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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JULIE WINDLE BRYANT

Appeal 2014-008173
Application 11/553,088
Technology Center 3700

Before CHARLES N. GREENHUT, ANNETTE R. REIMERS, and
GORDON D. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellant¹ appeals under 35 U.S.C. § 134 from a rejection of claims
1–6, 8–14, 16, and 22. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ The Appellant identifies the real party in interest as JWB-S, Inc., a corporation of which the inventor, Julie Windle Bryant, is president and owner. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a reduced strain toilet seat. Spec. 1. Claim 1, reproduced below, illustrates the claimed subject matter:

1. A toilet seat comprising:
 - a rigid base having a centrally located aperture disposed therein, the rigid base sized for receiving and supporting a weight of a human in a seated position for use as a toilet seat, the rigid base comprising a top surface, a bottom surface and two side surfaces;
 - a top cover affixed to the bottom surface of the rigid base and forming a gap between the top cover and the top surface and the two side surfaces of the rigid base; and
 - a solid gel cushion disposed within the gap, thereby providing a cushioned interface between the rigid base and the human;
- wherein the shape of the toilet seat is substantially circular with a flattened outer top edge, a flattened inner top edge and two flattened outer sides.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Harrison	US 3,863,277	Feb. 4, 1975
White	US 6,370,704 B1	Apr. 16, 2002
Nomura	US 6,815,379 B2	Nov. 9, 2004
Keller	WO 2005/102134 A1	Nov. 3, 2005

REJECTIONS

The Examiner made the following rejections:

Claims 1, 2, 4–6, 8–10, 12–14, and 16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Harrison and Keller.

Claims 3, 11, and 22 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Harrison, Keller, Nomura, and White.

Claim 22 stands rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

OPINION

Claims 1, 2, 4–6, 8–10, 12–14, and 16 rejected as obvious over Harrison and Keller.

A. Appellant first argues that the Examiner’s proposal to substitute the gel of Keller for the foam in Harrison would result in an inoperable device. Appeal Br. 6. Specifically, Appellant argues that in the claimed toilet seat “the gel is held in position by the cover and the position of the cover is maintained by being attached to the bottom surface of the solid core.” Appeal Br. 6.

Claim 1 calls for a top cover affixed to the bottom surface of the rigid base and forming a gap between the top cover and the top and two side surfaces of the base. The solid gel cushion of Appellant’s claim 1 is disposed in the gap. There is no requirement in claim 1 that the gel be held in position by the cover, and Appellant’s argument is not persuasive because it is not directed to limitations found in claim 1.

We note that Keller discloses several ways to hold his gel in place (Keller 10:7–16), and this supports the Examiner’s conclusion that a person of ordinary skill in the art would use the necessary processes to hold the gel in place. Ans. 2.

B. Appellant next argues that using the gel of Keller in the seat of Harrison would not result in “the force reduction and comfort provided by

[Appellant's] claimed toilet seat." Appeal Br. 7–8. Appellant bases this argument on the idea that the gel of Keller would not remain in place, but would ooze inside the covering until the user was being supported by the cover pressing directly against the rigid base. Appeal Br. 8. Because of how Keller describes his material we do not agree. Specifically, Keller describes his material as having “shape memory even after repeated use.” Keller 3:30–4:1. In addition, Keller says,

since a gel material as defined above has shape memory, i.e., it is capable of returning to its original shape after the cushioned body [of the user] is removed, its use according to the invention has the advantage of reducing the “bottoming out” effect due to a repeated and continued use of conventional cushioning devices.

Keller 7:10–14.

Generic flowable material may be drawn by gravity. If such fluid media were used, the toilet seat would thus exert pressure on some portions of the cushioned body as the flowable media attempt to flow in response to the gravitational force. . . . The use of a gel according to the invention has removed the . . . drawback . . . because the gel material does not excessively flow.

Keller 7:22–29. Keller thus discloses a material and performance criteria for the material that would preclude the oozing at the core of Appellant's argument. In addition, Appellant has not pointed to specific language in claim 1 directed to the force reduction and comfort argument. Because this argument is not directed to any limitation in claim 1, on the record presented, we are not persuaded that the Examiner erred. Limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982).

C. For her third argument, Appellant argues that there was no motivation in Harrison and Keller that they should be combined. Appeal Br.

9. Specifically, Appellant states that “[t]he [E]xaminer’s treatment of foam and gel as equivalents eliminates any motivation for one of ordinary skill to substitute one for the other, and thus correspondingly eliminates the [E]xaminer’s support for a finding of obviousness.” Appeal Br. 9.

Case law does not support the Appellant.

[W]hen a patent “simply arranges old elements with each performing the same function it had been known to perform” and yields no more than one would expect from such an arrangement, the combination is obvious. [*Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)].

KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 417 (2007). In this case, both Harrison and Keller teach cushioned toilet seats, and Keller teaches a solid gel to reduce a decubitus-like effect, as the Examiner explained. Ans. 3 (referring to Keller 2:27–3:1). The Examiner has done more than provide mere conclusory statements. Instead, the Examiner has “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

Accordingly, we are not persuaded the Examiner erred.

*Claims 3, 11, and 22 rejected as obvious over
Harrison, Keller, Nomura, and White.*

A. Appellant argues that the rejection of claim 22 should be reversed because “the [E]xaminer has not demonstrated that a person of ordinary skill would have chosen and combined the elements of White, Jr. and Harrison.” Appeal Br. 12. Appellant asserts that without such evidence the rejection is insufficient. *Id.* This argument is based on a mistake of law. There is no requirement to show that a person of ordinary skill in the art

would, in fact, have chosen a particular combination of features. In *KSR International Co. v. Teleflex Inc.*, the Court wrote:

For over a half century, the Court has held that a “patent for a combination which only unites old elements with no change in their respective functions ... obviously withdraws what is already known into the field of its monopoly and diminishes the resources available to skillful men.” This is a principal reason for declining to allow patents for what is obvious. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.

KSR, 550 U.S. at 415–416 (2007) (alteration in original) (citations omitted). The Court further found that “when a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *KSR*, 550 U.S. at 417. For this argument, Appellant has conceded that White shows the shape for a toilet seat described in claim 22. Appeal Br. 12. Nor does Appellant contest that the other features of claim 22 and claim 9 from which claim 22 depends are shown by Harrison, Keller, and Nomura. Appellant makes no argument that claim 22 does not describe an arrangement of old elements, each performing the same function as it had been known to perform and yielding no more than one would expect from such an arrangement. Accordingly, Appellant has not demonstrated a failure to meet the standard set forth in *KSR*, and so we are not persuaded of error.

B. Appellant argues the rejection of claims 3 and 11 was erroneous based on the same mistaken legal theory as they argued in connection with

claim 22. Appeal Br. 12–13. We do not find this argument persuasive for the reasons stated above in connection with claim 22.

*Claim 22 stands rejected as failing to comply
with the written description requirement*

A. Claim 22 reads: “The toilet seat of claim 9, wherein the outer circumferential edge of the top cover and the inner circumferential edge of the top cover are substantially linear.” Appeal Br. 19 (Claims App.). The Examiner rejects this claim as failing to comply with the written description requirement of 35 U.S.C. § 112, first para. The Examiner explained, “[t]he language, as claimed, fails to have support in the original specification. Therefore, it is considered as new matter.” Final Act. 4.

Appellant seeks reversal because the Examiner failed to find a specific level of ordinary skill in the art. Appeal Br. 14. The Federal Circuit has set out the standard for determining whether a specification supports a claim.

We have consistently held that, to satisfy § 112, a patent's written description “must ‘clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’” *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (alteration in original) (quoting *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991)).

Novozymes A/S v. DuPont Nutrition Biosciences APS, 723 F. 3d 1336, 1346 (Fed. Cir. 2013). Here, the Examiner made rejections under §103, relying on references that are closely related to Appellant’s field and so reflect the level of ordinary skill in the art. Therefore, the Examiner need not have made specific findings concerning the level of skill in the art. *See Okajima*

v. Bourdeau, 261 F.3d 1350, 1355 (Fed. Cir. 2001). Accordingly, we are not persuaded the Examiner erred.

B. Appellant also complains that the Examiner did not specify which words in Claim 22 do not have support in the Specification. Appeal Br. 14. In fact, almost none of the language in claim 22 has any support in the written description or original claims. The phrases “outer circumferential edge” and “inner circumferential edge,” and both “linear” and “substantially linear” do not appear in the original Specification or claims as Appellant admits. Appeal Br. 15. To be clear, then, none of the substantive words or phrases in claim 22 appear in the Specification as originally filed. For support, Appellant reprints Figure 3 and quotes three lines in the Specification: “[T]he toilet seat 20 of the present invention is shaped more circular with the top outer and inner edge substantially flat and outer right and left edge substantially flat.” Appeal Br. 14–15 (quoting Spec. 6:14–17). Appellant then repeats the substantive phrases from claim 22 noted above and concludes “the [Appellant] believes that it shows possession of the claimed invention.” Appeal Br. 15. 37 C.F.R. § 41.37(c)(1)(iv) requires substantive arguments in an appeal brief. *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011). Appellant’s argument amounts to a mere denial of the accuracy of the Examiner’s finding. Without more, such an argument does not apprise us as to where the Specification demonstrates Appellant was in possession of the subject matter now claimed as of the filing date sought.

DECISION

For the above reasons, the Examiner’s rejection of claims 1–6, 8–14, 16, and 22 is affirmed.

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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)(1)(iv).

AFFIRMED