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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WILLIAM E. NORDT III, IAN D. KOVACEVICH,
JASON HUNEYCUTT, and THOMAS J. PHILPOTT

Appeal 2015-001233¹
Application 13/241,865²
Technology Center 3700

Before MICHAEL W. KIM, MICHAEL C. ASTORINO, and
JAMES A. WORTH, *Administrative Patent Judges*.

WORTH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. §§ 134 and 6(b).

We AFFIRM-IN-PART.

¹ Our decision refers to the Appellants’ Appeal Brief (“Appeal Br.,” filed Apr. 10, 2014) and Reply Brief (“Reply Br.,” filed Oct. 27, 2014), and the Examiner’s Final Office Action (“Final Act.,” mailed Sept. 10, 2013) and Answer (“Ans.,” mailed Aug. 27, 2014).

² According to Appellants, the real party in interest is Nordt Development Co., LLC (Appeal Br. 3).

Introduction

Appellants' disclosure relates to various supports for the body and, with respect to certain embodiments, to potentiating supports for hinge joints of the body (Spec. ¶ 6). Certain supports are designed for the knee and certain for the elbow (*id.*).³

Claims 1, 9, and 14 are the independent claims on appeal. Claim 1, reproduced below, is representative of the subject matter on appeal:

1. A support for an area of a body that includes a hinge joint, comprising:
 - (a) a hinge mechanism comprising an injection molded strut component and injection molded first and second arm components;
 - (b) an elastically stretchable framework injection molded about the strut and arm components of the hinge mechanism, the framework being configured to extend across the hinge joint of the area of the body, and the framework defining a flexible, elastically stretchable web of elastomeric interconnecting members;
 - (c) wherein the first arm component is connected to the strut component such that the first arm component is rotatable relative to the strut component only about a first pivot axis;
 - (d) wherein the second arm component is connected to the strut component such that the second arm component is rotatable relative to the strut component only about a second pivot axis; and
 - (e) wherein the strut component is configured to extend with the framework across the hinge joint such that the first pivot axis is located on a first

³ Appellants state that this application is a continuation of No. 12/101,763, which was the subject of Appeal No. 2012-006703 (Appeal Br. 3). A decision in that appeal issued on July 31, 2014.

side of the hinge joint and the second pivot axis is located on a second, opposite side of the hinge joint.

(Appeal Br., Claims App.)

Rejection on Appeal

The Examiner maintains, and Appellants appeal, the following rejection:

Claims 1–20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gildersleeve (US 6,238,360 B1, iss. May 29, 2001).

ANALYSIS

Independent claim 1 and dependent claims 3–8

We are unpersuaded by Appellants’ argument that Gildersleeve fails to disclose “injection molded” material, as recited in independent claim 1, i.e., “(a) a hinge mechanism comprising an injection molded strut component and injection molded first and second arm components” and “(b) an elastically stretchable framework injection molded about the strut and arm components of the hinge mechanism” (Appeal Br. 10, 20). Appellants contend that the Examiner appears to ignore the “injection molded” recitation, and that “injection molded” is intended to convey a structural limitation which other terms of manufacture may convey, such as “welded” (Appeal Br. 10–11 (citing *In re Garnero*, 412 F.2d 276, 279 (CCPA 1979; MPEP 2113)).

For claims directed to products which are defined by a process of manufacture (i.e., “product-by-process” claims), the court has explained that a new process of manufacture does not necessarily mean that the product

itself is novel or non-obvious. *See Greenliant Systems, Inc. v. Xicor LLC*, 692 F.3d 1261, 1264–65 (Fed. Cir. 2012); *Amgen Inc. v. F. Hoffman-La Roche Ltd.*, 580 F.3d 1340, 1370 n.14 (Fed. Cir. 2009). Here, Appellants do not persuasively explain what structural limitation is imparted by this manufacturing practice. Accordingly, we agree with the Examiner that the recitation of “injection molded” is not limiting because it does not change the claimed product (*see* Ans. 5–6).

Appellants also argue that Gildersleeve fails to disclose a “framework defining a flexible, elastically stretchable web of elastomeric interconnecting members,” as recited in independent claim 1 (Appeal Br. 12–14). Appellants assert that Gildersleeve merely discloses that the material may be of “any desirable fabric” (Appeal Br. 13). The Examiner relies on sleeve 12 of Gildersleeve (Final Act. 3). Gildersleeve states sleeve 12 may be formed of fully or partially stretchable fabric, that it may include elastic members, and that it is stitched together (col. 3, ll. 27–33, col. 4, ll. 1–11, col. 4, ll. 34–36). As such, we agree with the Examiner that sleeve 12 of Gildersleeve is composed of a “flexible, elastically stretchable web of elastomeric interconnecting members,” as recited in independent claim 1 (*see* Ans. 5–6).

We, therefore, sustain the Examiner’s rejection under § 102(b) of independent claim 1. Appellants do not argue the patentability of claims 3–8 separately from that of independent claim 1, from which they each depend. We, therefore, sustain the Examiner’s rejection under § 102(b) of claims 3–8, for similar reasons as for independent claim 1.

Dependent claim 2

We are persuaded by Appellants’ argument that Gildersleeve fails to disclose a second hinge mechanism on the opposite side of the framework,

as recited in dependent claim 2, i.e., “the hinge mechanism is located along a first side edge of the framework, and wherein the support further comprises a second, identical hinge mechanism affixed to the framework and located along a second, opposite side edge of the framework” (Appeal Br. 14, 20). The Examiner reasons that Gildersleeve incorporates the hinge mechanism of Mason (US 4,697,583, iss. Oct. 6, 1987), and that Mason discloses a brace with two hinge joints on opposite sides of the brace (*see* Ans. 6). However, Gildersleeve’s incorporation by reference of Mason specifically refers to, and is therefore limited to, the bicentric hinge mechanism of Mason (*see* Gildersleeve, col. 5, ll. 36–39). Thus, Gildersleeve fails to incorporate the remainder of Mason, such as how Mason arranges the bicentric connectors in a brace. We, therefore, do not sustain the Examiner’s rejection under § 102(b) of dependent claim 2.

Independent claim 9 and dependent claims 10–13

Independent claims 9 contains similar language and requirements as dependent claim 2 (Appeal Br. 18). For the similar reasons as claim 2, we do not sustain the Examiner’s rejection under § 102(b) of independent claim 9. We also do not sustain the Examiner’s rejection under § 102(b) of claims 10–13, which depend therefrom.

Independent claim 14 and dependent claims 16–20

Appellants’ arguments with respect to independent claim 14 and dependent claims 16–20 are similar to those made with respect to independent claim 1, and we find them unpersuasive for similar reasons (Appeal Br. 18). We, therefore, sustain the Examiner’s rejection under

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§ 102(b) of independent claim 14 and claims 16–20, for similar reasons as for independent claim 1.

Dependent claim 15

Dependent claim 15 contains similar language and requirements as dependent claim 2 (Appeal Br. 19). We do not sustain the Examiner's rejection under § 102(b) of dependent claim 15, for similar reasons as for dependent claim 2.

DECISION

The Examiner's decision to reject claims 1, 3–8, 14, and 16–20 under § 102(b) is affirmed.

The Examiner's decision to reject claims 2, 9–13, and 15 under § 102(b) is reversed.

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-IN-PART