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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSEPH D. BRANNAN and KYLE R. RICK

Appeal 2015-001192^{1,2}
Application 13/444,496
Technology Center 3600

Before ANTON W. FETTING, PHILIP J. HOFFMANN, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

HOFFMANN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the rejection of claims 1–24. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Our decision references Appellants' Specification ("Spec.," filed Apr. 11, 2012) and Appeal Brief ("Br.," filed May 23, 2014), as well as the Examiner's Answer ("Answer," mailed Aug. 15, 2014).

² According to Appellants, Covidien LP is the real party in interest. Br. 1.

According to Appellants, the invention “relates generally to microwave applicators used in tissue ablation procedures. More particularly, the . . . [invention] is directed to a microwave applicator having either a liquid or solid loaded tip dipole antenna.” Spec. 1, ll. 14–16. Claims 1, 13, and 20 are the only independent claims. *See* Br., Claims App. We reproduce claim 1, below, as representative of the appealed claims.

1. A microwave antenna assembly comprising:
 - a feedline including an inner conductor, an outer conductor and an inner insulator disposed therebetween;
 - a radiating portion including an unbalanced dipole antenna having a proximal portion and a distal portion of different lengths, wherein the proximal portion includes at least a portion of the inner conductor and the inner insulator and the distal portion includes a conductive member; and
 - a sleeve disposed around at least a portion of the outer conductor and the conductive member, the sleeve defining a vacuum chamber therein disposed between a distal end of the outer conductor, the proximal end of the conductive member, and the inner insulator.

Id.

REJECTIONS AND PRIOR ART

The Examiner rejects claim 1 under 35 U.S.C. § 102(e) as anticipated by Konishi (US 2007/0233057 A1, pub. Oct. 4, 2007).

The Examiner rejects claims 2–5 and 13 under 35 U.S.C. § 103(a) as unpatentable over Konishi and Prakash (WO 03/039385 A2, pub. May 15, 2003).

The Examiner rejects claims 6–12 and 14–24 under 35 U.S.C. § 103(a) as unpatentable over Konishi, Prakash, and Turovskiy (US 2005/0015081 A1, pub. Jan. 20, 2005).³

The Examiner provisionally rejects claims 1–24 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claims 1–24 of Application No. 12/350,292.

See Answer 2–11.

ANALYSIS

Anticipation rejection of claim 1

Independent claim 1 requires “an unbalanced dipole antenna having a proximal portion and a distal portion of different lengths.” Br., Claims App. With respect to this limitation, the Examiner determines the following:

Konishi clearly shows in figures 13 and 14 two electrodes [208 and 209] with different lengths at different locations on the antenna assembly. Figure 38 shows the same embodiment based on the same reference numbers [the 200 series] which shows the entire structure of the antenna and not just a cut out as shown in figures 13 and 14. The entire structure in figure 38 shows the sections that contain electrode 208 and the section that contains electrode 209 having different lengths, thus meeting the limitation of a proximal and distal portion of different lengths. The examiner further relies on the MPEP to support his rejection; MPEP section 2125 . . . states drawings can be used as prior art, especially when structure is “clearly show.” *In re Mraz*, 455 F.2d 1069. The examiner would like to point out that specific dimensions, or proportions are not being relied upon, and the examiner is merely relied on the fact that one section is longer

³ Although page 4 of the Answer seems to indicate that the Examiner rejects claim 13 based on a combination of Konishi, Prakash, and Turovskiy, based on our review of the Answer, it appears that this is a typographical error, and that claim 13 is rejected based on a combination of Konishi and Prakash.

than the other section [which is clearly disclosed in figures 13, 14 and 38].

Answer 12–13 (square brackets in original).

Appellants argue the rejection is in error because the Examiner erroneously relies on Konishi’s drawing to show the claimed relative lengths of the dipole antenna portions—viz. portions having different lengths from one another, such that one portion is longer than another portion. *See* Br. 5–7. Appellants point out that the Examiner does not find that Konishi describes the drawings as drawn to scale. *See id.* at 6. Appellants also argue that the Examiner does not find that Konishi describes that electrodes 208 and 209 are different lengths, or that antenna assembly 220 is an unbalanced dipole antenna. *See id.*

Thus, we must determine whether the Examiner properly relies upon Konishi’s figures which, although not described by Konishi as drawn to scale, appear to disclose dipole antenna portions of different lengths. For the reasons set forth below, we determine that the Examiner properly relies upon Konishi’s figures to show antenna portions of different lengths.

Drawings, like references in any other form, are “evaluat[ed] and appl[ied] . . . on the basis of what they reasonably disclose and suggest to one skilled in the art.” *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979) (quoting *In re Baum*, 374 F.2d 1004, 1009 (CCPA 1967)). Accordingly, “[d]escription for the purposes of anticipation can be by drawings alone as well as by words.” *In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972) (quoting *In re Bager*, 47 F.2d 951, 953 (CCPA 1931)).

This principle, though, is subject to the caveat that “patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the

issue.” *Hockerson-Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000); *see also Nystrom v. Trex Co.*, 424 F.3d 1136, 1149 (Fed. Cir. 2005); *In re Wright*, 569 F.2d 1124, 1127 (CCPA 1977) (“Absent any written description in the specification of quantitative values, arguments based on measurement of a drawing are of little value.”); *but cf. Cummins-Allison Corp. v. SBM Co.*, 484 Fed. App’x 499, 507 (Fed. Cir. 2012) (nonprecedential) (“As long as a person of skill in the art could derive the claimed dimensions from the patent’s disclosure, there is no additional requirement that the specification must explicitly disclose the precise proportions or particular sizes.”).

When applying these diverging concepts, precedent reveals that the propriety of relying upon a particular drawing depends upon the content of the drawing and the nature of the purported teaching at issue. Even if not drawn to scale, drawings may teach quantitative relationships between or among the depicted elements which do not depend upon their actual dimensions. For example, *Vas-Cath Inc. v. Mahurkar* and *In re Heinle*—both considering whether drawings could provide written-description support under 35 U.S.C. § 112, which is an issue analogous to that of determining the teachings of drawings for prior art purposes—demonstrate that drawings alone can teach ratios or relative sizes of the elements depicted. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1566 (Fed. Cir. 1991) (concerning claims requiring “a return lumen diameter substantially less than 1.0 but substantially greater than 0.5 times the diameter of the combined lumens”); *In re Heinle*, 342 F.2d 1001, 1007 (CCPA 1965) (concerning a claimed “circumferential width of each of said apertures being approximately one-fourth of the circumference of said core.”). Similarly,

Mraz, 455 F.2d at 1072, demonstrates that unscaled drawings can teach quantitative angular features, which—like ratios of measurements or relative lengths made from drawings—are unaffected by the actual sizes of the items shown.

As discussed above, the issue Appellants argue relates to whether Konishi’s figures teach the relative lengths of the antenna portions (i.e., whether the figures teach antenna portions having different lengths)—the type of information addressed in *Vas-Cath* and *Heinle*, and, also as discussed above, the type of information that is independent of the actual size or scale of drawings. Because even an unscaled drawing may teach a relationship between structures, we determine that the Examiner may rely on Konishi’s figures to teach antenna portions of different lengths.

Notwithstanding the above discussion, Appellants provide citations to portions of Konishi’s written disclosure which seemingly indicate that the electrodes may be the same length, thereby raising a question as to whether Konishi’s figures actually teach antenna portions of different lengths. *See* Br. 7 & nn. 1–5 (citing Konishi ¶¶ 78, 86, 88, 89, 94). The Examiner does not address, in the Answer, any of these portions of Konishi, or otherwise explain any apparent discrepancies between different length electrodes shown in Konishi’s figures and same length electrodes described in Konishi’s written disclosure. Nonetheless, we find that a different portion of Konishi describes that the electrodes may be different lengths, consistent with what is shown in Konishi’s figures. In particular, Konishi states that “the length of the first electrode is shortened,” which we interpret to refer to the length of first electrode 208 relative to second electrode 209. Konishi ¶ 20. We note that this is consistent with Konishi’s figures, which

consistently show first electrode 208 as shorter than second electrode 209. Regardless, even had Konishi not expressly described that “the length of the first electrode is shortened,” we determine that the portions of Konishi cited by Appellants are insufficient to convince us that Konishi is not referring to particular embodiments of the invention in which the electrodes are the same length, and, thus, we find that there is no discrepancy between Konishi’s figures showing different length electrodes and Konishi’s description of same length electrodes.

Thus, for the above reasons, we sustain the Examiner’s rejection of claim 1. Although Appellants separately argue against the propriety of the other obviousness rejections, Appellants arguments are substantially the same as the arguments discussed above for claim 1. Thus, we also sustain the rejections of claims 2–24.

DECISION

We AFFIRM the Examiner’s anticipation and obviousness rejections of claims 1–24.

We summarily SUSTAIN the Examiner’s double patenting rejection of claims 1–24.

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