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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KURT HAFEKEN SR. and
JEFFREY WOODSON

Appeal 2017-011491
Application 13/603,119
Technology Center 3700

Before MICHAEL C. ASTORINO, CYNTHIA L. MURPHY, and
SCOTT C. MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 4–8, 11–18, and 20, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6.

We affirm.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Century, LLC. Appeal Br. 1.

Claimed Subject Matter

The claims are directed to a training bag to be used, for example, in martial arts training. Spec. 2. Claim 1, reproduced below, is the only independent claim on appeal.

1. A training bag comprising:

a bag, where the bag has an elongated shape with a first end and a second end and where the bag comprises a foam cylinder at least partially surrounded by a vinyl cover; and

a base with a top and a bottom, where the bag removably attaches to the top of the base at the second end of the bag, where the base rests on a floor when in use, and where the base has a dynamic geometry and is filled with material that allows the base to deform when the bag is struck, such that the base changes geometry and remains in contact with the floor when the training bag is struck and the allows the bag to rebound to a vertical position.

References and Rejections

The Examiner relies on the following references in rejecting the claims on appeal:

Kuo	US 6,106,443	Aug. 22, 2000
Carlin	US 6,790,167 B1	Sept. 14, 2004
Tsakiris	US 8,376,916 B2	Feb. 19, 2013
Hartigan	US 8,814,729 B2	Aug. 26, 2014

Claims 1, 4–8, 11, 13–18, and 20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hartigan, Carlin, and Tsakiris. Ans. 2. Claim 12 stands rejected under 35 U.S.C. § 103 as being unpatentable over Hartigan, Carlin, Tsakiris, and Kuo. *Id.*

ANALYSIS

Appellant's arguments are directed solely to independent claim 1, and Appellant does not raise any separate substantive arguments concerning any of dependent claims 4–8, 11–18, or 20. *See* Appeal Br. 14–15; Ans. 2. Accordingly, claims 4–8, 11–18, and 20 stand or fall with claim 1. 37 C.F.R. 41.37(c)(1)(iv).

The Examiner finds that Hartigan teaches all limitations of claim 1 except for foam padding that is cylindrical in shape surrounded by a vinyl cover. Ans. 3–4. The Examiner relies on Tsakiris to supply the recited foam cylinder, determining that it “would have been obvious to one of ordinary skill in the art to extend the foam padding of Hartigan around the bag, resulting in a cylindrical shape, as taught by Tsakiris to make the bag more flexible to use.” *Id.* at 4. The Examiner relies on Carlin to disclose the recited vinyl cover, determining that it “would have been obvious to one of ordinary skill in the art at the time of the invention to modify the device of Hartigan to include the vinyl cover taught by Carlin to add durability and soften the striking surface.” *Id.*

Appellant raises numerous arguments in response. We have reviewed these arguments in detail and find them all to be unpersuasive. Appellant's primary arguments are addressed below.

First, Appellant argues that the ballast of Hartigan does not provide a “righting function” because it

does not teach that the base has a dynamic geometry that changes when the bag is struck, keeping the bag in contact with the floor and allowing the bag to rebound to a vertical position. Rather, the dummy of Hartigan is specifically designed to disengage from the base upon being struck.

Appeal Br. 8. This argument is not persuasive.

As Appellant acknowledges, Hartigan teaches a dummy mounted on “a sled made from a flexible material and inflated with air, and provides an option of including a chamber in the sled that is filled with a ballast.” *Id.* The Examiner explains that the disclosed ballast would function to keep Hartigan’s base (i.e., sled) in contact with the floor. Ans. 6–7. It is apparent that Hartigan’s inflatable, flexible base, when used with ballast, would be filled with a material (i.e., air) that would “allow[] the base to deform when the bag is struck, such that the base changes geometry and remains in contact with the floor when the training bag is struck and the allows the bag to rebound to a vertical position,” as recited in claim 1. In this regard, we note that the language of claim 1 is broad, and does not require a base that would deform and return the bag to a vertical position in response to *all* types of impacts. As the Examiner observes, claim 1 could encompass a base that deforms and then returns the bag to a vertical position in response to a “light strike,” even if a harder blow might cause the bag to detach from the base. *See id.* at 7.

We also agree with the Examiner’s determination that Hartigan’s flexible, air-filled base has a “dynamic geometry” because it changes shape in response to an application of force or a change in the inflation pressure. *See id.* at 5–6. Appellant does not offer any persuasive explanation to the contrary. *See* Appeal Br. 8–9.

In addition, Appellant’s argument that Hartigan’s device could tear in certain circumstances (*see id.* at 9) is not persuasive. Claim 1 does not require a tear-proof device. Moreover, one skilled in the art would have

understood that Hartigan's dummy, which is designed to be tackled repeatedly, could be made of a tear-resistant material.

We also are not persuaded that the Examiner erred in the evaluation of the cited portions of the testimony in the first declaration Tibor Siklosi. *See* June 15, 2015 Declaration Supporting Amendment (the "First Declaration" or "First Decl."); Ans. 14–18.

Mr. Siklosi testifies in paragraphs 4 and 14 of his First Declaration that Hartigan's ballast would not provide a righting function. But claim 1 does not require ballast that "provides a righting function," and this testimony does not adequately address the Examiner's determination that Hartigan's *flexible, air-filled base* would deform, and then return to its original orientation, returning the dummy to an upright position after the dummy was struck. Mr. Siklosi also does not adequately explain his opinion that the addition of ballast would prevent the flexible, air-filled base from deforming and then rebounding. *See* First Decl. ¶¶ 4, 14.

In paragraph 6 of the First Declaration, Mr. Siklosi testifies that the "fundamental basis" of Hartigan's system "is a forceful separation of a temporarily joined device by way of two people carrying diametrical forces." But Mr. Siklosi does not identify any limitation in claim 1 that would exclude a system of the type disclosed in Hartigan.

In paragraph 7 of the First Declaration, Mr. Siklosi does not identify any claim limitation that requires a dummy "conducive for boxing training." In paragraphs 8 and 9 of the First Declaration, Mr. Siklosi similarly fails to identify any limitation of claim 1 that would exclude a dummy that is releasably attached to a base via Velcro, and also does not explain why Hartigan's dummy would not rebound to a vertical position subjected to an

impact insufficient to detach the dummy from its base. Paragraphs 10 and 11 of the First Declaration do not adequately explain why ballast would have prevented Hartigan's base from deforming.

Next, Appellant argues that one of ordinary skill in the art would not have had reason to extend the foam padding of Tsakiris around the dummy of Hartigan in a cylindrical shape, in the manner proposed by the Examiner. According to Appellant, if Hartigan's device were padded by external foam or filled with internal foam, it would no longer function. Appeal Br. 10–11. This argument is not persuasive.

As the Examiner points out, Hartigan teaches that the dummy may be cylindrical, and also may include external foam pads. *See* Ans. 11 (citing Hartigan, 8:4–6, 9:57). The Examiner determines that it would have been obvious to “modify the device of Hartigan to include the foam about the entire circumference of the device to give a desired hardness to the surface of the device (as taught by Hartigan, Col. 8, Lines 12–23).” *Id.* at 11–12.

Appellant does not offer any persuasive explanation to support its contention that extending Hartigan's foam pads around the entire circumference of the device would prevent that device from functioning. *See* Appeal Br. 10–11. For example, the cited paragraph of the First Declaration does not adequately explain why such a device would no longer function. *See* First Decl. ¶ 13. Appellant's related argument that Hartigan's device would not function if filled with internal foam is not persuasive because the Examiner has not suggested that it would have been obvious to modify Hartigan's dummy in this manner. *See* Ans. 13.

Appellant's *third* primary argument is that one of ordinary skill would not have had sufficient reason “to combine any of the prior art references.”

Appeal Br. 11. According to Appellant, Hartigan and the other cited prior art references “addres[s] wholly different issues and [are] incapable of achieving the goals of the subject invention.” *Id.* This testimony, and corresponding paragraph 5 of the First Declaration, are conclusory and do not persuade us of error in the Examiner’s rejection. Neither Appellant, nor Mr. Siklosi, adequately explain why the cited references allegedly “are incapable of achieving the goals of the subject invention.” *See id.*; Siklosi Decl. ¶ 5. In any event, the rationale for combining prior art references can be something other than the goals of the claimed invention.

Finally, Appellant argues that the Examiner has not given sufficient weight to the evidence of commercial success set forth in a later declaration of Tibor Siklosi. *See* Feb. 2, 2016, Second Declaration Supporting Amendment (the “Second Declaration” or “Second Decl.”). On this record, we are not persuaded that the Examiner so erred.

For example, Mr. Siklosi testifies in paragraph 4 of his Second Declaration that Century LLC’s VSI product (part of the Versys line of products) embodied the claimed invention. But Mr. Siklosi does not include any diagrams or descriptions of the Versys product, much less compare this product to the limitations recited in the claims. Thus, we are not persuaded that the Examiner erred in determining that Appellant “has provided no evidence of a nexus” between any alleged commercial success “and the subject matter as claimed.” Ans. 19.

Mr. Siklosi testifies in paragraph 5 of the Second Declaration that the VSI product constitutes 70% of the Versys product line, and provides Versys sales figures for 2013, 2014, and 2015. Mr. Siklosi then testifies that sales of Versys products were increasing while sales of two other product lines

were decreasing during the same period. *See* Second Decl. ¶¶ 7–8. But the cited evidence does not demonstrate a difference of sales trends attributable to the claimed invention. For example, Mr. Siklosi does not testify when during 2013 the VSI product was introduced. *See id.* at ¶ 5. Thus, it is not possible to determine any trend by comparing Mr. Siklosi’s 2013 sales figure (which likely represent a partial year) to the sales of other product lines during 2013, or to sales of the Versys product line during 2014 and 2015. During 2014 and 2015 (the only years for which Mr. Siklosi provides full-year sales figures for all products), sales of the three product lines described in the Second Declaration were all relatively flat. Though sales of the Versys line increased slightly, this may well have been because the per-unit price decreased from an average of \$83.04 per unit during 2014, to \$80.01 per unit during 2015.² In contrast, the per-unit prices of the other two product lines increased between 2014 and 2015.³ In other words, it appears that Century LLC was discounting the Versys product line while raising the prices of the other two product lines. The Second Declaration does not demonstrate any definite sales trends, much less establish an upward trend in Versys sales that was attributable to the claimed invention. For at least these reasons, we are not persuaded that the Examiner erred in determining that Appellant has failed to present adequate evidence “of the sales of this device relative to the market” as necessary to demonstrate commercial success. Ans. 18.

² These figures were calculated by dividing the sales in dollars set forth in paragraph 5 of the Second Declaration by the corresponding sales in units.

³ The average price of the Wavemaster line increased from \$39.22 per unit during 2014 to \$44.53 during 2015, and the average price of the Bob line increased from \$174.35 per unit during 2014 to \$178.46 during 2015.

Mr. Siklosi also testifies that the VSI product also has received praise on websites such as Amazon.com. *See* Second Decl. ¶¶ 12–13. We agree, however, with the Examiner’s observation that this evidence of consumer praise is anecdotal in nature. *See* Ans. 20. For example, the Second Declaration does not demonstrate that any significant portion of customers found the claimed features to be important. Thus, we also are not persuaded that the Examiner erred in the evaluation of this evidence of consumer praise.

For the foregoing reasons, we are not persuaded that the Examiner erred, and we affirm the decision rejecting claims 1, 4–8, 11–18, and 20.

DECISION

In summary:

Claims Rejected	Basis	Affirmed	Reversed
1, 4–8, 11, 13–18, 20	§ 103, Hartigan, Carlin, Tsakiris	1, 4–8, 11, 13–18, 20	
12	§ 103, Hartigan, Carlin, Tsakiris, and Kuo	12	
Overall Outcome		1, 4–8, 11–18, 20	

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