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EXAMINER
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CRAIG, PAULA L

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JACK RAYMOND GROGAN, JR.

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Appeal 2013-003387  
Application 12/456,418  
Technology Center 3700

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Before EDWARD A. BROWN, GEORGE R. HOSKINS, and  
BRANDON J. WARNER, *Administrative Patent Judges*.

WARNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Jack Raymond Grogan, Jr. (“Appellant”), proceeding *pro se*, appeals under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claim 2, which is the sole pending claim. Appeal Br. 3, 5.<sup>1</sup> We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We note that neither the Appeal Brief (filed July 16, 2012) nor the Reply Brief (filed December 21, 2012) provides page numbers. For reference convenience, we designate the cover page of each brief as page 1 and number the pages consecutively therefrom, including the Appendices of the Appeal Brief.

### CLAIMED SUBJECT MATTER

Appellant's disclosed invention "relates to dispensers for liquid medications, and more specifically to medicine droppers." Spec. p. 2, ll. 7–8. In particular, the disclosed dispenser involves "putting a dosing scale such as a body weight scale directly on the dose dispensing device," such that the device can be "used to simultaneously calculate and measure an exact dose of liquid medication, based on the body weight of the patient." *Id.*, Abstract; Appeal Br. 5. Claim 2, reproduced below with emphasis added, is the sole independent claim and is representative of the subject matter on appeal.

2. A dose calculating dispenser for measuring a liquid medication, comprising a dispenser comprising a medicine dropper, oral syringe, or cup, and *at least one scale visible upon said dispenser*, said scale using only conventional measuring units that are already used to measure characteristics related to body size consisting of pounds, kilograms, inches, centimeters, months, years, square meters, or square feet, said characteristics related to body size consisting of weight, length, BSA (body surface area), or age, the measuring units of the scale comprising at least 2 discrete numerical points in a series, *such that a change in body size related characteristic corresponds to a change in liquid medication volume*, the numerical points directly representing the measuring units consisting of pounds, kilograms, inches, centimeters, months, years, square meters, or square feet, the scale generally positioned *such that as the dispenser is filled to a specific numerical point, the dispenser calculates and contains a dose of liquid medication for a patient having that characteristic related to body size.*

### EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Page	US 1,559,978	Nov. 3, 1925
Appellant's Admitted Prior Art ("AAPA") regarding disclosure of the Zimecterin dispenser ("Zimecterin dispenser disclosure"), as described on page 8 of the Specification and on page 3 of the Information Disclosure Statement Transmittal Letter filed June 11, 2009.		

### REJECTION

The following rejection is before us for review: Claim 2 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over AAPA (the Zimecterin dispenser disclosure) and Page. Final Act. 5–6.

### ANALYSIS

The Examiner determined that a combination of teachings from AAPA (the Zimecterin dispenser disclosure) and Page renders obvious the subject matter recited in claim 2. Final Act. 5–6. In particular, the Examiner found that the Zimecterin dispenser disclosure includes the structure of a dispenser as claimed, including a scale that uses measuring units relating to body size, with the exception that its scale calculates a dose *as the contents are dispensed*, rather than *as the dispenser is filled*. *Id.* at 5.

However, the Examiner stated that "it is well known in the syringe art for [a] scale to be positioned to either start with a completely filled syringe and dispense the required dose [(i.e., calculate a dose as the contents are dispensed)], or to start with an empty syringe and fill the syringe with the required dose before dispensing the dose [(i.e., calculate a dose as the

dispenser is filled)].” *Id.* at 5–6. Specifically, the Examiner found that Page teaches a syringe including a scale “generally positioned such that *as the dispenser is filled* to a specific numerical point, *the dispenser calculates and contains the dose.*” *Id.* at 6 (citing Page, Abstract; p. 1, ll. 7–26; p. 2, ll. 8–39, 90–100; Figs. 1–3) (emphasis added).<sup>2</sup> Appellant does not dispute these factual findings, acknowledging that the identified dispenser and scales “are very old and very familiar.” Appeal Br. 7; *see id.* at 7–10.

The Examiner concluded that, given the teachings of the prior art, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the dispenser of the Zimecterin dispenser disclosure “to include a scale generally positioned such that as the dispenser is filled to a specific numerical point, the dispenser calculates and contains the dose [(i.e., calculates a dose as the dispenser is filled, as recited in the claim)], as taught by Page, to allow the syringe to be filled with a dose from a bottle, as taught by Page.” Final Act. 6. Thus, the combination of teachings applied by the Examiner to render obvious the subject matter recited in claim 2 includes multiple scales on the dispenser—namely, the original scale from the Zimecterin dispenser disclosure (which calculates a dose as the contents are dispensed), and the scale incorporated from the teaching of Page (which calculates a dose as the dispenser is filled). *See id.*; Ans. 6–7 (explaining that the dispenser of the Zimecterin dispenser

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<sup>2</sup> The Examiner also found that Page teaches using both ascending and descending scales, which “allows for the syringe to be filled with a dose from a bottle [(i.e., calculates a dose as the dispenser is filled)] . . . while also permitting a determination of how much medication has been given [(i.e., calculates a dose as the contents are dispensed)].” *Id.* (citing Page, p. 2, ll. 90–100; Figs. 1–3).

disclosure “would be equally usable, if not more so, if it had two scales extending in opposite directions,” and that “[t]wo scales in opposite directions [would] allow for more flexibility in dosing”).

Appellant argues by identifying asserted deficiencies in the original scale from the Zimecterin dispenser disclosure relative to the scale recited in the claim. *See* Appeal Br. 8–9; *see also id.* at 10–13, 23–25. We are not persuaded by Appellant’s argument because these asserted deficiencies are not responsive to the rejection presented, which acknowledges a shortcoming of the scale of the Zimecterin dispenser disclosure alone but fills this gap by including the scale taught by Page. Thus, Appellant’s argument, which attacks a reference individually, is insufficient to apprise us of error when the rejection is predicated upon a combination of prior art teachings. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (citing *In re Keller*, 642 F.2d 413, 425 (CCPA 1981)).

Appellant also argues that there would have been no reason to remove the original scale from the Zimecterin dispenser disclosure, which calculates a dose as the contents are dispensed. *See* Appeal Br. 8–9; *see also id.* at 11. But this argument also is not responsive to the rejection presented, which does not remove the original scale from the Zimecterin dispenser disclosure, but instead simply includes an *additional* scale, as taught by Page, that calculates a dose as the dispenser is filled, as discussed above. Accordingly, this argument likewise does not apprise us of error.

Appellant’s arguments generally contend that there would have been no reason to combine the known teachings of the prior art as relied on in the rejection presented, and that the changes proposed to the dispenser of the Zimecterin dispenser disclosure would not have been obvious. *See, e.g.,*

Appeal Br. 7–8, 11–12, 25–27. We are not persuaded by these general contentions, however, because the Examiner sufficiently articulated reasoning based on rational underpinnings in support of the legal conclusion of obviousness applied in the rejection presented. *See* Final Act. 5–6; *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

A reason to modify a reference may often prompt a person of ordinary skill in the art to do what the inventor has done, but for a different purpose or to solve a different problem; it is not necessary that the prior art suggest the modification to achieve the same advantage or result discovered by an applicant. *See, e.g., In re Kahn*, 441 F.3d 977, 987 (Fed. Cir. 2006); *see also KSR Int’l Co.*, 550 U.S. at 421 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). Here, both the reason provided in the Final Office Action (to allow the syringe of the Zimecterin dispenser disclosure to be filled with a calculated dose from a bottle, as taught by Page) and the response in the Answer explaining an advantage of the combination (including two scales measuring from opposite directions would allow for more flexibility in dosing) are reasonable, and Appellant’s general contentions are insufficient to refute the Examiner’s position. *See* Final Act. 6; Ans. 6.

Moreover, we note that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co.*, 550 U.S. at 416. Appellant has not provided any factual evidence or persuasive technical reasoning to explain why the combination as applied in the rejection would yield anything other than a result that would have been predictable to one of ordinary skill in the art.

Finally, to the extent that Appellant's argument suggests that the combination of teachings relied on in the rejection presented is no more than impermissible hindsight, we are not persuaded by such an argument. *See* Appeal Br. 25 (stating that "[t]here is no rational reason . . . to make these changes other than to create the claimed invention"). Although Appellant may imply that the combination is no more than impermissible hindsight based on Appellant's own Specification, such an implication is not persuasive because Appellant does not identify, nor do we discern, any knowledge that the Examiner relied upon that was gleaned only from Appellant's disclosure and that was not otherwise within the level of ordinary skill at the time of the invention. *See In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971) (So long as a conclusion of obviousness is based on a reconstruction that "takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from [Appellant's] disclosure, such a reconstruction is proper.").

After careful consideration of all the evidence, Appellant's arguments do not apprise us of error in the Examiner's findings or reasoning in support of the conclusion of obviousness. Accordingly, we sustain the rejection of claim 2 under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of the Zimecterin dispenser disclosure and Page.

#### DECISION

We AFFIRM the Examiner's decision rejecting claim 2 under 35 U.S.C. § 103(a) as being unpatentable over AAPA (the Zimecterin dispenser disclosure) and Page.



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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED