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CARLSON, GASKEY & OLDS, P.C. 400 WEST MAPLE ROAD SUITE 350 BIRMINGHAM, MI 48009			KURILLA, ERIC J	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SURENDRA KHAMBETE

Appeal 2018-006947
Application 14/223,251
Technology Center 3600

Before JOHN C. KERINS, GEORGE R. HOSKINS, and LEE L. STEPINA,
Administrative Patent Judges.

STEPINA, *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 12 and 15–20.² We have jurisdiction 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. Appellant identifies the real party in interest as Indratech LLC. Appeal Br. 1.

² Claims 1–11, 13, and 14 are cancelled.

CLAIMED SUBJECT MATTER

The claims are directed to a cushion assembly.

Claim 12, reproduced below with emphasis added, is the sole pending independent claim.

12. A tufted cushion assembly comprising:
a core made of first polymer fibers, the first polymer fibers being randomly oriented;
at least one topper layer made of second polymer fibers, the second polymer fibers being randomly oriented, the at least one topper layer being arranged adjacent to a surface of the core, and the at least one topper layer having a density different than the core; and
a tuft extending through the core and the at least one topper layer to provide the tufted cushion assembly, *wherein the tufted cushion assembly provides a support factor of less than or equal to 3, and wherein the support factor is determined using a 4-inch tall sample of the tufted cushion assembly at a tufted height.*

Appeal Br. 6 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Dallavalle	US 1,243,267	Oct. 16, 1917
Davidson	US 5,160,785	Nov. 3, 1992
Kaylor	US 7,238,633 B1	July 3, 2007

REJECTION

Claims 12 and 15–20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Kaylor, Dallavalle, and Davidson.

OPINION

Kaylor, Dallavalle, and Davidson

The Examiner finds that Kaylor discloses many of the elements recited in claim 12, including a cushion assembly comprising a core and a topper layer, but does not disclose (i) that the cushion assembly is tufted, and (ii) the tufted cushion assembly provides the recited support factor of “less than or equal to 3.” *See* Final Act. 2–3. The Examiner relies on Dallavalle to teach a tufted cushion assembly. *Id.* The Examiner construes the term “support factor” based on paragraph 5 of Appellant’s Specification and finds Davidson teaches a compression modulus of 2.8–3 that is similar to Appellant’s support factor. *Id.* at 3 (citing Davidson 3:3–14, 6:51–60). The Examiner reasons that it would have been obvious to implement the compression modulus disclosed by Davidson in the modified cushion assembly of Kaylor “in order to make a cushion that is highly resistant to sagging after repeated use.” *Id.*

Appellant argues:

While Dallav[a]lle generally teaches a tuft, Kaylor and Davidson are not tufted assemblies. There is no evidence that Kaylor or Davidson would exhibit a support factor of less than or equal to 3 *when tufted*. There is also no evidence that the compression modulus taught by Davidson would be less than or equal to 3 when applied to a tufted assembly, let alone when determined using a 4-inch tall sample *at the tufted height*, as recited in the claims. There is no *prima facie* case of obviousness for at least these reasons.

Appeal Br. 3. Thus, Appellant’s contention focuses on whether there is evidence that the compression modulus taught by Davidson would be less than or equal to 3 when “applied to” a tufted assembly. Appellant rephrases this argument, stating, “Appellant’s point is that while a certain support

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factor is known and while a tuft is known, there is no evidence that the claimed support factor would exist in the proposed combination once tufted.” *Id.* at 4 (emphasis omitted).

In response, the Examiner states that the record shows that the “support factor” characteristic was known in manufacturing in such standards as ASTM D1564. Ans. 4 (citing Non-Final Office Action dated November 26, 2016). The Examiner points out that “Davidson teaches a foam pad that has a support factor of less than or equal to 3 using a 4-inch tall sample of the foam pad.” *Id.* Addressing Appellant’s contention that there is no evidence that Davidson’s compression modulus would “exist in the proposed combination,” the Examiner states:

As taught by Davidson and the testing standards within the art, the height of the sample would still be required to be 4 inches *regardless of the presence of a tuft*. Furthermore, one of ordinary skill would have found it obvious at the time the invention was made to add a tuft to a sample and maintain a support factor of less than or equal to 3 by testing samples by trial and error and adjusting the construction of the cushion as necessary.

Id. (emphasis added).

In the Reply Brief, Appellant reiterates the argument from the Appeal Brief, stating, “the prior art may teach a compression modulus of less than 3, that teaching does not apply to a tufted assembly, and the Examiner has not accounted for the effect of a tuft on those assemblies.” Reply Br. 1.

Addressing the Examiner’s discussion of “trial and error,” Appellant asserts, “the Examiner merely states that one would have used ‘trial and error,’ but all the Examiner has done is allege (without support) that one would aimlessly change variables until some positive outcome was achieved.” *Id.* at 2.

The Examiner has the better position because the proposed modification to the cushion assembly disclosed by Kaylor, as modified with the teachings of Dallavalle, is not a bodily incorporation of a component or components, *per se*, from Davidson’s cushion. Rather, the proposed modification is to incorporate Davidson’s disclosure of a *support factor* of 3 or less, defined the same way this property is defined in paragraph 5 of Appellant’s Specification. *See* Final Act. 3; Davidson 3:3–14, 6:51–60. In other words, the Examiner proposes to modify the cushion assembly of Kaylor based on the combined teachings of Dallavalle and Davidson, such that the resultant cushion assembly would be tufted (per Dallavalle) and have a support factor of 3 or less (per Davidson). *See id.* Appellant’s argument that “the Examiner has not accounted for the effect of a tuft” on the cushion assemblies disclosed by Kaylor and Davidson (Reply Br. 1) does not address the rejection as set forth by the Examiner because the rejection modifies the tufted cushion assembly of Kaylor and Dallavalle to have a particular property (the support factor disclosed by Davidson), not a structural component that would leave the resultant property in question. The Examiner’s rejection results in a cushion assembly with a support factor of 3 or less, as taught by Davidson, taking into account that the cushion assembly being modified has a tuft.³ Accordingly, we sustain the rejection of claim 12.

³ We understand the Examiner’s discussion of “trial and error” (*see* Ans. 4) to address the issue of whether a person of ordinary skill in the art would have been enabled by the prior art to provide a support factor of 2.8–3 (as explicitly disclosed in Davidson) in a cushion assembly having a tuft. Thus, we do not agree that the Examiner’s rejection relies on a person of ordinary skill in the art “aimlessly chang[ing] variables until some positive outcome was achieved.” Reply Br. 2.

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Appellant does not make arguments for the patentability of claims 15–20 aside from those discussed above regarding claim 12. *See* Appeal Br. 3–4. Accordingly, for the same reasons, we sustain the rejection of claims 15–20.

CONCLUSION

The Examiner’s rejections are affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
12, 15–20	103(a)	Kaylor, Dallavalle, Davidson	12, 15–20	

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