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Row 2: 27939, 7590, 09/11/2020, Philip H. Burrus, IV, Burrus Intellectual Property Law Group LLC, 222 12th Street NE, Suite 1803, Atlanta, GA 30309
Row 3: EXAMINER ANDERSON, DON M
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES E. BURGESS and JOHN KUTSCH

Appeal 2019-002698
Application 12/769,900
Technology Center 3700

Before MICHELLE R. OSINSKI, SUSAN L. C. MITCHELL, and
PAUL J. KORNICZKY, *Administrative Patent Judges*.

KORNICZKY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE¹

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner’s decision to reject claims 14–16 and 21–23. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ In this Decision, we refer to (1) the Examiner’s Final Office Action dated June 7, 2018 (“Final Act.”) and Answer dated January 9, 2019 (“Ans.”), and (2) Appellant’s Appeal Brief dated September 6, 2018 (“Appeal Br.”) and Reply dated February 20, 2019 (“Reply”).

² We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Medline Industries, Inc. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a stackable suction canister and lid assembly. Claim 14, the only independent claim on appeal, is reproduced below:

14. A canister assembly, comprising:

a canister base having a bottom and a tapered sidewall extending from the canister base to a lid-engaging rim; and

a lid comprising:

an interior portion surrounded by a perimeter portion defining a canister connector, the interior portion defining a first partial interior portion occupying seventy percent or less of the interior portion and a second partial interior portion occupying thirty percent or more of the interior portion, wherein:

the lid comprises a plurality of ports extending from the interior portion;

all ports of the plurality of ports are disposed along the first partial interior portion;

the lid comprises a pour spout disposed along the second partial interior portion; and

axes of each of the ports are aligned orthogonally with a pour spout axis of the pour spout and parallel with a plane defined by the perimeter portion; and

a stacking recess to receive a filter of an adjacent lid when the adjacent lid is rotated out of phase from, and stacked together with, the lid.

REFERENCE

The prior art relied upon by the Examiner is:

Name	Reference	Date
Deaton	US 4,228,798	Oct. 21, 1980

REJECTIONS

The Examiner made the following rejections:

1. Claims 14–16 and 21–23 stand rejected under pre–AIA 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Final Act. 2.

2. Claims 14–16 and 21–23 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Deaton. Final Act. 3.

Appellant seeks our review of these rejections.

OPINION

Rejection 1: Claims 14–16 and 21–23 as Lacking Written Description

The Examiner finds that independent claim 14 (and claims 15–16 and 21–23 which depend from claim 14) fails to comply with the written description requirement because there is no support for “axes of each of the ports are *aligned orthogonally* with a pour spout axis of the pour spout” as recited in claim 14. Final Act. 2–3. The Examiner finds that there is support for a pour spout oriented “substantially orthogonally” relative to the axis of the ports but not for pour spouts that are “orthogonally” aligned as recited in claim 14. *Id.* at 2–3 (citing Spec. ¶ 37, Figs. 1–2). The Examiner states that “Paragraph 037 specifically states that figures 1 and 2 show a ‘substantially orthogonally’ alignment and is silent with respect to the other figures.” *Id.* at 3.

Appellant argues that the Examiner’s rejection is erroneous. Appeal Br. 8–13; Reply 6–8. We agree.

Paragraph 31 of the Specification states:

To further increase stackability, each of the plurality of ports 107, 108, 109 in this illustrative embodiment has been turned

sideways, such that a reference axis 110, 111, 112 running through each of the plurality of ports 107, 108, 109 is *aligned substantially parallel* with a plane 113 defined by the perimeter portion 103. *Said differently*, each of the plurality of ports 107, 108, 109 is turned sideways *so as to be parallel* with a major surface of the interior portion 102 of the lid member 101.

(Emphasis added). From this disclosure, a person of ordinary skill in the art would understand that the Specification uses the term “substantially” parallel alignment to include a parallel alignment, and that “substantially” includes a perfect relationship in addition to those that are merely close. *See Andrew Corp. v. Gabriel Electronics, Inc.*, 847 F.2d 819, 821 (Fed. Cir. 1988) (stating “‘substantially equal’ is a term of degree, and that its acceptability depends on ‘whether one of ordinary skill in the art would understand what is claimed . . . in light of the specification’, even if experimentation may be needed”). In context of claim 14, a person of ordinary skill in the art would understand that “substantially orthogonal” relationships disclosed in the Specification and claims include “orthogonal” relationships.

We find that the Specification contains written description support for the phrase “axes of each of the ports are *aligned orthogonally* with a pour spout axis of the pour spout” as recited in claim 14. Thus, the rejection of claims 14–16 and 21–23 under 35 U.S.C. § 112 is not sustained.

Rejection 2: Claims 14–16 and 21–23 as Unpatentable over Deaton

The Examiner finds that claims 14–16 and 21–23 are unpatentable over Deaton. Final Act. 3–6. Appellant argues claims 14–16 and 21–23 as a group. Appeal Br. 14–16. We select independent claim 14 as the

representative claim, and claims 15, 16, and 21–23 stand or fall with claim 14. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Deaton discloses all of the limitations of claim 14 except for the limitation reciting “axes of each the ports aligned orthogonally with a pour spout axis of the pour spout and parallel with a plane defined by the perimeter portion.” Final Act. 4–5. For this limitation, the Examiner finds that “selecting the particular angle of the ports is a matter of routine optimization.” *Id.* at 5. The Examiner explains that “port 30 disclosed by Deaton is designed to receive a fluid inlet line” (citing Deaton, 5:10–23), and “port 34 of Deaton is also intended to receive a vacuum line” (citing *id.* at 5:24–35). The Examiner further finds that the “particular angle of the ports is a result-effective variable as evidenced by Reiner (US 2008/0015526) which teaches that the angle of a port 5 will [affect] the kinking of an attached hose” (*id.* at ¶ 23), and Appellant “has disclosed no criticality to the claimed angles or alignment.” Final Act. 5. The Examiner reasons that it would have been obvious to one of ordinary skill in the art “to have modified the ports of Deaton such that the axes of each the ports are aligned orthogonally with a pour spout axis of the pour spout and are parallel with a plane defined by the perimeter portion” because “finding the claimed arrangement would be a simple matter of routine optimization of a result-effective variable.” *Id.* (citing MPEP 2144.05 II); *see* Ans. 7 (“Per MPEP 2144.05 II, the presence of a known result-effective variable would be a motivation for a person of ordinary skill in the art to experiment to reach another workable product or process.”).

Appellant argues that the Examiner’s rejection is erroneous because Deaton “discloses orthogonal relationships between all of its ports and the

plane defined by its perimeter when Appellant claims the opposite, namely, parallel relationships between all of its ports and the plane defined by its perimeter.” Appeal Br. 15–16. Appellant also argues that the “Examiner’s response to Ground 2 confirms that Deaton fails to teach each and every limitation of claim 14” because “the Examiner states that the teachings of Reiner are required to alter the teachings of Deaton. Reply 9. Appellant argues that “the rejection is not a rejection under 35 USC § 103 in view of Deaton *and Reiner*. It is instead a rejection under 35 USC § 103 in view of Deaton only.” *Id.*

Appellant’s arguments are not persuasive. Appellant does not address, much less rebut, the Examiner’s findings that “selecting the particular angle of the ports is a matter of routine optimization” and the “particular angle of the ports is a result-effective variable as evidenced by Reiner (US 2008/0015526) which teaches that the angle of a port 5 will [affect] the kinking of an attached hose (see ¶ 0023).” Final Act. 5; *see* Ans. 7. Contrary to Appellant’s argument that the Examiner seeks to combine the teachings of Deaton and Reiner, the Examiner merely relies on Reiner to support the finding that the “particular angle of the ports is a result-effective variable.” Final Act. 5; *see* Ans. 7. Similarly, Appellant has not disclosed any criticality to the claimed angles or alignment. Finally, Appellant does not address the Examiner’s reasoning that it would have been obvious to one of ordinary skill in the art “to have modified the ports of Deaton such that the axes of each the ports are aligned orthogonally with a pour spout axis of the pour spout and are parallel with a plane defined by the perimeter portion” because “finding the claimed arrangement would be a simple matter of routine optimization of a result-effective variable.” Final

Act. 5; Ans. 7. Because Appellant does not address the Examiner's findings and reasoning, Appellant does not show error by the Examiner.

For the reasons above, the rejection of claim 14 and claims 15, 16, and 21–23 falling therewith is sustained.

CONCLUSION

The Examiner's decision to reject claims 14–16 and 21–23 under pre-AIA 35 U.S.C. § 112, first paragraph, is REVERSED.

The Examiner's decision to reject claims 14–16 and 21–23 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Deaton is AFFIRMED.

DECISION SUMMARY

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
14–16, 21–23	112, first paragraph	Written Description		14–16, 21–23
14–16, 21–23	103(a)	Deaton	14–16, 21–23	
Overall Outcome			14–16, 21–23	

TIME PERIOD FOR RESPONSE

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