

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte JOHN M. BURCH

Appeal No. 2002-0746
Application No. 08/926,113

ON BRIEF

Before FRANKFORT, STAAB and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-7, 13-15 and 24, which are all of the claims pending in this application.

with adults, is difficult because the natural instinct of many children is to fight against anything being placed over their breathing passages. Accordingly, appellant's invention is directed toward providing "a device for administering oxygen to a pediatric patient in an emergency situation which efficiently supplies oxygen and calms the patient" (specification, page 3). The device is shaped as a "plaything" so as to be attractive to pediatric patients and includes a plurality of oxygen outlet ports 24 "designed to provide a nearly direct flow of oxygen to the patient's nose and mouth regions, regardless of the position the plaything is held in by the patient (specification, page 11). Independent claims 1, 13 and 24 are illustrative of the invention and read as follows:

1. A device for supplying gas to a pediatric patient comprising:

a connector coupled to a source for gas;

a plaything-shaped receptacle coupled to said connector for receiving said gas, said receptacle having one or more outlets for dispersing said gas in a wide area about said receptacle as the receptacle is placed in a position [in] which the patient can view the plaything-shaped receptacle without attachment of the receptacle to the patient's nose or mouth, such that the receptacle may be held in the general direction of the patient and at least a portion of said one or more outlets will direct gas towards the patient's nose and mouth such that the patient will receive a high concentration

so that the patient may face the plaything-shaped receptacle;

dispersing gas through at least one port in said receptacle to produce a wide area of high gas concentration in front of the patient's mouth and nose regions independent of the orientation and position of the receptacle, as it is held in front of the patient's face.

24. A device for supplying gas to a pediatric patient comprising:

a connector coupled to a source for gas;

a plaything-shaped receptacle coupled to said connector for receiving said gas, said receptacle having one or more outlets for dispersing said gas in a wide area as the receptacle [*sic*: receptacle] is held away from the patient's face, without fixed attachment to the patient's head, so that it may be viewed by the patient with said one or more outlets pointed in the general direction of said patient's face such that said one or more outlets will direct said gas towards the patient's nose and mouth to provide the patient with a high concentration of said gas for consumption.

The sole prior art reference relied upon by the examiner in rejecting the appealed claims is:

Battaglia

4,669,461

Jun. 2, 1987

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the answer (Paper No. 23) for the examiner's complete reasoning in support of the rejection and to the brief and reply brief (Paper Nos. 22 and 24) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art reference, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Battaglia discloses a device for administering oxygen to infants during nursing. The device includes a flow-directing member 24 for directing oxygen directly to the vicinity of the infant's nostrils 26, the flow-directing member being comprised of a curved surface 28 intersecting a flat floor surface 30 to provide a half-funnel shape having an outlet opening 32 and a smaller inlet opening 34 which is attached to a tube 38 leading to a supply of warmed oxygen. A flow regulating plate 54 having a plurality of small holes 56 is located within the flow-directing member 24 to regulate the flow of

nipple and the location of the nostrils 26 of the infant 20. Accordingly, the bottle nursing configuration is held firmly to the neck of the bottle but with the capability to be adjusted forward or backward to direct the oxygen as desired for the supplementation of the infant's air (column 3, lines 64-68). In the breast feeding configuration 80 shown in Figures 5-9, the flow-directing member 24 is attached to the breast by means of a soft, flexible breast conforming pad 88, having an adhesive surface 90 which, when not in use, is protected by a peel-off covering 92. The adhesive pad 88, upon application, conforms to the contour of the breast and allows placement appropriate to the direction of the supplemental oxygen to the vicinity of the infant's nostrils 26. A rivet-like fastener 94 arrangement is provided to readily permit rotation of the flow-directing member 24 about the fastener 94, from side to side in the plane of the floor 30 in a turret-like manner. The breast nursing configuration may thus be held firmly to the breast at an appropriate position to direct oxygen to the vicinity of the infant's nostrils but with the additional capability of turret-like movement to adjust the direction of flow without repositioning the adhesive pad 88 on the mother's breast 84 (column 5, lines 1-7).

It is the examiner's position that the subject matter of claims 1-7, 13-15 and 24 is anticipated by Battaglia. To anticipate, every element and limitation of the claimed

Appellant argues that the subject matter of claim 1 is not anticipated by Battaglia because (1) the receptacle in Battaglia is not “plaything-shaped” and (2) Battaglia does not teach a receptacle for dispensing gas in a wide area about the receptacle while in a position to be viewed by the patient, without attachment to the patient’s head (brief, pages 5-8). For the reasons which follow, we do not find either of these arguments persuasive.

As for the limitation that the receptacle is “plaything-shaped,” we note that appellant’s specification discloses several very different shapes as being suitable, including a teddy bear, dolls, a book, cars, telephones and “[g]eometric playthings, such as spheres and cubes with interesting designs” (specification, page 13). Thus, within the context of appellant’s invention, we understand “plaything-shaped” to encompass any shape to which a young child or infant may be attracted. While we appreciate that the attraction to the Battaglia oxygen administration device may not be universal, it is equally true that the attraction to any single one of the shapes enumerated in appellant’s specification may also not be universal, thereby making it desirable, as pointed out by appellant on page 13 of the specification, “to have a number of different designs for the oxygenation device 16 available in the EMS setting, so that a child has a

the receptacle of Battaglia or the bottle to which it is attached also serves a utilitarian function does not preclude it from being “plaything-shaped.”¹

As for appellant’s second argument, the outlet opening 32 of the flow-directing device 24 of Battaglia is designed to direct or disperse oxygen in a sufficiently wide area about the device as the device is placed in a position in which the infant can view the device that the device is capable of being held in the general direction of the patient (i.e., in a direction with the outlet opening 32 pointed toward the infant’s nose and mouth), without the device being attached to the infant’s nose or mouth, and the outlet opening 32 will direct oxygen toward the infant’s nose and mouth such that the infant will receive a high concentration of oxygen. While the Battaglia device is disclosed in use as being attached to either a bottle or a mother’s breast, the nipple of which is inserted into the infant’s mouth during nursing, the device is fully capable of being used to direct oxygen toward the infant’s nose and mouth region without the bottle or breast to which the device is attached being inserted or “attached” to the infant’s nose or mouth.² While it appears that there are positions and orientations in which Battaglia’s device could be held which would not result in oxygen being directed from the outlet

opening 32 to the infant's nose or mouth, we see nothing in claim 1 which requires that the device be capable of operating as claimed in any orientation and position.

For the foregoing reasons, appellant's arguments do not persuade us of any error on the part of the examiner in rejecting claim 1 as being anticipated by Battaglia. Thus, the examiner's decision to reject claim 1, as well as claims 2-7 which appellant has grouped therewith (brief, page 3), under 35 U.S.C. § 102 as being anticipated by Battaglia is affirmed.

Appellant argues (brief, page 9) that the subject matter of claim 24 is not anticipated by Battaglia for the same reasons cited above in connection with claim 1. We find these reasons no more persuasive with regard to claim 24 than with regard to claim 1, discussed *supra*. Additionally, appellant points out that claim 24 recites a plaything-shaped receptacle "for dispersing said gas in a wide area *as the receptacle* [*sic: receptacle*] *is held away from the patient's face*" and argues that Battaglia does not describe a device that will produce a wide area of gas while being held away from the patient's face (brief, page 9). For the reasons discussed above with regard to claim 1, we do not find this argument persuasive. Thus, the examiner's decision to reject claim 24 under 35 U.S.C. § 102 as being anticipated by Battaglia is also affirmed.

As discussed above, the device of Battaglia, whether in the bottle nursing configuration or the breast feeding configuration, is not capable of dispersing gas through the outlet opening 32 to produce a high gas concentration in front of the infant's mouth and nose regions independent of the orientation and position of the receptacle. Rather, Battaglia's flow-directing member 24 must be oriented such that the outlet opening 32 is directed generally at the infant's face. Accordingly, the examiner's decision to reject claim 13, as well as claims 14 and 15 which depend therefrom, under 35 U.S.C. § 102 as being anticipated by Battaglia is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-7, 13-15 and 24 under 35 U.S.C. § 103 is affirmed as to claims 1-7 and 24 and reversed as to claims 13-15.



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

AFFIRMED-IN-PART

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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JENNIFER D. BAHR)	
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