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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DARIN SCHAEFFER and KAREN KOST

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Appeal 2018-005214  
Application 13/953,022  
Technology Center 3700

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Before EDWARD A. BROWN, JAMES P. CALVE, and  
JILL D. HILL, *Administrative Patent Judges*.

HILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 2–17, 21, and 23–25. Appellant's representative presented oral argument on January 7, 2020. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Cook Medical Technologies LLC. Appeal Br. 3.

## BACKGROUND

Independent claims 2 and 11 are pending. Claim 2, reproduced below with certain limitations italicized, illustrates the claimed subject matter:

2. A medical device for treating a bodily passage having a wall, said medical device comprising:

an elongate member having an elongate member proximal end and an elongate member distal end, the elongate member defining an infusion lumen and an inflation lumen and an outer surface extending between the elongate member proximal end and the elongate member distal end;

a first balloon attached to the outer surface of the elongate member and adapted to move between a deflated configuration and an inflated configuration, the first balloon comprising a first balloon wall defining an infusion chamber and at least one protuberance extending radially outward from the first balloon wall, the infusion chamber in communication with the infusion lumen, the at least one protuberance having a protuberance outer surface and defining at least one protuberance pore in communication with the infusion chamber such that fluid introduced into the infusion chamber can pass through the at least one protuberance pore, the protuberance outer surface disposed radially outward from the first balloon wall; and

a second balloon attached to the outer surface of the elongate member and disposed radially inward of the first balloon, the second balloon adapted to move between a deflated configuration and an inflated configuration and comprising a second balloon wall defining an inflation chamber in communication with the inflation lumen;

wherein the protuberance outer surface is adapted to damage said wall of said bodily passage when the second balloon is in the inflated configuration;

wherein the at least one protuberance pore comprises a plurality of protuberance pores, *each pore of the plurality of protuberance pores having an opening defined on the protuberance outer surface*; and

wherein the plurality of protuberance pores extends along a length of the at least one protuberance relative to a longitudinal axis of the elongate member.

#### REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Vigil	US 5,873,852	February 23, 1999
Schaeffer	US 2011/0060276 A1	March 10, 2011
Baumbach	US 2011/0166547 A1	July 7, 2011

#### REJECTION

I. Claims 2–17, 21, and 23–25 stand rejected under 35 U.S.C. 103(a) as unpatentable over Schaeffer, Vigil, and Baumbach. Final Act. 2.

#### ANALYSIS

The Examiner finds, *inter alia*, that Schaeffer discloses a catheter comprising an elongate member 300 with proximal and distal ends 242a, 242b, infusion and inflation lumens 216, 206, and a first balloon 42 with an infusion chamber 242 and pores 243. Final Act. 2–3. The infusion lumen 216, infusion chamber 242, and pores 243 are in fluid communication. *Id.* at 3. The Examiner finds that the wall of Schaeffer’s first balloon 42 does not have a protuberance extending radially outwardly therefrom, the protuberance having an outer surface defining a protuberance pore “disposed radially outward from the first balloon wall, wherein the protuberance outer surface is adapted to damage said wall of a bodily passage.” *Id.* The Examiner finds, however, that Vigil discloses a catheter with a balloon 16,

18 having a protuberance 50 extending radially outward from the balloon wall, the protuberance having a protuberance outer surface defining a protuberance pore 48 in communication with an infusion chamber, “wherein the protuberance outer surface is adapted to damage” the wall of the body passage and to “provid[e] fluid communication between the internal body vessel wall and balloon interior via the protuberance.” *Id.* at 4. The Examiner concludes that it would have been obvious to modify Schaeffer to include “at least one protuberance extending radially outward from the balloon wall, the at least one protuberance” (1) “having a protuberance outer surface,” (2) “defining at least one protuberance pore,” and (3) being “adapted to damage said wall of a bodily passage as disclosed by Vigil for the purpose of providing fluid communication between the internal body vessel wall and balloon interior via the protuberance.” *Id.*

*Claims 2, 11, 21, 23, and 24*

Appellant argues claims 2, 11, 21, 23, and 24 as a group. We select independent claim 2 as representative. Claims 11, 21, 23, and 24 stand or fall with claim 2.

Appellant initially “traverses the rejection of these claims because the Examiner has failed to satisfy the notice requirement established by 35 U.S.C. § 132 and because the Examiner has failed to establish a *prima facie* showing of the obviousness of any rejected claim.” Appeal Br. 6. According to Appellant, the Examiner “has failed to satisfy the notice requirement at least because he has not identified each limitation of the rejected claims in the cited references.” *Id.* at 8. More specifically, Appellant contends that “the Examiner failed to identify any specific feature or disclosure within the Vigil reference, or any other reference, as disclosing

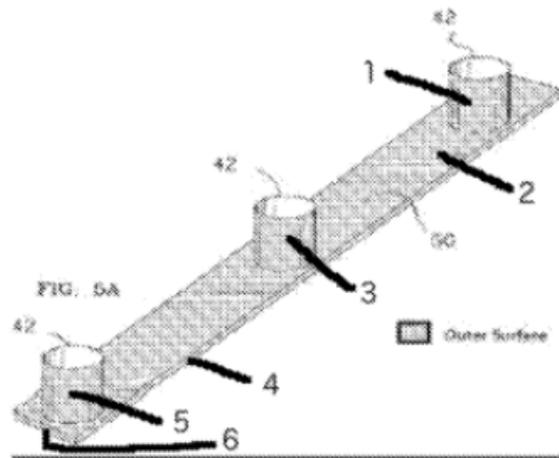
a surface on which an opening is defined for each pore of a plurality of protuberance pores.” *Id.*

The Examiner responds that a skilled artisan “would have looked at Vigil Figs. 2, 3, 5A, and 5B . . . and recognized that elements 50 and 48 have outer surfaces.” Ans. 7.

We are not persuaded by Appellant’s argument. The Examiner’s rejection does not reasonably prevent Appellant from recognizing the evidentiary basis for, and seeking to counter, the grounds for rejection. The Examiner finds that Vigil’s protuberance 50 has an outer surface. The outer surface of element 50 of Vigil is shown in its Figures 5A and 5B, and the outer surface of element 50 can be visually ascertained. That the Examiner did not also annotate Figures 5A and 5B, or identify each area of the outer surface of Vigil’s element 50, does not reasonably prevent Appellant from recognizing and seeking to counter the grounds for rejection. Further, Appellant’s disagreement with the Examiner’s finding does not establish a failure to satisfy the notice requirement. Rather, it evidences that Appellant was on notice of the basis of the Examiner’s rejection and was able to respond accordingly. *See* Appeal Br. 12 (discussing Vigil, Figs. 4A, 4B, 5A, 5B); *see also* Ans. 2–4 (providing findings with annotations on Vigil’s drawings); Reply Br. 1–2 (responding to findings in the Answer).

Appellant next argues that, even if the Examiner satisfied the notice requirement, the combination of Schaeffer, Vigil, and Baumbach fails to establish *prima facie* obviousness. Appeal Br. 9. According to Appellant, the combination of Schaeffer, Vigil, and Baumbach fails to teach or suggest “a protuberance outer surface on which an opening is defined for each pore of the plurality of protuberance pores,” and the Examiner “omitted any

discussion of the limitations that require a protuberance outer surface on which an opening is defined for each pore of the plurality of protuberance pores.” *Id.* at 10. Appellant contends that the Examiner fails to identify any surface of Vigil “on which an opening is defined for each pore of the plurality of pores,” instead making “conclusory statements that such an outer surface exists ‘as seen in Vigil Figs. 5A and 5B.’” *Id.* at 11 (citing Final Act. 9). Appellant further contends that each opening 48 of Vigil’s element 50 “is defined by a separate surface,” rather than being defined by a single “protuberance outer surface.” *Id.* at 12; Reply Br. 3. Appellant provides the following annotated version of Vigil’s Figure 5A, which is reproduced below with numbering what Appellant contends are six separate surfaces.



Appellant thus argues that the above-identified six surfaces in Vigil’s Figure 5A do not define a “protuberance outer surface” as claimed, because the surfaces do not form a single contiguous surface. This argument requires that we construe “protuberance outer surface” to be such a single contiguous surface. The only possible support for such a narrow construction might come from, for example, Appellant’s Figures 1, 2, and 5–9. However, we decline to define “a protuberance outer surface” to be limited to such a

single planar contiguous surface based solely on several of Appellant's drawings of various catheter embodiments (*see* Spec. ¶¶ 1122). It is well-settled that limitations are not to be read into the claims from the specification and a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment. *See In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993); *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). We, thus, are not persuaded that the above annotated six surfaces in Vigil's Figure 5A fail to teach a "protuberance outer surface," and we discern no error in the Examiner's finding.

For these reasons, we are not persuaded that the Examiner's rejection of claim 2 contains error. Claims 11, 21, 23, and 24 fall with claim 2.

*Claims 3–10 and 12–16*

The Examiner finds that Schaeffer discloses the limitations of each of dependent claims 3–10 (Final Act. 5–7) and 12–16 (Final Act. 10–12).

Regarding the rejection of these dependent claims, Appellant repeats the above unavailing argument, and further argues, with respect to each of claims 3–10 and 12–16, that the Examiner fails to provide "any articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." Appeal Br. 13–14.

It appears to us that, because the Examiner finds the limitations set forth in claims 3–10 and 12–16 to be disclosed by the primary reference Schaeffer, and thus, the Examiner is not proposing to further modify Schaeffer or the combination to include any of these limitations, the Examiner is relying on the initial reason for combining Schaeffer with Vigil (Final Act. 4) and for combining Schaeffer with Baumbach (*id.* at 5), as

articulated for the rejection of independent claims 2 and 11. While such practice may not be ideal, Appellant's general argument does not inform us of any reason why the Examiner's findings for the dependent claims based on Schaeffer are in error, or why the Examiner's actual proffered reasoning lacks a rational underpinning in the Examiner's analysis of independent claim 2, nor does Appellant point out any explicit way that the rejection of the dependent claims lacks a rational basis or contains error. We, therefore, are not persuaded that the Examiner's reasoning in the stated rejection is in error.

For these reasons, we sustain the rejection of claims 2–17, 21, and 23–25 as unpatentable over Schaeffer, Vigil, and Baumbach.

#### DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/ Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
2–17, 21, 23–25	103	Schaeffer, Vigil, Baumbach	2–17, 21, 23–25	
<b>Overall Outcome</b>			2–17, 21, 23–25	

#### TIME PERIOD FOR RESPONSE

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**