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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RODERICK A. HYDE, JORDIN T. KARE,
DENNIS J. RIVET, and LOWELL L. JR. WOOD

Appeal 2017-007239
Application 13/721,474
Technology Center 3700

Before JOHN C. KERINS, WILLIAM A. CAPP, and
ARTHUR M. PESLAK, *Administrative Patent Judges*.

PESLAK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 4, 5, 7, 9, 10, 20, 21, 23, 24, 40, 110–113, and 119–127.[1] We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] Elwha LLC is the applicant and identified as the real party in interest. Appeal Br. 5.

THE CLAIMED SUBJECT MATTER

Claim 1, reproduced below with italics added, is illustrative of the claimed subject matter.

1. An active torso support, comprising:

at least one force applying element adapted to apply force to a portion of a torso of a subject, the at least one force applying element including a torso contacting portion and a controllable force-generating component for applying force to the portion of the torso by moving the torso- contacting portion relative to a surface of the portion of the torso, the at least one force applying element adapted to apply force sufficient to provide support to muscles in the torso to prevent or minimize discomfort or injury to muscles or other structures in the torso due to loading, the at least one force applying element including at least one mechanical linkage, expandable element, inflatable element, pneumatic element, or hydraulic element;

at least one positioning element adapted to position the at least one force applying element with respect to the torso of the subject; and

control circuitry including:

electrical circuitry configured to receive a height signal indicative of a height of a portion of the active torso support from a height sensor;

a memory adapted to store a time history of the height signal indicative of the height of the portion of the active torso support;

posture determination circuitry configured to generate a signal indicative of a posture of the subject based at least in part on the time history of the height of the portion of the active torso support; and

actuation circuitry configured to control actuation of the at least one force applying element responsive to the signal indicative of the posture of the subject.

REJECTION

Claims 1, 4, 5, 7, 9, 10, 20, 21, 23, 24, 40, 110–113, and 119–127 are rejected under 35 U.S.C. §102(e) as anticipated by Chang (US 8,928,484 B2, issued Jan. 6, 2015) or alternatively under 35 U.S.C. §103(a) as unpatentable over Chang and Kline (US 5,749,838, issued May 12, 1998).

DISCUSSION

In the rejection of independent claim 1, the Examiner finds that Chang discloses "electrical circuitry configured to receive a height signal indicative of a height of a portion of the active torso support from a height sensor" because Chang's "accelerometer 405 is connected to microprocessor 403 via wires, i.e. electrical circuitry is *capable of* receiving a height signal of a portion of . . . the positioning element from accelerometer 405." Final Act. 19 (citing Chang, 2:41–62, 4:54–67, 5:1–62, 12:1–67, 13:1–58) (emphasis added). The Examiner further finds that "there is not any further structure required by the limitation nor is there any additional structure preventing the circuitry of the sensor device 301[of Chang] from doing so." *Id.* Independent Claim 121 contains a substantially similar limitation and the Examiner relies on the same findings from Chang in the rejection of claim 121. Appeal Br. 79 (Claims App); Final Act. 13.

Appellants contend that "Chang makes no reference whatsoever to height in the Examiner-cited paragraphs or elsewhere." Appeal Br. 44. Appellants argue that "the electrical circuitry of Chang receives 'data from the tri-axial accelerometer about **movement** of the user,' and specifically 'acceleration' along the 'horizontal (x-), vertical (y-), and transverse (z)-axes,' which are used to 'determine a postural description of the user.'" *Id.*

at 43–44. Appellants further argue that the "presence of an accelerometer is not sufficient to anticipate sensing of height or history information." *Id.* at 44. The Examiner responds that "the Appellant has not provided any evidence that the prior art device of Chang is incapable of being configured to receive a height signal . . . as by the Appellant's own disclosure the mechanism by which height is determined is an accelerometer." Ans. 7.

The claims require that electrical circuitry be "configured to" receive a height signal. "Configured to" is normally construed more narrowly than "capable of" and, generally, is equivalent to "made to" or "designed to." *See e.g. In re Giannelli*, 739, F.3d 1375, 1379 (Fed. Cir. 2014); *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1349 (Fed. Cir. 2012). Although we appreciate the Examiner's reference to the use in Appellants' Specification of an accelerometer to determine height, the Examiner has not directed us to any disclosure that Chang's accelerometer is configured to determine height nor do we discern any such disclosure in Chang. The mere fact that Chang's accelerometer may be capable of generating a height signal is not sufficient to satisfy the limitation in claims 1 and 121 of electrical circuitry *configured to* receive a height signal. Therefore, we do not sustain the rejection of independent claims 1 and 121 as anticipated by Chang. Claims 4, 5, 7, 9, 10, 20, 21, 23, 24, 40, 110–113, 119, 120, and 122–127 depend from claim 1 or claim 121. We likewise do not sustain the rejection of the dependent claims for the same reasons.

In the alternative rejection under 35 U.S.C. § 103(a), the Examiner does not rely on Kline to cure the deficiencies in the disclosure of Chang discussed above. Final Act. 5, 14–15. Consequently, we do not sustain the

Examiner's alternative rejection of claims 1, 4, 5, 7, 9, 10, 20, 21, 23, 24, 40, 110–113, and 119–127 under 35 U.S.C. § 103(a).

DECISION

The Examiner's decision rejecting claims 1, 4, 5, 7, 9, 10, 20, 21, 23, 24, 40, 110–113, and 119–127 is reversed.

REVERSED