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CENTRAL COAST PATENT AGENCY, INC 3 HANGAR WAY SUITE D WATSONVILLE, CA 95076			NGUYEN, CAMTU TRAN	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JACOB BENFORD

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Appeal 2018-003861  
Application 14/304,458  
Technology Center 3700

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Before JOHN C. KERINS, WILLIAM A. CAPP, and LEE L. STEPINA,  
*Administrative Patent Judges.*

KERINS, *Administrative Patent Judge.*

DECISION ON APPEAL  
STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) from the Examiner's Final Office Action dated June 15, 2017 ("Final Act."), rejecting claims 1 and 6. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

## THE INVENTION

Appellant's invention relates to an ankle-bracing apparatus. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. An ankle-bracing apparatus, comprising:

a curved support plate curved substantially 180 degrees to fit on the medial aspect of a user's lower leg above the ankle, open to the lateral aspect of the leg;

a foot plate shaped to fit the sole of the user's foot, having a vertical extension on a medial side, presenting a pivot point near an uppermost end of the vertical extension;

a strut extending downward from the medial side of the support plate, the strut having a pivotal fastener near a lowermost end joined pivotally to the pivot point on the vertical extension of the foot plate;

a retaining element on the lateral side of the user's ankle, at a height approximately of the plantar/dorsiflexion fulcrum of the ankle;

a first, lower buckle attached to the retaining element;

a first strap attached at a first end to the foot plate at a first attachment point, extending upward, passing through the first buckle, extending then downward from the first buckle, and attached at a second end to the foot plate at a second attachment point separated from the first attachment point;

a second, upper buckle, attached to the retaining element; and

a strap arrangement joining the second, upper buckle to a first and a second anchor point on the medial side of the support plate, the strap arrangement having a first portion adapted to pass in front of the leg and a second portion adapted to pass behind the

leg, and adjustable to alter the dimension from the second, upper buckle to the anchor points to adjust tension on the strap arrangement.

### THE REJECTIONS

The Examiner rejects:

- (i) claims 1 and 6 under 35 U.S.C. § 101 as being directed to or encompassing a human organism;
- (ii) claims 1 and 6 under 35 U.S.C. § 103(a) as being unpatentable over Wilkerson (US 5,902,259, issued May 11, 1999) in view of Rhenter (US 5,697,893, issued Dec. 16, 1997) and Lapenskie (US 4,489,719, issued Dec. 25, 1984).

### DISCUSSION

#### *Claims 1 and 6--§ 101*

The Examiner rejects claims 1 and 6 as being directed to or encompassing a human organism. Final Act. 3. The Examiner notes, in this respect, that claim 1 recites “a retaining member on the lateral side of the user’s ankle at a height approximately of the plantar/dorsiflexion fulcrum of the ankle.” *Id.* (quoting claim 1) (emphasis omitted).

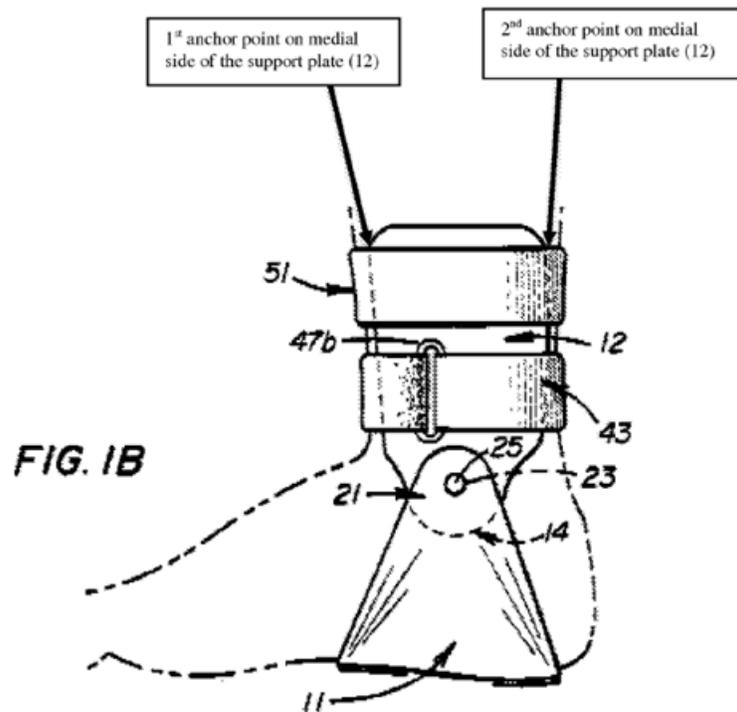
Appellant responds by requesting that an Examiner’s Amendment to claim 1 be made such that the claimed retaining element is “adjacent to,” rather than “on” the lateral side of the user’s ankle. Appeal Br. 5. There is no evidence that such an amendment was entered into the application file.

No substantive argument traversing the rejection is presented in either the Appeal Brief or Reply Brief. Appellant has thus waived any such argument(s) that could have been made. 37 C.F.R. § 41.37(c)(1)(iv).

Accordingly, the rejection of claims 1 and 6 under 35 U.S.C. § 101 is summarily sustained.

*Claims 1 and 6--§ 103(a)--Wilkerson/Rhenter/Lapenskie*

The Examiner finds, in pertinent part, that Wilkerson discloses a strap arrangement 51 that joins a second, upper buckle to first and second anchor points on the medial side of support plate 12, limitations which appear in claim 1. Final Act. 5. The Examiner provides an annotated version of Figure 1B of Wilkerson, reproduced below, to illustrate where the Wilkerson disclosure supports the finding directed to the first and second anchor points. *Id.*



Depicted above is an Examiner-annotated side elevation view of an ankle brace disclosed in Wilkerson in Figure 1B thereof.

Appellant maintains that this portion of the Wilkinson disclosure involves only a single leg strap affixed to only one end of medial shell 12, with the strap also being able to secure to itself with hook-and-loop fasteners. Appeal Br. 7 (citing Wilkerson, Fig. 1B, col. 5, ll. 44–49). Appellant maintains that this does not evidence the existence of two (first and second) anchor points on the medial side of the support plate. *Id.*; Reply Br. 3.

Appellant has the better position here. Figure 4 of Wilkerson, and the attendant discussion of the attachment of strap 51 to medial shell 12 at column 5, lines 45–48, evidence that the strap is attached (or anchored, in claim terminology) at its end to the upper portion of the medial shell. Correlating Figure 4 with Figure 1B, this attachment or anchor point is in the vicinity of what the Examiner refers to as the “2<sup>nd</sup> anchor point” in the annotated version of Figure 1B above. The Examiner provides no evidence that strap 51 is anchored at any other point to medial shell 12, and Figure 4 appears to support an interpretation that it is not. Thus, the Examiner’s finding that the area identified as “1<sup>st</sup> anchor point” on annotated Figure 1B corresponds to one of the claimed anchor points is not supported by the evidence.

Neither Rhenter nor Lapenskie is relied on by the Examiner in any manner that would remedy this deficiency in the teachings of Wilkerson. Accordingly, the rejection of claims 1 and 6 as being unpatentable over a combination of those references is not sustained.

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**DECISION**

The rejection of claims 1 and 6 under 35 U.S.C. § 101 is affirmed.

The rejection of claims 1 and 6 under 35 U.S.C. § 103(a) is reversed.

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**