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Fitch, Even, Tabin & Flannery, LLP 120 South La Salle Street, Suite 2100 Chicago, IL 60603-3406			MORRIS, TAYLOR L	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LINDA M. WALTHER, FRANK MARTORELLI, and
CRISTOBAL J. RODRIGUEZ

Appeal 2019-001754
Application 15/674,744
Technology Center 3600

Before CHARLES N. GREENHUT, MICHAEL L. HOELTER, and
ANNETTE R. REIMERS, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The present application (Application No. 15/674,744) is “a continuation of prior U.S. Patent Application No. 15/430,117 filed February 10, 2017.” Spec. ¶ 1. This parent Application No. 15/430,117 is, itself, “a continuation-in-part of co-pending and co-owned U.S. Patent Application No. 13/339,788.” Spec. ¶ 1. As to grandparent Application No. 13/339,788, “there was an appeal (Appeal No. 2015-003220) in which the Board entered a Decision on Appeal dated January 25, 2017” reversing the rejections by the Examiner (hereinafter “’220 Decision”). Appeal Br. 3. Appellant has also submitted a further appeal in grandparent Application No. 13/339,788, this further appeal bearing Appeal No. 2019-002517. No decision on this further appeal has yet been rendered.

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner’s decision to reject claims 1–8 and 10–13. *See* Appeal Br. 3. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

The disclosed subject matter “relates generally to intravenous poles.” Spec. ¶ 2. Apparatus claim 1 is the sole independent claim, is illustrative of the claims on appeal, and is reproduced below.

1. An intravenous (IV) pole base configured to couple in a tessellating manner to at least one other like IV pole base comprising:

a base footing having a side edge and a plurality of tessellating elements comprising at least each of a first blank and a first tab formed at opposing sides of the side edge;

a plurality of rolling members disposed on an underside of the base footing;

an IV pole coupler formed central to the base footing and configured to receive and hold an IV pole such that the IV pole extends outwardly perpendicularly to the base footing.

EVIDENCE

Bachmann	US. 3,335,989	Aug. 15, 1967
Hobson	US 6,929,588 B2	Aug. 16, 2005
Elzerman	US 2008/0234116 A1	Sept. 25, 2008

² 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 “Medline Industries, Inc.” Appeal Br. 3.

REJECTIONS

Claims 1, 2, 4, 5, and 10–13 are rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Elzerman and Hobson.

Claims 3 and 6–8 rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Elzerman, Hobson, and Bachmann.

ANALYSIS

*The rejection of claims 1, 2, 4, 5, and 10–13
as unpatentable over Elzerman and Hobson*

Appellant argues all these claims (i.e., claims 1, 2, 4, 5, and 10–13) together. *See* Appeal Br. 6–11. We select claim 1 for review, with the remaining claims (i.e., claims 2, 4, 5, and 10–13) standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 is directed to an intravenous (IV) pole base comprising “an IV pole coupler” that is “configured to receive and hold an IV pole.” The Examiner relies on a combination of the first and second embodiments of Elzerman (*see* Figs. 1 and 3) as teaching this coupler structure. *See* Final Act. 5 (it would have been obvious “to modify the pole in the second embodiment of Elzerman with the pole receiving structure from its first embodiment”). Claim 1 further recites “a plurality of rolling members disposed on an underside of the base footing.” The Examiner relies on “the removable casters from Hobson” for this teaching concluding that it would have been obvious to combine Elzerman and Hobson “in order to provide a means of adapting a base structure to have mobility.” Final Act. 5 (*referencing* Hobson 2:26–28, Abstract). Regarding the recited “configured to” claim language, the Examiner states, “any base structure able to receive a

cylindrical pole is configured to be the base for an IV pole.” Final Act. 5; *see also* Elzerman ¶ 20.

Appellant contends, “**Elzerman’s base is not ‘configured’ as an IV pole coupler.**” Appeal Br. 7. Appellant references the earlier ’220 Decision, and specifically where the Board stated “[i]n short, the Examiner does not indicate where, expressly or inherently, [the prior art to Simmons] discloses an apparatus ‘configured to’ provide support to an intravenous pole.” Appeal Br. 8 (quoting ’220 Decision, p. 4). Appellant contends, “[t]he exact same situation exists now.” Appeal Br. 8.

The Examiner acknowledges that the present rejection “differs from the reference used in the [earlier appeal, i.e., Simmons], which lacked an express disclosure” of a pole interface. Ans. 5. However, in the present matter, the “configuration in Fig. 1 [of Elzerman] is indicated as being a telescoping pole structure, which has a lower structure which is configured to receive an upper pole structure.” Ans. 5. Hence, according to the Examiner, “Appellant’s argument that the rejection of the present application is the same situation is incorrect.” Ans. 5.

There is merit to the Examiner’s findings and conclusions. The earlier cited reference to Simmons was acknowledged as lacking a pole support (*see supra*), but that is not the case with Elzerman. Elzerman clearly discloses a base supporting a pole. *See* Elzerman Fig. 1, ¶ 20.

Addressing Elzerman, Appellant contends, “Elzerman’s base is configured to connect to that particular pole. Elzerman makes no disclosure that this exercise pole is or can otherwise serve as an IV pole.” Appeal Br. 8; *see also* Reply Br. 2 (“Elzerman describes an exercise pole, and only an exercise pole. An exercise pole is not an IV pole.”), Ans. 4. While it is true

that Elzerman is silent as to the disclosed pole being an IV pole, claim 1 does not positively recite an IV pole. Instead, claim 1 recites a coupler “configured to receive and hold an IV pole.”³ Elzerman clearly teaches “length adjustability may be achieved by the use of a number of discrete segments affixable to one another, as for example by threading.” Elzerman ¶ 20. Appellant does not explain how Elzerman’s teaching of pole affixation would not equally apply to an IV pole.

Appellant also argues, “[i]t is not obvious to add Hobson’s casters to Elzerman’s base.” Appeal Br. 8. Appellant contends, “[p]lacing wheels underneath [Elzerman’s] base would run completely contrary to [Elzerman’s] principle of operation by almost wholly removing the friction between the base and the floor that Elzerman looks to establish.” Appeal Br. 9. Appellant further argues, “the ordinarily-skilled person’s common sense would suggest that if the person can lift and manipulate the base in order to attach (and detach) those casters, they are more than capable of moving the base once it has been lifted a short distance.” Reply Br. 3; *see also* Appeal Br. 10.

One skilled in the art would be cognizant not only of the desired end-use of the device, but also a need to transport the device to/from the end-user or to/from a designated exercise area. It is this latter action the Examiner seems to address by focusing on the use of removable casters to provide device mobility as needed. *See* Final Act. 5; Ans. 8 (“The casters of Hobson allow a user the option of translating the platform along the floor and their

³ This is consistent with our decision in the ’220 Decision which states, “we agree with the Examiner that an intravenous pole is not positively claimed.” ’220 Decision, p. 3.

removability lets a user revert the base to an untranslatable state.”). As indicated above, Appellant contends that the Examiner’s suggested method of mobility is more cumbersome than other methods of transport that are available.⁴ Regardless, Appellant does not dispute Elzerman’s express disclosure of device mobility. *See* Elzerman ¶ 17 (the device “is simple in construction, lightweight, portable and easy to use”). Here, the Examiner has provided a way to insure such portability by combining Hobson’s detachable casters with Elzerman’s base. “The fact that the motivating benefit comes at the expense of another benefit, however, should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another.” *Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n. 8 (Fed. Cir. 2000).

In summation, even presuming the Examiner’s suggested method of portability might be less desirable than other methods under certain circumstances, Appellant is not persuasive that the Examiner’s suggested method lacks “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (*citing In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Accordingly, and based on the record presented, we sustain the Examiner’s rejection of claims 1, 2, 4, 5, and 10–13 as being obvious over Elzerman and Hobson.

⁴ The Examiner notes, “Elzerman fails to account for all use cases, particularly that by overweight individuals or those who are not agile, as discussed by Hobson, who are not [] capable of lifting and moving the base of Elzerman for an extended period of time.” Ans. 8.

*The rejection of claims 3 and 6–8
as unpatentable over Elzerman, Hobson, and Bachmann*

Appellant does not argue the rejection of claims 3 and 6–8 separate from the arguments presented above. To be clear, Appellant states, “[w]hile we believe that other arguments are available to highlight the allowable subject matter presented in various ones of these dependent claims, we also believe that the comments set forth herein regarding allowability of the independent claim [is] sufficiently compelling.” Appeal Br. 11. As we are not persuaded of Examiner error in the rejection of claims 1, 2, 4, 5, and 10–13 above, we likewise are not persuaded of Examiner error in the further rejection of claims 3 and 6–8 over Elzerman, Hobson, and Bachmann.

CONCLUSION

In summary:

Claims Rejected	Basis	Affirmed	Reversed
1, 2, 4, 5, and 10–13	35 U.S.C. § 103(a) in view of Elzerman and Hobson	1, 2, 4, 5, and 10–13	
3 and 6–8	35 U.S.C. § 103(a) in view of Elzerman, Hobson, and Bachmann	3 and 6–8	
Overall Outcome		1–8 and 10–13	

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

AFFIRMED