



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/570,226	12/15/2014	Ivan E. Brown	P10701US04	3630
22885	7590	03/24/2020	EXAMINER	
MCKEE, VOORHEES & SEASE, P.L.C. 801 GRAND AVENUE SUITE 3200 DES MOINES, IA 50309-2721			LOUIS, LATOYA M	
			ART UNIT	PAPER NUMBER
			3785	
			NOTIFICATION DATE	DELIVERY MODE
			03/24/2020	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

michelle.woods@ipmvs.com
patatty@ipmvs.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte IVAN E. BROWN, TERYLE L. KOUNKEL, and
BRANDON RODRIGUEZ

Appeal 2018-008393
Application 14/570,226
Technology Center 3700

Before: JENNIFER D. BAHR, ANNETTE R. REIMERS, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

DOUGAL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 1–16 and 18–20, which constitute all the claims pending in this application. 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(a). Appellant identifies the real party in interest as Brownmed, Inc. Appeal Br. 1.

CLAIMED SUBJECT MATTER

The claims are directed to a vibrating massaging footwear. Claims 1 and 18 are independent. Claim 1, reproduced below (some paragraphing added), is illustrative of the claimed subject matter:

1. A foot wear article comprised of
a sole;
an upper attached to the sole which defines a foot opening;
an insert pad that is
 a series of elongated general parallel pockets, each of which are filled with particulate material to restrict particle flow within the pocket, and each of which has opposing ends in open communication with the ends of other of said pockets so that particulate material may move from one pocket to another,
 said insert pad fitting on top of the sole to provide the feeling of walking on a sandy beach; and
an electro-massage element comprised of
 a rechargeable battery and
 associated coin motors, said coin motors each being associated with one parallel pocket mounted in said insert pad to provide vibration to a wearer's foot and to the particulate material of each of said generally parallel pockets.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Gold	US 5,098,419	Mar. 24, 1992
Benaron	US 5,902,256	May 11, 1999
Waldon	US 8,523,793 B1	Sept. 3, 2013
Connor	US 2003/0060739 A1	Mar. 27, 2003
Harry	US 2004/0173220 A1	Sept. 9, 2004
Thompson	US 2012/0174877 A1	July 12, 2012
Brown	US 2012/0210602 A1	Aug. 23, 2012

REJECTIONS

Claims 1–11 and 18–20 are rejected under 35 U.S.C. § 103 as being unpatentable over Harry, Brown, Waldon, and Benaron.

Claims 12, 13, and 16 are rejected under 35 U.S.C. § 103 as being unpatentable over Harry, Brown, Waldon, Benaron, and Connor.

Claim 14 is rejected under 35 U.S.C. § 103 as being unpatentable over Harry, Brown, Waldon, Benaron, and Gold.

Claim 15 is rejected under 35 U.S.C. § 103 as being unpatentable over Harry, Brown, Waldon, Benaron, and Thompson.

OPINION

Appellant argues the rejection of claims 1–11 and 18–20 together. We select independent claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv) (permitting the Board to select a single claim to decide the appeal as to a single ground of rejection of a group of claims argued together). Appellant does not separately argue the rejections of claims 12–16, noting that “resolution of this issue . . . is determinative of all of the claims.” Appeal Br. 5. Thus, our resolution of the issues raised in Appellant’s arguments over the rejection of claim 1 is also determinative for the rejections of claims 12–16.

The Rejection of Claim 1

We first provide a brief summary of the rejection of claim 1, before addressing Appellant’s arguments concerning alleged shortcomings in the rejection. The Examiner finds that Harry teaches most of the features of the foot wear article of claim 1. Final Act. 5–6. This includes a sole, an upper, and an insert pad. *Id.* at 5. The Examiner finds that Harry’s insert pad

includes “an electro-massage element comprised of a rechargeable battery and associated actuators mounted in said insert pad to provide vibration to a wearer’s foot and to all the particulate material in the insole.” *Id.* (internal citations omitted); see Brown ¶ 121 (disclosing “a multiplicity of small, rigid beads 92 distributed throughout the surrounding matrix material of the insert”).

The Examiner finds that Harry does not specifically disclose: 1) “a series of elongated general parallel pockets” in the insert pad, 2) that the actuators are coin motors, and 3) “each actuator associated with one pocket.” *Id.* at 5–6.

Concerning the first missing feature, the Examiner finds that Brown teaches a foot wear article that, like Harry, also teaches particulates in a foot insert. *Id.* at 5. The Examiner finds that Brown teaches “elongated . . . parallel pockets . . . filled with particulate material . . . , and each of which has opposing ends in open communication with the ends of other of said pockets so that particulate material may move from one pocket to another.” *Id.* (internal citations omitted). The Examiner determines that “[i]t would have been obvious . . . to have provided the particulate material of Harry with pockets as taught by Brown to provide the advantage of enhanced comfort and ease of use.” *Id.*

Concerning the second missing feature, the Examiner finds that Waldon teaches using coin motors for the vibration actuators. Waldon teaches a therapeutic joint device that provides massage through vibration (i.e., vibration of the coin motors). Waldon, Abstract. The Examiner determines that “[i]t would have been obvious . . . to have manufactured the

actuators of Harry as coin motors as taught by Waldon to provide the advantage of enhanced comfort and a smaller footprint.” Final Act. 5–6.

Finally, concerning the third missing feature, the Examiner finds that Harry, as modified by Brown, suggests “chambers for the particulate material” and “vibration actuators (23, 81) in particulate material.” *Id.* at 6. And that “Benaron teaches in fig. 5, each motor (36) associated with a pocket (22).” *Id.* The Examiner determines that “[i]t would have been obvious . . . to have provided the actuators of Harry associated with each pocket as taught by Benaron to provide the advantage of enhanced spacing for greater massage effect and coverage.” *Id.*

Appellant’s Arguments

Appellant argues that “Benaron is totally irrelevant,” presumably because it assertedly does not teach “pockets or open ended channels” (Appeal Br. 7) or because it has “nothing to do with vibrational footwear to provide the sand-like feel of walking on a beach” (Reply Br. 2). However, as acknowledged by Appellant, Brown teaches “loose filled material inside an open ended pocket or channel.” Appeal Br. 7. The Examiner relied on Brown for these teachings, not Benaron. Final Act. 5. As discussed above, Benaron is only relied on for teaching “each motor (36) associated with a pocket (22).” *Id.* at 6; *see also* Ans. 10 (further discussing Benaron).

Appellant further argues that in Benaron “[t]here are no parallel pockets filled with particulate material, open at the ends with coin motors (actuators?) mounted in the parallel pockets having open ends.” *Id.* However, once again, Appellant is arguing over features of the claim that the Examiner found to be taught in other references, as well as, the combination of a number of references. One cannot show nonobviousness by attacking

references individually where the rejections are based on combinations of references. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (citations omitted) (explaining that obviousness must be considered in light of “what the combined teachings of the references would have suggested to those of ordinary skill in the art”). For this reason, we are not informed of error in the Examiner’s rejection.

Concerning Brown, Appellant argues that Brown

is devoid of any suggestion of vibrated technology of any kind for an open ended channel with loose material inside of channels to enhance the vibrational propagation of the beads and correspondingly the movement as they move from channel to channel and to enhance therapy and provide a relaxed beach sand feel to the feet of the wearer of the sandal.

Appeal Br. 7. However, the rejection does not rely on Brown for all of these features. Arguments presented in an appeal must address the grounds of rejection set forth by the Examiner. 37 C.F.R. § 41.37(c)(1)(iv). Thus, Appellant’s arguments over Brown alone do not inform us of error in the Examiner’s rejection.

Declaration of Dr. Brown

In support of patentability, Appellant offers the Declaration of Dr. Ivan Brown, one of the named inventors in the present application. Brown Decl. ¶ 6. Appellant states that the “Declaration does not comment on the prior art,” but rather identifies “what is important” in the invention. Appeal Br. 9.

Dr. Brown states:

having one-coin motor associated with each of the parallel channels or pockets is important because if that were not the case the vibrational propagation of the beads and the movement enhancement as they move from channel to channel (pocket to

pocket) would not occur to the same level to enhance the therapy and the relaxed beach sand feel to the feet of the wearer of the sandal.

Brown Decl. ¶ 9.

Appellant argues that none of the references “singly or in combination” “teaches the results outlined in Dr. Brown’s Rule 132 Affidavit.” Appeal Br. 9. However, neither the Declaration nor Appellant’s argument establish that this is the case. Rather, the Examiner has identified teachings in the prior art that correspond with all of the requirements of claim 1. Final Act. 5–6. Further, the Examiner has provided reasons to combine the various references. *Id.* Appellant has not shown these to be in error. Thus, as we are not informed of error, we sustain the Examiner’s rejections.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–11, 18–20	103	Harry, Brown, Waldon, Benaron	1–11, 18–20	
12, 13, 16	103	Harry, Brown, Waldon, Benaron, Connor	12, 13, 16	
14	103	Harry, Brown, Waldon, Benaron, Gold	14	
15	103	Harry, Brown, Waldon, Benaron, Thompson	15	
Overall Outcome			1–16, 18–20	

Appeal 2018-008393
Application 14/570,226

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED