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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AUSTIN ALBERT WALSH

Appeal 2019-001518
Application 14/843,129
Technology Center 3600

Before JOSEPH A. FISCHETTI, KENNETH G. SCHOPFER, and
TARA L. HUTCHINGS, *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3, 12, 14, and 21–27.² We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE and enter a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

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 Austin Walsh. Appeal Br. 2.

² We note that Appellant's proposed amendment filed on March 12, 2018 and which attempted to cancel claims 3 and 23, was not entered. *See* Advisory Act. mailed April 3, 2018.

BACKGROUND

The Specification discloses that the “invention relates generally to a bicycle helmet that has an added minimally sized, face protection structure, to protect the bicyclist’s face while providing a great amount of visibility and a great amount of ventilation, for increased safety and endurance.”

Spec. 1.

CLAIMS

Claims 1, 12, and 27 are the independent claims on appeal. Claim 1 is illustrative of the appealed claims and recites:

1. A bicycle helmet including a minimally sized face protective structure comprising:

said bicycle helmet having a front side, said front side having a main helmet opening for the positioning of a bicyclist's face, said bicycle helmet having a back side, said bicycle helmet having a left side, said bicycle helmet having a right side, said bicycle helmet having an exterior surface,

said minimally sized face protective structure having a cross-sectional height of less than 30 millimeters high that extends within that height for a length of more than 200 millimeters long, said minimally sized face protective structure being under 30 millimeters high that extends within that height for a length of more than 200 millimeters long to be small enough to allow a vitally high level of air flow to pass in front of the bicyclist's face to provide ample oxygen for the bicyclist to breathe and allow ample cooling fresh air to flow past the exercising bicyclist to keep the bicyclist cool plus allowing a high level of both peripheral visibility and far and near visibility all while providing face protection,

said minimally sized face protective structure having a first connective section positioned at one end of said minimally sized face protective structure, said minimally sized face protective structure having a second connective section

positioned at said minimally sized face protective structure opposite end,

said bicycle helmet is formed integrally with said minimally sized face protective structure,

said left side of said bicycle helmet is substantially formed around said first connective section of said minimally sized face protective structure, said right side of said bicycle helmet is substantially formed around said second connective section of said minimally sized face protective structure, so that a secure connection between said bicycle helmet and said minimally sized face protective structure is made,

said first connective section of said minimally sized face protective structure further has a first auxiliary stabilizing extension that extends from said first connective section up to said left side of said bicycle helmet, said left side of said bicycle helmet formed substantially around said first auxiliary stabilizing extension,

said second connective section of said minimally sized face protective structure further has a second auxiliary stabilizing extension that extends from said second connective section up to said right side of said bicycle helmet, said right side of said bicycle helmet formed substantially around said second auxiliary stabilizing extension to provide a strong connection between said bicycle helmet and said minimally sized face protection,

said minimally sized face protective structure being substantially positioned in front of said main helmet opening, so that said minimally sized face protective structure can protect the bicyclist's face, said minimally sized face protective structure extending substantially to in front of the bicyclist's mouth, chin or neck,

said bicycle helmet is made substantially from a plastic or partially plastic material,

said minimally sized face protective structure may be constructed from an amount of plastic, fiberglass, carbon fiber, aluminum, magnesium, steel or a combination of materials that provides said minimally sized face protective structure the strength to substantially prevent a cyclist's face from hitting a

road or path during a bicycle type crash impact, whereby said minimally sized face protective structure provides facial impact protection that also provides a great amount of visibility and allows air to easily flow around said minimally sized face protective structure to thereby provide ample oxygen and ample cooling fresh air for the exercising bicyclist, whereby the bicyclist has increased protection, ventilation and visibility to greatly avoid crashing and injury.

Amended Claims filed Oct. 19, 2017 (emphasis added).

REJECTIONS³

1. The Examiner rejects claims 1, 12, and 21–27⁴ under 35 U.S.C. § 103 as unpatentable over Del Rosario.⁵
2. The Examiner rejects claim 3 under 35 U.S.C. § 103 as unpatentable over Del Rosario in view of Martinez.⁶
3. The Examiner rejects claim 14 under 35 U.S.C. § 103 as unpatentable over Del Rosario in view of Bryksa.⁷

DISCUSSION

New Ground of Rejection

With respect to this rejection, we refer by way of example, to the emphasized language of claim 1 quoted above. With respect to this limitation and the substantially similar limitations included in independent

³ We reference the rejections as set forth by the Examiner in the Advisory Action mailed May 18, 2018. The Examiner has withdrawn the rejections under 35 U.S.C. § 112. *See* Advisory Act. 2 (mailed May 18, 2018).

⁴ We consider the Examiner's inclusion of claims 3 and 14 in the heading for this rejection to be an inadvertent error, as those claims are separately rejected and not discussed in the body of this rejection.

⁵ Del Rosario, US 2009/0260133 A1, pub. Oct. 22, 2009.

⁶ Martinez, US 6,834,398 B1, iss. Dec. 28, 2004.

⁷ Bryksa, US 4,317,239, iss. Mar. 2, 1982.

claims 12 and 27, we conclude that it is not reasonably possible to interpret the claim with sufficient clarity to satisfy 35 U.S.C. § 112(b). *See In re Packard*, 751 F.3d 1307, 1313 (Fed. Cir. 2014) (per curiam). In particular, we are unable to determine the metes and bounds of claim 1 to the extent it requires a face protective structure that is

small enough to allow a vitally high level of air flow to pass in front of the bicyclist's face to provide ample oxygen for the bicyclist to breathe and allow ample cooling fresh air to flow past the exercising bicyclist to keep the bicyclist cool plus allowing a high level of both peripheral visibility and far and near visibility all while providing face protection.

The claim requirements that the structure must provide “ample oxygen,” “ample cooling fresh air,” and “a high level of both peripheral visibility and far and near visibility” are relative and subjective terms that are not defined in the Specification with specificity such that one of ordinary skill in the art would understand the full scope of the claim when read in light of the Specification.

Accordingly, for the reasons set forth above, we conclude that independent claims 1, 12, and 27 are indefinite under 35 U.S.C. § 112(b). We also conclude that each of the dependent claims is indefinite for the same reasons. Finally, in view of our determination that claims 1, 3, 12, 14, and 21–27 are indefinite, and because we find that an analysis of the prior art rejection would necessarily be based on a speculative assumption as to the meaning of the claims, we do not sustain the rejection of the claims under 35 U.S.C. § 103(a). *See In re Steele*, 305 F.2d 859, 862–63 (CCPA 1962). It should be understood, however, that our decision in this regard is *pro forma* and based solely on the indefiniteness of the claimed subject matter, and

does not reflect in any way on the adequacy of the prior art evidence applied in support of the rejection.

CONCLUSION

We *pro forma* reverse the Examiner's rejections of claims 1, 3, 12, 14, and 21–27 under 35 U.S.C. § 103.

In a new ground of rejection, we reject claims 1, 3, 12, 14, and 21–27 under 35 U.S.C. § 112(b) as indefinite.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). Section 41.50(b) provides that “[a] new ground of rejection . . . shall not be considered final for judicial review.”

Section 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

- (1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .
- (2) *Request rehearing.* Request that the proceeding be reheard under §41.52 by the Board upon the same record.

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) (2017).

Appeal 2019-001518
 Application 14/843,129

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed	New Ground
1, 12, 21–27	103	Del Rosario		1, 12, 21–27	
3	103	Del Rosario, Martinez		3	
14	103	Del Rosario, Bryksa		14	
1, 3, 12, 14, 21–27	112(b)	Indefinite			1, 3, 12, 14, 21–27
Overall Outcome				1, 3, 12, 14, 21–27	

REVERSED
37 C.F.R. § 41.50(b)