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Fay Kaplun & Marcin, LLP 150 Broadway, suite 702 New York, NY 10038			JOHANAS, JACQUELINE T	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KENNY KOAY, MICHAEL WAHL, RENE HAAG,
ROBERT LIMOUZE, GEORGE HAIDUKEWYCH, BRUCE H. ZIRAN,
CORY A. COLLINGE, and FRANK A. LIPORACE

Appeal 2017-009217
Application 14/599,419¹
Technology Center 3700

Before DONALD E. ADAMS, ELIZABETH A. LAVIER, and
DAVID COTTA, *Administrative Patent Judges*.

LAVIER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellants seek review of the Examiner's rejections of claims 1, 3–9, and 11–15. We have jurisdiction under 35 U.S.C. § 6(b).

For the reasons set forth below, we REVERSE.

¹ Appellants identify the real party in interest as Synthes USA Products, LLC. Appeal Br. 2.

BACKGROUND

The Specification relates to bone plates for treating fractures. *See* Spec. ¶¶ 1–2. Claim 1 is illustrative, and recites:

1. A plate for treating a bone, comprising:

a plate body extending along a longitudinal axis from a first end to a second end and being sized, shaped and contoured to be positioned along a desired surface of a bone;

a slotted opening extending through the plate body from a first surface which, when the plate is positioned along the desired surface of the bone faces away from the bone, to a second surface which, when the plate is positioned along the desired surface faces toward the bone, the slotted opening defined by a first portion sized and shaped to permit a first head portion of a first bone fixation element fixed to the bone to be passed therethrough and a second elongated portion extending along the longitudinal axis from the first portion in communication with the first portion, the second portion sized to prevent the first head portion of the first bone fixation element from being passed therethrough so that, when the first head portion of the first bone fixation element is received through the first portion, the plate is slidable relative thereto such that the second portion engages the first head portion of the first bone fixation element; and

a second hole extending through the plate body from the first surface to the second surface and being open to an exterior of the plate body via a lateral opening, *the second hole sized and shaped to slidably engage a second head portion of a second bone fixation element via the lateral opening.*

Appeal Br. 15 (Claims Appendix) (emphasis added).

REJECTION MAINTAINED ON APPEAL

1. Claims 1 and 5–8 stand rejected under 35 U.S.C. § 102(a)(1) as anticipated by Winslow.² Ans. 2.
2. Claims 3 and 4 stand rejected under 35 U.S.C. § 103 as unpatentable over Winslow. Ans. 7.
3. Claims 9, 11, and 13–15 stand rejected under 35 U.S.C. § 103 as unpatentable over Winslow and Smith.³ Ans. 8.
4. Claim 12 stands rejected under 35 U.S.C. § 103 as unpatentable over Winslow, Smith, and Frank.⁴ Ans. 10.

DISCUSSION

This appeal turns on a single issue: whether Winslow discloses a “second hole sized and shaped to slidably engage a second head portion of a second bone fixation element via [a] lateral opening” as recited in claim 1.⁵ The Examiner identifies aperture 36 of Winslow as corresponding to the claimed second hole (*see* Final Action 4) and the gap 79 of Winslow as corresponding to the claimed lateral opening (*see id.* at 12). Figure 3 of Winslow is reproduced below:

² Winslow et al., US 2013/0345707 A1, published Dec. 26, 2013.

³ Smith et al., US 2015/0105779 A1, published Apr. 16, 2015.

⁴ Frank et al., US 2008/0294164 A1, published Nov. 27, 2008.

⁵ Claim 9, the only other independent claim on appeal, recites the same phrase.

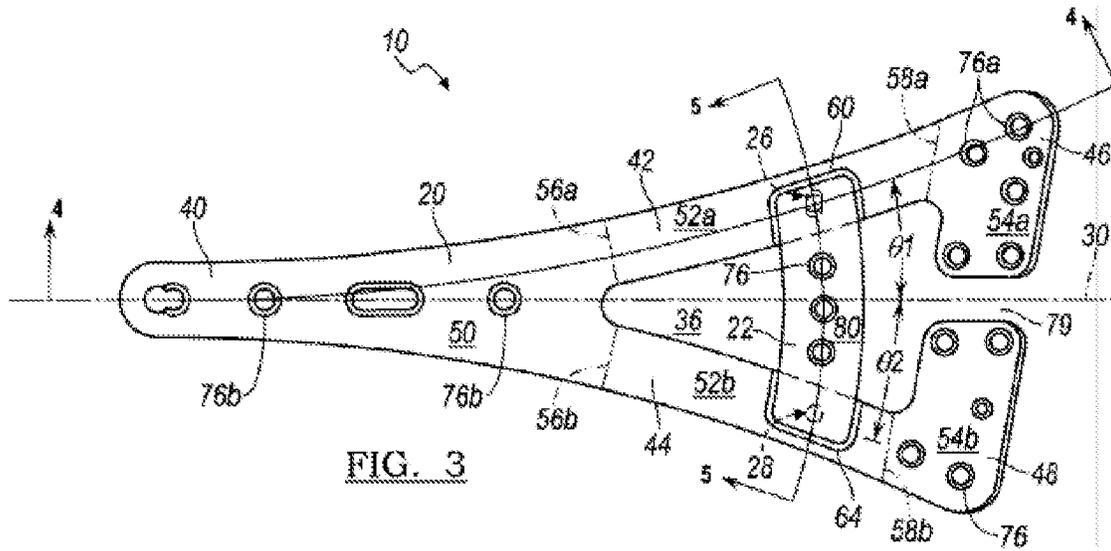


Figure 3 of Winslow is a top view of an orthopedic plate assembly. Winslow ¶¶ 15, 17. Aperture 36 is illustrated above as a central, triangular hole, but it can be sized and located in a manner appropriate to the bone morphology and fracture patterns. *See id.* ¶ 39. Gap 79 separates two tabs, 46 and 48. *See id.* ¶ 53.

The Examiner takes the position that Winslow’s aperture 36 and gap 79, in being capable “of having a head of a bone screw slide against the perimeters thereof” (Final Action 12), satisfy claim 1’s requirement that the second hole be capable of “slidably engag[ing]” the head portion of a bone fixation element. If claim 1 required only sliding, not slidable engagement, we might find ourselves in agreement with the Examiner. As it is, though, we find that the Examiner has not established any evidence on this record that mere contact, or sliding along, constitutes slidable *engagement* between the hole and the head of the bone fixation element. Likewise, although the Examiner posits that “[a] large bone screw” could slide through gap 79 into

aperture 36 of Winslow (Ans. 11), the Examiner fails to cite any teaching in Winslow to support this assertion.

Accordingly, the Examiner has failed to establish that Winslow anticipates claim 1. As all of the appealed claims were rejected (whether under § 102 or § 103) based on the same erroneous application of Winslow,⁶ we cannot sustain any of the rejections of any of the appealed claims.

CONCLUSION

We do not sustain the Examiner's rejections of claims 1, 3–9, or 11–15.

REVERSED

⁶ As to the § 103 rejections over multiple references, there is no indication in the record that the Examiner relied on other cited references to cure the aforementioned deficiency in Winslow.