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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROBERTUS GERARDUS VAN OUDENALLEN

Appeal 2017-010181
Application 13/217,120
Technology Center 3600

Before BIBHU R. MOHANTY, KENNETH G. SCHOPFER,
MATTHEW S. MEYERS, *Administrative Patent Judges.*

MOHANTY, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant seeks our review under 35 U.S.C. § 134 from the final rejection of claims 17–42 which are all the claims pending in the Application. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF THE DECISION

We AFFIRM.

THE INVENTION

The Appellant's claimed invention is directed to a garment for warming the body to prevent redistribution hypothermia (Spec., paras. 3, 7). Claim 17, reproduced below, is representative of the subject matter on appeal.

17. A system for warming a patient to prevent redistribution hypothermia, said system comprising:

a garment configured to cover a lower body portion of the patient, said garment having a pair of leg portions and a waist portion, said garment including an air chamber, said air chamber having a first surface that is air permeable, said first surface being proximate the patient when the patient is wearing said garment, said air chamber having a second surface that is air impermeable, said second surface being an outside surface of said garment, said garment including an inlet port penetrating said air chamber wherein when an air hose is connected to said inlet port said air chamber receives conditioned air; and

a gown configured to cover an upper body portion of the patient, said gown having a length sufficient to overlap said waist portion of said garment when said garment and said gown are worn by the patient, said gown having an opening proximate said inlet port when said garment and said gown are worn by the patient, said opening configured and dimensioned to accommodate the air hose when the air hose is connected to said inlet port.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Panetta	US 5,383,918	Jan. 24, 1995
Farnworth	US 2006/0174392 A1	Aug. 10, 2006
Naaman	US 7,117,687 B2	Oct. 10, 2006
Nocente	US 2007/0289050 A1	Dec. 20, 2007

The following rejections are before us for review:

1. Claim 41 is rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter.
2. Claim 40 is rejected under 35 U.S.C. § 112, first paragraph for failing to show possession of the claimed invention.
3. Claims 17–24, 29, 30, 32, 33, 35, 36, and 39–42 are rejected under 35 U.S.C. § 103(a) as unpatentable over Panetta and Farnworth.
4. Claims 17–42 are rejected under 35 U.S.C. § 103(a) as unpatentable over Naaman and Nocente.

FINDINGS OF FACT

We have determined that the findings of fact in the Analysis section below are supported at least by a preponderance of the evidence¹.

ANALYSIS

Rejection under 35 U.S.C. § 101

The Examiner has determined that the claim “appears to claim parts of the human body, which is not directed to statutory subject matter (i.e. human per se)” in reciting the limitation for:

said garment including an inlet port penetrating said air chamber wherein when an air hose is connected to said inlet port said air chamber receives conditioned air from the air hose **and vents conditioned air out of the air chamber towards the feet and the waist of said patient**

¹ See *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

(Final Act. 6; *see also* Ans. 4).

The Appellant argues that this rejection is improper (App. Br. 11; Reply Br. 2, 3).

We agree with the Appellant. Here the cited claim limitation simply does not claim parts of the human body but is rather directed to a garment that is used to cover parts of the body, and thus, this rejection is not sustained.

Rejection under 35 U.S.C. § 112(a) first paragraph

The Examiner has determined that claim 40, which recites: “wherein the lower body garment **does not extend above the waist of the patient** when said lower body garment is worn by the patient,” is not supported by the Specification (Final Act. 5). However, the Examiner at the same page 5 also states that “some drawings appear to agree with this functional language.” A similar statement is made in the Answer at page 3.

In contrast, the Appellant argues that the cited claim limitation is supported by Figures 1 and 5 and by the Examiner’s own statements that some of the Figures disclose the cited claim limitation (Ans. 10; Reply Br. 1, 2).

We agree with the Appellant. Here, the Examiner has stated in the Final Rejection at page 5 that “some drawings appear to agree with this functional language” and there is no requirement that all the Figures do this. Accordingly a prima facie case has not been established and this rejection is not sustained.

Rejections under 35 U.S.C. § 103(a)

The Appellant first argues that the rejection of claim 17 is improper because Panetta does not disclose a “gown” (App. Br. 11–13; Reply Br. 3, 4). The Appellant argues that the definition of a gown depending on the cited source is for a “loose-fitting, flowing garment covering at least the upper body” but provides no specific citation to such a definition in the Specification (App. Br. 11). In contrast, the Examiner has determined that the rejection is proper (Ans. 4, 5). We agree with the Examiner as Figure 1 of Panetta shows the outline of the body having space from the suit edge 13 and, thus, the garment is “loose-fitting” under a broadest reasonable interpretation. The Appellant also makes similar arguments for the rejection of claim 17 made with Naaman and Nocente as not disclosing a “gown” (App. Br. 17, 18; Reply Br. 7, 8). These arguments are also not deemed persuasive as Naaman in the cited combination discloses a garment depicted in Figure 3B that appears to loosely fit under a broadest reasonable interpretation as well.

The Appellant next argues in regard to claim 17 that Panetta does not disclose the gown “having an opening proximate said inlet port” (App. Br. 13; Reply Br. 4). In contrast, the Examiner has determined that the rejection is proper (Ans. 6, 7). We agree with the Examiner as in Panetta’s portals such as A, B, C, and D for example are at least “proximate” an opening under a broadest reasonable interpretation.

The Appellant next argues in regard to claim 21 that Panetta does not disclose the gown having “an opening providing access to said inlet port of said garment” (App. Br. 14; Reply Br. 4). In contrast, the Examiner has determined that the rejection is proper in this regard (Ans. 6, 7). We agree

with the Examiner in this regard as in Panetta the portals such as A, B, C, and D, can be accessed from the garment opening.

The Appellant argues in regard to claim 42 that Panetta does not disclose an opening in the “overlap region” (App. Br. 14, 15; Reply Br. 4, 5). Here, the term “region” is broad enough to include the openings in the overlap region in the cited combination. Regardless, the placement of an opening at any desired location for cooling at that location would have been an obvious, predictable modification to one of ordinary skill in the art in making the combination of record for cooling at that location. In *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) the Court stated that when considering obviousness that “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR* at 418.

The Appellant next argues in regard to claim 17 that Panetta does not disclose an “opening configured and dimensioned to accommodate the air hose” (App. Br. 15; Reply Br. 5, 6). In contrast, the Examiner has determined that the rejection is proper in this regard (Ans. 8, 9). We agree with the Examiner as the opening is sized to accommodate an air hose of some size.

The Appellant next argues that in regard to claim 17 that Naaman does not disclose a system “warming a patient to prevent redistribution hypothermia” (App. Br. 15, 16; Reply Br. 6). In contrast, the Examiner has determined that the rejection is proper in this regard (Ans. 10, 11). We agree with the Examiner in this regard as the Appellant argues the reference

piecemeal when the rejection is made from the combination of references and the rationale provided.

The Appellant next argues that in regard to claim 17 that Naaman does not disclose a garment “configured to cover a lower body portion of the patient” (App. Br. 6, 17; Reply Br. 6, 7). In contrast, the Examiner has determined that the rejection is proper (Ans. 10, 11). We agree with the Examiner in this regard as the Appellant argues the reference piecemeal when the rejection is made from the combination of references and rationale provided.

The Appellant also argues with regard to claim 17 that there is insufficient motivation to modify Naaman and Nocente (App. Br. 18, 19; Reply Br. 8). In contrast, the Examiner has asserted that there is a proper rationale for the cited combination. We have reviewed the rejection of record and arguments presented in the Final Rejection at pages 22–25 and the Appeal Brief at pages 12 and 13 in this regard. The rejection states that it would have been obvious to modify the garment of Naaman to include leg portions to cover the entire body. We agree with and adopt the rationale in the rejection of record and this argument is not deemed persuasive.

We have reviewed the Appellant’s arguments presented in both the Appeal Brief and Reply Brief and do not find them persuasive with regard to the arguments made for claims 17, 21, and 42 addressed above for the rejections of record. Accordingly these argued rejections of record are sustained. The Appellant has presented the same arguments for the remaining claims and the rejection of these claims is sustained as well.

CONCLUSIONS OF LAW

We conclude that Appellant has shown that the Examiner erred in rejecting claim 41 under 35 U.S.C. § 101.

We conclude that Appellant has shown that the Examiner erred in rejecting claim 40 under 35 U.S.C. § 112, first paragraph for failing to show possession of the invention.

We conclude that Appellant has not shown that the Examiner erred in rejecting claims 17–24, 29, 30, 32, 33, 35, 36, and 39–42 under 35 U.S.C. § 103(a) as unpatentable over Panetta and Farnworth.

We conclude that Appellant has not shown that the Examiner erred in rejecting claims 17–42 under 35 U.S.C. § 103(a) as unpatentable over Naaman and Nocente.

DECISION

The Examiner's rejection of claims 17–42 is sustained.

AFFIRMED