

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* YAMUNA ZAKE

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Appeal 2008-1095  
Application 10/412,058  
Technology Center 3700

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Decided: May 19, 2008

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Before DONALD E. ADAMS, LORA M. GREEN, and  
RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

GREEN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the  
Examiner's final rejection of claims 1-17 and 19.<sup>1</sup> We have jurisdiction

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<sup>1</sup> Claims 1 and 19 stand as being objected to by the Examiner (App. Br. 7). An objection, however, is not reviewable by Appeal to the Board, but may only be reviewed by petition to the Director. MPEP § 706.01

under 35 U.S.C. § 6(b). Claims 1, 2, 4, and 6 are representative of the claims on appeal, and read as follows:

1. In a foot-therapy device having a dome for foot therapy the improvements consisting essentially wherein the dome is a central, substantially solid but resilient, substantially spherical dome with a bead rim about and extending a substantially circular, generally planar base of the dome that extends substantially across the dome.
2. The device according to claim 1, wherein at least the dome is made of a resilient material that compresses and/or deforms but does not collapse under average and/or normal human body weight.
4. The device according to claim 2, and further comprising a blind hole that extends from the base more than half a height of the dome to a frustum-shaped end within the dome, whereby to aid the deformation that does not collapse under average and/or normal human body weight.
6. A method of foot therapy with the device according to claim 1, comprising supporting the base and pressing a selected portion of the bottom of a foot against the dome.

The Examiner relies on the following references:

Voykin	US 4,852,553	Aug. 1, 1989
Vanderwoude	US 4,196,722	April 8, 1980
Johnson	US 6,228,001 B1	May 8, 2001

We affirm-in-part.

## DISCUSSION

Claims 1, 2, and 4 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Vanderwoude.

The Examiner relies on Figure 1 of Vanderwoude as disclosing a device as claimed (*see Ans. 3*).

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Appellant argues that Vanderwoude “show no rim about a planar base that extends substantially across the dome and none is described in the patent.” (App. Br. 10.)

It is axiomatic that in order for a reference to anticipate a claim, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001).

Claim 1 requires “a substantially circular, generally planar base of the dome that extends substantially across the dome.” Thus, the “generally planar base” must extend “substantially across the dome.” As neither the Appellant nor the Examiner point to a definition for substantially in the Specification, and nor can we find one, the term takes on its ordinary meaning. *Optical Disc Corp. v. Del Mar Avionics*, 208 F.3d 1324, 1334 (Fed. Cir. 2000). The ordinary meaning of “substantially”<sup>2</sup> is “[c]onsiderable in . . . degree, amount, or extent.”

Figure 1 of Vanderwoude, relied upon by the Examiner, is reproduced below.

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<sup>2</sup> substantially. Dictionary.com. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/substantially> (accessed: April 22, 2008).

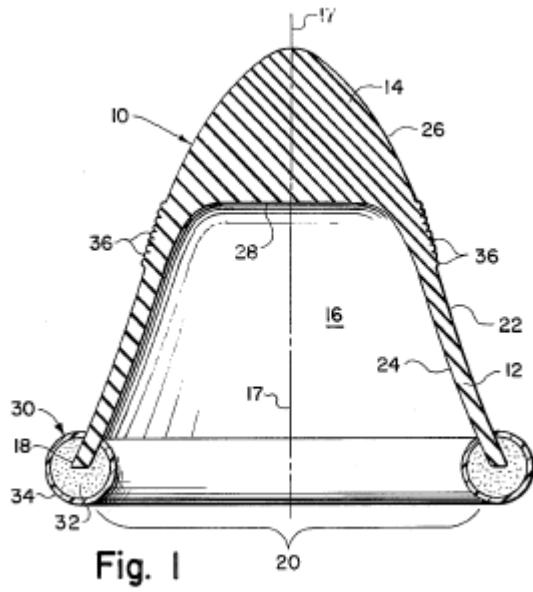


Fig. 1

Figure 1 is a vertical cross-section of an embodiment of the respiratory therapy percussion instrument taught by Vanderwoude (Col. 3, ll. 26-28). As can be seen from the Figure, the base is at the end of the dome, but does not extend substantially, i.e., a considerable extent, across the bottom of the dome. Thus, Figure 1 of Vanderwoude as relied upon by the Examiner does not teach all of the limitations of independent claim 1, and we are compelled to reverse the rejection.

Claims 1, 2, 4, and 19 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Johnson. As Appellant does not argue claims 2 and 19 separately, they stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner relies on Figures 10 and 11 as disclosing a device “capable to be used for foot therapy.” (Ans. 3-4.) According to the Examiner, Johnson teaches that the device consists essentially of “a central substantially solid but resilient, substantially spherical dome 359 (fig. 11) with a bead rim 314 (fig. 11) about and extending a substantially circular,

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generally planar base of the dome that extends substantially across the dome.” (*Id.* at 4). The Examiner also relies on Johnson for teaching that the dome is made of a resilient, elastomeric material (*id.*).

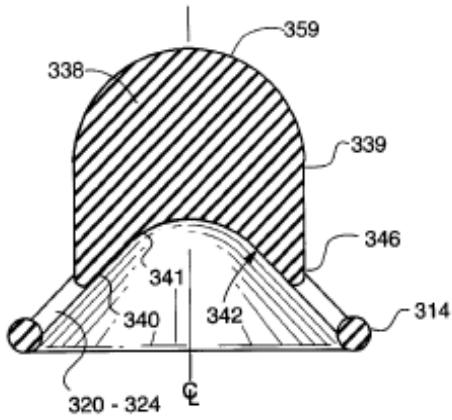
Appellant argues that the Johnson device is not a dome with a rim around the base (App. Br. 13). According to Appellant, the device in shown in Figures 10 and 11 of Johnson has a bottom edge 314, not a base that extends substantially across the dome (*id.*). Moreover, Appellant asserts, the lower surface 340 is spaced from the bottom rim 314 by the skirt portion 346, and thus cannot be the claimed base (*id.*). Appellant also argues that it is concave, and not planar as claimed, and thus Johnson does not teach a device having a generally planar base as claimed (*id.* at 13-14).

Appellant asserts further:

Labeling the interior concave section 342 of the Johnson, et al. patent in the rejection as the blind hole of claim 4 does not change this. Only the interior concave section 342 of the Johnson, et al. patent extends substantially across the dome and, therefore, only the interior concave section 342 can be in the place of the base claimed to extend substantially across the dome and, because the interior concave section 342 is concave, and not generally planar, as claimed, it cannot anticipate identically the claimed base as required for the rejection with or without the addition of the blind hole of claim 4 that, by law (35 USC 112) includes the base of claim 1.

(*Id.* at 14.)

Figure 11 of Johnson is reproduced below.



**FIG. 11.**

Figure 11 is a sectional view of one of the embodiments the exercise device of Johnson, a perspective view of which may be seen in Figure 10 of Johnson (Johnson, col. 3, ll. 14-17). As can be seen from the drawing, the lower surface 340 has a concave section 342 (col. 5, ll. 60-61). We find that the lower concave surface 340 reads on the “generally planar base of the dome that extends substantially across the dome” of claim 1.

Our mandate is to give claims their broadest reasonable interpretation. *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). “An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. Only in this way can uncertainties of claim scope be removed, as much as possible, during the administrative process.” *In re Zletz*, 893 F.2d 319, 322 (Fed. Cir. 1989).

We cannot find a definition for “generally” in the Specification, the term thus takes on its ordinary meaning. The ordinary meaning of

generally<sup>3</sup> is “for the most part” or “without reference to particular instances or details; not specifically.” Thus, given its broadest reasonable interpretation, a “generally planar base” reads on the lower surface of the device as shown in Figure 11 of Johnson, as the concave surface is generally, that is, not specifically, but is for the most part, planar. In addition, the lower surface extends substantially, in this case, all the way across the lower surface of the dome. Moreover, Appellant’s argument that lower surface 340 is spaced from the bottom rim 314 by the skirt portion 346 is unavailing, as the lower surface 340 is at the bottom of the dome as can be seen in the Figure.

The outcome is different, however, as to claim 4. Claim 4 requires “a blind hole that extends from the base more than half a height of the dome to a frustum-shaped end within the dome.” As we find that the concave lower surface 314 is the generally planar base as required by claim 1, it cannot also serve as the blind hole. Thus, Johnson does not teach all of the limitations of claim 4, and we reverse the rejection as to that claim.

Appellant argues further that the device of Johnson is drawn for use by the hand, wrist, and arm, and is thus not a foot-therapy device (App. Br. 13). Claim 1, however, is drawn to a device, and the statement that it is drawn to a foot therapy device is merely intended use, and not a patentable limitation.

Thus, in summary, we affirm the rejection as to claims 1, 2, and 19, but reverse as to claim 4.

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<sup>3</sup> generally. Dictionary.com. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/generally> (accessed: April 22, 2008).

Claims 1-6, 8, 10, 12, 14, 16, and 19 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Voykin and Johnson. Appellant argues claims 2, 4, and 5 separately from claim 1. Thus, claims 3, 6, 8, 10, 12, 14, 16, and 19 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

As to claim 1, we found above that Johnson anticipates claim 1. As anticipation is the epitome of obviousness, *In re McDaniel*, 293 F.3d 1379, 1385 (Fed. Cir. 2002), we affirm this rejection as well. As claims 3, 6, 8, 10, 12, 14, 16, and 19 stand or fall with claim 1, we affirm the rejection as to those claims as well.

As to claims 2, 4, and 5, Appellant argues that the combination ignores “the stability of claim 2 and the hole of claims 4 and 5, which are part of the claimed invention as a whole.” (App. Br. 16.)

As to claim 2, as noted by the Examiner, Johnson teaches that the dome is made of a resilient, elastomeric material (Ans. 4). The ability of the material to collapse and/or deform but not collapse under average body weight would be an inherent characteristic of the material. Thus, Johnson teaches the added limitation of claim 2, as we affirm the rejection as to that claim.

As to claims 4 and 5, we found above that Johnson does not teach a blind hole as required by those claims. As Voykin does not remedy that deficiency of Johnson, the rejection is reversed as to claims 4 and 5.

Claims 7, 9, 11, 13, 15, and 17 stand rejected under 35 U.S.C.

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§ 103(a) as being obvious over the combination of Voykin and Johnson as further combined with McClain.

As Appellant does not argue the merits of this rejection (*see* App. Br. 18), this rejection is summarily affirmed.

#### CONCLUSION

In summary, we: reverse the rejection of claims 1, 2, and 4 under 35 U.S.C. § 102(b) as being anticipated by Vanderwoude; affirm the rejection of claims 1, 2, and 19 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Johnson, but reverse the rejection as to claim 4; affirm the rejection of claims 1-3, 8, 10, 12, 14, 16, and 19 under 35 U.S.C. § 103(a) as being obvious over the combination of Voykin and Johnson, but reverse as to claims 4 and 5; and affirm the rejection of claims 7, 9, 11, 13, 15, and 17 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Voykin and Johnson as further combined with McClain.

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

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