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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte EBONY BLACKMON-HUMPHREY

Appeal 2018-005880
Application 14/483,505
Technology Center 3700

Before WILLIAM A. CAPP, ERIC C. JESCHKE, and
FREDERICK C. LANEY, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a).

THE INVENTION

Appellant's invention is a nursing bra. Spec. ¶ 1. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A nursing brassiere for facilitating release of breast milk from a nipple of a breast of a woman, the nursing brassiere comprising:

a shoulder strap section (10) having a pair of primary shoulder straps (12, 112) and a pair of secondary shoulder straps (14, 114), the primary shoulder straps connected to the secondary shoulder straps;

a pair of breast cups (16) connected to the secondary shoulder straps (14, 114), each of the pair of breast cups configured to substantially cover the breast of the woman, each of the pair of breast cups further including an open ended sleeve of stretchable compression material completely encircling an external periphery of the breast for providing compressive pressure directed radially inward toward a centerline of the breast, the centerline of the breast extending outwardly from a chest of the woman through the nipple of the breast, the open-ended sleeve of stretchable compression material for placing pressure on milk ducts of the breast to assist in release of breast milk from the milk ducts, the stretchable compression material providing a constant and uniform pressure to breast tissue around the external periphery of the breast and in an outward direction toward the nipple to push milk from the milk ducts and out of the nipple;

a middle section (18) connected between the breast cups; and a body support section (20) having a front portion (22) connected extending through side portions (24) to a back portion (26), the front portion connecting to the middle section and each of the pair of breast cups, the side portions connecting to the front portion with one side portion connecting to one each of the pair of breast cups, and the back portion extending between the side portions and having a top edge, wherein the primary shoulder straps connect to the top edge of the back portion.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

NAME	REFERENCE	DATE
Pearson	US 6,083,079	July 4, 2000
Scholz	US 2007/0105481 A1	May 10, 2007
Leavell	US 8,414,353 B1	Apr. 9, 2013
Handras	US 2014/0051331 A1	Feb. 20, 2014

The following rejections are before us for review:

1. Claims 1–17 are is rejected under 35 U.S.C. § 112(b) as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor regards as the invention.
2. Claims 1, 3–9, 11, 17, and 20 are rejected under 35 U.S.C. § 103 as being unpatentable over Pearson.
3. Claims 2, 10, and 18 are rejected under 35 U.S.C. § 103 as being unpatentable over Pearson and Leavell.
4. Claims 12 and 13 are rejected under 35 U.S.C. § 103 as being unpatentable over Pearson and Scholz.
5. Claims 14–16 are rejected under 35 U.S.C. § 103 as being unpatentable over Pearson and Handras.
6. Claim 19 is rejected under 35 U.S.C. § 103 as being unpatentable over Pearson, Leavell, and Scholz.

OPINION

Indefiniteness

The Examiner considers claim 1 to be indefinite because it lacks detail concerning the breast cups and open ended sleeve. Final Act. 7–8. The

Examiner considers claim 7, which depends from claim 1, to be indefinite because it is unclear whether the recitation of “primary shoulder strap sections” in claim 7 refers to another structure that is different from the “primary shoulder straps” of claim 1. *Id.* at 8.

Appellant reacts to the rejection by submitting an After Final amendment to the claims and commenting that such amendment “remedied” the Section 112 concerns. Appeal Br. 9. Appellant remarks that “entry of the Amendment” advances prosecution and places the application in a better form for appeal. *Id.*

The Examiner responds by pointing out that, after Appellant submitted its After Final amendment but before filing its Appeal Brief, the Examiner issued an Advisory Action notifying Appellant that the After Final amendment was not entered. *See* Advisory Action dated September 8, 2017; Ans. 2.² Appellant’s Reply Brief makes no mention of the Section 112 rejection. *See generally* Reply Br.

Under the circumstances, we deem the Section 112 rejection to be unopposed and that argument against the claims that are actually on appeal is waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (failure to separately argue claims constitutes a waiver of arguments for separate patentability). We sustain the Examiner’s Section 112 indefiniteness rejection of claims 1–17.

² Indeed, Appellant attached the non-entered claims to the original Appeal Brief, necessitating issuance by the Office of a Notice of Defective Appeal Brief and the subsequent filing by Appellant of a corrected Appeal Brief that included the correct set of claims that are on Appeal before us. *See* Notice of Defective Appeal Brief dated September 14, 2017.

*Unpatentability of
Claims 1, 3–9, 11, 17, and 20 over Pearson*

Claim 1

The Examiner finds that Pearson discloses the invention substantially as claimed except that only some embodiments teach the use of primary and secondary straps. Final Act. 9. The Examiner considers that it would have been obvious to combine teachings from the various embodiments. *Id.* at 9–10. The Examiner further finds that Pearson fails to explicitly disclose use of a stretchable, compression material, but that it would have been obvious to do so. *Id.* The Examiner further finds that only some embodiments of Pearson disclose a body support section as claimed, but that it would have been obvious to combine teachings from the various embodiments of Pearson to achieve the claimed invention. *Id.* at 11. According to the Examiner, a person of ordinary skill in the art would have so combined and modified the teachings of Pearson as a matter of design choice and to provide a comfortable fit for the user. *Id.*

Appellant argues that Pearson fails to teach the use of stretchable compression fabric to provide uniform pressure directed radially toward the nipple of the nursing mother. Appeal Br. 9–10. Appellant argues that Pearson fails to use pressure to alleviate clogged milk ducts and to release milk from the breast. *Id.* at 10.

In response, the Examiner notes that, in the Background section of Appellant’s Specification, Appellant admits that it was known to use stretchable material (Spandex) in a nursing bra. Ans. 3. The Examiner notes that Pearson teaches the use of soft, flexible materials “known in the trade.” *Id.* at 4. The Examiner then concludes that it would have been reasonable and obvious to utilize stretchable material in Pearson. *Id.* The

Examiner further cites the case of *In re Leshin*, 277 F.2d 197, 199 (CCPA 1960) for the proposition that it is a matter of obvious design choice to select suitable materials. *Id.* at 5.

Pearson discloses a bra that includes embodiments directed to a nursing application. Pearson, col. 8, ll. 13–16. Pearson features padded shaper 12 with an inverted “Y” shape that surrounds the upper portion and sides of a breast. *Id.* col. 5, l. 67 – col. 6, l. 6. Shaper 12 is made from relatively non-elastic materials. *Id.* col. 6, ll. 6–9. Shaper 12 is configured so that it “gently supports” the breast. Pearson “stabilizes” – “without flattening” a woman’s breasts. *Id.* col. 5, ll. 12–24. Partial cup 20 is attached to the lateral legs of shaper 12. *Id.* col. 6, ll. 19–20. Cup 20 supports the breast from underneath and is configured, together with the lateral legs of shaper 12, to provide foundation support and lifting force to the breast. *Id.* col. 6, ll. 20–35. As with shaper 12, partial cup 20 is made from relatively non-elastic material. *Id.* col. 6, ll. 37–39.

Thus, Pearson is replete with references to providing “gentle support” to the breast. *See e.g.*, Pearson, col. 2, ll. 65–67; col. 3, ll. 50–55; col. 6, ll. 6–10; col. 6, ll. 36–42; col. 6, ll. 53–58. Elastic band 46 “gently” holds the bra in place against the torso, but does not function “to provide any significant support” for the breasts of the wearer. *Id.* col. 6, ll. 53–60.

We have reviewed US 4,633,876 to Scullin, issued Jan. 6, 1987, which is referred to in Appellant’s Background section and the Examiner’s Answer. Spec. ¶ 5; Ans. 3. Scullin does indeed disclose the use of Spandex in a nursing bra. *See id.* col. 5, ll. 28–48. However, we observe that it is one thing to make a bra out of Spandex, but that it is an entirely different matter to construct a bra and configure the arrangement of the components of the

bra using Spandex so as to provide “constant and uniform pressure” to breast tissue. Scullin may disclose the former, but the Examiner errs in finding that it teaches or suggests the latter. Thus, the Examiner may be correct that Pearson could be modified to use stretchable material. Ans. 4–5. However, there is no evidentiary support for the Examiner’s conclusory statement that merely using stretchable material would “provide compressive pressure directed radially inward toward the centerline of the breast.” *Id.* at 4. A person of ordinary skill in the art would understand that the stretchable material would also have to be sized and shaped into a particular configuration vis-à-vis the corresponding size and shape of the breast in order to provide compressive pressure.

Pearson teaches providing “gentle” support “without flattening the breasts” which, in our view, is almost diametrically opposed to providing constant and uniform pressure. Thus, we find unlikely that a person of ordinary skill in the art would have modified Pearson with Scullin’s Spandex and configured the bra in such a manner as to achieve the claimed invention. *See In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) (explaining that the mere fact that the prior art may be modified in the manner suggested by the Examiner does not necessarily make the modification obvious).

In view of the foregoing discussion, we determine that the Examiner’s findings of fact are not supported by a preponderance of the evidence and that the Examiner’s legal conclusion of unpatentability is not well-founded. Accordingly, we do not sustain the Examiner’s unpatentability rejection of claim 1.

Claims 3–9, 11, and 17

These claims depend, directly or indirectly, from claim 1. Claims App. The Examiner's rejection of these claims suffers from the same infirmity that was identified above with respect to claim 1. Thus, for essentially the same reason expressed above in connection with claim 1, we do not sustain the rejection of claims 3–9, 11, and 17.

Claim 20

Claim 20 is an independent claim that, like claim 1, has a limitation directed to providing compressive pressure to the breast. Claims App. Thus, the Examiner's rejection of claim 20 suffers from the same infirmity that was identified above with respect to claim 1. Thus, for essentially the same reason expressed above in connection with claim 1, we do not sustain the rejection of claim 20.

*Unpatentability of Claims 2, 10, 12–16, 18, and 19
over Combinations Based on Pearson*

Claims 2, 10 and 12–16

These claims depend, directly or indirectly, from claim 1. Claims App. The Examiner's rejection of these claims suffers from the same infirmity that was identified above with respect to claim 1. That infirmity is not remedied by the Examiner's reliance on various secondary references that are used solely to teach dependent limitations. Final Act. 12–23. Thus, for essentially the same reason expressed above in connection with claim 1, we do not sustain the rejection of claims 2, 10 and 12–16.

Claims 18 and 19

Claim 18 is an independent claim that, like claim 1, has a limitation directed to compressive pressure on the breast, for which the Examiner, once

again, relies on Pearson. Claims App., Final Act. 19–20. Claim 19 depends from claim 18. Claims App. The Examiner’s rejection of these claims suffers from the same infirmity that was identified above with respect to claim 1. That infirmity is not remedied by the Examiner’s reliance on various secondary references. Final Act. 19–21, 24–25. Thus, for essentially the same reason expressed above in connection with claim 1, we do not sustain the rejection of claims 18 and 19.

CONCLUSION

Claims Rejected	§	Reference(s)/Basis	Affirmed	Reversed
1-17	112	Indefiniteness	1-17	
1, 3-9, 11, 17, 20	103	Pearson		1, 3-9, 11, 17, 20
2, 10, 18	103	Pearson, Leavell		2, 10, 18
12, 13	103	Pearson, Scholz		12, 13
14-16	103	Pearson, Handras		14-16
19	103	Pearson, Leavell, Scholz		19
Overall Outcome			1-17	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-IN-PART