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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JONATHAN ISSEROW and LAURA ISSEROW

Appeal 2019-006112[1]
Application 14/747,523[2]
Technology Center 3700

Before NINA L. MEDLOCK, KENNETH G. SCHOPFER, and AMEE A. SHAH, *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the rejection of claims 1–22. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] Our decision references the Appeal Brief ("Appeal Br.," filed Feb. 12, 2019), the Reply Brief ("Reply Br.," filed July 31, 2019), the Examiner's Answer ("Ans.," mailed June 28, 2019), the Non-Final Office Action ("Non-Final Act.," mailed July 12, 2018), and the Specification ("Spec.," filed June 23, 2015).

[2] According to Appellants, the real parties in interest are Jonathan Isserow and Laura Isserow. Appeal Br. 1.

BACKGROUND

The Specification discloses that "[t]he present invention and its embodiments relate to a wound and/or skin care treatment device and related methods of use." Spec. 2, ll. 20–21.

CLAIMS

Claims 1, 13, 14, and 22 are the independent claims on appeal. Claim 1 is illustrative of the appealed claims and recites:

> 1. A method of medical treatment comprising the steps of:
>
> providing a medical treatment device, the medical treatment device comprising,
>
> a therapeutic medium,
>
> wherein the therapeutic medium is configured to produce temperatures covering a range of about -10°C to about 50°C;
>
> an applicator connected to the therapeutic medium, the applicator comprising,
>
> an application layer having an application surface and a receiving surface with the application layer being configured to be applied to a skin surface of a user, and a conductive layer having a front side and a back side,
>
> wherein the conductive layer is extensively affixed to and completely covers the receiving surface of the application layer;
>
> a plurality of flexible lighting mechanisms being interwoven with fibers of the application layer;
>
> a plurality of flexible electrodes integrated with the application layer;
>
> a power source connected to the therapeutic medium,
>
> wherein the power source is at least one battery; and

> a wireless transceiver coupled to the power source and configured to provide bidirectional communication between the treatment device and a secondary electronic device,
>
> wherein patient information is sent in real time from the treatment device to the secondary electronic device;
>
> applying the medical treatment device to at least one patient for a predetermined time frame before the at least one patient undergoes at least one medical procedure.

Appeal Br. 25–26.

REJECTIONS

1. The Examiner rejects claims 1–22 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.
2. The Examiner rejects claims 1–4, 6, 7, and 19–21 under 35 U.S.C. § 103 as unpatentable over Voznesensky[3] in view of Klein,[4] Fruitman, [5] Vetanze,[6] Zhang, [7] Jacobs,[8] Ein, [9] and Wagner.[10]
3. The Examiner rejects claim 5 under 35 U.S.C. § 103 as unpatentable over Voznesensky in view of Klein, Fruitman, Vetanze, Zhang, Jacobs, Ein, Wagner, and Dunbar.[11]

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[3] Voznesensky et al., US 6,567,696 B2, iss. May 20, 2003.
[4] Klein, US 4,930,317, iss. June 5, 1990.
[5] Fruitman et al., US 2006/0142816 A1, pub. June 29, 2006.
[6] Vetanze, US 7,503,927 B1, iss. Mar. 17, 2009.
[7] Zhang et al., US 2008/0170982 A1, pub. July 17, 2008.
[8] Jacobs, US 2008/0046047 A1, pub. Feb. 21, 2008.
[9] Ein, US 2002/0026226 A1, pub. Feb. 28, 2002.
[10] Wagner, V.D. (2007). *Effect of a preoperative warming intervention on the acute phase response of surgical stress*. Tampa, FL: University of South Florida.
[11] Dunbar et al., US 2006/0195168 A1, pub. Aug. 31, 2006.

4. The Examiner rejects claims 8, 10, and 11 under 35 U.S.C. § 103 as unpatentable over Voznesensky in view of Klein, Fruitman, Vetanze, Zhang, Jacobs, Ein, Wagner, and Scott.[12]
5. The Examiner rejects claims 9, 12, and 13 under 35 U.S.C. § 103 as unpatentable over Voznesensky in view of Klein, Fruitman, Vetanze, Zhang, Jacobs, Ein, Wagner, Scott, and Dunbar.
6. The Examiner rejects claims 14–18 under 35 U.S.C. § 103 as unpatentable over Voznesensky in view of Klein, Fruitman, Vetanze, Zhang, Jacobs, Ein, and Dunbar.
7. The Examiner rejects claim 22 under 35 U.S.C. § 103 as unpatentable over Voznesensky in view of Klein, Fruitman, Vetanze, Zhang, Jacobs, Ein, and Scott.

DISCUSSION

Written Description

The Examiner finds that each of the independent claims lacks written description support for the therapeutic medium configured to produce temperatures in the range of -10°C to 50°C. Non-Final Act. 5. The Examiner appears to acknowledge that the Specification discloses the claimed temperature range, but the Examiner finds "that the Specification does not implicitly or explicitly teach how the cooling is being achieved and mainly with what means is the temperature range being applied and can 'alternate' between hot and cold treatments." *Id.* at 6.

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[12] Scott, E.M. (2007). Systemic warming before, during, and after major abdominal surgery reduced postoperative complications more than warming during surgery only. *Evidenced-Based Nursing*, *10*(4), 114–114. doi: 10.1136/ebn.10.4.114.

We agree with Appellants that the Specification provides explicit support for this limitation. *See* Appeal Br. 18. For example, the Specification discloses "[i]n one embodiment there is a treatment device having a chemical heat source, wherein the chemical heat source can produce a temperature in the range of about -10°C to about 50°C;" and that "the heat source 10 may be capable of producing temperatures in the range of about -30°C to about 90°C and more preferably from about -10°C to about 50°C." Spec. 8, ll. 1–3; 26, ll. 2–4. We find this disclosure sufficient to reasonably convey to persons of ordinary skill in the art that Appellants were in possession of the claimed invention such that the written description requirement has been satisfied. *See, e.g.*, *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983).

Accordingly, we do not sustain this rejection.

Obviousness

We are persuaded of reversible error with respect to the obviousness rejection of each independent claim to the extent it relies on adding Klein's conductive layer to Voznesensky's device.

With respect to claim 1, for example, the Examiner finds that Voznesensky teaches an application layer that is conductive but "is silent about specifically teaching a conductive layer having a front side and a back side, wherein the conductive layer is extensively affixed to and completely covers the receiving surface of the application layer." Non-Final Act. 8. The Examiner finds that Klein teaches a therapeutic device with a conductive layer with front and back sides that "is extensively affixed to and completely covers the receiving surface of the application layer." *Id.* The Examiner explains that Klein's plate 34 is made of conductive material and

can be attached to pad 32 to extend the cooling area and that "[t]he conductive plate provides an attachment means for connecting the thermoelectric heat pump to the pad and also provides an extension of the hot/cold plate of a thermoelectric heat pump of a hot/cold assembly." *Id.* The Examiner concludes that

> Therefore, it would have been obvious to one of ordinary skill in the art to modify the heat transfer medium 16 in Voznesensky to further include a conductive layer wherein the conductive layer is affixed to and completely covers the receiving surface of the application layer for the purposes of extending the therapeutic area as taught by Klein.

Id. at 8–9. In the Answer, the Examiner explains that the combination would result in "adding the thin plate of Klein between the thermo-conductive outer layer 16 and heater/cooler" resulting in the "transfer thermal energy from the heater/cooler to the thermo-conductive layer and electrodes." Ans. 5.

We determine that the Examiner does not provide an adequate reason with the requisite rational underpinnings to support the conclusion of obviousness with respect to each of the independent claims. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). In particular, we agree with Appellants that the Examiner has not identified an adequate reason to add another conductive layer to Voznesensky's device. *See* Appeal Br. 19.

Voznesensky discloses a heater/cooler 22 that is attached to a heat transfer medium 16. Voznesensky Fig. 2. Voznesensky discloses that the heat transfer medium "preferably comprises an outer cover of thermo-conductive material." *Id.* at col. 6, ll. 29–32. Voznesensky also discloses that the heat transfer medium has openings in which electrodes are placed such that they are electrically isolated from the heat transfer area. *Id.* at

col. 6, ll. 33–36. Thus, Voznesensky discloses a heat transfer medium that is completely covered by a conductive material except at the openings in which electrodes are inserted.

We determine that the Examiner's reasoning is lacking for two reasons. First, to the extent the Examiner indicates that a second conductive layer could be added to completely cover the application layer, Voznesensky's thermo-conductive covering already appears to do this. Second, to the extent the Examiner is proposing that a second conductive layer could be added to cover the openings in which electrodes are placed, we find that, at best, it is unclear how Voznesensky's electrodes would function with such a covering, and at worst, we agree with Appellants that this would interfere with the functioning of those electrodes given that Voznesensky discloses that the electrodes are electrically isolated from the heat transfer area. *See* Appeal Br. 19. For these reasons, we determine that the Examiner has not set forth an adequate reason to support the proposed combination.

Based on the foregoing, we do not sustain the rejection of independent claim 1. Because the Examiner relies on the same findings and reasoning with respect to the rejections of the other independent claims and the dependent claims, we also do not sustain the rejections of claims 2–22.

CONCLUSION

We REVERSE the rejections of claims 1–22.

REVERSED