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docket@beckthomas.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AUGUSTO RODOLFO QUINONES

Appeal 2016-006235
Application 13/071,864¹
Technology Center 1700

Before TERRY J. OWENS, WESLEY B. DERRICK, and
CHRISTOPHER C. KENNEDY, *Administrative Patent Judges*.

DERRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134 from the Examiner's maintained rejection of claims 40–44, 46, and 47.² An oral hearing was held on February 15, 2018. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM-IN-PART.

¹ Appellant identifies the real parties in interest as Augusto Rodolfo Quinones, Integrated & Proven Catalyst Technologies Corporation, and Quanta Technologies, LLC. Appeal Br. 1.

² While Appellant does not identify claim 46 as appealed, “[a]n appeal, when taken, is presumed to be taken from the rejection of all claims under rejection unless cancelled by an amendment filed by the applicant and entered by the Office.” 37 C.F.R. § 41.31(c).

CLAIMED SUBJECT MATTER

The subject matter of the claims on appeal relates to composite catalyst composition having particle sizes of components adjusted to improve the catalyst functionality for specific reactions. Specification filed March 25, 2011 (“Spec.”), Abstract.

Independent claims 40 and 42 are representative.

40. A composite catalyst for use in fluid catalytic cracking having a particular size distribution formed by blending at least two components with different compositions and different particle size distributions.

42. A composite catalyst composition fluid catalytic that is dependent on a particle size wherein no more than 5% of particles in the composite are larger than 110 microns and no more than 5% of particles in the composite are smaller than 20 microns.

Appeal Brief filed November 23, 2015 (“Appeal Br.”), 8.

THE REJECTIONS

Claim 46 stands rejected under 35 U.S.C. § 112, second paragraph for indefiniteness.

Claims 40, 41, 43, 44, and 46 stand rejected under 35 U.S.C. § 102(e) as anticipated by Habib.³

Claim 42 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Habib.

Claims 40 and 47 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Macedo.⁴

³ Habib, Jr. et al., US 2011/0224068 A1, published September 15, 2011.

⁴ Macedo, US 2002/0036157 A1, published March 28, 2002.

DISCUSSION⁵

We have reviewed the maintained grounds of rejection set forth by the Examiner, Appellant's arguments and proffered evidence, and the Examiner's response. On this record, we summarily affirm the indefiniteness rejection of claim 46, reverse the anticipation rejection of claims 40, 41, 43, 44, and 46, reverse the obviousness rejection of claim 42 over Habib, and summarily affirm the obviousness rejection of claims 40 and 47 over Macedo.

We add the following.

Indefiniteness

The Examiner finds claim 46 is indefinite because there is insufficient antecedent basis for “the composite catalyst of claim 45” because there is no pending claim 45. Final Act. 2; Ans. 2; Amendment dated March 20, 2015, 5 (canceling claim 45).

Appellant does not contest the rejection. *See generally* Appeal Br.

In the absence of any argument, we are unpersuaded of reversible error and, therefore, we summarily affirm the indefiniteness rejection of claim 46.

Anticipation

The Examiner finds claims 40, 41, 43, 44, and 46 are anticipated by Habib. Examiner finds Habib teaches “a preferable particle size distribution” and finds Habib's Example 3 discloses a “composition . . .

⁵ In this discussion, we refer to the Specification, the Amendment dated March 20, 2015 (“Amendment”), the Final Office Action dated May 7, 2015 (Final Act.”), the Appeal Brief, the Examiner's Answer dated April 5, 2016 (“Ans.”), and the Reply Brief filed June 5, 2016 (“Reply Br.”).

formed by blending of two or more components with different compositions and different particle[] size distributions.” Ans. 2–3 (citing ¶¶ 96, 136–142 (Example 3)). The Examiner determines that the steps of blending the two components together are product-by-process limitations that do not limit the product “to the manipulations of the recited steps, [but] only [to] the structure implied by the steps.” Final Act. 3; Ans. 3, 6. The Examiner relies on proffered reasoning that “[t]he percent of the components that pass through screens [in Example 3] does not necessarily lead to and is unlikely to result in identical particle size distributions in this range [between 44 and 125 microns].” Ans. 6.

Appellant argues, *inter alia*, that Habib ¶ 96 is silent as to “components with different particle size” (Appeal Br. 2–3) and that “Example 3 uses different components but those components have the same particle sizes between 44 and 125 [microns]” (*id.* at 5). Appellant correctly notes that while “claim 40 is a product by process claim, it requires that the product at the end of the process have [sic, has] two blended components with two different size distributions.” Reply Br. 2.⁶

On this record, the Examiner has failed to establish a sufficient factual basis for Habib disclosing a mixture of components where the components have differing particle size distributions. The reasoning that the screening process in Habib’s Example 3 “does not necessarily lead to and is unlikely to result in identical particle size distributions” (Ans. 6), absent more, is insufficient to support a *prima facie* case of anticipation of independent claim 40. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967) (“The

⁶ The Reply Brief lacks page numbering; we refer to the pages by number sequentially from the first page.

Patent Office has the initial duty of supplying the factual basis for its rejection. It may not . . . resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in its factual basis.”); *In re Sporck*, 301 F.2d 686, 690 (CCPA 1962); *see also In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) (“[T]he examiner bears the initial burden . . . of presenting a *prima facie* case of unpatentability.”).

Accordingly, we reverse the Examiner’s finding of anticipation of claims 40, 41, 43, 44, and 46 by Habib.

Obviousness over Habib

As in the anticipation rejection, the Examiner relies on Habib for the notion that it teaches a preferred particle size. Ans. 4 (citing Habib ¶ 96). The Examiner further reasons that “the hydrocarbon process is [thus] considered dependent on this particle size.” *Id.* The Examiner also relies on Habib as disclosing preferred particle sizes of “20–150 microns” or that “obtained within mesh screens from 44–125 microns” and finds “[t]hese values lie inside/overlap with Applicants [sic] claimed particle sizes.” *Id.* (citing Habib ¶ 93, Example 3). The Examiner concludes there is a *prima facie* case grounded on the overlap. *Id.*

Appellant relies on the inventor’s § 1.131 declaration dated March 12, 2015 (“Decl.”) to establish prior invention. Appeal Br. 5–7; Reply Br. 2–3. The declaration identifies the material from which particles were removed to meet the claim limitations as to particle size to be a “composite catalyst composition for use in fluid catalytic cracking” (Decl. 2), and is relied on as “show[ing] unequivocally possession of a composite catalyst wherein no more than 5% of the particles are larger than 110 and no more than 5% of the particles are less than 20 [microns]” (Appeal Br. 6); *see also* Reply Br.

2–3. Counsel for Appellant similarly contended during the oral hearing that the material discussed in the declaration was, and was identified in the declaration as, a catalyst according to claim 42.

In light of the declarant’s testimony, the proffered corroborating evidence, and the unambiguous averments of record, the Examiner erred reversibly in finding the evidence insufficient to establish prior invention. While vague and general statements are insufficient, the Examiner fails to establish how the declaration stating the material is “a composite catalyst composition for use in fluid catalytic cracking” (Decl. 2) fails to “set forth a composite catalyst composition” (Ans. 7).

Accordingly, we reverse the rejection of claim 42 for obviousness over Habib.

Obviousness over Macedo

The Examiner rejections claims 40 and 47 as unpatentable for obviousness over Macedo. Ans. 5; Final Act. 6–7. The Examiner relies on Macedo’s disclosure of a composition catalyst composition for use in a fluid catalytic cracking process, which catalyst composition is formed by mixing an alumina and zeolite. Final Act. 6–7 (citing Macedo ¶¶ 2, 6, 26–27).

Appellant fails to contest the rejection in the Appeal Brief (*see generally* Appeal Br.), only raising an argument against the rejection for the first time in the Reply Brief (Reply Br. 3–4).

We, accordingly, deem the arguments waived as there is no good reason offered why they could not have been raised earlier in the Appeal Brief. 37 C.F.R. § 41.41(b)(2); *cf. McBride v. Merrell Dow and Pharms., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (internal citations omitted) (“Considering an argument advanced for the first time in a reply brief . . . is

not only unfair to an appellee but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered.”).

Accordingly, in the absence of any argument properly before us, we are unpersuaded of reversible error in the Examiner’s rejection of claims 40 and 47 for obviousness over Macedo.

DECISION

The Examiner’s rejection under 35 U.S.C. § 112 of claim 46 is AFFIRMED.

The Examiner’s rejections under 35 U.S.C. § 102(e) of claims 40, 41, 43, 44, and 46 and of claim 42 under 35 U.S.C. § 103(a) over Habib are REVERSED.

The Examiner’s rejection under 35 U.S.C. § 103(a) of claims 40 and 47 under 35 U.S.C. § 103(a) over Macedo 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)(1)(iv).

AFFIRMED-IN-PART