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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID LINK

Appeal 2019-003687
Application 15/636,867
Technology Center 3600

Before DANIEL S. SONG, BENJAMIN D. M. WOOD, and
BRETT C. MARTIN, *Administrative Patent Judges*.

WOOD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's April 19, 2018 Final Action rejecting claims 1–14. *See* Final Act. 1. An oral hearing in accordance with 37 C.F.R. § 41.47 was held on June 4, 2020, a transcript of which will be entered into the record in due course. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ “Appellant” refers to the applicant as defined by 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Dorskocil Manufacturing Company, Inc. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to a pet enclosure system. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. An animal enclosure comprising:

a panel having a first horizontal wire, a second horizontal wire, a first vertical wire extending between the first and second horizontal wires of the panel and a second vertical wire extending between the first and second horizontal wires of the panel, the first and second vertical wires of the panel and the first and second horizontal wires of the panel forming a perimeter of an opening sized and configured to enable an animal to pass therethrough;

a door having a first horizontal wire, a second horizontal wire, and a vertical wire extending between the first and second horizontal wires of the door, each of the first horizontal wire and the second horizontal wire of the door being pivotally attached to the first vertical wire of the panel so that the door is pivotal between a closed position and an open position, and attached so that the door is vertically movable between a latched position and an unlatched position;

a first hook attached to the first horizontal wire of the door and configured to engage the first horizontal wire of the panel adjacent the second vertical wire of the panel when the door is in the closed position and the latched position;

a second hook attached to the first horizontal wire of the door and configured to engage the first horizontal wire of the panel adjacent the first vertical wire of the panel when the door is in the closed position and the latched position;

a third hook attached to the second horizontal wire of the door and configured to engage the second horizontal wire of the panel adjacent the first vertical wire of the panel when the door is in the closed position and the latched position;

a fourth hook attached to the second horizontal wire of the door and configured to engage the second horizontal wire of the panel adjacent the second vertical wire of the panel when the door is in the closed position and the latched position; and

a latch attached to the door, the latch configured to move in a horizontal direction and engage the second vertical wire of the panel,

the first hook, the second hook, the third hook and the fourth hook are configured to engage the first and second horizontal wires of the panel adjacent the first and second vertical wires of the panel forming the perimeter of the opening to secure the door in the closed position, and the first hook, the second hook, the third hook and the fourth hook being vertically movable between the latched position and the unlatched position.

Appeal Br. 20 (Claims App.).

REFERENCES

Name	Reference	Date
Link	US 6,883,463 B2	Apr. 26, 2005
PPP	Precision Pet Products, Inc. Advertisement	2007 ²

REJECTION³

Claims Rejected	35 U.S.C. §	Reference(s)/Basis
1-14	103	Link, PPP

² The Examiner finds that PPP was identified in a June 17, 2016 IDS of parent application 13/913,625, and was “published at least as early 2007.” Final Act. 3. Appellant does not dispute this finding.

³ The Examiner had also rejected the claims as indefinite. Final Act. 2-3. This rejection was apparently withdrawn after the entry of Appellant’s August 3, 2018 Amendment of the claims. *See* Appeal Br. 7 (noting that Examiner did not address the indefiniteness rejection in an August 3, 2018 Advisory Action issued after the Amendment was entered); Ans., *generally* (not addressing the indefiniteness rejection).

OPINION

Appellant argues claims 1–13 as a group, and claim 14 separately. Appeal Br. 8–18. We select claim 1 as representative of the grouped claims, and decide the appeal of those claims on the basis of claim 1 alone. 37 C.F.R. § 41.37(c)(1)(iv). We will discuss claim 14 separately. In addition, we note that only those arguments actually made by Appellant have been considered in this decision. Arguments which Appellant could have made but chose not to make in the Brief have not been considered and are deemed to be waived. *See id.*; *see also In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“it has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections”); *Ex Parte Frye*, 94 USPQ2d 1072, 1075–76 (BPAI 2010, precedential)(“The panel then reviews the obviousness rejection for error based upon the issues identified by appellant, and in light of the arguments and evidence produced thereon.”).

A. Claim 1

The Examiner finds that Link teaches most of the limitations of claim 1, but “is silent on the placement as claimed of a first hook, second hook, third hook and fourth hook along with the door [that] is vertically movable between a latched position and an unlatched position.” Final Act. 4. The Examiner therefore relies on PPP for this limitation. The Examiner finds that PPP depicts a vertically slidable door with a hook having the same structure and serving the same purpose as the claimed hooks:

Precision Pet Products (PPP) teaches an animal door system for an animal enclosure, a hook fabricated from a wire rod that is curved to form a blunt tip of the hook (PPP picture of crate has a hook fixed on the top center horizontal wire[] of the door that receives the a [*sic*] horizontal wire rod of the top portion of the front cage panel), the horizontal wire rods wrapped around the vertical wire rod of the frame is gapped away from upper horizontal wire rods of the frame so that the door is vertically slideable about the vertical wire rod of the frame enabling the door to slide in the upward direction to an upward position and in a downward direction to a downward position, the entry of the hook capable of receiving a horizontal wire rod when in the closed position and in the downward position (PPP operational function of crate door in the picture).

Id. at 4–5. The Examiner determines that “[i]t would have been obvious to one of ordinary skill in the art to modify the teachings of Link with the teachings of PPP at the time of the invention for a more secure closure.” *Id.* at 5.

The Examiner acknowledges that Link as modified by PPP “is silent on the use of the second, third and fourth hooks,” but determines that “the modification is merely an obvious engineering design choice involving the duplication of a known element for a multiple effect performing the same intended function . . . for a secure hold and does not present a patentably distinct limitation over the prior art of record.” *Id.* (citing *In re Harza*, 274 F.2d 669, 671 (CCPA 1960)). The Examiner further determines that “[t]he modification is merely the shifting the location of a known element performing the same intended function which does not present a patentably distinct limitation over the prior art of record . . . for a more secure closure.” *Id.* (citing *In re Japikse*, 181 F.2d 1019 (CCPA 1950)).

Appellant responds, *inter alia*, that “[t]he Examiner has failed to provide any evidentiary basis for the alleged motivation on the record,” and

“has simply made conclusory statements that the combination of references would form a secure closure.” Appeal Br. 11. According to Appellant, “the Examiner appears to be relying on common knowledge or common sense.” *Id.*

This argument does not persuade us that the Examiner erred in rejecting claim 1. We disagree that the Examiner failed to provide evidence in support of its finding that one of ordinary skill in the art would have combined the references to form a more secure closure. The Examiner found that “PPP teaches the known general knowledge of one of ordinary skill in the art that it is known to use a hook member to secure the door panel to the first horizontal member of the front face panel by sliding the door panel up and down along a vertical member to have the hook engage the horizontal member of the front face panel.” Ans. 7–8. The Examiner explains that “PPP is establishing and suggesting the knowledge and motivation to place the hook members around the perimeter of the door panel to secure placement of the door panel.” *Id.* at 8. In other words, the Examiner relies on PPP to establish that the claimed hook structure was known, and further, that its purpose—to secure a wire crate door to the front face panel—was also known. Notably, Appellant does not appear to dispute either of these findings.⁴

⁴ At the hearing Appellant’s counsel stated that Appellant disputed these findings on page 8 of the Appeal brief. Tr. 6:13–22. The particular statement on which Appellant relies reads as follows:

Appellant submits that the claims are allowable, since neither of the two cited references alone or in combination render obvious an animal enclosure comprising a door that is vertically movable between a latched position and an unlatched position, a first hook, a second hook a third hook and fourth hook attached to the

Appellant further argues that “[t]he structure recited in claim 1 is not a mere duplication of parts.” Appeal Br. 13. Appellant’s point is that the claimed hooks are not in the same position as PPP’s hook, i.e., they do not merely “extend outwardly from the center of the top perimeter of the door,” as is the case with PPP’s hook. *Id.* Appellant particularly notes that two of the claimed hooks (the third and fourth hooks) “engage the horizontal wire that forms the lower perimeter of the opening of the panel adjacent the vertical perimeter wires.” *Id.* Appellant asserts that “there is no disclosure in any reference of disposing hooks adjacent the corners of the door, and there is no disclosure of disposing hooks at a lower position of the door.” *Id.* at 14.

This argument mischaracterizes the Examiner’s rejection. The Examiner is not arguing that the references expressly disclose four hooks at the claimed hook locations, but rather relies on *Harza* to support the determination that duplicating known structure (PPP’s hook) to perform its

door and configured to engage the first and second horizontal wires of a panel adjacent the first and second vertical wires of the panel forming the perimeter of the opening to secure the door in the closed position, and the first hook, the second hook, the third hook and the fourth hook being vertically movable between the latched position and the unlatched position, as required by independent claim 1 of this application.

Appeal Br. 8. This statement, however, is merely a general denial that claim 1 is unpatentable over the cited references, and does not address any specific findings made by the Examiner. *In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (holding that the Board had reasonably interpreted 37 C.F.R. § 41.37(c)(1)(vii) (the predecessor to § 41.37(c)(1)(iv)) as requiring “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art”).

known function (securing the door) is an obvious modification of what is disclosed, and relies on *Japikse* to support the determination that repositioning the known structure is also an obvious modification of what is disclosed. See Final Act. 5 (citing *Japikse* for the proposition that “shifting the location of a known element performing the same intended function . . . does not present a patentably distinct limitation over the prior art of record); Ans. 5 (same). Appellant does not dispute the general principle that reproducing known structure for a known function is not inventive, but instead argues that the specific claimed hook locations are not disclosed. Yet Appellant does not address the Examiner’s *Japikse* analysis, much less demonstrate why it is incorrect. For example, Appellant does not dispute that hooks located at the bottom of Link’s door would have the same structure or operate in the same way as the hook depicted in PPP.

Appellant’s remaining arguments concern what appear to be the Examiner’s alternative reasoning to support the rejection of claim 1 over Link and PPP. For example, the Examiner refers to Link’s curved wires 35 in the analysis. Final Act. 4. These curved wires differ from the claimed hooks because they are not attached to and movable with the door; instead, they extend from the side edges of the two side panels 13a, b towards adjacent side panels 15a, b. Link, 3:49–53. Regardless, what is clear is that the Examiner articulated a rejection that does not and need not rely on this structure, because it is not disputed that PPP depicts the claimed hook structure. Thus, arguments directed to Link’s curved wires 35 are moot.

The Examiner also appears to present alternative reasons to combine Link and PPP, i.e., “for safe and happy puppies as depicted in [PPP],” and because the modification would have been “obvious to try.” Ans. 8. Our

analysis, however, relies only on the rationale that the combination would result in a “more secure closure.” Final Act. 5. Thus, Appellant’s arguments in opposition to the Examiner’s alternative rationales are also moot.

B. Claim 14

Claim 14 depends from claim 1 and additionally recites “wherein the first hook is disposed outside of the perimeter of the opening when the door is in the closed position and the latched position.” Appeal Br. 22 (claims app.). The Examiner determines that “Link as modified” teaches this limitation. Final Act. 7. Appellant responds that in PPP, “the hook is disposed within the perimeter of the opening when the door is in the closed position and the latched position.” Appeal Br. 18. In defense of the rejection of claim 14, the Examiner asserts that “[t]he claim language is broad in nature and the structure of the prior art satisfies the structural limitation of the claim since at least a portion of the hook is outside the perimeter of the opening when it is engaged with the horizontal bar of the face panel of the crate. Appellant did not specifically address claim 14 in its Reply Brief.

We are not persuaded that the Examiner erred in rejecting claim 14. First, Appellant’s argument appears to be based on PPP alone, instead of the combination of references on which the rejection is based. *See In re Merck & Co., Inc.*, 800 F.2d 1091, 1097–98 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.” (citations omitted)). Second, we agree with the Examiner that the claim language is broad enough to encompass at least a portion of the hook being

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outside the perimeter of the opening when the door is in the closed and latched position.

CONCLUSION

The Examiner's rejections are affirmed.

More specifically,

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-14	103	Link, PPP	1-14	

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