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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TODD ANDERSON

Appeal 2018-008965
Application 15/411,597
Technology Center 3600

Before JENNIFER D. BAHR, MICHELLE R. OSINSKI, and SEAN P. O'HANLON, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant[1] appeals under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 2, 4–10, 12–17, 19 and 20.[2] We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] We use the term "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42.

[2] Claims 3, 11, and 18 are cancelled. *See* Amendment (Nov. 8, 2017).

THE CLAIMED SUBJECT MATTER

Claims 1 and 16 are independent. Claim 1, reproduced below with paragraph structure added, is illustrative of the subject matter on appeal.

> 1. An apparatus for walking a canine, the apparatus comprising
>
> a wearable strap for positioning over a shoulder and across a torso of a user, the strap having a front portion positioned over a front of the user and a back portion positioned over a back of the user;
>
> an attachment device positioned between the front portion and the back portion, the attachment device positioned at a bottom of the strap and configured to receive a leash therein;
>
> a first adjustment device positioned proximate the attachment device, the first adjustment device configured to allow the attachment device to be adjusted relative to the front portion to properly position the attachment device at the bottom of the strap;
>
> a storage pouch releasably attached to the strap, the storage pouch configured to store and dispense waste bags from a bottom slot of the storage pouch and for receiving and containing waste bags filled with waste through a top opening of the storage pouch;
>
> the strap is configured to rotate around the shoulder of the user to move from front to back between approximately a 4 o'clock position of the user and an 8 o'clock position of the user, the strap eliminates direct pressure on the user from the canine and provides the user with the ability to prepare for the canine's movements without a jerking motion, the strap distributes forces associated with the canine pulling evenly around the torso of the user, eliminating strain on the shoulder and arms of the user.

Appeal Br. 17 (Claims App.).

EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Johnson	US 4,815,640	Mar. 28, 1989

Green	US 2005/0229867 A1	Oct. 20, 2005
Garcia	US 2010/0095903 A1	Apr. 22, 2010
Ekstrum	US 2013/0042819 A1	Feb. 21, 2013
Henry	US 2013/0126563 A1	May 23, 2013
Clark	US 2015/0075448 A1	Mar. 19, 2015
Flaig	US 2016/0219838 A1	Aug. 4, 2016
Seuk	US 2017/0064928 A1	Mar. 9, 2017
Ehret	FR 2522484	Sept. 9, 1983

THE REJECTIONS

I. Claims 1, 4, 5, and 16 stand rejected under 35 U.S.C. § 103 as unpatentable over Seuk and Flaig. Final Act. 2–6.

II. Claims 2 and 17 stand rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Johnson. *Id.* at 6.

III. Claims 6, 7, 9, and 10 stand rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Clark. *Id.* at 6–8.

IV. Claim 8 stands rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, Clark, and Green. *Id.* at 8–9.

V. Claim 12 stands rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Henry. *Id.* at 9.

VI. Claim 13 stands rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Ehret. *Id.* at 9–10.

VII. Claim 14 stands rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Garcia. *Id.* at 10–11.

VIII. Claim 15 stands rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, and Ekstrum. *Id.* at 11.

IX. Claims 19 and 20 stand rejected under 35 U.S.C. § 103 as unpatentable over Seuk, Flaig, Johnson, and Clark. *Id.* at 11–12.

OPINION

Rejection I

In contesting the rejection of claims 1, 4, 5, and 16, Appellant presents arguments for independent claims 1 and 16 together, and does not separately argue dependent claims 4 and 5. *See* Appeal Br. 3–12. We select claim 1 as representative, and claims 4, 5, and 16 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Seuk teaches most of the limitations recited in claim 1, including, in relevant part,

> a wearable strap (130) for positioning over a shoulder and across a torso of a user (see fig. 5, para 0019), . . . wherein the strap is configured to rotate around the shoulder of the user to move from front to back between approximately a 4 o'clock position of the user and an 8 o'clock positions of the user (the strap of Seuk will rotate as such when placed around the shoulder of a user, the physics of the motion will be the same), the strap eliminates direct pressure on the user from the canine and provides the user with the ability to prepare for the canines' movements without a jerking motion, the strap distributes forces associated with the canine pulling evenly around the torso of the user, eliminating strain on a shoulder and arms of the user (the strap of Seuk will perform this function when worn this way with the same results, the physics of the motion will be the same, Seuk has adjustment slides 138 and can be worn as tightly or as loosely as desired).

Final Act. 2–3. The Examiner finds that "Seuk is silent about the storage pouch being releasably attached to the strap, wherein the storage pouch comprises a bottom slot configured to dispense and store waste bags and a

top opening for receiving and containing waste filled bags." *Id.* at 3. However, the Examiner finds that

> Flaig teaches a waste storage pouch (see abstract and figs. 1–2) wherein the pouch being releasably attachable to a strap (see fig. 1, element 17, para 0018, allows for releasable attachment of the waste pouch to a strap) and wherein storage pouch comprises a bottom slot (15) configured to dispense and store waste bags (para 0020) and a top opening (13) for receiving and containing waste filled bags (can be used to store used bags, see para 0021).

Id. The Examiner determines that it would have been obvious "to make the storage pouch of Seuk releasable and containing a slot to dispense waste bags as well as a top opening, as taught by Flaig, in order to allow a user easy access to the pouch and to dispense clean bags as well as hold used waste bags." *Id.*

Appellant argues:

> The apparatus of Seuk must be retained tightly against the body of the user. The apparatus of Seuk: does not let the mount rotate between approximately a 4 o'clock position of the user and an 8 o'clock position of the user; does not eliminate direct pressure on the user from the canine; and does not provide the user with the ability to prepare for the canine's movements without a jerking motion. In order to maintain the type of positive control of the dog, as required by Seuk, the carabiner must be maintained at a 9 o'clock position, or in the middle of the user's torso (as shown in FIG. 5). The apparatus of Seuk is meant to be worn tight to the body and no movement or slippage is allowed for it to work.

Appeal Br. 5–6; *see also id.* at 6 (asserting that, "[a]s the sling of Seuk does not move, the carabiner is attached to the sling by a piece of webbing, thereby insuring that the exact positioning of the carabiner relative to the buckles and the sling is maintained"). Appellant asserts that "Seuk simply

shows a sling worn tightly around the torso over one shoulder or tightly around the waist. There is no slack in the strap in any of the embodiments shown by Seuk." Reply Br. 3; *see also id.* (asserting that "Seuk describes wearing the sling tightly around the torso over one shoulder or tightly around the waist. All of the illustrations provided by Seuk show the sling snug against the body and not capable of moving as claimed").

We are not persuaded by this line of argument because Appellant does not point to, nor do we find, any disclosure in Seuk to support the position that shoulder sling 130 must be worn tightly around the torso or that carabiner 140 must be maintained at the user's 9 o'clock position for the apparatus to work. Appellant's assertions appear to be based upon speculative assumptions regarding the fit of shoulder sling 130 around the torso and the position of carabiner 140 as they appear in Seuk's figures. A drawing teaches all that it reasonably discloses and suggests to a person of ordinary skill in the art. *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979). Although Seuk's drawings reasonably may suggest that Seuk's shoulder sling works under the conditions depicted in the drawings, they provide no reasonable suggestion that Seuk's shoulder sling would fail to work under other conditions (e.g., if it was worn more loosely and/or the location of the carabiner changed during the course of use). In other words, Appellant's assertions amount to nothing more than attorney argument unsupported by evidence and, thus, are entitled to little, if any, weight. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *see also In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974) (An attorney's arguments in a brief cannot take the place of evidence.).

Appellant argues that,

> if the apparatus of Seuk is worn over the shoulder and allowed to be free flowing, . . . the carabiner of Seuk would be loose and would not stay in the 9 o'clock position, thus not providing the type of positive control desired by Seuk. In light of the above, it is clear that the proposed modifications to Seuk, as suggested by the Examiner, change the principle of operation of [the] apparatus disclosed in Seuk and, therefore, the rejection of the claims based on Seuk as the primary reference is not appropriate.

Appeal Br. 6. Appellant asserts that "[r]edesigning the apparatus of Seuk, which requires the carabiner to be located as shown in FIG. 5, to a shoulder strap which can freely rotate between approximately a 4 o'clock position of the user and an 8 o'clock position of the user is not obvious." *Id.* at 7. This argument is unpersuasive because it is not responsive to a modification proposed by the Examiner in the rejection. The Examiner does not propose modifying shoulder sling 130 so as to allow it to rotate around a user's shoulder. *See* Final Act. 3. Rather, the Examiner finds that Seuk's shoulder sling 130 would function in the same way as the claimed strap. *See id.* The Examiner explains that "the strap of Seuk has applicant's structure as claimed. Further, the strap of Seuk includes a size adjustment slide 138, [and] a user can position Seuk however desired over the shoulder and to whatever tightness the user desires." Ans. 5; *see also id.* at 7 (explaining that "whether or not Seuk moves on the user['s] torso depends entirely on how tight or loose a user fits the strap of Seuk and the force which a dog exerts on the leash").

Appellant argues that Seuk "is not capable of performing the functional elements of the present invention as claimed. The Examiner has failed to provide sufficient evidence that the cited art is capable of

performing the same function as the function possessed by the claimed apparatus." Appeal Br. 8. Appellant asserts that

> the apparatus of Seuk does transmit direct pressure to the user from the canine and does not provide the user with the ability to prepare for the canine's movements without a jerking motion. The *loose fit* of the apparatus of the present invention is imperative to keep the wearer or user safe and in an upright and stable position, thereby preventing injury to the upper body of the user. In addition, due to the *loose fit* of the present invention, a user can better anticipate when a pulling canine may present a threat of a fall due to the pulling motion, thereby allowing the user to react by leaning back or sitting down to minimize harm to the user.

Id. (emphasis added). In other words, Appellant contends that the functions of the claimed invention are facilitated by a loose fit of the strap, whereas Seuk discloses a tight fit. We are not persuaded by this argument because it is premised upon the unsupported position that Seuk's apparatus must be worn tightly such that it could not rotate around the shoulder. As discussed above, Appellant does not proffer any evidence or persuasive technical reasoning that Seuk must be worn tightly. *See Pearson*, 494 F.2d at 1405. Instead, we agree with the Examiner that Seuk's shoulder sling could be worn more loosely by a user such that it could rotate around the torso. *See* Final Act. 3; Ans. 7. Seuk teaches that "[t]he length of sling 130 is adjustable using adjustment slides 138 to accommodate handlers of different sizes." Seuk ¶ 19 (boldface omitted). As the Examiner explains, "the structure required to tighten or loosen the strap of Seuk is the adjustment mechanism 138." Ans. 7. In this regard, Appellant does not persuasively refute the Examiner's position that the structure of Seuk's shoulder sling 130 and adjustment slides 138 would allow it to be worn more loosely and perform the functions recited in the claim. *See id.* at 10 (explaining that

"Seuk will perform the functional limitations when a force is exerted on Seuk. Seuk may be situated loosely over the shoulder of a user, 138 of Seuk allows for this adjustment"). We note that Appellant has not pointed out any particular structural element or feature of its physical apparatus (with Appellant instead focusing on how the apparatus is worn) that is lacking in Seuk that would prevent Seuk's apparatus from performing as claimed.

As discussed above, the Examiner proposes modifying Seuk to include a releasable storage pouch, as taught by Flaig. *See* Final Act. 3. Appellant argues that the Examiner's proposed combination of Seuk and Flaig is improper because "Flaig teaches away from the present invention." Appeal Br. 9. In particular, Appellant asserts that Flaig's "type of self-contained device with a retractable leash teaches away from the wearable strap which is positioned over the shoulder, as described in the present invention." *Id.* These arguments are unconvincing. In order to "teach away," a reference must "criticize, discredit, or otherwise discourage the solution claimed." *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). Here, Appellant has not identified any passage in Flaig that actually criticizes, discredits, or discourages the use of a wearable strap positioned over the shoulder. We note that "[a] reference does not teach away . . . if it merely expresses a general preference for an alternative invention but does not 'criticize, discredit, or otherwise discourage' investigation into the invention claimed." *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (quoting *Fulton*, 391 F.3d at 1201).

Appellant argues that "[c]ombining the teaching of Flaig with the teaching of Seuk renders the sling of Seuk inoperable." Appeal Br. 9. In particular, Appellant asserts that, "[a]s Seuk does not have an end which is

formed into a loop, the hard shell pet waste collection device cannot be attached to Seuk as taught by Flaig." *Id.*; *see also id.* (asserting that "[t]he wearable strap of the present invention, which is positioned over the shoulder[,] cannot be formed into a loop as required by Flaig"). Appellant also asserts that

> [t]he combination of [the] apparatus of Seuk with the device of Flaig would yield an apparatus with a pet waste collection device extending from the carabiner 140 of Seuk which is maintained at the 9 o'clock position, as was previously described. The positioning of the pet waste collection device of Flaig would compromise the connection between the apparatus of Seuk and the leash.

Id. at 10. According to Appellant, "[i]f the Flaig device were positioned anywhere else on a rotatable wearable strap, the weight of the Flaig device would rotate the wearable strap to an improper position." *Id.* We are not persuaded by this line of argument. Flaig teaches a pet waste collection device 11 comprising container 12 with handle 16 and leash fastener 17. Flaig ¶¶ 16–18. Flaig teaches that "leash fastener 17 is shown as a carabiner, however, alternate types of locking fasteners, such as any of various clips and clasps may be used." *Id.* ¶ 18 (boldface omitted). Although Flaig teaches that pet leash 31 is formed into a loop and secured to leash fastener 17 (Flaig ¶ 18), Appellant does not persuasively explain why attaching Flaig to Seuk would require forming Seuk's shoulder sling 130 into a loop (*see* Appeal Br. 9). Rather, we agree with the Examiner that "the clip (17) of Flaig allows the storage container of Flaig to be attached anywhere on the device of Seuk" (Ans. 12) and would "not inhibit Seuk from attaching a pet leash to his clip 140" (*id.* at 11). Appellant also does not identify error in the Examiner's position that "[t]he force of the canine

pulling the belt will cause the device to rotate around the shoulder of a user, the weight of the waste bag storage apparatus will be negligible when compared to this." *Id.* at 13; *see also. id.* (explaining that "the weight of a pet waste container will not have a greater force than the strength of a dog pulling the device. The force of a small waste bag dispenser is minimal when compared to the force exerted on a canine handling apparatus when dog pulls forward").

Moreover, Appellant does not persuasively refute the Examiner's reasoning that the proposed modification would improve Seuk's apparatus by "allow[ing] a user of Seuk to store poop bags and . . . provid[ing] for the additional structure of an additional leash on hand if needed. Or Flaig may provide a way to store the leash of Seuk when the leash is not in use." *Id.* at 11. We note that, "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007); *see also id.* at 416 ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results."). Appellant has not provided any factual evidence or persuasive technical reasoning to explain why modifying Seuk's apparatus to include a releasable storage pouch, as taught by Flaig, in an operable manner would yield anything other than a predictable result, or that doing so would be somehow beyond the level of ordinary skill in the art. "A person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR*, 550 U.S. at 421.

We are also unpersuaded by Appellant's argument that the Examiner's proposed combination of Seuk and Flaig is based upon impermissible hindsight. *See* Appeal Br. 9, 11. Appellant does not identify any knowledge relied upon by the Examiner that was gleaned only from Appellant's disclosure and that was not otherwise within the level of ordinary skill in the art at the time of the invention. *See In re McLaughlin*, 443 F.2d 1392 (CCPA 1971) ("Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper.").

For the above reasons, Appellant does not apprise us of error in the Examiner's conclusion of obviousness with respect to claim 1. Accordingly, we sustain the rejection of claim 1, and claims 4, 5, and 16 falling therewith, under 35 U.S.C. § 103 as being unpatentable over Seuk and Flaig.

Rejections II–IX

With respect to the rejections of claims 2, 6–10, 12–15, 17, 19, and 20 Appellant does not set forth any additional substantive arguments separate from the arguments discussed *supra*; instead adding only that each of Johnson, Clark, Green, Henry, Ehret, Garcia, and Ekstrum does not cure the asserted deficiencies in the combination of Seuk and Flaig, and otherwise relying on dependency from independent claims 1 and 16. *See* Appeal Br. 12–16. Thus, for the same reasons that Appellant's arguments do not apprise us of error in the rejection of base claims 1 and 16, Appellant also

does not apprise us of error in the rejections of claims 2, 6–10, 12–15, 17, 19, and 20.

Accordingly, we likewise sustain the rejections of claims 2, 6–10, 12–15, 17, 19, and 20 under 35 U.S.C. § 103 as being unpatentable over Seuk, Flaig, and one or more of Johnson, Clark, Green, Henry, Ehret, Garcia, and Ekstrum.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 4, 5, 16	103	Seuk, Flaig	1, 4, 5, 16	
2, 17	103	Seuk, Flaig, Johnson	2, 17	
6, 7, 9, 10	103	Seuk, Flaig, Clark	6, 7, 9, 10	
8	103	Seuk, Flaig, Clark, Green	8	
12	103	Seuk, Flaig, Henry	12	
13	103	Seuk, Flaig, Ehret	13	
14	103	Seuk, Flaig, Garcia	14	
15	103	Seuk, Flaig, Ekstrum	15	
19, 20	103	Seuk, Flaig, Johnson, Clark	19, 20	
Overall Outcome			1, 2, 4–10, 12–17, 19, 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED