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EXAMINER	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte COREY MINION

Appeal 2015-002404
Application 12/040,145
Technology Center 3700

Before: LINDA E. HORNER, CHARLES N. GREENHUT, and BRENT M. DOUGAL, *Administrative Patent Judges*.

DOUGAL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134 from a final rejection of claims 1–9. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

CLAIMED SUBJECT MATTER

The claims are directed to an air spray glue gun. Claim 1, reproduced below, is the only independent claim.

> 1. A spray gun for spraying an adhesive material comprising:
> an adhesive pathway for receiving the adhesive material;
> a heating element for melting the adhesive material into an adhesive stream which flows within the adhesive pathway;
> an air pathway for an air stream; and
> a nozzle comprising an end of the adhesive pathway and an end of the air pathway, wherein the end of the air pathway runs in contact with the end of the adhesive pathway such that the adhesive pathway and the air pathway have a laminar configuration at the nozzle such that the air stream and adhesive stream exit the nozzle flowing substantially laminarly and adjacent to one another to interact pursuant to the Venturi effect.

REFERENCES

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

Steinel	US 4,642,158	Feb. 10, 1987
Kendall	US 2008/0073448 A1	Mar. 27, 2008

REJECTIONS

Claims 1–3, 6, and 7 are rejected under 35 U.S.C. § 102(b) as being anticipated by Steinel.

Claims 1–3 and 6–9 are rejected under 35 U.S.C. § 102(e) as being anticipated by Kendall.

Claim 4 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Kendall.

Claim 5 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Steinel.

OPINION

Preliminary Matters

The drawings are objected to for not depicting features of claim 4. Final Act. 3. We do not address the merits of the objection because the Examiner's objection is a petitionable matter–not an appealable matter. 37 C.F.R. §§ 1.113(a), 1.181; *see also* MPEP § 2163.06(II) and MPEP § 706.01 ("[T]he Board will not hear or decide issues pertaining to objections and formal matters which are not properly before the Board.").

Steinel

Appellant argues that claim 1 is not anticipated because Steinel does not teach:

> the end of the air pathway runs in contact with the end of the adhesive pathway such that the adhesive pathway and the air pathway have a laminar configuration at the nozzle such that the air stream and adhesive stream exit the nozzle flowing substantially laminarly and adjacent to one another to interact pursuant to the Venturi effect.

Appeal Br. 7. Rather, "[t]he glue dispenser 7 of Steinel is spaced apart substantially from the end of the sleeve 18 that encompasses the hot air blower 14. The air and adhesive pathways do not run in contact and there is no laminar and adjacent flow from the gun as claimed." *Id.* at 7.

The Examiner provides two lines of reasoning for how these features are taught by Steinel. Answer 2. First, the Examiner states that "the term 'air pathway' and 'adhesive pathway' are being considered to mean the pathway that the air or adhesive travel on, not the tube or structure that surrounds the air or adhesive pathway." *Id.* at 3. This interpretation is inconsistent with the language of the claim that defines the respective ends

to be part of the nozzle ("a nozzle comprising an end of the adhesive pathway and an end of the air pathway").

Second, the Examiner states that as the claimed ends are not fully defined, the nozzles 7[1] and 18 of Steinel are in contact with each other which is all that is required to teach the claimed features. *Id.* This interpretation is also inconsistent with the claim language. Claim 1 requires "a nozzle comprising an end of the adhesive pathway and an end of the air pathway, wherein the end of the air pathway runs in contact with the end of the adhesive pathway." It is not sufficient for the structure of the two nozzles to contact each other; rather the claim requires the *ends of the adhesive pathway and the air pathway* to "run[] in contact."

For these reasons we do not sustain the anticipation rejection of claim 1 under Steinel. For this same reason, we do not sustain the rejections based on Steinel of claims 2, 3, and 5–7, which depend from claim 1.

Kendall

Appellant argues that claim 1 is not anticipated because "Kendall operates to produce essentially the opposite effect from the claimed invention" and thus, "Kendall teaches away from the claimed invention." Appeal Br. 8–9.

But, as noted by the Examiner, under an anticipation rejection, "it doesn't matter how different the prior art functions from the present invention, what matters is how the prior art is *structurally* different from the *claimed* invention." Answer 5. *See Celeritas Techs., Ltd. v. Rockwell Int'l*

[1] The Answer refers to reference number 18 for both the air pathway and the adhesive pathway of Steinel, which appears to be a typographical error.

Corp., 150 F.3d 1354, 1361 (Fed. Cir. 1998) ("teaching away" is legally irrelevant to the question of anticipation).

The Examiner found that "[s]ince Kendall discloses all structural limitations of the claimed invention, it is fully capable of performing the intend[ed] use of 'the air stream and adhesive stream exit the nozzle to interact pursuant to the Venturi effect.'" Answer 5. The Examiner further concludes: "the flow in the adhesive pathway and the air pathway are fully capable of flowing laminarly depending on the velocity of and the amount of material and/or air. While in its use, Kendall is fully capable of providing laminar flow that causes a Venturi effect just as the claim requires." *Id.* at 6.

Appellant disagrees and argues that "reliance of the Venturi effect" is a structural, as well as, functional difference. Reply Br. 2. It is argued that this is because "use of the Venturi effect to draw out the glue bead into a strand stems from the configuration of the air and adhesive pathways being directly in contact and adjacent to each other at the end of the gun." *Id.* Appellant argues that Kendall does not teach "the end of the air pathway runs in contact with the end of the adhesive pathway" and thus "there is no laminar flow and no operation of the Venturi effect as claimed." Appeal Br. 9. Appellant explains that this is because "the gas port 3 [of Kendall] extends out of contact from the nozzle 1." *Id.*

Though Kendall does teach that the gas port is in front of the adhesive pathway (by as little as 5 mm (Kendall ¶ 49)), it is not clear why this would prevent the claimed laminar flow. Rather Kendall appears to be consistent with the teachings of Appellant's Specification as shown by claim 6 which states that "the air pathway exits the nozzle at a location substantially adjacent to and with an offset *upstream* from where the adhesive pathway

exits the nozzle." *See also* Specification 7:28–29, Fig. 3. Appellant does not explain why the slightly upstream air pathway exit of Kendall is not capable of providing laminar flow while the similar design described in the Specification is able to.

For these reasons we are not informed of error in the rejection of claim 1 under Kendall. Claims 2 and 6–9, which depend from claim 1 and are not separately argued, fall with claim 1 for the same reasons. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claims 3 and 4

Apparatus claim 3 depends from claim 1 and adds "wherein the spray gun has a power rating, and an angle of attack of the air stream against the adhesive stream exiting the nozzle is set based on the power rating of the spray gun." Apparatus claim 4 depends from claim 3 and adds "wherein the spray gun has a power rating of at least eighty watts and the air stream and the adhesive stream exit the nozzle parallel to one another."

In rejecting claim 3, the Examiner found that it is inherent that "the spray gun [of Kendall] has a power rating" and found that the angle of attack of the air stream "is set to 0 degrees in fig 1." Final Act. 6.

In rejecting claim 4, the Examiner found that Kendall teaches the claimed parallel exits and that a power rating of 80 watts is obvious "in order to adequately heat the glue in the glue gun." *Id.* at 7–8.

Appellant argues that Kendall does not "relate[] the angle of the air stream to the power rating of the gun in any manner." Appeal Br. 10. It is further argued:

> claims 3–5 do not recite the mere presence of an angle of attack and power rating, but further recite a specific configuration that relates the angle of attack to the power rating. Accordingly, even if it is assumed that the devices in the references inherently have "an" angle of attack and "a" power rating in the general sense, it is not inherent or otherwise disclosed that the angle of attack is set based on the power rating as claimed.

Appeal Br. 10–11.

Appellant appears to be arguing that claims 3–5 are product-by-process claims and that it is not enough for the Examiner to find the claimed structural features in the prior art; rather, the Examiner also needs to find a method-like teaching of determining the angle of attack based on the power rating. But this is incorrect.

> [E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself.
>
> The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.

In re Thorpe, 777 F.2d 695, 697 (Fed. Cir. 1985) (citations omitted).

For this reason we are not informed of error in the rejection of claims 3 and 4 over Kendall.

DECISION

The Examiner's rejections of claims 1–3 and 5–7 over Steinel are reversed.

The Examiner's rejections of claims 1–4 and 6–9 over Kendall are 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-IN-PART