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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRADLY HUNTER

Appeal 2019-002282
Application 15/203,409
Technology Center 3700

Before STEFAN STAICOVICI, CHARLES N. GREENHUT, and
LEE L. STEPINA, *Administrative Patent Judges*.

STEPINA, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–3 and 5–8. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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 iWALKFree, Inc. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a hands-free crutch. Spec. ¶ 8.

Claim 1, reproduced below with emphasis added, is illustrative of the claimed subject matter.

1. A crutch configured to accommodate different circumference legs, comprising:
 - a frame;
 - a lower leg platform coupled to the frame;
 - a thigh fastener coupled to the frame through left and right arms, the left and right arms disposed to engage a user's upper thigh;
 - independently adjustable left and right mechanisms configured to adjustably fix the angular positions at which the left and right arms, respectively, extend from the frame along a horizontal plane* such that the angular positions of each of the left and right arms can be fixed at a plurality of angles along the horizontal plane relative to the frame and such that the angular positions of each of the left and right arms relative to the frame along the horizontal plane can be fixed at different angles from each other; and
 - an upper thigh contact surface coupled to the frame, the upper thigh contact surface disposed on the frame such that a corresponding front surface of the user's upper thigh contacting the upper thigh contact surface is prevented from extending substantially forward beyond the front of the frame.

Appeal Br. 21 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Tilsley	US 5,746,236	May 5, 1998
West	US 7,600,524 B2	Oct. 13, 2009
Jay	US 8,047,969 B1	Nov. 1, 2011

REJECTIONS

I. Claims 1–3 and 5–8 are rejected under 35 U.S.C. § 102(e) as anticipated by Jay.

II. Claims 1–3 and 5–8 are rejected under 35 U.S.C. § 103(a) as unpatentable over West and Tilsley.

OPINION

Rejection I—Jay

The Examiner finds that Jay discloses all of the elements recited in claim 1, and, specifically, that brackets 52 correspond to the recited independently adjustable left and right mechanisms that are configured to adjustably fix angular positions of left and right arms that engage a user's thigh. Final Act. 5–6 (citing Jay, col. 4, Figs. 1, 4).

Appellant argues that brackets 52 of Jay merely allow linear translation of leg braces 54, and, therefore, fail to meet the requirement in claim 1 that they provide for angular adjustment within a horizontal plane. *See* Appeal Br. 6–12.

In response, the Examiner, referring to Figure 1 of Jay, finds that brackets 52 rest against Jay's frame and that leg braces 54 are vertically adjustable. Ans. 11. The Examiner further finds that Jay's Specification does not teach that brackets 52 are permanently fixed to leg braces 54. *Id.* Based on these findings, the Examiner determines that brackets 52 allow for angular adjustment of leg braces 54. *Id.* Fundamentally, the Examiner determines that brackets 52 act as clamps that, when in an untightened state, allow for both angular and vertical movement of leg braces 54.

In reply, Appellant argues that Jay is silent as to how brackets 52 enable adjustment of leg braces 54, and the disclosure in Jay is insufficient to support the Examiner's findings. *See* Reply Br. 2–4.

We do not sustain the rejection of claim 1 because the Examiner's finding that brackets 52 of Jay function as clamps, “to adjustably fix the angular positions [of the] the left and right arms” is not supported by a preponderance of the evidence. Jay describes the function of brackets 52 as follows:

Turning to FIG. 4, the Split Knee Bow™ leg retention system, formed by the knee cuff 18 and the pair of leg braces 54, is adjustable utilizing the pair of leg brace brackets 52 for wider or narrower legs and calf muscles—this is also unique to the VELOCITY® brand motion stilts.

Jay 4:18–27. Thus, Jay *generally* discloses adjustment of leg braces 54 via brackets 52, but does not specifically describe how this adjustment is achieved. Figure 4 of Jay is a top plan view of a Jay's belt attachment system in a partially open configuration. *Id.* at 2:45–46. Figures 1 and 4 of Jay depict bracket 52 directly coupled to vertical upright 42 via two unlabeled threaded connections. Based on the plan view depicted in Figure 4, it is unclear how bracket 52 would act as a clamp against upright 42 because an unlabeled bolt and nut combination is directly between bracket 52 and vertical upright 42.² This is because the unlabeled bolt and nut do not appear to be the type of surface against which a person of ordinary skill in the art would clamp leg braces 54 via brackets 52. Nor does Jay's Specification indicate the presence of any other suitable clamping structure

² Vertical upright 42 is unlabeled in Figure 4 of Jay, but Figure 1, in combination with Figure 4, evidences the location of the unlabeled bolt and nut.

or that this is how brackets 52 are used. Rather, as discussed above, Jay merely generally describes the final result of using brackets 52 for accommodating wider or narrower legs and calf muscles (Jay col. 4, ll. 20–21), but not precisely how this result is achieved. Thus, the Examiner’s finding that brackets 52 function as clamps that would allow for angular adjustment of leg braces 54 appears to be based on speculation.

Patentability determinations “should be based on evidence rather than on mere speculation or conjecture.” *Alza Corp. v. Mylan Laboratories, Inc.*, 464 F. 3d 1286, 1290 (Fed. Cir. 2006). Accordingly, we do not sustain the rejection of claim 1 and claims 2, 3, and 5–8 depending therefrom as anticipated by Jay.

Rejection II—West and Tilsley

The Examiner finds that West discloses many of the elements recited in claim 1, including “independently adjustable left and right mechanisms” (releasable adjustments 27, 28, 127, and 128). Final Act. 8–10. However, the Examiner finds that West’s releasable adjustments 27, 28, 127, and 128 allow only for *telescoping* adjustment, not angular adjustment, of thigh pad portions 22 and 24 (which the Examiner finds correspond to the recited left and right arms).³ To address this deficiency, the Examiner finds that Tilsley “teaches a crutch with a frame, lower leg platform and uses a different type of releasable telescoping adjustment as shown in figures 3–5.” *Id.* at 10. Based on these findings, the Examiner states:

³ The Examiner does not explicitly identify the limitation in claim 1 that is not disclosed by West, but based on the Examiner’s discussion of Figure 5 of Tilsley and the Examiner’s proposed modification, we understand the Examiner’s position to be that the ability to adjust the angular position of the left and right arms is not taught by West. *See* Final Act. 10–11.

It would have been obvious to one skilled in the art to have substituted the releasable telescoping adjustment of Tilsley et al taught in figure 5 for that of West as another type and to obtain predictable results. See MPEP 2143 I(B) *Simple substitution of one known element for another to obtain predictable results*. It is the examiner's position that the combination crutch including the releasable telescoping adjustment (independently adjustable left and right mechanisms) of Tilsley et al would allow for independent adjustably and fixing the angular position of each of the left and right arms at different angles from each other and relative to the frame.

Id. at 11. Thus, the Examiner (i) proposes to substitute the mechanism depicted in Figure 5 of Tilsley for the releasable adjustments 27, 28, 127, and 128 in West, (ii) determines that the result of this substitution would be a mechanism that allows for angular adjustment as required by claim 1, and (iii) determines that the result of the proposed combination would have been predictable to a person of ordinary skill in the art.

Appellant contends that neither reference discloses mechanisms to adjustably fix angular positions (of left and right arms) as recited. Appeal Br. 16–19. Rather, Appellant asserts, both West and Tilsley disclose that their respective adjustment mechanisms allow for adjustment only in the vertical direction. *Id.* According to Appellant, “the ‘predictable results’ of the combination would be a crutch that simply has a different way of vertically adjusting the height of the pads 22, 24 of West without any mechanisms that would allow for the independent adjustment of the angular position of the pads 22, 24 relative to the frame along a horizontal plane.” *Id.* at 18–19.

In response, the Examiner notes that West and Tilsley disclose similar devices, reproduces the disclosures in Figures 4 and 5 and column 2, line 67–column 3, line 3 of Tilsley, reiterates the statement of the rejection, and

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concludes “[a]ngular adjustability is inherent to the internal clamp mechanism.” Ans. 13–15 (emphasis omitted). Accordingly, it is the Examiner’s position that the configuration to adjustably fix the angular positions of the left and right arms in West, as recited in claim 1, would be the inherent result of the proposed combination of the teachings of West and Tilsley.

In reply, Appellant argues that, not only is angular adjustability of the pertinent components undisclosed by Tilsley, it is not possible in Tilsley’s system due to the presence of handle 12 connecting upright sections 32. Reply Br. 5–6.

For the following reasons, we do not sustain the Examiner’s rejection of claim 1 as unpatentable over West and Tilsley. First, the Examiner has concluded that the result of the proposed substitution of parts from West and Tilsley would have been predictable to a person of ordinary skill in the art, but has not adequately explained how the substituted component from Tilsley would operate within the device of West. Rather, the Examiner merely refers to the structure relied on in Tilsley by figure number with little discussion of what is disclosed or how this structure functions. When rejecting claims, “[t]he pertinence of each reference, if not apparent, must be clearly explained.” 37 C.F.R. § 1.104(c)(2). Second, in light of the fact that Tilsley does not disclose rotation of the components connected via the clamp depicted in Figure 5, but merely illustrates vertical adjustment, the Examiner has not adequately explained how the proposed substitution of one part for another would inherently result in left and right mechanisms that are configured to adjustably fix angular positions of left and right arms as claimed. Specifically, the fact that a clamp *might* allow rotation is insufficient to support a finding that the rotational configuration recited in

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claim 1 would be the inherent result of the Examiner's proposed combination of the teachings of West and Tilsley. As the Examiner has not made clear how the device resulting from the Examiner's proposed combination would function, the Examiner has not demonstrated that there was a reasonable expectation of successfully arriving at a functioning device in making the Examiner's proposed combination. *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988) (cited at MPEP § 2143(I)(B)). Accordingly, we do not sustain the rejection of claims 1-3, and 5-8 as unpatentable over West and Tilsley.

CONCLUSION

The Examiner's rejections are REVERSED.

More specifically,

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-3, 5-8	102(e)	Jay		1-3, 5-8
1-3, 5-8	103(a)	West, Tilsley		1-3, 5-8
Overall Outcome				1-3, 5-8

REVERSED