

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte LYNN ALMYRA NELSON LIEN

Appeal No. 2004-0088
Application No. 09/821,663

ON BRIEF

Before McQUADE, NASE, and BAHR, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 to 3 and 5 to 20, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a device for providing ready access to a dose of medication, the device being readily carried by the individual and identifying at least the nature of the medication (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

Claims 1, 5, 9 and 13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Mumford¹ in view of Bayliss, IV (Bayliss)².

Claims 2, 3, 6 to 8 and 10 to 12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Mumford in view of Bayliss as applied to claim 1, further in view of Official Notice.

Claims 14 and 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Mumford in view of Bayliss and Official Notice as applied to claims 2 and 10, further in view of Porter et al. (Porter)³.

¹ U.S. Patent No. 4,093,103 issued June 6, 1978.

² U.S. Patent No. 6,036,017 issued March 14, 2000.

³ U.S. Patent No. 4,733,807 issued March 29, 1988.

Claims 16 to 20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Mumford in view of Bayliss as applied to claim 1, further in view of ColDepietro et al. (ColDepietro)⁴ and Official Notice.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 11, mailed April 11, 2003) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 10, filed March 14, 2003) 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, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 1 to 3 and 5 to 20 under 35 U.S.C. § 103. Our reasoning for this determination follows.

⁴ U.S. Patent No. 6,273,260 issued August 14, 2001.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

All the claims under appeal recite a dispenser comprising, inter alia,

- (1) a housing comprising a top section and a bottom section forming an enclosure with an interior surface wherein the top section and the bottom section are attached so that the top section may be removed from engagement with the bottom section without being separated from the bottom section;
- (2) the bottom section having a restraining holder for the pill;
- (3) the top section having a closing element that engages with the restraining holder within the bottom section to prevent the pill from moving without restraint within the enclosure;
- (4) a pill within the restraining holder;
- (5) the enclosure having no more than four separate restraining holders within the enclosure; and

(6) the exterior of the dispenser having an indicator for the expiration date or anniversary date of pill placement within the dispenser.

In making the rejections before us in this appeal, the examiner determined that limitations (1) to (5) are taught by Mumford's container; that limitation (6) is taught by Bayliss; and that in view of Bayliss it would have been obvious to provide limitation (6) to Mumford's container.⁵

The appellant argues (brief, pp. 11-12) that Mumford's container does not teach limitation (3) (i.e., the top section having a closing element that engages with the restraining holder within the bottom section to prevent the pill from moving without restraint within the enclosure) since, as shown in Figures 1 and 3 of Mumford, the pills move freely within chamber 53.

Thus, the issue in this appeal is whether or not the claimed top section having a closing element that engages with the restraining holder within the bottom section to prevent the pill from moving without restraint within the enclosure is met by (i.e., reads on) Mumford. In deciding this issue, we must first understand the scope and meaning of the phrase "to prevent the pill from moving without restraint within the enclosure."

⁵ The appellant has not disputed this obviousness determination.

To help us understand the scope and meaning of the phrase "to prevent the pill from moving without restraint within the enclosure," we have reviewed the appellant's disclosure, especially the paragraph bridging pages 10-11 which reads as follows:

FIG. 1 shows a dispenser 2 comprising a bottom section 4 and a top section 6. The bottom section 4 is in the form of a heart shape to facilitate identification of the purpose of the dispenser 2 for heart related health events. A wall 8 on the bottom section 4 forms a storage area 10 within the bottom section 4. Within the storage area 10 are shown three pill storage retainers 12, 14 and 16. The typical pill storage retainer (e.g., 14) has a wall 18 and a central open area 20 that is large enough to support or completely contain a pill (e.g., 22 shown in pill storage retainer 12). The central open area 20 should have a sufficient diameter or open area to be able to allow a pill to comfortably and loosely fit within the open area 20. Here, the shape of the pill 22 is shown to be circular, but the pill may be square, ellipsoid, tubular, octagonal, cubic, or other geometric shape, and the open area 20 to receive such a shaped pill should correspond or provide a supportive shape for that particular pill. By having the shape of the open area 20 correspond to the shape of the pill, the sides of the open area 20 will support the pill, capsule, caplet or the like, reduce the amount of shifting that will occur within the container, and reduce damage, breakage, or powdering of the product. The relative fit between the medicine and the support should be tight enough to restrict movement, without providing such a gripping contact that the pill would be physically degraded or removal would be made difficult. To avoid this, the medicine should be able to fall from the open area 20 by the action of tipping or inverting the open container, and/or the sides of the open area 20 should be lower than the top of the medicine (e.g., less than 80% of the medicine height, less than 50% of the medicine height, and the like). A square open area 20 with each interior side being greater than the diameter of a circular cross-sectioned pill will satisfy the support requirement, without having to have the shape of the pill and the open area 20 be geometrically comparable.

From this disclosure, we understand the phrase "to prevent the pill from moving without restraint within the enclosure" to mean that the pill is prevented from moving

within the enclosure by the closing element engaging with the restraining holder without providing a gripping contact that would make removal of the pill difficult.

With this understanding, we turn to Mumford to ascertain if Mumford's container includes a top section having a closing element that engages with the restraining holder within the bottom section to prevent the pill from moving without restraint within the enclosure. Figures 1-6 of Mumford illustrate a selectively openable, telescopically closeable tablet container 10. The container includes a lid 12 and a base 14 adapted to be brought into telescopic closed relationship. Lid 12 includes a panel 16 and a peripheral skirt which includes opposed sidewalls 18, front wall 20, and a rear wall 22. Depending downwardly from the internal surface of panel 16 is an annular wall 52. Base 14 includes a panel 30, opposed sidewalls 24, a front wall 26 and a rear wall 28 which walls proceed upwardly from panel 30. Also proceeding upwardly, and disposed internally of the container 10, is an annular wall 54 integrally formed on panel 30. Wall 52 and wall 54 are so proportioned that when lid 12 is brought into telescopic relation about base 14 they inter-engage to define a sealed, internally disposed tablet chamber 53. Container 10 is formed as a single piece by providing a generally U-shaped hinge 34 which connects rear wall 22 of lid 12 and rear wall 28 of base 14. As shown in Figures 1 and 3 of Mumford, the tablets are free to move within the tablet chamber 53.

Since Mumford's tablets are free to move within the tablet chamber 53, his walls 52 and 54 do not prevent the tablet from moving within the chamber without providing a gripping contact that would make removal of the tablet difficult. Accordingly, limitation (3) is not met by Mumford and the examiner has not presented evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the applied prior art to arrive at the claimed invention. Therefore, the decision of the examiner to reject claims 1 to 3 and 5 to 20 under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 to 3 and 5 to 20 under 35 U.S.C. § 103 is reversed.

REVERSED

JOHN P. McQUADE
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

)
)
)
)
)
) BOARD OF PATENT
) APPEALS
) AND
) INTERFERENCES
)
)
)
)

Appeal No. 2004-0088
Application No. 09/821,663

Page 10

MARK A. LITMAN & ASSOCIATES, P.A.
YORK BUSINESS CENTER, SUITE 205
3209 WEST 76TH ST.
EDINA, MN 55435

JVN/jg