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Abel Schillinger, LLP 8911 N. Capital of Texas Hwy Bldg 4, Suite 4200 Austin, TX 78759			CHIUSANO, ANDREW TSUTOMU	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MATTHIAS SCHWAIBOLD

Appeal 2019-001315
Application 14/670,737
Technology Center 2100

Before JOHNNY A. KUMAR, JENNIFER L. McKEOWN,
SCOTT B. HOWARD, *Administrative Patent Judges*.

KUMAR, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 2, and 4–16, which constitute all the claims pending in this application. 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) (2017). Appellant identifies the real party in interest as LOEWENSTEIN MEDICAL TECHNOLOGY S.A. Appeal Br. 3.

STATEMENT OF CASE

Introduction

Appellant's Specification relates to a device for artificial respiration.
Spec. page 1, line 10.

Representative Claims

Representative claims 1 and 15 under appeal read as follows:

1. A device for artificial respiration, wherein the device comprises a blower connected to a control, both the control and the blower being arranged in a housing and the control being connected to at least one indicating device and also at least one operating element, wherein the indicating device is formed as a display that has a touchscreen function and, using a symbol-based operating structure, can be used as an input device in such a way that respective symbols visualize an assigned function and that a hierarchically structured operating capability is generated by the control, and wherein a possibility for selecting different languages is provided for a patient menu and an expert menu, a language for the menu concerned being selected by an input button and the input button being connected by logic circuitry to a language selection menu, in which the user can select the language, the input button being also connected by logic circuitry to a language memory wherein, after confirmation of a language selected, this language is loaded from the memory and used.

15. A method for indicating user interface information for a respirator comprising a blower connected to a control, both the control and the blower being arranged in a housing, and the control being connected to at least one indicating device and also at least one operating element, wherein the method comprises providing the indicating device in the form of a display that has a touchscreen function and, using a symbol-based operating structure, can be used as an input device in such a way that respective symbols visualize an assigned function and that a hierarchically structured operating capability is generated by the control, the touchscreen function providing a possibility for selecting different languages for a patient menu and an expert menu, wherein a language for the menu concerned can be selected by an input button and the input button is connected by logic circuitry to a language selection menu, in

which the user can select the language, the input button being also connected by logic circuitry to a language memory and wherein, after confirmation of a language selected, this language is loaded from the memory and used.

References and Rejections on Appeal

Claims 15 and 16 are rejected under 35 U.S.C. § 112(b) as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor, or for pre-AIA the applicant regards as the invention.

Claims 1, 2, 4, 6, 10, and 12–16 are rejected under 35 U.S.C. § 103 as being unpatentable over Frame et al. (US 2015/0020801 A1; published Jan. 22, 2018) in view of Setzer et al. (US 2008/0072902 A1; published Mar. 27, 2008).

Claim 5 is rejected under 35 U.S.C. § 103 as being unpatentable over Frame in view of Setzer as applied to claim 1 above, and further in view of Milne et al. (US 2014/0012150 A1; published Jan. 9, 2014).

Claims 7–9 are rejected under 35 U.S.C. § 103 as being unpatentable over Frame et al. in view of Setzer as applied to claim 1 above, and further in view of Gejdos et al. (US 2011/0246242 A1; published Oct. 6, 2011).

Claim 11 is rejected under 35 U.S.C. § 103 as being unpatentable over Frame in view of Setzer as applied to claim 10 above, and further in view of Brewer et al. (US 2002/0056452 A1; published May 16, 2002).

ANALYSIS

We have reviewed the Examiner's rejections in light of Appellant's arguments that the Examiner has erred. With respect to the rejections under

35 U.S.C. §§ 112(b) and 103(a), we agree with the Examiner’s findings and conclusions and adopt them as our own.

Rejection under 35 U.S.C. § 112(b)

The Examiner finds:

Claims 15-16 are rejected under 35 U.S.C. 112(b) or 35 U.S.C. 112 (pre-AIA), second paragraph, as being indefinite. . . .

Claims 15-16 are directed toward a method, but the only method steps are “providing the indicating device in the form of a display” (claim 15) and “providing a number of input buttons” (claim 16). The remainder of claims recite hardware components and functional capabilities.

Final Act. 2.

The Examiner also finds “these claims are indefinite because they are process claims, but it is unclear what the steps in the claim actually are, and when infringement would occur.” Ans. 3.

Because Appellant is attempting to claim both a system and a method for using that system, we agree with the Examiner. *See IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005) (holding invalid the following hybrid claim as covering both a system and a method: “The system of claim 2 [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the user uses the input means to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.” (emphasis omitted)); *see also In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1318 (Fed. Cir. 2011). In each of these cases, the Federal Circuit held claims indefinite for combining two classes of invention.

This rule is well recognized and has been incorporated into the MPEP § 2173.05(p)(II) (“A single claim which claims both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. 112(b) or pre-AIA 35 U.S.C. 112, second paragraph.”).

Accordingly, we do sustain the Examiner’s rejection of claims 15 and 16 under 35 U.S.C. § 112(a).

Rejections under 35 U.S.C. § 103

We have reviewed the Examiner’s rejections in light of Appellant’s arguments (Appeal Br. 8–16; Reply Br. 2–3) that the Examiner has erred, but we disagree with Appellant’s arguments. The Examiner has provided a comprehensive response, supported by sufficient evidence, to each of the contentions raised by Appellant. *See* Ans. 3–4. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellant’s Appeal Brief (*id.*). We highlight the following points for emphasis.

In rejecting claim 1, the Examiner finds Frame teaches all the recited claim limitations except for “wherein the indicating device is formed as a display that has a touchscreen function,” for which the Examiner relies on Setzer. *See* Final Act. 4–5. The Examiner finds the combination would have been obvious to one of ordinary skill in the art “having the teachings of Frame and Setzer before him at the time of filing, to modify the indicating device as disclosed by Frame to include a touchscreen function as taught by Setzer.” *Id.* at 5. The examiner further finds “[o]ne of ordinary skill in the art would be motivated to modify the indicating device of Frame to include

the touchscreen function of Setzer because it provides an easier to use ventilator interface (Setzer, paras. 02–03).” *Id.*.

Appellant contends

the device recited in instant claim 1 provides the possibility of *separately* selecting (1) a language for a patient menu and (2) a language for an expert menu. This is illustrated in e.g., instant Figure 15 which shows a possible embodiment where the virtual buttons for the (previously selected) language for the expert and the (previously selected) language for the patient are side by side. Switching between the two languages merely requires touching the virtual button for the expert or touching the virtual button for the patient.

Reply Br. 3 (emphasis ours).

The Examiner finds, and we agree

Appellant’s argument rests on features that are not actually in the claim. In particular, Appellant argues that, “[t]here is nothing in the above passage of FRAME that suggests that there are two different language menus . . . the device recited in instant claim 1 provides the possibility of separately selecting (1) a language for a patient menu and (2) a language for an expert menu” App. Br. 10. However, the claim simply states, “providing a possibility for selecting different languages for a patient menu and an expert menu.” Frame discloses menus that are available to a patient and another control menu available to an expert like the owner or distributor of the medical device. Frame, ¶ [0116]. Frame also discloses that the language of the device can be changed. Frame, ¶ [0119]. Thus, this Frame provides the possibility of selecting the language for both types of menus.

Ans. 4.

In other words, with respect to Appellant’s contention about “*separately* selecting,” we agree with the Examiner that the broadest

reasonable interpretation of the claim language, consistent with the Specification, does not preclude Frame's menus available to a patient and another menu available to an expert.

Therefore, Appellant's arguments do not persuade us of error in the Examiner's position with respect to the rejection of independent claims 1 and 15, as well as the dependent claims, which are not argued separately. *See* Appeal Br. 14–16. We, therefore, sustain the 35 U.S.C. § 103 rejections of claims 1, 2, and 4–16.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C §	Reference(s)/Basis	Affirmed	Reversed
15, 16	112(b)	Indefiniteness	15, 16	
1–2, 4, 6, 10, 12–16	103	Frame, Setzer	1, 2, 4, 6, 10, 12–16	
5	103	Frame, Setzer, Milne	5	
7–9	103	Frame, Setzer, Gejdos	7–9	
11	103	Frame, Setzer, Brewer	11	
Outcome			1, 2, 4–16	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED