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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HAI D. PHAM and JARED FABER

Appeal 2019-002755
Application 14/701,953
Technology Center 2600

Before CATHERINE SHIANG, BETH Z. SHAW, and
JAMES W. DEJMEK, *Administrative Patent Judges*.

DEJMEK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from a Final Rejection of claims 1–8 and 11–21. Appellant has canceled claims 9 and 10. *See* Amdt 3 (filed April 24, 2018). We have jurisdiction over the remaining pending claims under 35 U.S.C. § 6(b).

We affirm.

¹ Throughout this Decision, we use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42 (2018). Appellant identifies Honeywell International Inc. as the real party in interest. Appeal Br. 2.

STATEMENT OF THE CASE

Introduction

Appellant's disclosed and claimed invention generally relates to the use of a body area network (BAN) in a security access system. Spec. ¶¶ 1, 10. According to the Specification a BAN "is a wireless network of computing devices that are associated with a particular human body or a particular person." Spec. ¶ 2. As an example, the Specification describes that intelligent physiological sensors may be implanted in the body and may communicate desired information to an external device. Spec. ¶ 7. Information transmitted from an implanted device may include information identifying the device and/or the person in whom the device is implanted. Spec. ¶ 14. In a disclosed embodiment, this information may be used by a security access system to open a door (i.e., provide access). Spec. ¶ 14.

Claim 1 is representative of the subject matter on appeal and is reproduced below with the disputed limitation emphasized in *italics*:

1. A system comprising:
a computer processor configured to:
receive body area network (BAN) data; and
operate a point of entry as a function of the BAN data;
wherein the BAN data are generated by a body area network comprising a wireless network of physiological sensing devices worn by or embedded in a person;
wherein the BAN data comprise identification data for the person associated with the BAN, and the identification data are used to operate the point of entry;
wherein the identification data comprise data relating to an implanted device in the person; and
wherein the data relating to the implanted device in the person comprise data that identify the implanted device.

The Examiner's Rejections

1. Claims 1, 2, 5–8, 11, 12, 15–18, 20, and 21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moriarty et al. (US 2013/0194092 A1; Aug. 1, 2013) (“Moriarty”); Falck et al. (US 2011/0280224 A1; Nov. 17, 2011) (“Falck”); and Chandra et al. (US 2014/0273829 A1; Sept. 18, 2014) (“Chandra”). Final Act. 3–9.

2. Claims 3, 13, and 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moriarty, Falck, Chandra, and Amento et al. (US 8,908,894 B2; Dec. 9, 2014) (“Amento”). Final Act. 9–10.

3. Claims 4 and 14 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moriarty, Falck, Chandra, Amento, and Benoit et al. (US 2015/0067792 A1; Mar. 5, 2015) (“Benoit”). Final Act. 11.

ANALYSIS²

In rejecting claim 1, the Examiner finds Moriarty teaches, *inter alia*, a system to receive body area network (BAN) data, wherein the BAN data are generated by a body area network comprising a network of physiological devices worn by or embedded in a person and, further, wherein the BAN data comprise identification data for a person associated with the BAN, the identification data comprising data relating to an implant in a person. Final Act. 3 (citing Moriarty ¶¶ 27–28, 30, 48). The Examiner relies on Falck to teach expressly the use of wireless sensors in a BAN network (Final Act. 3

² Throughout this Decision, we have considered the Appeal Brief, filed September 18, 2018 (“Appeal Br.”); the Reply Brief, filed February 19, 2019 (“Reply Br.”); the Examiner’s Answer, mailed December 19, 2018 (“Ans.”); and the Final Office Action, mailed July 5, 2018 (“Final Act.”), from which this Appeal is taken.

(citing Falck ¶¶ 5, 62)) and Chandra to teach the use of BAN data for operating a point of entry and providing identification data that identify the device in the person (Final Act. 3 (citing Chandra ¶¶ 12, 15, 26, 34)).

Appellant disputes the Examiner’s finding that Chandra teaches identification data that identify the implanted device in the person. Appeal Br. 10. In particular, Appellant asserts that Chandra does not relate to *implanted* devices, but rather describes an *ingested* device (i.e., a pill comprising a transmitter). Appeal Br. 10. Appellant argues that even under a broadest reasonable interpretation, the claimed *implanted* device is not taught by Chandra’s *ingested* device. Appeal Br. 10; Reply Br. 2 (disputing the Examiner’s proposed broadest reasonable interpretation).

Regardless of whether Chandra teaches an *ingested device* or an *implanted device*, we note that the Examiner finds *Moriarty* teaches an implanted device. Final Act. 3 (citing *Moriarty* ¶¶ 27–28); Ans. 4 (explaining the Examiner’s position that *Moriarty* is relied to teach the use of an implanted BAN device and that such implantation is a conventional practice (citing *Moriarty* ¶¶ 28, 35)). We agree with the Examiner that *Moriarty* teaches an implanted BAN device. *See, e.g.*, *Moriarty* ¶¶ 28 (describing “implant modules”), 31–32 (“[t]he patient 102 may have internal or external sensors 140 . . .”), 35 (“a wide variety of different types of internal or external sensors may be utilized at different parts of the patient’s body”).

Moreover, the Examiner finds, and we agree, *Moriarty* teaches the BAN devices (i.e., the implanted devices) may transmit information identifying the person associated with the BAN device. Final Act. 3 (citing *Moriarty* ¶ 48 (describing that “medical data and other information (e.g.,

identity information, contact information, etc.)” may be transmitted by the device and received by an external device)); *see also* Moriarty ¶ 49 (describing various levels and types of information transmitted from the BAN device).

Non-obviousness cannot be established by attacking references individually where, as here, the ground of unpatentability is based upon the teachings of a combination of references. *In re Keller*, 642 F.2d 413, 426 (CCPA 1981). Rather, the test for obviousness is whether the combination of references, taken as a whole, would have suggested the patentee’s invention to a person having ordinary skill in the art. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

We understand the Examiner’s rejection to rely on the combined teachings of, *inter alia*, Moriarty and Chandra. *See* Final Act. 3. In particular, Moriarty teaches an implanted device that transmits information identifying the person associated with the BAN device as well as other information, and Chandra teaches that a device internal to the body transmits information to identify the device itself. *See* Final Act. 3 (citing Moriarty ¶¶ 27–28, 48; Chandra ¶ 12). Thus, we find that the combined teachings of Moriarty and Chandra teach or reasonably suggest an implanted device that transmits information (i.e., identification data) comprising data related to an implanted device in the person (as taught Moriarty) and that the data relating to the implanted device comprise data to identify the device itself (as taught by Chandra).

For the first time in the Reply Brief, Appellant belatedly asserts that Moriarty “is specifically directed towards medical monitoring and not the use of a BAN to control external systems.” Reply Br. 2. As such, Appellant

argues the Examiner has not shown the prior art (i.e., Moriarty) teaches an implanted device that includes identification data and that can be used to operate a point of entry. Reply Br. 3. In addition, Appellant belatedly argues for the first time in the Reply Brief that there is no reason that one of ordinary skill in the art would modify Moriarty's system with Chandra's device to operate a point of entry. Reply Br. 3. Instead, Appellant asserts that the Examiner has impermissibly relied on hindsight reasoning in support of the proposed combination. Reply Br. 3.

These argument were not made in the Appeal Brief, but could have been, and are not responsive to any new evidence or finding set forth by the Examiner in the Answer. In the absence of a showing of good cause by Appellant, this argument is untimely and deemed waived.

Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the [E]xaminer's answer, including any designated new ground of rejection, will not be considered by the Board for purposes of the present appeal, unless good cause is shown.

37 C.F.R. § 41.41(b)(2); *see also Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (informative) (explaining that arguments and evidence not presented timely in the principal brief, will not be considered when filed in a Reply Brief, absent a showing of good cause explaining why the argument could not have been presented in the principal brief); *Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (informative) (“[T]he reply brief [is not] an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner's rejections, but were not.”).

Moreover, even if we were to consider Appellant's untimely arguments, we do not find them persuasive of Examiner error. As an initial

matter, whether Moriarty is used for a different purpose is not persuasive. Our reviewing court guides it is irrelevant that the prior art and the present invention may have different purposes. *See Nat'l Steel Car, Ltd. v. Canadian Pac. Ry., Ltd.*, 357 F.3d 1319, 1339 (Fed. Cir. 2004) (“A finding that two inventions were designed to resolve different problems . . . is insufficient to demonstrate that one invention teaches away from another.”). That is, it is sufficient that references suggest doing what Appellant did, although the Appellant’s particular purpose was different from that of the references. *In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983) (citing *In re Gershon*, 372 F.2d 535, 538–39 (CCPA 1967)). “Obviousness is not to be determined on the basis of purpose alone.” *In re Graf*, 343 F.2d 774, 777 (CCPA 1965). “Common sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007); *see also KSR*, 550 U.S. at 421 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”).

Further, although the Examiner determines an ordinarily skilled artisan would have been motivated to modify Moriarty’s system of transmitting BAN data to a remote device with the particular application environment of Chandra (i.e., transmitting BAN data for security access) (*see, e.g.*, Final Act. 3–4), we also note that one of ordinary skill in the art would have been motivated to modify the Chandra’s system of gaining access to a controlled entry point using a body area network to transmit identification information of an ingested transmitter device (*see Chandra* ¶ 34) with the implanted BAN device of Moriarty (*see Moriarty* ¶ 28). *See In*

re Bush, 296 F.2d 491, 496 (CCPA 1961) (“where a rejection is predicated on two references each containing pertinent disclosure which has been pointed out to the applicant, we deem it to be of no significance, but merely a matter of exposition, that the rejection is stated to be on A in view of B instead of B in view of A”). As Chandra describes, an issue with the ingested devices is that they are only operational for a short period of time (i.e., five to seven minutes). Chandra ¶ 38. By using an implanted device (as taught by Moriarty), this issue may be mitigated. *See KSR*, 550 U.S. at 420 (explaining that “any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining” references); *see also Bush*, 296 F.2d at 496 (explaining that changing the order of the references does not constitute a new ground of rejection (citing *In re Cowles*, 156 F.2d 551, 554 (CCPA 1946))).

For the reasons discussed *supra*, we are unpersuaded of Examiner error. Accordingly, we sustain the Examiner’s rejection of claim 1 under 35 U.S.C. § 103. For similar reasons, we also sustain the Examiner’s rejection of independent claims 11 and 17, which recite commensurate limitations and were not argued separately. *See Appeal Br. 11; see also 37 C.F.R. § 41.37(c)(1)(iv)*. Additionally, we sustain the Examiner’s rejection of claims 2–8, 12–16, and 18–21, which depend directly or indirectly therefrom and were not argued separately. *See Appeal Br. 11; see also 37 C.F.R. § 41.37(c)(1)(iv)*.

CONCLUSION

We affirm the Examiner’s decision rejecting claims 1–8 and 11–21 under 35 U.S.C. § 103.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 5–8, 11, 12, 15–18, 20, 21	103	Moriarty, Falck, Chandra	1, 2, 5–8, 11, 12, 15–18, 20, 21	
3, 13, 19	103	Moriarty, Falck, Chandra, Amento	3, 13, 19	
4, 14	103	Moriarty, Falck, Chandra, Amento, Benoit	4, 14	
Overall Outcome			1–8, 11–21	

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)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED