

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 THOMAS V. CASEY II, KRISTOFF NELSON and FERGUS QUIGLEY

Appeal No. 2006-0526
Application No. 10/206,620

HEARD: March 21, 2006

Before FRANKFORT, McQUADE, 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 1-14 and 22-26. Claims 15-21 stand withdrawn from consideration under 37 CFR § 1.142(b). No other claims are pending in this application.

We AFFIRM.

BACKGROUND

The appellants' invention relates to a vascular graft for repair of damaged or diseased sections of blood vessels, the graft being crimped¹ only on those areas where flexibility is required, such as a portion to be placed at a curved location of the vessel. According to appellants' specification (pages 1 and 2), this is an improvement over the common practice of crimping grafts over their entire surface. Claims 1 and 22 are representative of appellants' invention and are reproduced below in the opinion section of this decision.

The Rejection

Claims 1-14 and 22-26 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Lunn².

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejection, we make reference to the answer (mailed July 26, 2004) for the examiner's complete reasoning in support of the rejection, and to the brief (filed May 26, 2004) and reply brief (filed September 20, 2004) for the appellants' arguments thereagainst.

¹ The term "crimped" appears to have been used by appellants in the sense of corrugated.

² US Pat. No. 5,476,506, issued December 19, 1995.

OPINION

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

Claims 1 and 22 read as follows:

1. An implantable tubular graft for placement in a body vessel having a curved location, comprising:
a generally tubular graft body having a tubular wall including first and second opposite open ends, said tubular wall including a crimped portion for placement at said curved location of said body vessel, and an uncrimped portion, said crimped and uncrimped portion being disposed between said opposite open ends.
22. A method of implanting a graft device for placement in a body vessel having a curved location, comprising:
providing a longitudinal extending tubular graft of original length, having a tubular wall including first and second opposing open ends defining a fluid passageway therethrough and said tubular wall including a crimped portion, and an uncrimped portion;
positioning the graft device about a catheter;
deploying said graft within said body vessel with said crimped portion being disposed adjacent said curved location; and
allowing said graft to radially expand to contact a body lumen wall.

Lunn discloses a bi-directional crimped graft comprising a thin walled hollow cylinder having a first open end 12 and a second open end 14 having end portions 16, 18 each provided with a series of longitudinally extending pleats or crimps and having a central portion 20 between the end portions 16, 18 provided with a series of circumferential crimps. The longitudinal crimps permit radial expansion of the end portions of the graft wall while the circumferential crimps permit longitudinal extension of the central portion. Lunn also teaches that "[t]he circumferential crimps serve also to render the central portion of the graft more flexible and capable of conforming to curves in the vascular system without undesirable kinking" (column 2, lines 33-36).

Additionally, Lunn teaches:

It should be understood that while the exemplified embodiment has been illustrated with specific geometry, a wide variation is possible within the broad teachings of this invention. For example, while the crimps in the central portions and in the end portions have been illustrated as having uniform amplitude and frequency, in certain instances it may be preferable to vary these parameters within a given portion or even to omit crimping in certain sections of a given portion [column 4, lines 7-15].

In disclosing a graft having a central portion provided with crimps and end portions provided with crimps and disclosing that it may be preferable to omit crimping in certain sections of a given portion, Lunn discloses a generally tubular graft body having a tubular wall including a crimped portion and an uncrimped portion (the section of a given portion in which crimping is omitted) disposed between opposite open ends. The language "for placement at said curved locations of said body vessel" in claim 1 is directed to the function or intended use of the device. It is well settled that the recitation of an intended use for an old product does not make a claim to that old product patentable. In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997). While Lunn does not specify any particular locations for the sections of omitted crimping, it is quite clear from Lunn's disclosure that, even in grafts on which crimping is omitted in certain sections of a given portion as taught by Lunn, there will be circumferential crimping in the central portion and longitudinal crimping in the end portions to permit the central portion axial expansion and end portion radial expansion which is the objective of Lunn's invention. Lunn's graft appears reasonably capable of being placed in a body vessel having a curved location³, with a crimped portion (i.e., any section of any portion wherein crimping is not omitted) being placed at said curved location of said vessel. Accordingly, the functional language of claim 1 does not in this

³ Indeed, most, if not all, body vessels are circular, or curved, in cross-section.

instance serve to patentably distinguish over the graft of Lunn. See, e.g., In re Swinehart, 439 F.2d 210, 212-13, 169 USPQ 226, 230-31 (CCPA 1971).

In any event, Lunn depicts placement of the graft in a body vessel with the central portion being placed or disposed adjacent or at a curved location (aneurysm 36). As discussed above, Lunn clearly discloses providing crimping in this portion. Whether the section(s) of omitted crimping, which responds to the "uncrimped portion" of appellants' claims 1 and 22, disclosed by Lunn is/are in the central portion, one of the end portions or in all three portions, a "crimped portion" (a section of the central portion in which crimping is not omitted) is placed or disposed adjacent or at this curved location.

In light of the above, we find no error in the examiner's determination that the subject matter of independent claims 1 and 22 is anticipated by Lunn. The rejection of claims 1 and 22, as well as claims 2-14, 25 and 26 which appellants have not argued separately apart from claim 1 and claims 23 and 24 which appellants have not argued separately apart from claim 22, as being anticipated by Lunn is sustained.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-14 and 22-26 under 35 U.S.C. § 102(b) 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

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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) BOARD OF PATENT
JOHN P. McQUADE) APPEALS
Administrative Patent Judge) AND
) INTERFERENCES
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