

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte WOLFRAM F. O. FENGLER

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Appeal No. 97-3981  
Application 08/506,423<sup>1</sup>

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ON BRIEF

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Before STONER, Chief Administrative Patent Judge, McQUADE and CRAWFORD,  
Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Wolfram F. O. Fengler appeals from the final rejection of claims 1 through 10, all of the claims pending in the application.

The invention relates to a massage apparatus. Claim 1 is illustrative and reads as

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<sup>1</sup> Application for patent filed July 24, 1995.

follows:

1. In combination with a bed that is located on a floor, a space located between said bed and said floor, a massaging apparatus totally confined within said space, the improvement comprising:

a portion of said massaging apparatus to be movable from said space and located in a suspended position above said bed, upon operation of said massaging apparatus said portion to apply massaging therapy to a human located on said bed from above said bed and upon termination of the operation said portion to be moved and relocated within said space.

The references relied upon by the examiner as evidence of anticipation and obviousness are:

Persaud	4,984,568	Jan. 15, 1991
Schumacher	5,078,125	Jan. 7, 1992
Chong, British Patent Document	2,166,351	May 8, 1986

The appealed claims stand rejected as follows:

- a) claims 1 through 5 under 35 U.S.C. § 102(b) as being anticipated by Persaud;
- b) claims 6 through 8 and 10 under 35 U.S.C. § 103(a) as being unpatentable over Schumacher in view of Persaud; and
- c) claim 9 under 35 U.S.C. § 103(a) as being unpatentable over Schumacher in view of Persaud, and further in view of Chong.

Reference is made to the appellant's brief (Paper No. 7) and to the examiner's final

rejection and answer (Paper Nos. 5 and 8) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

Turning first to the standing 35 U.S.C. § 102(b) rejection of claims 1 through 5, Persaud discloses a back massaging device which is described in the following terms:

a representative embodiment of the concepts of the present invention is illustrated in the drawings and makes use of a back massaging device which includes a base having a clamp for securement to a bed frame rail. A vertical column is mounted for reciprocal axial and rotational movement on the base. A transverse arm is pivotally mounted at an upper end of the vertical column and includes an actuating rod mounted for reciprocal parallel linear movement therewith. A massaging implement is pivotally secured on a distal end of the actuating rod. A programmable control simultaneously controls movement of the vertical column, the transverse arm and the actuating rod to move the massaging implement over a preprogrammed contour of an individual's back. The programmable control may include a remotely operable joystick to allow control of the back massaging device by a reclining individual during a back massaging operation [column 2, lines 14 through 31].

Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Independent claim 1 recites the combination of a bed located on a floor, a space between the bed and floor and a massaging apparatus totally confined within the space.<sup>2</sup> As pointed out by the appellant, Persaud does not teach this particular structural

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<sup>2</sup> The fact that claim 1 is written in Jepson format (see MPEP § 2129) with the noted relationship between the bed, floor and massaging apparatus being recited in

relationship. The only structural relationship between the massaging apparatus, bed and floor disclosed by Persaud is depicted in Figures 1 through 4 wherein the massaging apparatus is clamped to a bed frame rail. These figures clearly show that the massaging apparatus, as so clamped, is not totally confined within the space between the bed and the floor. The examiner's contention that Persaud's massaging apparatus is capable of being "unclamped from the frame of the bed, collapsed down and placed under the bed" (final rejection, page 2) is of no moment since claim 1 requires in positive terms that the massaging apparatus be totally confined within the space between the bed and floor, and not just that it be capable of such confinement.

Thus, Persaud does not disclose each and every element of the invention recited in claim 1. Accordingly, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of this claim, or of claims 2 through 5 which depend therefrom, as being anticipated by Persaud.

As for the standing 35 U.S.C. § 103(a) rejections on appeal, Schumacher, the examiner's primary reference, discloses a back massaging apparatus which is adapted to be mounted on a wall beside and above a bed. The apparatus includes, inter alia, a base in the form of the bottom of housing 40, a mounting arm in the form of frame 12, a cross

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the preamble of this claim does not appear to have any particular relevance to the anticipation issues presented in this appeal.

slide mechanism in the form of slide member 60, an elongated arm on the free outer end of the mounting arm in the form of reciprocating member 27, a massaging device in the form of back contacting portion 46 and a mounting arm movement means in the form of motor 64. These elements function in operative association with one another as described at column 2, line 50 et seq.

Persaud, described above, discloses a back massaging device having alternative massaging implements (see, for example, column 5, lines 21 through 25; and column 6, lines 1 through 8).

Chong discloses a back massaging apparatus employing pin-mounted weight members 80 for the purpose of setting desired massage forces (see page 2, lines 40 through 48).

In concluding that the subject matter recited in claims 6 through 8 and 10 would have been obvious within the meaning of § 103(a), the examiner explains that “[i]t would have been obvious to modify Schumacher to have the massaging device be removable for replacement as taught by Persaud to provide a different type of massage” (final rejection, page 3). With additional regard to claim 9, the examiner states that “[i]t would have been obvious to further modify Schumacher to add weights as taught by Chong to increase the pressure of the massaging device to the person to increase the massaging force” (final rejection, pages 3 and 4).

The appellant has not challenged the proposed combination of Schumacher and Persaud in arguing the rejection of independent claim 6. Instead, the appellant contends that the rejection is unsound because the applied references do not teach, and would not have suggested, an apparatus meeting the limitations in the claim relating to the mounting arm, the cross slide mechanism, and the massaging device (see pages 8 and 9 in the brief). Contrary to the appellant's arguments, however, (1) Schumacher's mounting arm (frame 12) is pivotally movable relative to a single plane parallel to the base (bottom of housing 40) between a stowage position and a fixed outwardly extending position (see Figures 4 and 5; and column 4, line 41 through column 5, line 3); (2) Schumacher's cross slide mechanism (slide member 60) permits the mounting arm (frame 12) to be lineally movable within the single plane (again see Figures 4 and 5; and column 4, line 41 through column 5, line 3); and (3) Schumacher's massaging device (back contacting portion 46) is separately movable a limited distance toward and away from the base (bottom of housing 40) (see column 4, lines 1 through 32), all to the extent recited in claim 6.

Thus, the appellant's position that the subject matter recited in claim 6 is patentable over the combined teachings of Schumacher and Persaud is not persuasive. Therefore, we shall sustain the standing 35 U.S.C. § 103(a) rejection of this claim.

We also shall sustain the standing 35 U.S.C. § 103(a) rejection of claims 7 and 8, which depend from claim 6, as being unpatentable over Schumacher in view of Persaud.

The appellant has not challenged the rejection of claim 7 with any reasonable specificity (see page 9 in the brief), thereby allowing this claim to fall with parent claim 6 (see In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987)).

Claim 8 requires the elongated arm recited in parent claim 6 to be removably mounted on the mounting arm. Although the appellant is correct that Schumacher does not expressly disclose the elongated arm (reciprocating member 27) as being removably mounted on the mounting arm (frame 12) (see page 10 in the brief), such a removable mounting would have been an obvious common sense expedient to one of ordinary skill in the art to facilitate repair of the apparatus. In this regard, a conclusion of obviousness may be based on common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969).

We shall not sustain, however, the standing 35 U.S.C. § 103(a) rejection of claim 9 as being unpatentable over Schumacher in view of Persaud, and further in view of Chong, or the standing 35 U.S.C. § 103(a) rejection of claim 10 as being unpatentable over Schumacher in view of Persaud.

Claim 9 depends from claim 8 and requires a counterweight which is movable on the elongated arm. Claim 10 depends from claim 6 and requires the elongated arm to be pivotally mounted on the mounting arm. Suffice it to say that there is nothing in the

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combined teachings of the applied references, including Chong's disclosure of pin-mounted weight members 80, which would have suggested an apparatus meeting these limitations.

In summary and for the above reasons, the decision of the examiner to reject claims 1 through 10 is affirmed with respect to claims 6 through 8 and reversed with respect to claims 1 through 5, 9 and 10.

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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

BRUCE H. STONER, JR. Chief	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
JOHN P. McQUADE	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
MURRIEL E. CRAWFORD	)	
Administrative Patent Judge	)	

JPM/caw

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