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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte EDWARD S. BOYDEN, DANIEL B. COOK,
RODERICK A. HYDE, ERIC C. LEUTHARDT,
NATHAN P. MYHRVOLD, ELIZABETH A. SWEENEY, and
LOWELL L. WOOD JR.

Appeal 2018-001825
Application 14/193,019
Technology Center 2100

Before JAMES B. ARPIN, JOSEPH P. LENTIVECH, and
DAVID J. CUTITTA II, *Administrative Patent Judges*.

LENTIVECH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 5–13, 15, 21–26, 30–37, and 45–50. Claims 2–4, 14, 16–20, 27–29, and 38–44 have been canceled. *See* App. Br. 18–24 (Claims Appendix). We have jurisdiction over the pending claims under 35 U.S.C. § 6(b).

We affirm.

¹ We use the word “Appellant” to refer to “Applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party-in-interest as Gearbox, LLC. App. Br. 3.

STATEMENT OF THE CASE

Appellant's Invention

Appellant's devices and systems generally relate to "making, administering, or utilizing one or more frozen particle compositions for various purposes." Spec. 25. Claim 1, which is illustrative, reads as follows:

1. A device, comprising:

at least one propulsion means operably linked to at least one delivery means and configured for administration of at least one frozen particle therapeutic composition to a biological tissue;

at least one ultrasonic image detector;

at least one microprocessor in electronic communication with at least one of the at least one propulsion means, the at least one delivery means, or the at least one ultrasonic image detector, and configured to provide real-time feedback of at least one characteristic of the administration of the at least one frozen particle therapeutic composition to the biological tissue, and instruct adjustment to at least one of the propulsion or delivery means based on the real-time feedback.

App. Br. 18 (Claims Appendix).

Rejections

Claims 1, 5, 7–10, 21, 23, 26, 31–34, 45, and 47 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of LePivert et al. (US 2008/0208052 A1; published Aug. 28, 2008) ("LePivert"), Churchill et al. (US 4,745,160; issued May 17, 1988) ("Churchill"), Ni et al. (US 2003/0049732 A1; published Mar. 13, 2003) ("Ni"), Knight et al. (US 2004/0120952 A1; published June 24, 2004) ("Knight"), Barnett et al. (US 2011/0104052 A1; published May 5, 2011) ("Barnett"), and Belson et al.

(US 2012/0167878 A1; published July 5, 2012) (“Belson”). Final Act. 2–13.

Claims 6 and 30 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of LePivert, Churchill, Ni, Knight, Barnett, Belson, and Lockard et al. (US 2010/0121307 A1; published May 13, 2010) (“Lockard”). Final Act. 13–14.

Claims 11–13, 15, 24, 25, 35–37, 48, and 49 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of LePivert, Churchill, Ni, Knight, Barnett, Belson, and Williams et al. (US 2010/0183721 A1; published July 22, 2010) (“Williams”). Final Act. 14–20.

Claims 22 and 46 stand rejected under 35 U.S.C. § 103 as being unpatentable over the combination of LePivert, Churchill, Ni, Knight, Barnett, Belson, and Straw et al. (US 2012/0103945 A1; published May 3, 2012) (“Straw”). Final Act. 20–22.

Claim 50 stands rejected under 35 U.S.C. § 103 as being unpatentable over the combination of LePivert, Churchill, Ni, Knight, Barnett, Belson, and Ismagilov et al. (US 2011/0112503 A1; published May 12, 2011) (“Ismagilov”). Final Act. 22–24.

Claims 1 and 26 stand rejected on the ground of obviousness-type double patenting as being unpatentable over claims 17 and 41 of Boyden et al. (US 8,849,441 B2; issued Sept. 30, 2014) (“Boyden”) in view of LePivert. Final Act. 24–25.

ANALYSIS

§ 103 Rejections

Appellant contends the combination of LePivert, Churchill, Ni, Knight, Barnett, and Belson fails to teach or suggest the limitations recited in claim 1. App. Br. 13–14. Appellant contends “the Examiner failed to identify explicitly or in equivalency that the cited references, alone or in combination, demonstrate a device or system including [the limitations recited in claim 1].” *Id.* Appellant further contends:

The Examiner conceded that, “LePivert does not explicitly disclose injection means for injecting/administering (a therapeutic composition) as a *propulsion means for propelling* the composition.” *See* last full paragraph, page 5, [Final] Office Action. The Examiner went on to attempt to generalize “injecting devices,” however, nothing in the record suggests or supports that any disclosure of LePivert or any other cited reference recites Appellant’s claim recitations, as set forth above. Appellant respectfully submits that the Examiner has not established that the cited references disclose each and every claim recitation of Appellant’s claims, as required to maintain this rejection.

Appellant further submits that nothing in the record supports administration of a “frozen particle therapeutic composition,” as set forth in the claims herein. Nothing in the record supports the Examiner’s position that any disclosure in LePivert or any other cited reference would function as intended with a “frozen particle therapeutic composition,” or that any such disclosure has not been rendered inoperable in an attempt to utilize the same within the context of the instant claims.

Id.

We do not find Appellant’s contentions persuasive. The Examiner makes express findings as to how the cited references teach or suggest the limitations recited in claim 1. Final Act. 3–8; Ans. 3–5. In particular, the

Examiner finds Churchill teaches “pressurized frozen injection devices.” Ans. 4 (citing Churchill 2:21–40, 3:61–66, 5:17–54). The Examiner also finds Barnett and Belson teach propulsion devices for administration of a frozen particle therapeutic composition. Ans. 4–5 (citing Barnett Fig. 1B, ¶¶ 105, 106; Belson ¶¶ 30–33). Appellant does not address the Examiner’s findings with respect to claim 1 and offers no explanation or reasoning as to how or *why* the cited references fail to teach or suggest the limitations of claim 1. Therefore, Appellant’s contentions are unpersuasive. *See* 37 CFR § 41.37(c)(1)(iv) (“The arguments shall explain *why the examiner erred* as to each ground of rejection contested by [A]ppellant. . . . [A]ny arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal.”) (emphasis added.)

Moreover, arguments not made are deemed waived. *See id; cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) (“It is not the function of this court to examine the claims in greater detail than argued by an [A]ppellant, looking for nonobvious distinctions over the prior art.”).

For the foregoing reasons, we are not persuaded the Examiner erred in rejecting claim 1; and claims 5, 7–10, 21, 23, 26, 31–34, 45, and 47, which are not separately argued with particularity. *See* App. Br. 12–14.

Appellant argues the additional references cited in the rejections of dependent claims 6, 11–13, 15, 22, 24, 25, 30, 35–37, 46, and 48–50 do not remedy the deficiencies of the references discussed above with respect to claim 1. App. Br. 14–16. For the reasons discussed above, we are not persuaded the Examiner erred in rejecting claims 6, 11–13, 15, 22, 24, 25, 30, 35–37, 46, and 48–50.

Obviousness-type Double Patenting Rejection

The Examiner provisionally rejects claims 1 and 26 on the ground of obviousness-type double patenting as being unpatentable over claims 17 and 41 of Boyden in view of LePivert. Final Act. 24–25.

Appellant does not provide arguments disputing the rejection. *See* App. Br. 16. Instead, Appellant states “[i]f the rejection is affirmed, then Appellant will submit an appropriate terminal disclaimer to overcome the rejection.” *Id.* We, therefore, summarily affirm the rejection. *See Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“When the appellant fails to contest a ground of rejection to the Board, . . . the Board may treat any argument with respect to that ground of rejection as waived.”).

DECISION

We affirm the Examiner’s rejections of claims 1, 5–13, 15, 21–26, 30–37, and 45–50 under 35 U.S.C. § 103.

We affirm the Examiner’s decision to reject claims 1 and 26 on the ground of obviousness-type double patenting.

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