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Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DONALD D. GREENE

Appeal 2019-001784
Application 13/462,763
Technology Center 3700

Before PHILLIP J. KAUFFMAN, JEREMY M. PLENZLER, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 25, 26, 36, 37, and 44–46, as amended August 14, 2018. The Examiner objects to claims 42 and 43 as being dependent upon rejected base claims. The remaining claims are cancelled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.¹

¹ In the Appeal Brief, Appellant challenged drawing objections, as well as the Examiner's refusal to enter an amendment dated October 3, 2013. Appeal Br. 7–8. Appellant concedes that the entry of the "Amendment under 37 CFR [§] 41.33," dated August 14, 2018, moots these challenges. Reply Br. 2–3. We will not address these challenges further.

CLAIMED SUBJECT MATTER

Claim 25 is independent, with claims 26, 36, 37, and 44–46 depending from claim 25. Claim 25 is reproduced below:

25. An exercise bench comprising:

a frame;

a seat situated over the frame;

a seatback at an angle to the seat;

a connection mechanism for adjustably and/or flexibly connecting the seatback to the frame or/and² the seat to at least enable the angle between the seatback and the seat to be materially adjusted; and

at least three pairs of handles, each pair of handles connected to the frame, the seat, the seatback, or/and the connection mechanism at generally symmetrical locations on opposite sides of the frame, the seat, the seatback, or/and the connection mechanism.

REJECTIONS

Claims 11–15, 27–35, 39–41, and 47–49 were cancelled in an “Amendment [After Notice of Appeal,] under 37 CFR [§] 41.33,” filed August 14, 2018. The amendment was entered on December 18, 2018, after an administrative remand issued on November 5, 2018. The amendment rendered moot some rejections appearing in the Office Action, mailed October 19, 2016, as well as some of the new grounds of rejection appearing in the Examiner’s Answer, mailed June 29, 2018. Other rejections were withdrawn in the Examiner’s Answer. Ans. 3–4. The only rejections

² It is unclear whether Appellant intends the conjunction “or/and” to mean something different than the conjunction “and/or,” used earlier. For purposes of this opinion, we will assume that the two are used interchangeably. In the event of further prosecution, Appellant may choose to clarify the meaning of these conjunctions.

remaining in the Appeal are two new grounds of rejection entered by the Examiner in the Answer:

1. Claims 25, 26, 36, 37, and 44–46 are rejected under 35 U.S.C. § 102(b) as being anticipated by Wilkinson (US 5,007,632, issued Apr. 16, 1991). Ans. 4.³

2. Claims 25, 26, 36, 37, and 44–46 are rejected under 35 U.S.C. § 102(b) as being anticipated by Sterling (US 4,838,547, issued June 13, 1989). Ans. 7.

OPINION

Wilkinson

Appellant argues claims 25, 26, 36, and 37 as a group. We select claim 25 as representative. Appeal Br. 4–7. Dependent claims 26, 36, and 37 stand or fall with independent claim 25. *See* 37 C.F.R. § 41.37(c)(1)(iv). The Appellant separately argues claims 44–46. Appeal Br. 7–9.

Claim 25

The only limitation in claim 25 disputed by Appellant is that related to the “at least three pairs of handles.” The Examiner finds that Wilkinson’s six hand holes 33, three of which are arranged linearly along each side of seat 2, satisfy this limitation. Ans. 5 (citing Wilkinson 4:1–7, Fig. 4). Figure 4 of Wilkinson is reproduced below.

³ Although additional claims are listed as subject to this rejection in the Answer, those claims have been cancelled, as explained above.

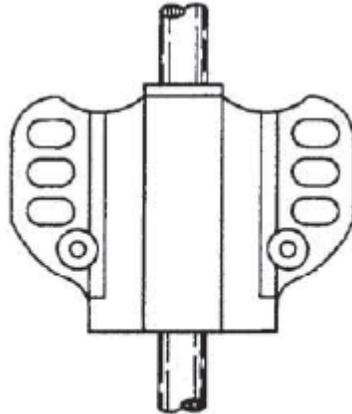


FIG. 4

Figure 4 shows the bottom of Wilkinson’s seat. Although reference numbers are absent from Figure 4, Wilkinson explains “[t]his view shows the hand holes 33 in the seat.” Wilkinson 4:2.

Appellant contends that the six hand holes 33 are not “handles,” as recited in claim 25, because they are not intended or configured to be grasped by a person. Reply Br. 5–6. In addition, Appellant contends that the six hand holes 33 are not “at least three sets of handles” because they are rigidly connected to one another, unlike “separate and distinct” handles described in the Specification. Reply Br. 6 (referencing “separate and distinct handles 108, 110, 240, 242, and 250 in the . . . application”).

Wilkinson describes hand holes 33 as being sufficiently large to fit a hand through. *See* Wilkinson 4:2–4 (“These holes are used during sit-ups by the person exercising to place their hands through the seat for better stability.”). A user who places his or her hands through hand holes 33 could grasp the solid material surrounding the holes, particularly the webs

extending between the outer edges of the holes and the lateral edges of the seat 3.

Although Wilkinson's hand holes 33 are rigidly connected to one another, as Appellant asserts, this contention is not commensurate with the scope of claim 25. Reply Br. 6. In particular, claim 25 does not recite that "the at least three pairs of handles" are "separate and distinct," such that they include the particular features of the exemplary embodiments described in Appellant's Specification.

Because Appellant's contentions are not persuasive, we sustain the rejection of claims 25, 26, 36, and 37 under 35 U.S.C. § 102(b) as being anticipated by Wilkinson.

Claims 44–46

Claim 44 recites, among other things, that "one of the pairs of handles is connected to the seatback." Claim 45 similarly recites, among other things, "one of the pairs of handles being connected to the seatback."

The Examiner does not specifically reference claim 45, but, when referring to claim 44, the Examiner finds that "Wilkinson discloses a pair of handles (33; Figure 4) connected to the seat at generally symmetrical locations on opposite sides of the seat (Figure 4; Col. 4, Lines 1-7)." Ans. 6.

Claim 25, from which claims 44 and 45 depend, recites that "each pair of handles [is] connected to the frame, the seat, the seatback, or/and the connection mechanism." Based on the plain language of that claim, we know, for example, that being "connected to . . . the seat" requires something different than being "connected to . . . the seatback."

Appellant correctly points out that all three pairs of handles identified by the Examiner are incorporated into Wilkinson's seat 2, rather than seat

back 3. Reply Br. 8–9. The Examiner offers no explanation as to how handles 33 are connected to seat back 3 in the manner required by the claim. For example, the Examiner fails to explain, in any way, how handles 33 are “connected to . . . the seatback,” rather than being “connected to . . . the seat.”

We do not sustain the rejection of claims 44 and 45 under 35 U.S.C. 102(b) as being anticipated by Wilkinson.

Claim 46 recites a “bench as in Claim 25 further including at least one additional pair of handles connected to the frame . . . at generally symmetrical locations on opposite sides of the frame.” Although the Examiner references claim 46, generally, the Examiner fails to make any particular finding related to the features recited in that claim (i.e., a pair of handles *in addition to* those defined by the hand holes 33). *See* Ans. 6. Therefore, we do not sustain the rejection of claim 46 under 35 U.S.C. § 102(b) as being anticipated by Wilkinson.

Sterling

Appellant argues claims 25, 26, 36, and 37 as a group. We select claim 25 as representative. Dependent claims 26, 36, and 37 stand or fall with independent claim 25. Appellant provides separate argument for claims 44–46.

Claim 25

With respect to claim 25, Appellant disputes only whether Sterling discloses a “frame,” and whether Sterling discloses “three pairs of handles . . . connected to . . . the seatback . . . at generally symmetrical locations on opposite sides of . . . the seatback.” Reply Br. 9–14. The Examiner finds that Sterling’s legs 15, 16, 28, 29 correspond to the recited “frame,” and

handles 19, 20, handles 23, 24, and handles 25, 26 correspond to the recited “three pairs of handles.” Ans. 7.

Figure 1 of Sterling is reproduced below.

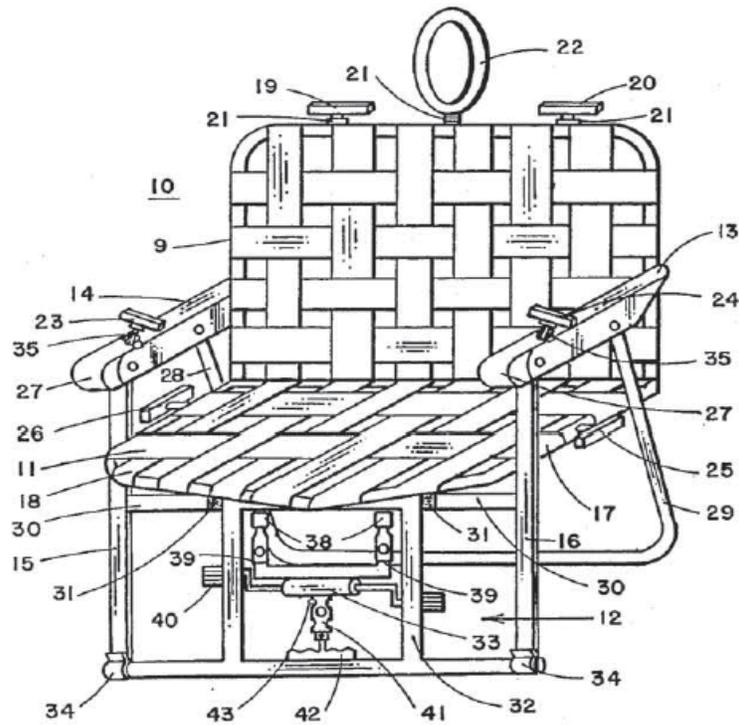


FIG. 1

Figure 1 is a perspective view of Sterling’s indoor-outdoor exercise chair 9. Exercise chair 9 has four legs 15, 16, 28, 29 coupled to exercise platform frame 32, seat 11, seat back 10, and numerous handles 19, 20, handles 23, 24, and handles 25, 26, as well as a pair of rubber caps 27 formed on the end of each arm 13 and 14 for grasping while lifting the legs or the back. Sterling 3:45–4:53.

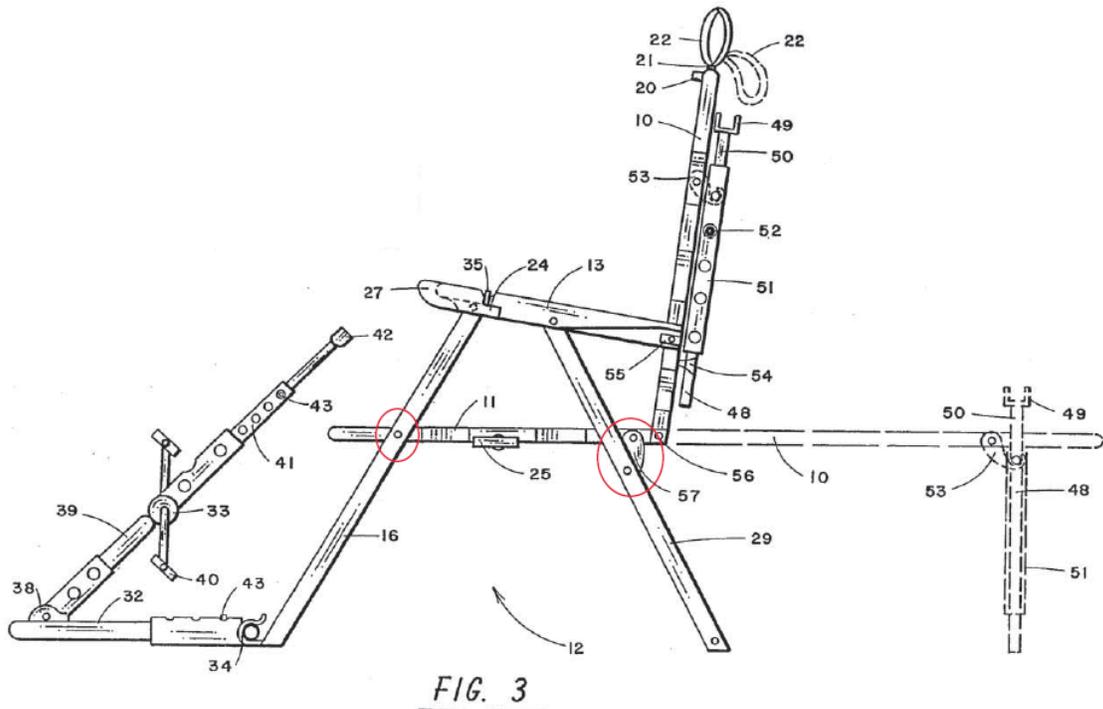
Appellant contends that a “frame” requires “a unitary physical structure that supports another physical structure,” and “can be a single piece

of material but usually consists of multiple parts in which each part adjoins each other part or is connected to it by one or more parts of the frame.”

Reply Br. 10. Appellant argues that legs 15, 16, 28, 29 do not constitute a frame because, collectively, they are not a unitary physical structure. Reply Br. 10–11. Moreover, Appellant argues that, even if legs 15, 16, 28, 29 do constitute a frame, the seat 11 is not “situated over the frame” because portions of the legs extend past the upper surface of the seat. Reply Br. 11.

Sterling discloses a “frame,” even under Appellant’s definition of that term. As noted above, Appellant’s definition requires a “unitary physical structure,” but not a “single piece of material.” Although the Examiner identifies legs 15, 16, 28, 29 as forming the “frame,” the “frame” is not necessarily exclusive to just those components. Applying Appellant’s definition, a “frame” “usually consists of multiple parts in which each part adjoins each other part or is connected to it by one or more parts of the frame.” Reply Br. 10.

Although not numbered separately in Sterling’s figures, Sterling explains that exercise chair 9 includes a “seat 11 frame” and a “chair back 10 frame.” Sterling 3:60, 4:12. There can be no dispute that legs 15, 16 and 28, 29 are connected to one another by at least the seat frame and the chair back frame, as best illustrated in Figure 3 of Sterling, reproduced below.



The figure reproduced above is Sterling's Figure 3, a side view of the chair shown in Sterling's Figure 1, with our annotation circling connection points between legs 15, 16, 28, 29 and the seat frame.⁴

Furthermore, the phrase "situated over the frame" is sufficiently broad to reasonably encompass the position of Sterling's seat 11 relative to legs 15, 16, 28, 29. Seat 11 is situated over at least lower portions of legs 15, 16, 28, 29. Either way, Sterling's exercise chair 9 includes "a frame; [and] a seat situated over the frame," as recited in claim 25. Moreover, as explained above, Sterling's "frame" is not limited to just legs 15, 16, 28, 29, but also includes the seat frame. The seating surface formed by the crisscrossing members secured to the seat frame (shown in Figure 1) is "situated over the frame" (e.g., over the tubing forming the seat frame).

⁴ The structure of the chair back frame and seat back frame is further illustrated in Figures 4 and 5, respectively. *See* Sterling 3:16–21.

Appellant next argues that handles 19, 20 are not “connected to . . . the seatback . . . at generally symmetrical locations on opposite sides of . . . the seatback,” as recited in claim 25. Reply Br. 12. Figure 4 of Sterling is reproduced below.

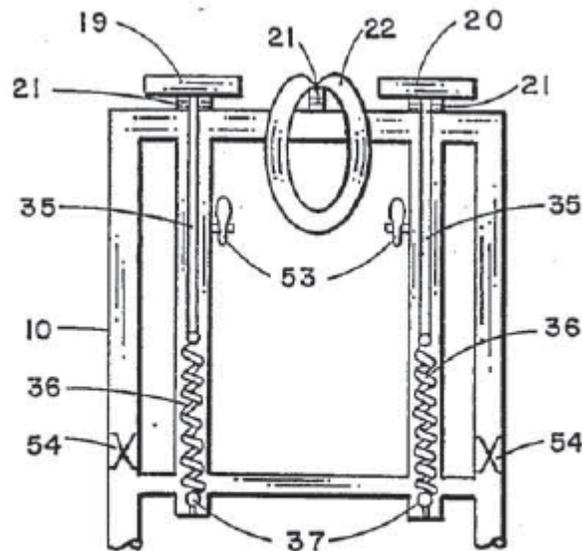


FIG. 4

Figure 4 is a perspective cutaway view of the chair back frame. As depicted in Figure 4, two vertical posts (i.e., the outermost posts) are joined at their upper ends by a cross member. A vertical line of symmetry is defined between the posts. Handles 19, 20 sit atop vertical tubing members situated between the posts, but on opposite sides of the vertical line of symmetry of the seat back 10. Sterling 4:10–15.

Appellant’s position implies that handles 19, 20 are not “at generally symmetrical locations on opposite sides of . . . the seatback” because the handles are not located on, or sufficiently near, the two vertical posts. Reply Br. 12, n.7. We disagree. The phrase “opposite sides” is sufficiently broad

to encompass a pair of components at similar positions opposite one another relative to the vertical line of symmetry. Defining “opposite sides” in this manner does not render the phrase “at generally symmetric location” superfluous—handles might be situated opposite each other across the line of symmetry and yet be asymmetric because they lie at significantly different distances from the line of symmetry.

Handles 19, 20, as depicted in Figures 1 and 4 of Sterling, are located on opposite sides of the seat back 10 because they are situated opposite each other across a vertical line of symmetry of the seat back. Handles 19, 20 are at generally symmetric locations because they, like the tubular members they sit atop, are roughly equidistance from the vertical line of symmetry.

We sustain the rejection of claims 25, 26, 36, and 37 under 35 U.S.C. § 102(b) as being anticipated by Sterling.

Claims 44–46

Appellant’s sole argument for the separate patentability of claims 44 and 45 is that handles 19, 20 are not “connected to the seatback at generally symmetrical locations on opposite sides of the seatback.” Reply Br. 14. Because this argument is not persuasive, for reasons explained above with respect to claim 25, we sustain the rejection of claims 44 and 45 under 35 U.S.C. § 102(b) as being anticipated by Sterling.

With respect to claim 46, the Examiner finds that Sterling’s rubber caps 27, which are connected indirectly to legs 15, 16, 28, 29 by way of arms 13, 14 (or, alternatively, connected indirectly to the lower parts of legs 15, 16, 28, 29 by way of arms 13, 14 and the upper parts of legs 15, 16, 28, 29), constitute an additional pair of handles. Ans. 8. Appellant disagrees, contending that rubber caps 27 are not handles because a person could not

wrap the fingers of one of his or her hands around the rubber caps such that the fingers touch, or nearly touch, his or her palm. Reply Br. 13, 15.

Appellant's contention is not persuasive.

Appellant has identified nothing in the intrinsic or extrinsic evidence that suggests that "handle" is limited to a part that can be grasped with the user's fingers touching, or nearly touching, the palm. Because Sterling expressly teaches that rubber caps 27 are designed to be grasped, they are a pair of handles. Sterling 3:56–59. We sustain the rejection of claim 46 under 35 U.S.C. § 102(b) as being anticipated by Sterling.

DECISION

We AFFIRM the Examiner's decision rejecting claims 25, 26, 36, and 37 under 35 U.S.C. § 102(b) as being anticipated by Wilkinson.

We REVERSE the Examiner's decision rejecting claims 44–46 under 35 U.S.C. § 102(b) as being anticipated by Wilkinson.

We AFFIRM the Examiner's decision rejecting claims 25, 26, 36, 37, and 44–46 under 35 U.S.C. § 102(b) as being anticipated by Sterling.

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