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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL FLORMAN

Appeal 2018-007070
Application 13/862,705
Technology Center 3700

Before: MICHAEL L. HOELTER, ANNETTE R. REIMERS, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

DOUGAL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134 from a rejection of claims 1, 12–18, 21–25, and 28–34. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Michael Florman. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a periodontal interdental delivery tray and periodontal medicament tray syringe. Claims 1, 12, and 22 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A periodontal tray system, comprising:
 - a tray layer that is designed to conform to at least a portion of an individual's mouth,
 - wherein the tray layer has an opening formed therein such that a periodontal aid is able to pass through the opening formed in the tray layer, the opening aligned with a periodontal pocket in the individual's mouth,
 - wherein the tray layer directs the periodontal aid that passes through the opening directly into the periodontal pocket in the individual's mouth, and
 - wherein the periodontal aid is designed to treat periodontal disease; and
 - a fitting coupled to the tray layer, wherein the fitting receives the periodontal aid and delivers the periodontal aid through the opening formed in the tray layer and directly into the periodontal pocket in the individual's mouth.

Appeal Br. 14 (Claims Appendix).

REJECTIONS

Claims 1, 12, 18, 22, 23, 24, 25, 30, 31, 33, and 34 are rejected under 35 U.S.C. § 102(b) as being anticipated by Viskup (US 5,443,386, iss. Aug. 22, 1995).

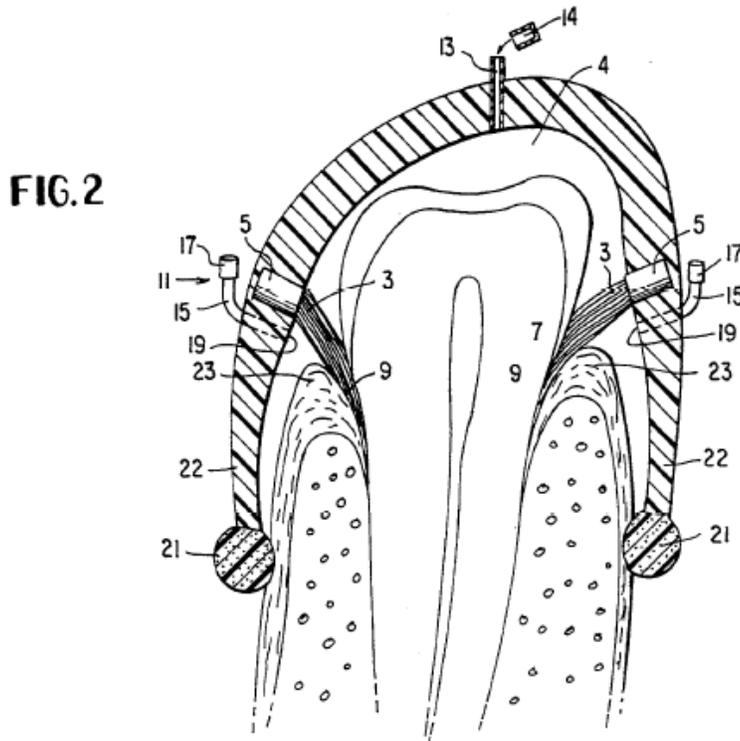
Claims 13–15, 21, 28, 29, and 32 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Viskup.

Claims 16, 17, 22, 24, 28, 29, and 32 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Viskup and Malmin (US 3,949,748, iss. Apr. 13, 1976).

OPINION

Claims 1, 12–15, 18, 21–23, 25, 30, and 31

The Examiner rejects independent claims 1, 12, and 22 as anticipated by Viskup. Final Act. 2–3. In particular, the Examiner points to the tooth cleaning device shown in Viskup Figure 2 reproduced below.



Viskup's Figure 2, "an enlarged cross section" of Figure 1, illustrates a tooth cleaning device with bristles designed to "penetrate the periodontal pockets." Viskup 1:62–63; *id.* at 2:22–25;² Fig. 2. The Examiner finds that Viskup teaches openings and fittings 11, 13 "configured/capable to receive" liquid or a periodontal aid and to direct either or both of them "into the area of periodontal disease." Final Act. 2–3. Appellant disagrees. Appeal Br. 7.

² We note that Viskup appears to confuse the disclosure of what is illustrated in Figures 2 and 3. Viskup 2:22–25, Figs. 2, 3.

Appellant admits that Viskup's inlets 11 that end in nozzles 19 "can direct an irrigating fluid toward a target location." *Id.* at 8. However, Appellant argues that "Viskup is silent as to the tray directing a periodontal aid directly into the periodontal pocket in the individual's mouth, and does not suggest that the inlets 11 are aligned with a periodontal pocket in the individual's mouth as set forth in claim 1." *Id.* Appellant further argues that the fluid needs to be directed "to a location of disease at the bottom of a periodontal pocket." *Id.* at 8.

We first note that the independent claims do not require that fluid or a periodontal aid be directed to the "bottom" of a periodontal pocket, only to the periodontal pocket. Further, Appellant's argument does not explain *why* Viskup's features 11, 13 are not configured to or capable of "direct[ing] the periodontal aid . . . directly into the periodontal pocket in the individual's mouth." *See* Final Act. 2. It is not necessary that Viskup explicitly state that the features perform this function. Although "[a] patent applicant is free to recite features of an apparatus either structurally or functionally . . . , choosing to define an element functionally . . . carries with it a risk." *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). This risk is that Appellant bears the burden to prove that the prior art does not possess the functional characteristic, once the Examiner has shown a reasonable basis for believing the claimed structure to be the same as the prior art structure.

We agree with Appellant that this functional limitation limits the claims. Appeal Br. 8–9. However, we do not agree that Appellant has identified a structural limitation differentiating the claims from the prior art.

As can be seen in Viskup Figure 2, the nozzles are positioned adjacent the periodontal pocket with the nozzles 19 pointing directly at the

periodontal pocket. Viskup, Fig. 2. Appellant admits that the inlets 11 that end in nozzles 19 “can direct an irrigating fluid toward a target location.” Appeal Br. 7. Viskup teaches that the tray can connect to “hygienic and therapeutic irrigation appliances (such as that sold under the trademark ‘Water Pik’) to provide a means for irrigating the teeth with cleansing, medicinal, or antibiotic solutions.” *Id.* at 3:11–15. WATER PIKs are commonly known to provide irrigation to teeth with an adjustable pressure spray nozzle. Further, a primary focus of Viskup is treating and cleaning the periodontal area. *Id.* at 1:12–16, 1:60–66, 2:3–8. Thus, it is unclear what additional features would be required for Viskup to be configured to direct a liquid directly into the periodontal pocket or to be capable of directing a periodontal aid into the periodontal pocket.

Appellant does point to “the opening aligned with a periodontal pocket in the individual’s mouth” in claim 1 and “the opening positioned directly above a periodontal pocket in the individual’s mouth” in claim 12, as areas of differentiation, but does not show how these features are not taught by Viskup. Reply Br. 3. For example, Viskup Figure 2 shows nozzle 19, an opening at the end of feature 11, pointing directly at and thus “aligned with a periodontal pocket.”

Even if Viskup did not show the nozzle pointing directly at the periodontal pocket, the Examiner also found that Viskup’s tray is capable of being manually adjusted to the desired position. Ans. 5–6. This is supported by Viskup, which teaches making channel 4 of the tray sufficiently wide to allow “movement of the tray with respect to the teeth for the bristles to provide proper cleansing action.” Viskup, 2:42–44; *see also id.* at Fig. 2. Appellant responds that the claimed alignment does not require

a manual step to be performed. Reply Br. 3. However, this is not the Examiner's point. Rather, the Examiner has shown that Viskup's tray is capable of adjustment so as to be aligned as claimed, not that the claims require a step of manual adjustment.

Concerning the phrase "directly above a periodontal pocket," in claim 12, neither the claims nor the Specification provide any guidance for the frame of reference for the term "above." The Examiner implicitly reads the term broadly, and Appellant, other than asserting that Viskup's openings are not above the periodontal pocket, provides no explanation or claim construction. *See* Reply Br. 3.

We read the phrase broadly so as to not exclude application to both the top and bottom rows of teeth and typical dental situations such as when the individual is standing or reclined in a dental chair. *See In re Am. Acad. of Sci. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (The United States Patent and Trademark Office gives claims their broadest reasonable interpretation consistent with the Specification, reading claim language in light of the Specification as it would be interpreted by one of ordinary skill in the art.). We determine that Appellant has not shown that the Examiner erred in applying a broad definition to this phrase.

For the above reasons, Appellant has not shown error in the Examiner's rejection of independent claims 1, 12, and 22. Appellant relies on their argument over the independent claims to show the patentability of dependent claims 13–15, 18, 21, 23, 25, 30, and 31. Thus, we are not informed of error in the rejections of these claims.

Claims 16, 17, 33 and 34

Claim 16 depends from claim 1 and requires “wherein the fitting is configured to receive a micro-instrument such that the micro-instrument passes through the opening formed in the tray layer and the tray layer guides the micro-instrument into the periodontal pocket in the individual’s mouth.” Claims 17, 33, and 34 include similar limitations.

Appellant argues that “the modification of Viskup to direct a micro-instrument to a periodontal pocket as proposed by the Office would change the principle of operation of Viskup.” Appeal Br. 12. Appellant argues that this is because Viskup only teaches directing liquid to fill the entire channel 4. *Id.* However, Viskup is not so limited. Viskup teaches “irrigating the teeth,” but Viskup does not specify how the irrigation is performed. Viskup, 3:14. Appellant has identified one possible way, but there is no evidence that it is the only possible way, or even that it is the preferred method. Thus, Appellant has not established that filling the entire channel 4 with fluid is a principle of operation of Viskup. Thus, we are not informed of error in the Examiner’s rejection.

Claims 22, 24, 28, 29, 32, and Cancelled Claims 26, 27

Appellant argues that the Final Office Action is insufficiently clear concerning the secondary rejections of claims 22, 24, 28, 29 and 32. Appeal Br. 11–12. Further, cancelled claims 26 and 27 are also included in the rejections. *Id.* at 10. The Examiner does not respond. *See generally* Ans.

The inclusion of cancelled claims 26 and 27 appears to be a typographical error.

Neither the Final Office Action, nor the Answer addresses the features of claim 24 in the anticipation rejection over Viskup. *See e.g.*, Final Act. 2–3. The features of claim 24 are discussed in the obviousness rejection over Viskup and Malmin. *See e.g.*, *id.* at 4. Thus, we do not sustain the anticipation rejection of claim 24. Appellant does not identify any error in the rejection of claim 24 over Viskup and Malmin. Appeal Br. 11–12.

Conversely, the features of claim 22 are discussed in the anticipation rejection over Viskup, but not in the obviousness rejection over Viskup and Malmin. *See e.g.*, Final Act. 2–4. As the analysis of the anticipation of claim 22 over Viskup is relied on³ in the obviousness rejection over Viskup and Malmin, claim 22 can properly be rejected under both bases. However, as no further explanation is given by the Examiner we view this as a typographical error.

The features of claims 28, 29, and 32 are discussed in both the obviousness rejection over Viskup alone and in combination with Malmin. *See e.g.*, *id.* at 4–5. Appellant argues that “the Office has not provided clear indication in its rejection as to which portions of Viskup and/or Malmin are believed to meet each of these claims individually” and thus a *prima facie* case has not been established. Appeal Br. 11. However, we understand Appellant’s confusion to be based on a typographical error in the obviousness rejection over Viskup and Malmin. The rejection incorrectly starts with “*Malmin* discloses the invention substantially as claimed except for the fitting receives a micro-instrument. . . .” rather than “[*Viskup*]

³ We also understand the rejection over Viskup and Malmin to include a typographical error in referring to Malmin instead of Viskup when stating “*Malmin* discloses the invention substantially as claimed except for” Final Act. 4 (emphasis added).

discloses the invention” Final Act. 4 (emphasis added). This error is clear from the rest of the discussion which relies on Malmin for the micro-instrument, which is not taught by Viskup.

Appellant does not identify any particular claim feature that is missing from the Examiner’s analysis. Thus, we are left to guess as to whether there is some other feature that Appellant believes is missing. Thus, we are not informed of error in the rejections of claims 28, 29, and 32.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)	Affirmed	Reversed
1, 12, 18, 22, 23, 24, 25, 30, 31, 33, 34	102	Viskup	1, 12, 18, 22, 23, 25, 30, 31, 33, 34	24
13–15, 21, 28, 29, 32	103	Viskup	13–15, 21, 28, 29, 32	
16, 17, 24, 28, 29, 32 ⁴	103	Viskup, Malmin	16, 17, 24, 28, 29, 32	
Overall Outcome			1, 12–18, 21–25, 28–34	

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

⁴ The original inclusion of claim 22 appears to be a typographical error.