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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ALBERTO MARTINEZ ALBALAT

Appeal 2019-003077
Application 13/885,272
Technology Center 3700

Before DANIEL S. SONG, MICHAEL L. HOELTER, and
BRANDON J. WARNER, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner’s decision to reject claims 1–4, 7, and 11–18. 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. Appellant identifies the real party in interest as “BIOSURGICAL S.L.” Appeal Br. 3.

CLAIMED SUBJECT MATTER

The disclosed subject matter “relates to a system and [a] method for the delivery of heated therapeutic fluids.” Spec. 1.² System claim 1 and method claim 13 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A system for the delivery of heated therapeutic fluid to a patient’s body cavity in a chemohyperthermia procedure, said system comprising:

- a) a heating element and a pump; and
- b) a tubing system, said tubing system comprising at least one length of tubing and

a heat exchanger;

the arrangement being such that, in use, the therapeutic fluid is heated by the heating element and pumped through the tubing system so that it is delivered to the patient’s body cavity,

characterised in that the tubing system further comprises at least one in-line temperature sensor located outside the patient’s body cavity such that, in use, the temperature sensor measures the temperature of the fluid as it enters the patient’s body cavity and/or at least one in-line temperature sensor located outside the patient’s body cavity such that, in use, the temperature sensor measures the temperature of the fluid as it exits the patient’s body cavity, wherein the heating element is controlled in response to the temperatures measured by the at least one in-line temperature sensor,

and wherein the heating element comprises means for controlling the temperature of the fluid that is configured such that the temperature of the fluid is adjusted with a variation of at most +/- 1°C between a temperature above body temperature in order to increase the effectiveness of the heated therapeutic fluid but below a temperature which causes damage to the patient’s tissue locally.

² Appellant’s Specification dated May 14, 2013 lacks both line and paragraph numbering. We thus reference Appellant’s Specification via page number only.

EVIDENCE

Name	Reference	Date
Westerbeck	US 6,336,911 B1	Jan. 8, 2002
Derrico et al. (“Derrico”)	US 2008/0154197 A1	June 26, 2008
Tan	US 2010/0298771 A1	Nov. 25, 2010

REJECTION

Claims 1–4, 7, and 11–18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Tan, Westerbeck, and Derrico.

ANALYSIS

Appellant argues claims 1–4, 7, and 11–18 (i.e., all the claims) together. *See* Appeal Br. 6–14. We select independent claim 1 for review, with the remaining claims standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 recites “at least one in-line temperature sensor located outside the patient’s body cavity” to measure fluid temperature as it “enters the patient’s body.” Claim 1 similarly recites “and/or at least one in-line temperature sensor located outside the patient’s body cavity,” but which measures fluid temperature “as it exits the patient’s body cavity.” Claim 1 further recites adjusting the fluid temperature “with a variation of at most +/- 1°C.”

The Examiner primarily relies on Tan for disclosing the limitations of claim 1, including the use of in-line sensors, but relies on Westerbeck for expressly disclosing the use of external sensors, and on Derrico for controlling the fluid temperature within the recited range. *See* Final Act. 6–

8. The Examiner provides a reason for first combining Tan and Westerbeck, and then for the combination with Derrico. *See* Final Act. 7, 8.

Appellant initially contends that the Examiner improperly framed the combination of Tan and Westerbeck as “if two documents are within the same field of endeavor then it is obvious to combine said two documents.” Appeal Br. 9 (referencing Final Act. 2, 3); *see also* Reply Br. 2, 3. This is an incomplete characterization of the Examiner’s reasons for combining these two references. *See* Final Act. 7. In addition to ascertaining that both Tan and Westerbeck pertain to delivering temperature controlled fluid to a patient (*see* Final Act. 6, 7, Ans. 3–4), the Examiner further notes Tan’s disclosure of in-line sensors that “may be . . . located within the body cavity or . . . located outside the tube outside the body.” Final Act. 7; *see also* Ans. 4, 7. Westerbeck, on the other hand, is expressly relied upon for teaching “in line temperature sensors located outside the patient’s body cavity” as recited. Final Act. 7; *see also* Ans. 5. The Examiner provides two reasons for combining Tan and Westerbeck; first, Westerbeck’s external location is specifically one of the alternatives Tan describes and, second, the Examiner addresses Westerbeck’s improved temperature control as providing more accurate temperature information. *See* Final Act. 7; *see also* Westerbeck 1:33–34 (“[t]he present invention improves the ability to control the blood and body temperature”), Ans. 5. Hence, the Examiner did not simply rely on Tan and Westerbeck being “within the same field of endeavor [and thus conclude that] it is obvious to combine said two documents” as asserted. Appeal Br. 9; *see also* Reply Br. 2, 3. Instead, we agree with Appellant that “[t]he correct topic to consider is: if/when the POSITA has the two documents in hand, whether the POSITA would logically combine these two

documents.” Appeal Br. 10; *see also* Reply Br. 3. We conclude that the Examiner provided reasons to “logically combine these two documents” as discussed above. Thus, Appellant’s contention focusing solely on the references being in the same field of endeavor, while ignoring the Examiner’s stated reasons for their combination, is not persuasive of Examiner error.

Appellant additionally questions the Examiner’s reliance on Westerbeck’s external sensors because such sensors “provide[] accurate information.” Appeal Br. 10; *see also* Reply Br. 4. Appellant contends instead, “[s]uch is not correct,” and that “each sensor of Westerbeck is really not for high accuracy.” Appeal Br. 10; *see also* Reply Br. 3, 4. However, as stated above, Westerbeck specifically addresses improvements to blood and body temperature control and, in doing so, employs “fast response small thermal mass sensor **30** [to] improve[] control of body temperature.” Westerbeck 1:33–34, 2:49–50; *see also* Ans. 5. Appellant argues “that Westerbeck does NOT state/suggest ‘improved accuracy (control)’ (emphasis added)” and that “nowhere does Westerbeck present the concept that fast equals accuracy.” Reply Br. 4; *see also* Appeal Br. 10.

Appellant does not make clear how Westerbeck’s teachings of a faster response time fails to also result in more accurate temperature control. *See* Ans. 5, 8. Appellant’s contentions are additionally not persuasive because we have been instructed that “attorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness.” *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997). Accordingly, Appellant’s contentions of Examiner error are not persuasive.

Appellant further argues that the Examiner’s reliance on Derrico is faulty because “Derrico clearly teaches to have temperature sensor be internal (i.e., item 210 of Derrico) to get the presented accuracy.” Appeal Br. 11. In other words, Appellant contends that it is Derrico’s internal sensor 210 that achieves the recited accuracy, which Appellant contrasts with the external sensors of the Tan/Westerbeck combination. *See* Appeal Br. 6, 11, 13, 14; *see also id.* at 7 (“the resulting device would have the internal temperature sensor 210 to get the desired accuracy”), Reply Br. 6, 9. This is not directly responsive to the rejection discussed above, and is not a correct reading of Derrico. *See also* Ans. 7. Derrico states that the system controller “preferably receives inputs from the plurality of temperature sensors **204–206** [and] internal temperature sensor **210**.” Derrico ¶ 21. More specifically, Derrico teaches:

For example, if the internal temperature sensor **210** indicates that the fluid temperature at the target region **112** is a half of a degree Celsius above the desired temperature, the system controller **212** may signal the temperature modulator **106** to slightly cool the fluid. Thus, the system controller **212** may continuously receive real-time feedback from the sensors and adjust both the primary temperature bias element **202** and the temperature modulator **106** to achieve the desired fluid temperature at the target region **112** with the desired temperature precision.

Derrico ¶ 25. Hence, Derrico provides an “example” of using internal sensor 210 to sense temperature to within a half degree Celsius, but nowhere does Derrico limit this sensing accuracy to only internal sensor 201. *See* Appeal Br. 11, 13, 14, Reply Br. 6, 8, 9, 11. Instead, Derrico clearly states that the controller receives feedback from all the sensors to achieve the desired fluid temperature. Claim 17 of Derrico buttresses this understanding by reciting a system wherein the controller refines the temperature “to within

0.1 degree Celsius” without limiting such accomplishment to only using an internal sensor. Thus, Appellant’s presumption that in order to achieve such accuracy, one must employ Derrico’s internal sensor (*see* Appeal Br. 6, 11, 13, 14, Reply Br. 6, 7, 9) is faulty. In other words, the Examiner is not “ignoring [the] clear teachings of Derrico,” nor is the Examiner ignoring “the teaching away discussed” in Derrico as asserted by Appellant. Appeal Br. 11, 12; *see also* Reply Br. 7, 9. In summation, and based on Derrico’s disclosure, we disagree with Appellant that “[t]he POSITA is going to use the internal sensor 210 of Derrico to get the allegedly sought accuracy,” to the exclusion of Derrico’s other sensors 204 and 206. Appeal Br. 12; *see also* Reply Br. 7–9. 11. Appellant also argues a theory of bodily incorporation of Derrico’s internal sensors, stating that only “that particular structural arrangement needs to be used.” Reply Br. 7. However, it is well settled that obviousness does not require that all of the features of the [] reference be bodily incorporated into the primary reference. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

Appellant further addresses the logic that internal and external sensors are “both accurate concerning INTERNAL temperature,” indicating that Derrico’s “internal sensor [is] MORE accurate for sensing internal temperature than [Derrico’s] external sensor.” Reply Br. 12–13. However, asking which sensor might technically be more accurate does not dispel the fact that Derrico teaches a certain range of accuracy and, as indicated above, there is no indication that such accuracy is limited solely to Derrico’s internal sensor, when Derrico clearly teaches receiving input from all the temperature sensors. *See* Derrico ¶¶ 21, 25.

Appellant further alleges the Examiner engaged in “cherry picking.” Appeal Br. 13; *see also* Reply Br. 10–11. However, as noted above, the Examiner provided coherent articulated reasoning with rational underpinning to support the legal conclusion of obviousness. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Appellant’s contentions are not persuasive of Examiner error on this point.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4, 7, 11–18	103(a)	Tan, Westerbeck, Derrico	1–4, 7, 11–18	
Overall Outcome			1–4, 7, 11–18	

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

AFFIRMED