

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LOU H. CRAWFORD

Appeal No. 96-2267
Application 08/154,344¹

ON BRIEF

Before CALVERT, STAAB and MCQUADE, *Administrative Patent Judges*.
STAAB, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 1, 2, 6, 8 and 12. Claims 3-5, 7, 9-11, 13 and 14, the only other claims remaining in the application, stand withdrawn

¹ Application for patent filed November 18, 1993.

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from further consideration under 37 CFR § 1.142(b) as not readable on the elected species.²

Appellant's invention pertains to a menstrual cup, that is, a small self-supporting receptacle for positioning in the vaginal channel for collecting menstrual discharge. A prior art menstrual cup is illustrated in Figure 1 and includes, *inter alia*, a tube-like withdrawal extension 6 that can be used to remove the cup from the vagina (specification, page 4). As explained by appellant on page 2 of the specification,

removal of the menstrual cup from the vagina should be accomplished on a regular basis for emptying, cleaning and hygienic purposes. It has been determined, however, that between such removal operations, it would be a matter of great convenience if the menstrual cup could be drained while in place. The present invention is based on the discovery that the withdrawal extension, if properly modified, may be used for this purpose. The withdrawal extension is provided in tubular form, having a longitudinal passage which communicates with the interior of the menstrual cup body. Means are provided to close the passage in the withdrawal extension and the withdrawal extension passage is normally kept closed. The closure means are of such nature, however, that with appropriate manipulation by the user, the passage may be opened for drainage purposes and thereafter reclosed.

² In the final rejection (Paper No. 7), the examiner inadvertently failed to mention the status of claims 13 and 14.

surrounding the cervix. See, for example, Figure 4. The cervical cover is provided with lips or cusps 4 and 5, defined as long, planar elements interconnected along their edges so as to define a flat outlet distal from the cervical cover. The lips function like a check valve to permit waste material to flow out of the cervix, while precluding the flow of fluid in the opposite direction.

Independent claim 1 calls for a menstrual cup comprising a body having a hollow interior, a tubular extension having a longitudinal passage therein in communication with the hollow interior of the body, and "means for normally closing said extension passage, said closing means being manually manipulable to an open state for opening said extension passage, whereby said menstrual cup can be drained of fluid without removal from the vagina."

In rejecting the appealed claims as being unpatentable over Gabbay, the examiner has taken the position that the lips or cusps 4 and 5 of Gabbay form a one-way valve structure

which . . . is at least closed to fluids in one direction. It is also normally closed as the slit is collapsed which would at least prevent some fluid from passing in the other direction. While the reference does not disclose manual manipulation of the passage, the edges of the passage may be squeezed to open the passage. [answer, page 5]

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It is thus apparent that the examiner has taken the position that the lips or cusps 4 and 5 of Gabbay correspond to the above quoted "means for normally closing . . ." limitation of claim 1. We do not agree with this position.

While it is well settled that terms in a claim are to be given their broadest reasonable interpretation in proceedings before the PTO, this interpretation must be consistent with the specification and the claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Bond*, 910 F.2d 831, 833, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990); *In re Sneed*, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983). As disclosed in the paragraph bridging pages 5 and 6 of appellant's specification, means must be provided which, in normal use, close the passage in the extension tube so that the menstrual cup can perform its purpose of *retaining* menstrual flow. That is, the closing means "must be reliable and *leak proof*" (specification, page 6, line 1; emphasis added). In the embodiment of Figure 9, for example, the normally closed slit will enable fluid to drain when squeezed, and when released "will return to its normal closed condition" (specification, page 8). When read in light of this disclosure, the "means for normally closing . . ." set forth in the last 4

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lines of claim 1 must be interpreted as requiring that means to be normally closed unless manually manipulated to an open condition. In contrast to this, Gabbay describes the lips or cusps 4 and 5 as being arranged

so that the discharges from the cervix, such as menstrual fluid, will have the greatest possible area to flow out of the valve. *These discharges must be able to flow out easily*; if they cannot they will be kept in contact with the cervix and will lead to infections of the cervix. . . . As menstrual fluid fills the space 13 [where the lips join the dome] it will put pressure on the base 14 of the dome to cause lip 4 to be biased away from lip 5 to let the menstrual fluid pass out of the valve. The flexibility of the lips is such that if only a small amount of fluid is to be discharged, the section of the lips upstream of the fluid will close while that downstream will open. [column 5, line 57 through column 6, line 5; emphasis added]

In light of this disclosure, we can think of no circumstances under which the artisan would construe Gabbay's lips 4 and 5 to correspond to the claimed "means for normally closing . . ." when the claim language is interpreted in a manner consistent with the appellant's specification.

In addition, we agree with appellant that the examiner's position that the "the edges of the passage [formed by the lips 4 and 5] may be squeezed to open the passage" (answer, page 5) is pure conjecture. First, Gabbay does not disclose, or desire, such operation. Second, in that Gabbay states that lips 4 and 5

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(1) must be sufficiently flexible to assure that if only a small amount of fluid is to be discharged, the section upstream of the fluid will close while that downstream will open (column 6, lines 2-5), and (2) the lips, if "very short, or somewhat inflexible," will not function properly (column 6, lines 9-13), it is improper to speculate whether squeezing the edges of the lips would in fact cause them to separate.

In light of the above, we will not sustain the examiner's rejection of the appealed claims as being unpatentable over Gabbay.

The decision of the examiner is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	
LAWRENCE J. STAAB)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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