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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AVETIK HARUTYUNYAN and SHOJI ISOBE

Appeal 2010-006133
Application 11/555,823
Technology Center 3700

Before JOHN C. KERINS, EDWARD A. BROWN, and
CHARLES N. GREENHUT, *Administrative Patent Judges*.

BROWN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 8-13. App. Br. 2. Claims 1-7 have been canceled. *Id.* We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We affirm.

THE CLAIMED SUBJECT MATTER

Claim 8, reproduced below, is the sole independent claim on appeal and is illustrative of the appealed subject matter:

8. An apparatus for injecting dry powder, the apparatus comprising; a first end; an end opposite; an ejector located between the first end and the end opposite wherein ratio of diameter of the first end to the ejector is about 1.1 to about 4; and aerosolized dry powder confined between the ejector and the end opposite wherein pressured gas is introduced through the first end, and the end opposite is bifurcated wherein one portion discharges the aerosolized powder and the other portion loops back and connects to the ejector.

THE REJECTIONS

The following rejections are before us on appeal:

1. Claims 8 and 10-12 under 35 U.S.C. § 103(a) as unpatentable over Kendall (US 5,279,854; iss. Jan. 18, 1994);
2. Claim 9 under 35 U.S.C. § 103(a) as unpatentable over Kendall and Spaulding '199 (US 4,900,199; iss. Feb. 13, 1990); and
3. Claim 13 under 35 U.S.C. § 103(a) as unpatentable over Kendall and Spaulding '808 (US 4,561,808; iss. Dec. 31, 1985).

ANALYSIS

Rejection of claims 8 and 10-12 – Kendall

Regarding claim 8, the Examiner found Kendall discloses a device comprising an ejector 20 between a first end (left end of device) and an end opposite (right end of device), and aerosolized dry powder 10 confined between the ejector 20 and end opposite, wherein the end opposite is bifurcated and one portion discharges the aerosolized powder (through nozzle 28 or 26) and the other portion loops back (at 74) and connects to ejector 20. Ans. 3 (*see also* Kendall, fig. 1). The Examiner also found that, in Kendall, when dry powder is carried from the hopper 14 to the nozzle 26, 28, aerosolized dry powder is inherently "confined" in the tube 18 located between the ejector 20 and the end opposite 26, 28. Ans. 6.

Appellants contend that the Examiner did not identify any disclosure in Kendall that aerosolized powder is confined between the ejector and the end opposite. App. Br. 4-6; Reply Br. 3. Appellants contend that in Kendall, polymer particles 10 in the supply means 10 are directly attached to the venturi means 20 to which the conduit means is connected. App. Br. 4-5 (citing Kendall, col. 4, ll. 24-37, fig. 1); Reply Br. 3. These contentions are not persuasive.

Kendall's apparatus includes a particle supply means 14 and a gas supplier 16 to provide a gas-entrained or fluidized stream of absorbent particles 10. *See* Kendall, col. 4, ll. 27-31; fig. 1. Kendall discloses that "[t]he conduit means **18** supplies the gas-entrained stream of absorbent particles **10** to a nozzle means **22**" *See* Kendall, col. 4, ll. 37-41. Appellants do not provide any persuasive argument as to why the Examiner's finding that powder is "confined" in Kendall's conduit means 18

is incorrect. Firstly, the Examiner correctly found that claim 8 does not recite any structure that defines how or where the aerosolized dry powder is "confined" between the ejector and the end opposite. Ans. 6.

The Patent and Trademark Office determines the scope of the claims "not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction 'in light of the specification as it would be interpreted by one of ordinary skill in the art.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316-17 (Fed. Cir. 2005). Regarding the Specification, Appellants do not direct us to any definition of the term "confined." Indeed, we are unable to find any description of this term in the Specification.

Appellants contend that the claim is directed to the apparatus shown in Figure 1 of their application. App. Br. 5-6; Reply Br. 2-3. Appellants further contend that "[t]he Examiner has improperly applied the claim limitation of *passing through the tube 220*, while Appellants' claims instead recite that dry powder **100** is *confined between* the ejector **240** and the end opposite **220** and **230**." App. Br. 6. However, the Specification does not describe that the dry powder is "confined" in the apparatus, or that powder passing through the tube 220 is not "confined." Claim 8 recites that the dry powder is "aerosolized," but does not recite that it is not passing between the ejector and end opposite. In *Kendall*, the dry powder between the ejector and end opposite is aerosolized dry powder, as well. Moreover, a particular embodiment appearing in the written description may not be read into the claim if the claim language is broader than the embodiment. *See Superguide Corp. v. DirecTV Enter., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

An ordinary meaning of "confine" is "to hold within a location." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 261 (11th ed. 2003).

Applying this definition, one of ordinary skill in the art would reasonably find that Kendall's conduit means 18 holds aerosolized dry powder that is present within its internal flow passage as the powder travels toward the valve means 30, such that the dry powder can be considered to be "confined" by the conduit means 18. For the foregoing reasons, Appellants have not apprised us of any error in the Examiner's finding that Kendall discloses "aerosolized dry powder confined between the ejector and the end opposite," as claimed.

Regarding the claim limitation, "the end opposite is bifurcated wherein one portion discharges the aerosolized powder *and the other portion loops back and connects to the ejector*" (emphasis added), Appellants contend that "[t]he connective term 'and' requires that that the looping back be simultaneous and continuous in operation with the discharging." App. Br. 7. Appellants contend that Kendall does not disclose this limitation. *Id.* These contentions are also not persuasive.

Kendall discloses that valve means 30 is switchable to direct gas-entrained absorbent particles to a first nozzle member 26 or a second nozzle member 28. *See* Kendall, col. 4, ll. 52-59; fig. 1. As noted by Appellants, Kendall discloses:

In a further embodiment of the present invention, the second nozzle **28** is not used, and a recirculation pipe **74** is joined in communication via a junction **72**, with the second outlet port **44** of the valve means **30**. This arrangement[] acts to periodically direct the gas-entrained stream of absorbent particles from valve means **30** back to particle supply means **14** through the recirculation pipe **74**.

Kendall, col. 7, ll. 18-25; fig. 1; *see also* App. Br. 7.

According to Kendall's disclosure, when the valve means 30 is switched to the second position, gas-entrained absorbent particles are directed to the conduit that is in flow communication with second nozzle 28, as shown in Figure 1. Junction 72 is used to direct the gas-entrained stream of absorbent particles back to the supply means 14 via the recirculation pipe 74. Appellants contend that Kendall does not have simultaneous and continuous flow through both portions of a bifurcated end, but rather has flow through either recirculation pipe 74 *or* nozzle means 22. App. Br. 6-7; Reply Br. 5. However, claim 8 recites that "the other portion loops back and connects to the ejector," but does not recite any limitation that flow must also occur through the "other portion." In Kendall's apparatus, at the time when absorbent particles are directed to the first nozzle 26 or second nozzle 28, the recirculation pipe 74 also "loops back," as claimed.

Regarding the claim limitation, "connects to the ejector," Appellants contend that "in [their] apparatus, one portion of aerosolized powder loops back and *connects to the ejector* **240**. By contrast, in the apparatus of Kendall, absorbent particles are *directed back to the particle supply means 14*." App. Br. 7-8; *see also* Reply Br. 4. Appellants also contend that "Kendall fails to disclose both that aerosolized powder is looped back and that it connects to an ejector." Reply Br. 4. However, claim 8 does not recite that aerosolized powder loops back, or that it connects to the ejector, but rather recites that the "*other portion* loops back and connects to the ejector." Emphasis added. Also, a particular embodiment appearing in the written description may not be read into the claim if the claim language is broader than the embodiment. *See Superguide Corp.*, 358 F.3d at 875.

Claim 8 also does not recite any limitation as to how the other portion "connects" to the ejector. The Examiner found that Kendall's loop back portion 74 (recirculation pipe) connects to the ejector, first considering Kendall's hopper 14 (particle supply means) to be part of the loop back portion. Ans. 7. According to this interpretation, the loop back portion is considered to be directly connected to the ejector. The Examiner alternatively interpreted the claim to not require the loop back portion to be directly connected to the ejector, but just to connect to the ejector, and determined that Kendall's loop back portion 74 connects to the ejector through the hopper. Ans. 8. Appellants have not apprised us of any error in these findings.

In view of the above, we sustain the rejection of claim 8 and its dependent claims 10-12.

Rejection of claim 9 - Kendall and Spaulding '199

Claim 9 depends from claim 8. Appellants contend that Spaulding '199 does not cure the alleged deficiencies of Kendall in regard to claim 8. App. Br. 8; Reply Br. 5-6. However, as we find no deficiency in the Examiner's rejection of claim 8, as discussed *supra*, we also sustain the rejection of claim 9 for similar reasons.

Rejection of claim 13 - Kendall and Spaulding '808

Claim 13 depends from claim 8. Appellants contend that Spaulding '808 does not cure the alleged deficiencies of Kendall in regard to claim 8. App. Br. 9; Reply Br. 5-6. However, as we find no deficiency in the

Appeal 2010-006133
Application 11/555,823

Examiner's rejection of claim 8, we also sustain the rejection of claim 13 for similar reasons.

DECISION

The Examiner's decision rejecting claims 8-13 is AFFIRMED.

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

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