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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KELLIE FOSTER KIRKDOFFER

Appeal 2018-001974
Application 14/463,945
Technology Center 3700

Before JEREMY M. PLENZLER, LEE L. STEPINA, and
SEAN P. O’HANLON, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner’s Decision rejecting claims 1–19. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

CLAIMED SUBJECT MATTER

Claims 1, 11, and 16 are independent, with claims 2–10, 12–15, and 17–19 depending from claim 1, 11, or 16. Claims 1–5 are reproduced below:

1. A pygmy goat and small livestock birthing aid comprises:

a flexible cable;

a single cable clamp;

an at least one flexible sleeve;

the flexible cable comprises a first end, a first handle portion, a first intermediate portion, a loop portion, a second end, a second handle portion, and a second intermediate portion;

the first end, the first handle portion, the first intermediate portion, the loop portion, the second intermediate portion, the second handle portion, and the second end being sequentially formed along the flexible cable;

the first intermediate portion and the second intermediate portion being slideably positioned within the at least one flexible sleeve;

the loop portion being positioned adjacent to the at least one flexible sleeve;

the first handle portion and the second handle portion being positioned adjacent to the at least one flexible sleeve, opposite to the loop portion; and

the first end and the second end are two separate and opposite ends of the flexible cable, the two separate and opposite ends being bound to each other by the single cable clamp, such that the first end, the first handle portion, the first intermediate portion, the loop portion, the second intermediate portion, the second handle portion, the second end and the single cable clamp keep the flexible cable in a loop configuration.

2. The pygmy goat and small livestock birthing aid as claimed in claim 1 comprises:

the at least one flexible sleeve comprises a first sleeve and a second sleeve;

the first intermediate portion being slideably positioned within the first sleeve;

the second intermediate portion being slideably positioned within the second sleeve; and

the first sleeve being tangentially and adjacently connected along the second sleeve.

3. The pygmy goat and small livestock birthing aid as claimed in claim 2 comprises:

a proximal collar;

a distal collar;

the first sleeve and the second sleeve tightly encircled by the proximal collar and the distal collar; and

the proximal collar and the distal collar being positioned opposite to each other along the at least one flexible sleeve.

4. The pygmy goat and small livestock birthing aid as claimed in claim 3, wherein the proximal collar and the distal collar are a pair of long clear shrink tubing.

5. The pygmy goat and small livestock birthing aid as claimed in claim 1, wherein the at least one flexible sleeve is made of polyethylene.

REJECTIONS

1. Claim 1 is rejected under 35 U.S.C. § 102(a)(1) as anticipated by Steinman (US 3,988,850, issued Nov. 2, 1976).

2. Claims 1, 2, 5, 7–11, 13, and 14 are rejected under 35 U.S.C. § 103 as being unpatentable over Murray (US 2,709,438, issued May 31, 1955) and Steinman.

3. Claims 2–4, 11, 12, 15, 16, 18, and 19 are rejected under 35 U.S.C. § 103 as being unpatentable over Murray, Steinman, and Kuwayama (US 6,449,810 B1, issued Sept. 17, 2002).

4. Claims 6 and 13 are rejected under 35 U.S.C. § 103 as being unpatentable over Murray, Steinman, and Bailhe (US 2,561,487, issued July 24, 1951).

5. Claim 17 is rejected under 35 U.S.C. § 103 as being unpatentable over Murray, Steinman, Kuwayama, and Bailhe.

OPINION

Anticipation by Steinman

The Examiner finds that Steinman discloses each limitation recited in claim 1. Final Act. 2–4. Appellant acknowledges the rejection (Appeal Br. 2), but offers no argument contesting that rejection (*see id.* at 8–17).

Our rules clearly state that Appellant’s “arguments shall explain why the examiner erred as to each ground of rejection contested by appellant.” *See* 37 C.F.R. § 41.37(c)(1)(iv). “When the appellant fails to contest a ground of rejection to the Board . . . the PTO may affirm the rejection of the group of claims that the examiner rejected on that ground without considering the merits of those rejections.” *Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008). Accordingly, because there is no assertion of error by Appellant, we summarily affirm the Examiner’s rejection of claim 1.

Obviousness over Murray and Steinman

The Examiner determines that claims 1, 2, 5, 7–11, 13, and 14 are unpatentable over Murray and Steinman. Final Act. 5–10. Appellant disputes only the rejection of claims 5, 8, and 9. Appeal Br. 15–16. Accordingly, because there is no assertion of error by Appellant, we

summarily affirm the Examiner's rejection of claims 1, 2, 7, 10, 11, 13, and 14.

Claim 5 depends from claim 1 and recites that "the at least one flexible sleeve is made of polyethylene." Claim 8 ultimately depends from claim 1 and recites that "the handle sleeve is made of polyvinyl chloride." Claim 9 depends from claim 1 and recites that "the flexible cable is a clear vinyl coated galvanized cable." The Examiner acknowledges that none of the cited references teach the features recited in these claims. Final Act. 8. The Examiner determines, however, that the addition of these features would have been obvious because "it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice." *Id.* (citing *In re Leshin*, 125 F.2d 416 (CCPA 1960)).

Appellant disputes the Examiner's reasoning, explaining, for example, that

based on page 4 lines 5–8 and 10–13 of the specification, the flexible cable 1 is a clear vinyl coated galvanized cable in order to provide a gentle and soft interface with the user and the newborn to be maneuvered, . . . the handle sleeve 6 is made of polyvinyl chloride for comfort and ease of use for the user when applying tension to the flexible cable 1, and the at least one flexible sleeve 3 is made of polyethylene such that the flexible cable 1 is easily slid through the flexible sleeve 3.

Appeal Br. 16. The Examiner responds by reiterating the conclusory design choice reasoning asserted in the Final Action. Ans. 5–6.

Appellant has the better position. The Examiner has not established sufficiently that it would have been obvious to incorporate the recited materials into Murray's device. *Leshin* does not stand for the proposition that every claim feature involving a selection of materials is *per se* obvious.

The Examiner has failed to provide any reason, beyond asserting design choice, generally, why it would have been obvious to modify Murray's device to include the recited materials.

Accordingly, we do not sustain the Examiner's decision to reject claims 5, 8, and 9.

Obviousness over Murray, Steinman, and Kuwayama

The Examiner determines that claims 2–4, 11, 12, 15, 16, 18, and 19 would have been obvious over Murray, Steinman, and Kuwayama. Final Act. 10–19. Appellant does not contest the rejection of claims 2 and 11.¹ See Appeal Br. 8–17. Accordingly, because there is no assertion of error by Appellant, we summarily affirm the Examiner's rejection of claims 2 and 11.

Claims 3, 12, 15, and 16 each at least require a “flexible sleeve,” a “proximal collar,” and a “distal collar,” with “the proximal collar and the distal collar being positioned opposite to each other along the at least one flexible sleeve.” The Examiner finds that Kuwayama teaches these features, and proposes modifying Murray's device accordingly. Final Act. 11–18.

Appellant draws our attention to the Examiner's findings concerning Kuwayama. See, e.g., Appeal Br. 11 (arguing that elastic rings 24, 26 are not positioned opposite one another along first and second body portions 34, 36). The Examiner responds that “[A]ppellant mistakenly refers the first sleeve of Kuwayama as reference number 34, second sleeve as reference number 36, proximal collar as reference number 24 and distal collar as reference number 26,” but in the Final Action “the first sleeve of Kuwayama is referred as reference number 24, second sleeve referred as reference

¹ Although Appellant also does not address claim 18 specifically, that claim depends from claim 16.

number 26, proximal collar referred as reference number 16 and distal collar referred as reference number 14.” Ans. 5; *see also, e.g.*, Final Act. 11.

Kuwayama is directed to “a stopper for accessories for tightening accessory chains or string elements, especially such as necklaces, bracelets and the like.” Kuwayama, 1:5–7. Figures 7 and 8 of Kuwayama illustrate ring-like elastic elements 24, 26, and first and second decoration side portions 14, 16, and are reproduced below for reference.

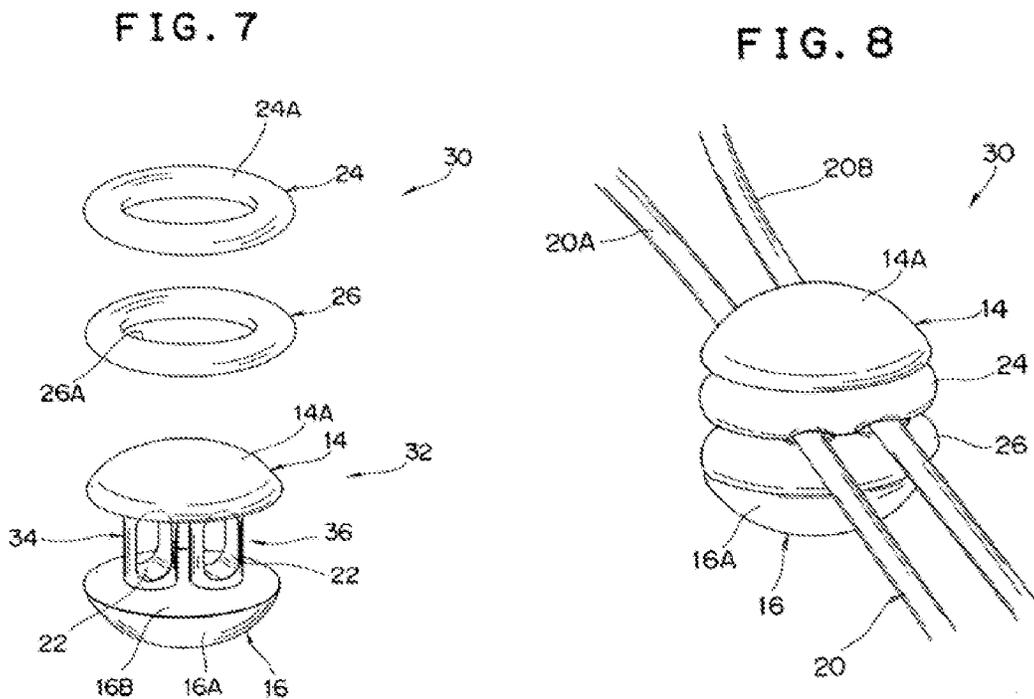


Figure 7 illustrates “a fractional diagonal view of the accessory-chain/string element stopper element” and Figure 8 illustrates “an overall diagonal view of the accessory-chain/string element stopper element” shown in Figure 7. *Id.* at 2:23–28.

One problem with the Examiner’s findings is that the claims require “the proximal collar and the distal collar being positioned opposite to each other along the at least one flexible sleeve.” As the Examiner made clear,

neither first body portion 34 nor second body portion 36 is considered as corresponding to the “at least one flexible sleeve” recited in the claims, it is ring-like elastic elements 24, 26. *See* Ans. 5 (“Nowhere in the Final Office Action does it indicate the first sleeve of Kuwayama being reference number 34[or] second sleeve as reference number 36.”). Neither end portion at reference numeral 14 or 16 is positioned anywhere along ring-like elastic element 24 or 26. Rather, ring-like elastic elements 24, 26 are located between the end portions at reference numerals 14, 16. For at least this reason, the rejection of claims 3, 12, 15, and 16 fails.

Claim 4 depends from claim 3, claim 18 depends from claim 16, and claim 19 depends from claim 18. The rejections of those claims suffer from at least the same deficiencies discussed above relative to the claims from which they depend.

For the reasons set forth above, we do not sustain the Examiner’s decision to reject claims 3, 4, 12, 15, 16, 18, and 19.

Obviousness over Murray, Steinman, and Bailhe

The Examiner determines that claims 6 and 13 are unpatentable over Murray, Steinman, and Kuwayama. Final Act. 19–20. Claim 6 depends from claim 1 and claim 13 depends from claim 11. Appellant does not contest the rejection of those claims. *See* Appeal Br. 8–17. Accordingly, because there is no assertion of error by Appellant, we summarily affirm the Examiner’s rejection of claims 6 and 13.

Obviousness over Murray, Steinman, Kuwayama, and Bailhe

The Examiner determines that claim 17 is unpatentable over Murray, Steinman, Kuwayama, and Bailhe. Final Act. 20. Claim 17 depends from

Appeal 2018-001974
Application 14/463,945

claim 16. The stated basis for the rejection of claim 17 does not cure the deficiencies explained above with respect to the rejection of claim 16.

Accordingly, we do not sustain the Examiner's decision to reject claim 17.

DECISION

We AFFIRM the Examiner's decision to reject claims 1, 2, 6, 7, 10, 11, 13, and 14.

We REVERSE the Examiner's decision to reject claims 3–5, 8, 9, 12, and 15–19.

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