. Spec., Title. Claim 41, reproduced below, is illustrative of the claimed subject matter:

41. A method for administering a consumable composition comprising:
- controlling a dispenser device to cause dispensing of a dose of a consumable composition into a container according to a dosing schedule stored in a memory device;
 - sensing, via at least one sensor device, an aspect of a dispensed dose of the consumable composition that has been received by the container; and
 - transmitting data indicative of the sensed aspect of the dispensed dose of the consumable composition to a system associated with a monitoring entity.

Br. 25 (Claims Appendix).

REJECTIONS

Claims 41–70 stand rejected under judicially created doctrine of obviousness-type double patenting as being unpatentable over claims of U.S. Patent 8,788,380. Final Act. 2. Appellants do not challenge this rejection in their Appeal Brief. Accordingly, we summarily affirm the double patenting rejection.

Claims 41–70 stand rejected under 35 U.S.C. § 101 as being directed to patent-ineligible subject matter. Final Act. 3–6.

Claims 41, 69, and 70 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Varvarelis (US 2006/0071011 A1, published Apr. 6, 2006). Final Act. 6–7.

ISSUES

First Issue: Has the Examiner erred in concluding the claims are patent-ineligible under 35 U.S.C. § 101?

Second Issue: Has the Examiner erred in finding Varvarelis teaches or suggests “sensing, via at least one sensor device, an aspect of a dispensed dose of the consumable composition that has been received by the container,” as recited in claim 41?

ANALYSIS

First Issue—35 U.S.C. § 101

In rejecting the claims, the Examiner finds the claims are directed to the abstract idea of “dispensing, sensing and communicat[ing] consumable compositions.” Final Act. 3. The Examiner determines that “dispensing, sensing[,] and communicat[ing] consumable compositions as disclosed in the claims are a fundamental economic practice, methods of organizing human activities[,] and/or an idea of itself.” Final Act. 4. With respect to the second step of the *Alice* framework, the Examiner finds “[t]he additional element(s) or combination of elements in the claim(s) other than the abstract idea per se amount(s) to no more than: a system.” Final Act. 3. The Examiner further determines that “[t]he claims require no more than a generic computer to perform generic computer functions that are well-understood, routine and conventional activities previously known to the industry.” Ans. 3–4; *see also* Ans. 4–5 (“generic computer functions that are well-understood, routine and conventional activities”).

Appellants argue the claims pass muster under both steps of the *Alice* inquiry. With respect to the first step, Appellants argue the claims are not

directed to an abstract idea because “[t]he presently claimed system enables sensor driven compliance determination of user consumption of dispensed compositions. Such automated compliance determinations facilitate regimen efficacy for prescribed compositions.” Br. 8. Appellants also argue “the claimed method is necessarily rooted in computer technology to overcome a problem specifically arising in user regimen compliance.” *Id.*

With respect to the second *Alice* step, Appellants contend “the invention as a whole amounts to significantly more than simply ‘dispensing, sensing and communicate’” because the claims provide a “‘dispenser device’ that dispenses a ‘dose a consumable composition’ according to a ‘dosing schedule stored in a memory device’ and the ‘at least one sensor’ that senses an aspect of that previously dispensed ‘dose of consumable composition[.]’” Br. 9. Appellants contend “these are meaningful limitations that add more than generally linking the use of the abstract idea [] to a generic computing device, because they solve an compliance-centric problem with a claimed solution that is necessarily rooted in computer technology (e.g. dispensers and associated sensors), similar to the additional elements in *DDR Holdings [v. Hotels.com, L.P., 773 F.3d 1245 (Fed. Cir. 2014)]*.” *Id.* Appellants also challenge the Examiner’s finding that the steps are well-known, routine, and conventional, arguing that the “limitations, when taken as an ordered combination, provid[ed] unconventional steps that confine the abstract idea to a particular useful application.” *Id.*

We are persuaded the Examiner has erred. Under the new examination procedure published online by the USPTO on April 19, 2018, entitled “Changes in Examination Procedure Pertaining to Subject Matter Eligibility, Recent Subject Matter Eligibility Decision (*Berkheimer v. HP,*

Inc.)” (“*Berkheimer Memorandum*”), there is a new fact finding requirement for Examiners, as applicable to rejections under § 101. Specifically, Examiners must now provide specific types of evidence to support a finding that claim elements (or combinations of elements) are well-understood, routine, and conventional.

Here, the Examiner’s determination that the claims are directed to an abstract idea and do not amount to significantly more than the abstract idea is predicated, at least in part, on an unsupported finding that Appellants’ claims are directed to routine, conventional, computer operations. *See, e.g.*, Ans. 3–5. Appellants have challenged this finding in their Brief. Br. 9 (“These limitations, when taken as an ordered combination, provid[ed] unconventional steps that confine the abstract idea to a particular useful application.”) In light of this challenge, the burden shifts to the Examiner to provide evidence in support of the finding—but no evidence has been provided. Consequently, we do not sustain the rejection under 35 U.S.C. § 101 for lack of supporting evidence based on: (1) *Berkheimer* (881 F.3d at 1369), and (2), the *Berkheimer Memorandum*, which changed the examination procedures to be fully compliant with *Berkheimer*.

Therefore, we do not sustain the rejection of Appellants claims under 35 U.S.C. § 101.²

² We further note that, although we do not reverse the rejection on this basis, we see merit in Appellants’ argument the claims pass muster under *Alice* step 1 because the Examiner’s characterization of the abstract idea is overly broad and does not give adequate consideration to the details of the features recited therein.

Second Issue—35 U.S.C. § 103(a)

In rejecting claim 41 the Examiner finds Varvarelis teaches the limitation “sensing an aspect of at least one dispensed dose of the consumable composition.” Final Act. 7 (citing Varvarelis Fig. 1 and item 124 of Fig. 5). Further, explaining the basis for the rejection in the Answer, the Examiner states that “sensing can be read on in Varvarelis door opening and pill dispensing in Figure 1. Varvarelis ‘sensor [124]’ reads on the [A]ppellants ‘sensing’ ‘at least one dispensed dose of the consumable composition that has been received by the container.’” Ans. 6.

Appellants argue the Examiner has not provided sufficient detail in the rejection of claim 41.³ Br. 12. Appellants also argue Varvarelis does not teach that the sensor 124 senses an aspect of a pill that has been received in the dispensing tray, but rather teaches the sensor 124 “provide[s] a signal of the dispensing activity, whereupon the processor 114 obtains timing data from the real time clock 116 and stores the timing data in the memory 112.” Br. 13.

We are not persuaded by Appellants’ arguments. At the outset, we first note that we disagree with Appellants’ assertion that the rejection is insufficiently informative to allow Appellants to meaningfully respond. The Examiner has identified the specific portions of the prior art reference that are pertinent to Appellants’ claims and provided an explanation for how they correspond to the recited limitations. Final Act. 6; Ans. 6.

We also are not persuaded by Appellants’ argument that Varvarelis fails to teach or suggest the “sensing” limitation of claim 41. Varvarelis

³ Appellants present the same arguments for independent claims 69 and 70. Br. 16–22.

relates to an electronic pill dispenser which “enhances patient compliance for following through a particular drug regimen.” Varvarelis, Abstract. The electronic pill dispenser includes a sensor (124). Varvarelis Fig. 4. The sensor (124) is configured such that “when the dispensing mechanism dispenses a pill P, the associated sensor(s) 124 provide a signal of the dispensing activity.” Varvarelis ¶ 36. Varvarelis further teaches “[t]he sensors 124 are configured to detect whether the dispenser mechanism 122 has a pill P within its recess” allowing it to “track the number of pills P that have been dispensed.” Varvarelis ¶ 39. The sensors in Varvarelis “may be any type of sensor” and “may be included . . . to detect other occurrences.” *Id.*

We agree with the Examiner that Varvarelis’s sensor detecting that a pill has been dispensed into the container by providing “a signal of the dispensing activity,” teaches “sensing an aspect of at least one dispensed dose of the consumable composition.” Appellants’ argument seems to suggest that providing a signal of dispensing activity is not the same as “sensing an aspect of at least one dispensed dose.” We do not agree. When Varvarelis’s sensor provides “a signal of the dispensing activity,” it does so because it has sensed an aspect of the pill—namely the dispensation of the pill itself. In light of the close similarity between the sensing activity of Varvarelis’s sensors and the claimed “sensing,” we conclude that Appellants have not sufficiently explained why this teaching in Varvarelis is insufficient to render obvious the “sensing” limitation of claim 41. Accordingly, we sustain the rejection of claim 41 under 35 U.S.C. § 103(a). For the same reasons, we also sustain the rejections of claims 69 and 70 for which Appellants present the same arguments.

DECISION

We summarily affirm the Examiner's double-patenting rejection of claims 41–70.

We reverse the Examiner's rejection of claims 41–70 under 35 U.S.C. § 101.

We affirm the Examiner's rejection of claims 41, 69, and 70 under 35 U.S.C. § 103(a).

Because we have affirmed at least one ground of rejection for each claim on appeal, we affirm the Examiner's decision to reject the claims. 37 C.F.R. § 41.50(a)(1).

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