The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BLAIR D. WALKER and WAYNE ARTHUR NODA

Appeal No. 2005-2054
Application No. 10/425,137

ON BRIEF

Before GARRIS, WALTZ and TIMM, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 5-7, 13 and 14.

The subject matter on appeal relates to a system for effecting heat exchange with a patient. With reference to the appellants' drawing filed July 9, 2004[1], the system 10 comprises

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[1]We do not find in the application record any indication that the examiner has acknowledged receipt of, much less approved of, this July 9, 2004 drawing. See the Manual of Patent Examining Procedure (MPEP) § 608.02(h)(Revision 2, May 2004). Nevertheless, in describing the appellants' claimed invention, we refer to this drawing because, unlike the originally filed drawing, the numerals in figure 2 are consistent with the numerals in the specification.

a catheter body 46, at least one enclosure-forming structure 66, 68, plural heat exchange fluid inlet holes 80 whereby heat exchange fluid enters into the enclosure-forming structure, and at least one outlet hole 82 whereby heat exchange fluid exits the enclosure-forming structure. According to independent claim 5, the system further comprises a heat exchanger supplying heat exchange fluid to the catheter in a closed circuit wherein the heat exchange fluid includes at least one substance having a freezing point below 0°C and water. Pursuant to independent claim 13, the system further comprises the feature wherein the inlet holes are smaller than the outlet hole. This appealed subject matter is adequately represented by the aforementioned independent claims 5 and 13 which read as follows:

> 5. A system for treating a patient, comprising:
>
> an intravascular heat exchange catheter configured for effecting heat exchange with blood as it flows past the catheter when the catheter is positioned in the vasculature of a patient and heat exchange fluid is circulated through the catheter, the catheter including:
>
> a catheter body;
>
> at least one enclosure-forming structure on the body;

plural heat exchange fluid inlet holes in the catheter body and forming respective passageways for heat exchange fluid to flow from an inlet lumen into the enclosure-forming structure;

at least one outlet hole in the body and forming a fluid passageway from the enclosure-forming structure into the catheter, the outlet hole leading to an outlet lumen separate from the inlet lumen; and

a heat exchanger supplying heat exchange fluid to the catheter and receiving heat exchange fluid from the catheter in a closed circuit wherein the heat exchange fluid includes at least one substance having a freezing point below zero degrees Celsius (0°C) and water.

13. A system for effecting heat exchange with a patient, comprising:

a heat exchange catheter configured for placement in a blood vessel of the patient without blocking the vessel to induce hypothermia in the patient when heat exchange fluid is circulated through the catheter, the catheter including:

a catheter body;

at least one enclosure-forming structure on the body;

plural heat exchange fluid inlet holes in the catheter body and forming respective passageways for heat exchange fluid into the enclosure-forming structure; and

at least one outlet hole in the body and forming a fluid passageway from the enclosure-forming structure into the catheter, wherein the inlet holes are smaller than the outlet hole.

The references set forth below are relied upon by the examiner in the Section 102 and Section 103 rejections before us:

Taheri	5,269,758	Dec. 14, 1993
Dae	6,231,594	May 15, 2001

Claims 5-7 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Taheri in view of Dae, and claims 13 and 14 are rejected under 35 U.S.C. § 102(b) as being anticipated by Taheri.[2]

We refer to the brief and reply brief and to the answer and final Office action for an exposition of the opposing viewpoints expressed by the appellants and by the examiner concerning these rejections.

OPINION

For the reasons which follow, we will sustain each of the rejections advanced on this appeal.

The totality of the appellants' argument concerning the Section 102 rejection is expressed in the sentence appearing on page 4 of the brief and reproduced below:

> The fact that the inlet holes in Claim 13 are smaller than the outlet hole is not addressed in the rejection and is not shown in Taheri, rendering the rejection defective under MPEP § 2131 (to support an anticipation rejection, every claim element must be taught or inherent in a single prior art reference).

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[2]As indicated on page 3 of the brief, the appealed claims have been grouped and argued in accordance with their grouping in the above noted rejections. Stated otherwise, the dependent claims on appeal have not been separately argued from their parent independent claims. Therefore, in assessing the merits of these rejections, we will focus on claims 5 and 13 which are the sole independent claims before us.

This argument is unpersuasive. As correctly indicated by the examiner in the answer, the figures of Taheri's drawing plainly show that patentee's inlets 54, 55 are smaller than his outlets 51. See In re Meng, 492 F.2d 843, 847, 181 USPQ 94, 97 (CCPA 1974)(invention may be anticipated by a drawing in a reference regardless of whether the drawing disclosure is accidental or intentional) and In re Mraz, 455 F.2d 1069, 1072, 173 USPQ 25, 27 (CCPA 1972)(things clearly shown in drawings of a reference are to be considered in determining claim patentability). Although the appellants, in responding to the answer, have filed a reply brief which acknowledges the examiner's Section 102 position (see the last sentence on page 2 of the reply brief), it is significant that the appellants have not contested with any reasonable specificity the examiner's previously mentioned anticipation finding.

Under these circumstances, we hereby sustain the Section 102 rejection of claims 13 and 14 as being anticipated by Taheri.

As for the Section 103 rejection, the following argument is presented by the appellants in the paragraph bridging pages 3 and 4 of the brief:

> The issue is simple so Appellant [sic, Appellants] will keep it short, in fact, down to three sentences including this one. Claim 5 has been erroneously rejected

> because there is no reason to combine the cold fluid of Dae with the warming device of Taheri as proposed, for the simple reason that Taheri is directed to warming a hypothermic patient, a purpose that would be confounded by modifying it with the cold fluid of Dae. Hence, the proposed modification is improper under MPEP § 2143.01 (citing In re Gordon).

This argument also is not convincing. Contrary to the appellants' belief, the teaching or suggestion in Dae regarding heat exchange fluid is applicable to the heat exchange catheter of Taheri for two reasons. First, Dae expressly teaches that his heat exchange catheter may be used for warming as well as cooling a patient (e.g., see lines 6-12 in column 1, lines 10-13 in column 2, lines 12-17 in column 10, and lines 36-49 in column 27). Since both Taheri and Dae envision using their respective catheters for warming a patient, Dae's teachings and suggestions regarding catheter heat exchange fluid (e.g., again see lines 12-17 in column 10 as well as lines 42-46 in column 23) are not incompatible with Taheri as the appellants contend. The second reason these references are not incompatible is that the disclosure of Dae as a whole including the teachings specifically identified above would have suggested to one having an ordinary level of skill in this art the desirability of providing Taheri's heat exchange catheter system with heat exchange fluid of the type taught or suggested by Dae in order to thereby use this

system for both heating and cooling purposes. This obviousness conclusion is reinforced by Dae's teaching that his heating and cooling functions may be performed by essentially any known heat exchange catheter (e.g., see lines 5-17 in column 10).

In light of the foregoing, it is our determination that the reference evidence adduced by the examiner establishes a prima facie case of obviousness which the appellants have failed to successfully rebut with argument or evidence of nonobviousness. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). We hereby sustain, therefore, the examiner's Section 103 rejection of claims 5-7 as being unpatentable over Taheri in view of Dae.

The decision of the examiner is affirmed.

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

AFFIRMED

BRADLEY R. GARRIS Administrative Patent Judge	)	
THOMAS A. WALTZ Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
CATHERINE TIMM Administrative Patent Judge	)	

BRG:hh

ROGITZ & ASSOCIATES
750 B STREET
STE. 3120
SAN DIEGO, CA 92101