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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte CONTEX INC.

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Appeal No. 98-1879
Reexamination No. 90/004,256[1]

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HEARD: Aug. 4, 1998

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Before KRASS, FLEMING, and LEE, Administrative Patent Judges.

KRASS, Administrative Patent Judge.

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[1] Reexamination proceeding for U.S. Patent No. 5,428,412, issued June 27, 1995, to Nick Stoyan, and based on application 08/107,929, filed August 17, 1993, which is a continuation-in-part of application 08/009,322, filed January 26, 1993, now U.S. Patent No. 5,349,395, issued September 20, 1994, which is a continuation-in-part of application 07/748,845, filed August 23, 1991, now U.S. Patent No. 5,191,365, issued March 2, 1993. Reexamination request filed May 29, 1996.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1, 10 and 11 in this reexamination proceeding of U.S. Patent No. 5,428,412. Claims 2 through 9 have been confirmed and are not before us on this appeal.

The invention is directed to a method for treating myopia with an aspheric corneal contact lens.

Independent claim 1 is reproduced as follows:

1. A method for treating a myopic eye comprising the steps of:

fitting a first contact lens to the cornea of a myopic eye, said first contact lens having an aspheric posterior surface and wherein said first contact lens is central touch fit to said cornea;

wearing said first contact lens for a sufficient time to flatten said cornea to form a reshaped cornea;

fitting a second contact lens to said reshaped cornea said second contact lens having an aspherically shaped posterior surface and wherein said second lens is central touch fit to said reshaped cornea; and

wearing said second contact lens for a sufficient time to further flatten said cornea to form a further reshaped cornea.

The examiner relies on the following reference:

Fontana (Fontana '74), "Orthokeratology Using the One Piece Bifocal," Orthokeratology, vol. 2, pp. 22-24, 1974.

Claims 1, 10 and 11 stand rejected under 35 U.S.C. § 102(b) as anticipated by Fontana ‘74.

Reference is made to the briefs and answer for the respective positions of appellant and the examiner.

OPINION

At the outset, we note that, in accordance with appellant’s grouping of the claims at page 5 of the principal brief and the lack of any specific arguments related to the specific further limitations of claims 10 and 11, claims 10 and 11 will stand or fall with independent claim 1.

We will sustain the examiner’s rejection of claims 1, 10 and 11 under 35 U.S.C. § 102(b).

It is clear from the disclosure of Fontana ‘74 that the reference discloses a method for treating a myopic eye by fitting a first contact lens to the cornea, wearing the contact lens for a sufficient time to flatten the cornea, fitting a second contact lens to the flattened cornea and wearing the second contact lens for a sufficient time to further flatten the cornea (see pages 23-24 of the reference).

The only issue, and the only issue argued by appellant, is whether the contact lenses of Fontana '74 have "an aspherically shaped posterior surface," as required by the claims.

It is appellant's position that Fontana '74 does not disclose such an "aspherically" shaped surface since the specification of U.S. Patent No. 5,428,412 defines "aspheric" as a surface having a radius of curvature that gradually changes, whereas the Fontana '74 lens does not have zones or a surface whose radius of curvature gradually changes.

While we agree with appellant that claim language must be given its broadest reasonable interpretation consistent with the specification, we find that appellant's interpretation is much too narrow for the circumstances. Appellant would have us read much of the specification into the claims in order to give the claimed "aspherically shaped posterior surface" a much narrower meaning than that which is required.

In citing page 23 of the Fontana '74 reference [see page 6 of the principal brief], appellant appears to agree that

Fontana ‘74 discloses a lens having at least three zones, a central zone, a para-central zone and a peripheral zone, wherein each of these zones has a constant radius of curvature, although the radius of curvature is different for each zone. Since the lens of Fontana ‘74 has three zones of different radii of curvature, it would appear to disclose an “aspheric” lens, as claimed.

Appellant admits that even his patent specification defines “aspheric” as a surface having a radius of curvature that changes, which is just what Fontana ‘74 teaches, but appellant argues that the definition of this term, as employed in the instant patent specification, requires also that the change be gradual.

The term “aspheric” is not a complex term of art or a new term coined and defined by appellant. It is a term with a clear meaning. In accordance with the Second College Edition of the American Heritage Dictionary, “aspheric” is defined as “[v]arying slightly from sphericity and having only slight aberration, as a lens.” Webster’s Ninth New Collegiate Dictionary defines the term as “departing slightly from the

spherical form" or "free from spherical aberration." Thus, neither dictionary uses the term "gradual," as contended by appellant. Clearly, since the lens of Fontana '74 has three zones of differing radii of curvature, thus, departing slightly from the spherical form and being free from spherical aberration, the lens of Fontana '74 is "aspheric," as required by the instant claims.

Assuming, arguendo, that we accept appellant's definition, requiring a gradual change in the radius of curvature, we still find the lens of Fontana '74 to meet this limitation. The term "gradual" is clearly a relative one. While it may be true that whereas the radius of curvature of the central zone of the instant lens "gradually" increases from a minimum of 4 millimeters to a maximum of 20 millimeters as one moves from the center of the central zone to the perimeter of the zone (none of which is claimed), the radius of curvature in Fontana '74 increases at a greater rate, this does not nullify Fontana '74 as a teaching of gradually changing the radius of curvature. After all, since one would need either extremely good eyesight or a microscope to

actually see the changes in the radius of curvature in the lens of either Fontana ‘74 or the instant invention, it would not be unreasonable, in our view, to find that Fontana ‘74 does disclose an aspherical contact lens wherein the radius of curvature gradually changes along the lens.

Appellant also argues [top of page 8 of the principal brief] that “aspheric” includes lenses having one or more zones where at least one of the zones has a radius of curvature that is aspheric. However, instant claim 1 does not recite any zones having a radius of curvature that is aspheric. The claim only

calls for first and second contact lenses wherein the contact lenses have “aspherically shaped posterior surfaces.” For the reasons supra, Fontana ‘74 clearly discloses such contact lenses.

The examiner’s decision rejecting claims 1, 10 and 11 under 35 U.S.C. 102(b) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under

37 CFR § 1.136(a).

AFFIRMED

Errol A. Krass Administrative Patent Judge	)	
Michael R. Fleming Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
Jameson Lee Administrative Patent Judge	)	

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