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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ALEXANDRA MACOMBER KLINE

Appeal 2019-000717
Application 15/604,168
Technology Center 3700

Before BIBHU R. MOHANTY, PHILIP J. HOFFMANN, and
BRADLEY B. BAYAT, *Administrative Patent Judges*.

HOFFMANN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

According to Appellant, the “invention relates to systems and method for tracking athletes on their pace of traverse on a running track and

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 Alexandra Macomber Kline. Appeal Br. 3.

providing a visual light cue reflective of a predetermined pace of traverse.”

Spec. ¶ 1. Claims 1, 10, and 19 are the independent claims on appeal.

Below, we reproduce claim 1 as illustrative of the appealed claims.

1. A system for pacing a runner around a running track at a predetermined pace with a moving visual light cue, comprising:

at least one light strip that is positioned in sight of at least one running lane of the running track, the at least one light strip containing a plurality of light elements; and

a dynamically updateable controller for the at least one light strip, the dynamically updateable controller further configured to track a position of the runner on the running track and selectively light one or more of the plurality of light elements of the at least one light strip in a sequence thereby giving the moving visual cue to the runner of the predetermined pace around the running track.

REJECTIONS² AND PRIOR ART

The Examiner rejects the claims as follows:

² Although Appellant argues that the Examiner errs by refusing to enter claim amendments that would overcome objections to claims 4, 6, and 13, the Examiner’s refusal to enter amendments that would overcome the claim objection (*see* Final Action 2; *see* Appeal Br. 10) is reviewable, if at all, by filing a petition for the Director’s review. *See In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002) (citing *In re Hengehold*, 440 F.2d 1394, 1403–04 (CCPA 1971) (stating that there are many kinds of decisions made by examiners that are not appealable to the Board when they are not directly connected with the merits of issues involving rejections of claims, and holding that “the kind of adverse decisions of examiners which are reviewable by the [B]oard must be those which relate, at least indirectly, to matters involving the rejection of claims”)); *see* MPEP §§ 706.01, 1002.02(c)(4), 1201 (the Board will not ordinarily hear a question that is reviewable by petition).

- I. Claims 9–18 under 35 U.S.C. § 112(b) as indefinite for failing to particularly point out and distinctly claim the subject matter that Appellant regards as the invention;
- II. Claims 1–3, 5, 7–12, 14, and 16–20 under 35 U.S.C. § 102(a)(1) as anticipated by Buresta (US 2012/0091921 A1, pub. Apr. 19, 2012); and
- III. Claims 4, 6, 13, and 15 under 35 U.S.C. § 103 as unpatentable over Buresta and Deutsch et al. (US 2007/0213126 A1, pub. Sept. 13, 2007) (hereinafter “Deutsch”).

ANALYSIS

Rejection I—Indefiniteness rejection of claims 9–18

In the Appeal Brief, Appellant fails to argue that the current claims are not indefinite. Instead, Appellant argues that the Examiner errs by failing to enter the claim amendments that Appellant filed on February 26, 2018. *See* Appeal Br. 10. We note that the Examiner “agrees that the amended claims submitted after final rejection, if entered, would overcome the outstanding 35 U.S.C. § 112(b) rejection[.]” (Answer 10), and, therefore, it is not clear to us why the Examiner did not enter the claim amendments for purposes of appeal (*see, e.g.*, Advisory Action Before the Filing of an Appeal Brief cover sheet (mailed Mar. 9, 018), text following box 7). Regardless, the Examiner’s refusal to enter the amendment is reviewable, if at all, by filing a petition for the Director’s review. *See, e.g., In re Mindick*, 371 F.2d 892, 894 (CCPA 1967) (holding that the refusal of an examiner to enter an amendment of claims is reviewable by petition under 37 C.F.R. § 1.181, and not by appeal to the Board). Inasmuch as Appellant

fails to show that the Examiner's indefiniteness rejection of the claims before us is in error (i.e., Appellant fails to persuade us that the Examiner errs by determining that claims are indefinite), we summarily sustain this rejection.

Rejection II—Anticipation rejection of claims 1–3, 5, 7–12, 14, and 16–20

As set forth above, independent claim 1 recites, in relevant part,

a dynamically updateable controller for the at least one light strip, the dynamically updateable controller further configured to track a position of the runner on the running track and selectively light one or more of the plurality of light elements of the at least one light strip in a sequence thereby giving the moving visual cue to the runner of the predetermined pace around the running track.

Appeal Br., Claims App. Appellant argues that the Examiner errs because Buresta does not disclose the claimed “dynamically updateable controller.” *Id.* at 11–13. Specifically, Appellant argues that “Buresta does not teach that the pacing program on the controller . . . is ‘dynamic’ and can change based on the determination of the ‘position’ of the athlete (which gives the pace of traverse).” *Id.* at 11. Based on our review of the record, Appellant does not persuade us that the Examiner's finding that Buresta discloses the claimed controller is in error.

The above-reproduced claim recitation represents the extent to which claim 1 describes the “dynamically updateable controller”—i.e., the controller is “configured to track a position of the runner on the running track,” and is configured to “selectively light one or more of the plurality of light elements of the at least one light strip in a sequence thereby giving the moving visual cue to the runner of the predetermined pace around the

running track.” The claim does *not*, for example, recite that the selective lighting is somehow affected by or related to the tracked position of the runner.

To the extent that we might otherwise rely on Appellant’s Specification to explain what a dynamically updateable controller is or is not, Appellant references the Specification’s paragraph 25. *See* Appeal Br. 12. Below, we reproduce this paragraph in its entirety:

The controller 24 is dynamically updated, either by a person inputting further commands, such as the runner or coach, and can use a variety of data for dynamically altering the training program. In one embodiment, the controller 24 determines the position of the runner 12 on the track 14 and determines the pace of traverse of the runner 12 and can dynamically update the light cue 30. In one embodiment, the controller 24 include a wireless interface and there is a location transmitter 22 worn by the runner 12 that transmits a location signal, and the controller has a receiver for the location signal. Through transmission of the location signal, the controller 24 knows where the runner 12 is and can determine the pace of traverse of the runner 12. The controller 28 sequentially lights individual elements of the plurality of light elements 20, such as cue 30, to give an appearance of continuous motion of a pacing light (or cue) to the runner 12. The motion of light cue 30 is in the direction of [Figure 1’s] arrow A, and the motion of light cue 34 is in the direction of [Figure 1’s] arrow B respectively.

Spec. ¶ 25. This portion of the Specification also does not disclose that the lighting is somehow affected by or related to the tracked position of the runner. For example, the second sentence of the paragraph states that “the controller 24 determines the position of the runner 12 on the track 14 and determines the pace of traverse of the runner 12 and can dynamically update the light cue 30,” but does *not* state, for example, that “the controller 24 determines the position of the runner 12 on the track 14 and based on the

position both 1) determines the pace of traverse of the runner 12 and 2) can dynamically update the light cue 30.” Instead, this sentence explains that “the controller 24 determines the position of the runner 12 on the track 14,” the controller “determines the pace of traverse of the runner 12,” and the controller “can dynamically update the light cue 30,” without further explanation of what “dynamically updat[ing]” entails. Thus, consistent with Appellant’s Specification, a dynamically adjustable controller encompasses a controller that determines the runner’s position on the track, determines the runner’s pace on the track, and permits adjustment of the light cues, apparently without limitation as to time (e.g., before a run), and apparently in response to any input (e.g., a setting by the coach prior to the run).

Based on the foregoing, to support adequately a finding that Buresta discloses the claimed “dynamically updateable controller,” the Examiner need only show that Buresta teaches a controller that is “configured to track a position of the runner on the running track,” and is configured to “selectively light one or more of the plurality of light elements of the at least one light strip in a sequence thereby giving the moving visual cue to the runner of the predetermined pace around the running track.” We disagree with Appellant that Buresta must disclose that the selective lighting occurs in response to, or is affected by, the tracked position of the runner. Appeal Br. 11–13.

The Examiner supports adequately that Buresta discloses a controller tracking a position of a runner, and selectively lighting light elements, as recited in claim 1. *See, e.g.,* Answer 3–4. Thus, we sustain the Examiner’s anticipation rejection of claim 1. Inasmuch as Appellant argues the rejection

of claims 2, 3, 5, 7–12, 14, and 16–20 with claim 1, we also sustain the anticipation rejection of claims 2, 3, 5, 7–12, 14, and 16–20.

Rejection III—Obviousness rejection of claims 4, 6, 13, and 15

Claims 4 and 13

With respect to dependent claim 4, claim 4 depends from claim 2, which depends from claim 1. Thus, we reproduce both claims 2 and 4 in their entirety:

2. The system of claim 1, wherein the dynamically updateable controller further includes a sensor for determining the position of the runner on the running track and determines a pace of traverse of the runner.

4. The system of claim 2, further comprising one or more position detectors positioned around the running track, the one or more position detectors transmitting a signal to the dynamically updateable controller indicating the position of the runner on the running track, and the dynamically updateable controller further configured to determine the pace of traverse of the runner based upon the signal.

Appeal Br. (Claims App.).

Appellant argues that the Examiner's rejection is in error based on the following:

In claim[] 4 . . . , a plurality of sensors are added to the systems of claim[] 1 . . . to provide position information to the controller 24 to determine the pace of the athlete. *This information allows the dynamic updating of the pacing program based upon the pace of the athlete*, which Buresta does not speak to, and neither does Deutsch. This element is neither shown in Buresta nor Deutsch[,] and the Examiner simply does not address it.

Id. at 12 (emphasis added). Appellant's argument is not persuasive of error, however, because Appellant's argument is not commensurate with the scope

of claim 4. Claim 4 does recite that the dynamically updateable controller “includes a sensor for determining the position of the runner on the running track” and “determines a pace of traverse of the runner,” and that the system includes “position detectors positioned around the running track . . . [and] transmitting a signal to the dynamically updateable controller indicating the position of the runner on the running track,” “and [that] the dynamically updateable controller [is] further configured to determine the pace of traverse of the runner based upon the signal.” Notwithstanding Appellant’s argument, however, claim 4 does not recite any “updating of the pacing program based upon the pace of the athlete.” Thus, we sustain the Examiner’s obviousness rejection of claim 4, as Appellant does not show that the Examiner errs. Because Appellant argues the rejection of claim 13 with claim 4, we also sustain the obviousness rejection of claim 13.

Claims 6 and 15

With respect to dependent claim 6, the claim recites the following:

6. The system of claim 1, further comprising
a transmitter carried by the runner, the transmitter configured to send selective command signals from the runner to the dynamically updateable controller to dynamically update the predetermined pace, moving visual light cue, or other attribute, and

the dynamically updateable controller further includes a receiver for the selective command signals sent from the runner.

Appeal Br., Claims App. We agree with Appellant that the Examiner does not support adequately that either reference discloses a transmitter carried by the runner and configured to send selective command signals from the runner to a dynamically updateable controller to dynamically update the

predetermined pace, moving visual light cue, or other attribute. *Id.* at 14–15. For example, although the Examiner relies on Deutsch’s paragraph 99 to disclose the claimed transmitter, the Examiner does not explain sufficiently how “the LED panel . . . flash[ing] the figure 1.23 . . . to indicate that the athlete is 1.23 second behind the desired pace for the event” discloses a transmitter transmitting selective command signals from the runner, as claimed. Answer 19–20. The Examiner also does not explain sufficiently how any “sensor worn by the athlete” as set forth in Deutsch’s paragraph 92, which according to the Examiner’s explanation appears to collect information without any input from the runner (*see, e.g.*, Answer 18–19), discloses a transmitter transmitting selective command signals from the runner. Thus, we do not sustain the Examiner’s obviousness rejection of dependent claim 6, or of dependent claim 15 that includes a similar recitation as claim 6.

CONCLUSION

We AFFIRM the Examiner’s indefiniteness rejection of claims 9–18.

We AFFIRM the Examiner’s anticipation rejection of claims 1–3, 5, 7–12, 14, and 16–20.

We AFFIRM the Examiner’s obviousness rejection of claims 4 and 13.

We REVERSE the Examiner’s obviousness rejection of claims 6 and 15.

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In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
9-18	112(b)	Indefiniteness	9-18	
1-3, 5, 7-12, 14, 16-20	102(a)(1)	Buresta	1-3, 5, 7-12, 14, 16-20	
4, 6, 13, 15	103	Buresta, Deutsch	4, 13	6, 15
Overall Outcome			1-5, 7-20	6

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

AFFIRMED IN PART