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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROLAND PHILLIPS

Appeal 2019-000731
Application 14/240,424¹
Technology Center 3600

Before BIBHU R. MOHANTY, PHILIP J. HOFFMANN, and
TARA L. HUTCHINGS, *Administrative Patent Judges*.

HOFFMANN, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant appeals from the Examiner’s rejection of claims 1 and 4–9. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

According to Appellant, “[t]he invention relates to a ballistic multilayer arrangement to defend against projectiles or other highly-accelerated components.” Spec. 1, ll. 5–7. Claim 1 is the sole the

¹ “The real party in interest in the present appeal is RELION Protection Systems AG.” Appeal Br. 3.

independent claim on appeal. Below, we reproduce claim 1 as representative of the appealed claims.

1. A ballistic layer for a ballistic multilayer arrangement, the ballistic layer being formed by an absorption layer including expanded glass held in a matrix including a synthetic resin, wherein the expanded glass is present in the form of sintered expanded-glass granulate, and the sintered expanded-glass granulate is held in a dense packing or fill by the matrix that encloses the sintered expanded-glass granulate.

REJECTIONS AND PRIOR ART

The Examiner rejects the claims as follows:

- I. Claims 1 and 4–9 under 35 U.S.C. § 103(a) as unpatentable over Misencik et al. (US 2009/0090236 A1, pub. Apr. 9, 2009) (“Misencik”) and Strachan (US 5,120,380, iss. June 9, 1992); and
- II. Claims 1 and 4–9 under 35 U.S.C. § 102(b) as anticipated by Morgan et al. (US 2011/0023763 A1, pub. Feb. 3, 2011) (“Morgan”).

ANALYSIS

Rejection I

In the Appeal Brief, Appellant argues that the Examiner’s obviousness rejection is in error because the Examiner does not support adequately that one of ordinary skill would use Strachan’s granulate in Misencik’s ballistic layer that is formed by an absorption layer including a matrix with a synthetic resin. *See* Appeal Br. 9–15. Based on our review of the record, including Appellant’s Appeal Brief and Reply Brief, and the Examiner’s

Final Office Action and Answer, we agree with Appellant. Thus, for the reasons discussed below, we do not sustain the obviousness rejection.

Similar to Appellant's claims, which recite "[a] ballistic layer for a ballistic multilayer arrangement" (Appeal Br., Claims App.), Misencik is directed to a "blast-resistant panel system" (Misencik ¶ 1). Although Appellant disagrees with the Examiner's finding, we assume, *arguendo*, that Strachan discloses the claimed sintered expanded-glass granulate. The Examiner determines that it would have been obvious to use Strachan's sintered expanded-glass granulate in Misencik's ballistic layer that is formed by an absorption layer including a matrix with a synthetic resin, because

[Appellant] is selecting one material type of particulate for another in an analogous art setting with expected or predictable results. [Appellant] should note that "when a patent claims a structure already known in the prior art [which] is altered by the mere substitution of one element for another known in the field, the combination must do more than yield predictable results."

Answer 4 (citation to *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) omitted). We do not sustain the rejection, however, because the Examiner does not establish that using Strachan's sintered expanded-glass granulate in place of Misencik's synthetic material would provide expected or predictable results.

As stated above, Misencik is directed to a blast-resistant panel system, which does not use a sintered expanded-glass granulate. Answer 4. The Examiner cites Misencik's paragraph 29 as providing "[e]xplicit motivation" for using Strachan's granulate. *Id.* at 5. Based on our review of this portion of Misencik, we do not discern any such motivation, or anything else indicating that using a sintered expanded-glass granulate in a blast-resistant panel system would provide expected or predictable results. Misencik's

paragraph 29 does not appear to even discuss the use of glass, but rather discusses the use of certain other “pulverizable material[s].” Misencik ¶ 29. Misencik’s discussion of using certain pulverizable materials in a blast-resistant panel system does not indicate that using a sintered expanded-glass granulate would provide expected or predictable results simply because a sintered expanded-glass granulate is a pulverizable material.

The Examiner also cites Strachan’s column 5, lines 10–36, as providing “[e]xplicit motivation” for using Strachan’s granulate in Misencik’s blast-resistant panel system. Answer 7. First, neither this portion nor any other portion of Strachan appears to be directed to a blast-resistant panel system, but rather Strachan is directed to “core-filled pultruded profiles.” Strachan col. 1, ll. 5–6. The Examiner does not find that Strachan discloses anything about the use of pultruded profiles in a blast-resistant panel system, a ballistic layer, or the like. Further, even assuming (as we discuss above) that the cited portion of Strachan refers to a sintered expanded-glass granulate, we do not discern anything in the portion of Strachan which the Examiner cites indicating that using a sintered expanded-glass granulate in Misencik’s blast-resistant panel system would provide expected or predictable results. At most, the cited portion of Strachan may establish that one of ordinary skill would know to use a sintered expanded-glass granulate in certain pultruded profiles.

Thus, based on the foregoing, we do not sustain the Examiner’s obviousness rejection of independent claim 1 and of claims 4–9 that depend from claim 1.

Rejection II

As set forth above, independent claim 1 recites, in relevant part, “[a] ballistic layer for a ballistic multilayer arrangement, *the ballistic layer* being formed by” Appeal Br., Claims App. (emphasis added). We agree with Appellant that the Examiner does not support adequately that Morgan discloses a “ballistic layer.” Appeal Br. 21. As discussed in Appellant’s Specification, a ballistic layer is a layer that “defend[s] against projectiles or other highly-accelerated components.” Spec. 1, ll. 5–7. Claim 1’s recitation of the claimed “ballistic layer” in the claim body is a structural limitation that Morgan must disclose to anticipate the claim. Based on our review of the record, including the supporting references the Examiner cites (*see, e.g.*, Answer 9–11), it is not clear that Morgan discloses a ballistic layer as claimed. Therefore, we do not sustain the anticipation rejection of independent claim 1, or of dependent claims 4–9.

DECISION

We REVERSE the Examiner’s anticipation and obviousness rejections of claims 1 and 4–9.

REVERSED