UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/058,770	10/21/2013	Adam P. Morrison	12-833-US	2603

20306 7590 12/19/2019

MCDONNELL BOEHNEN HULBERT & BERGHOFF LLP
300 S. WACKER DRIVE
32ND FLOOR
CHICAGO, IL 60606

EXAMINER	
GRUBY, RANDALL A	

ART UNIT	PAPER NUMBER
3754	

MAIL DATE	DELIVERY MODE
12/19/2019	PAPER

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

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ADAM P. MORRISON and KELLY A. MARKLE

Appeal 2019-003725
Application 14/058,770
Technology Center 3700

Before JENNIFER D. BAHR, BRANDON J. WARNER, and NATHAN A. ENGELS, *Administrative Patent Judges.*

BAHR, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision, set forth in the Final Office Action, dated July 11, 2018 (hereinafter "Final Act."), to reject claims 1, 4–6, 8, 9, 13, 15, and 22.[2] We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

---

[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 RUST-OLEUM CORPORATION. Appeal Br. 1.

[2] Claims 2, 3, 10, 11, 14, 16–21, and 23–25, which are the only other pending claims, have been withdrawn from consideration. Appeal Br. 5; Final Act. 1 (Office Action Summary).

CLAIMED SUBJECT MATTER

Appellant's invention is directed to "propellantless aerosol fluid dispensing systems including a reusable pressurizable canister and one or more disposable liquid-containing pouches." Spec. 2. Claim 1, reproduced below, is illustrative of the claimed subject matter.

> 1. A propellantless aerosol fluid dispensing system comprising:
>
> a first assembly including a container having a pressurizable chamber, a second chamber and a cap, the combination of the pressurizable chamber and the cap forming a pressure resistant cap seal, the cap further including at least one aperture and a pressurizing means for intermittently or continuously pressurizing the pressurizable chamber wherein a fixed wall separates the pressurizable chamber from the second chamber; and
>
> a second assembly including a pressure-collapsible pouch containing a dispensable fluid material and including a pouch and valve assembly, the valve assembly including a fitment, a valve and a nozzle wherein the pouch is sealed to the fitment such that at least a portion of the fitment is located within the sealed pouch and wherein the fitment and cap together form a pressure resistant pouch seal such that the nozzle of the valve assembly is located outside of the cap and wherein the second assembly is removable from the first assembly and wherein when the pressurizable chamber is pressurized with gas, gas pressure applied to the surface of the pouch containing a dispensible fluid urges the dispensible fluid in the pouch to exit the pouch through the valve assembly.

EVIDENCE

The prior art relied upon by the Examiner is:

Name	Reference	Date
Sims	US 3,662,929	May 16, 1972
Coleman	US 5,060,826	Oct. 29, 1991

REJECTIONS[3]

I. Claims 1, 4–6, 8, 9, 15, and 22 stand rejected under 35 U.S.C. § 102(b) as anticipated by Coleman.

II. Claim 13 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Coleman and Sims.

OPINION

Claims 1, 4–6, 8, 9, 15, and 22

In rejecting independent claims 1 and 22, the Examiner read the claimed "pressurizable chamber" on the chamber defined by the portion of Coleman's shell 11 above the fixed wall, on which inflatable impervious vessel 35 sits, and the fixed wall; the claimed "cap" on Coleman's cover 25; the claimed "pressurizing means" on Coleman's elbow 16, conduit 17, valve 18, pressure regulator 19, compressed air source 20, coupler 21, and reducer 22; the claimed "pressure-collapsible pouch" on Coleman's compressible vessel 40; the claimed "second chamber" on the chamber defined by the portion of Coleman's shell 11 below the fixed wall, in which elbow 16 and conduit 17 are disposed, and the fixed wall; and the claimed "fitment," "valve," and "nozzle" on Coleman's adaptor 47, valve 46, and dispensing tube 45. Final Act. 6–7.

The Examiner provided an annotated version of an expanded portion of the bottom of Coleman's Figure 7, which the Examiner labeled "Figure A," to illustrate the structure of Coleman corresponding to the claimed

[3] The Examiner withdrew a rejection of claims 1, 4–6, 8, 9, 13, and 15 under 35 U.S.C. § 112, second paragraph. Ans. 3; *see* Final Act. 5.

"fixed wall" and "second chamber." Final Act. 7. The Examiner's Figure A is reproduced below.

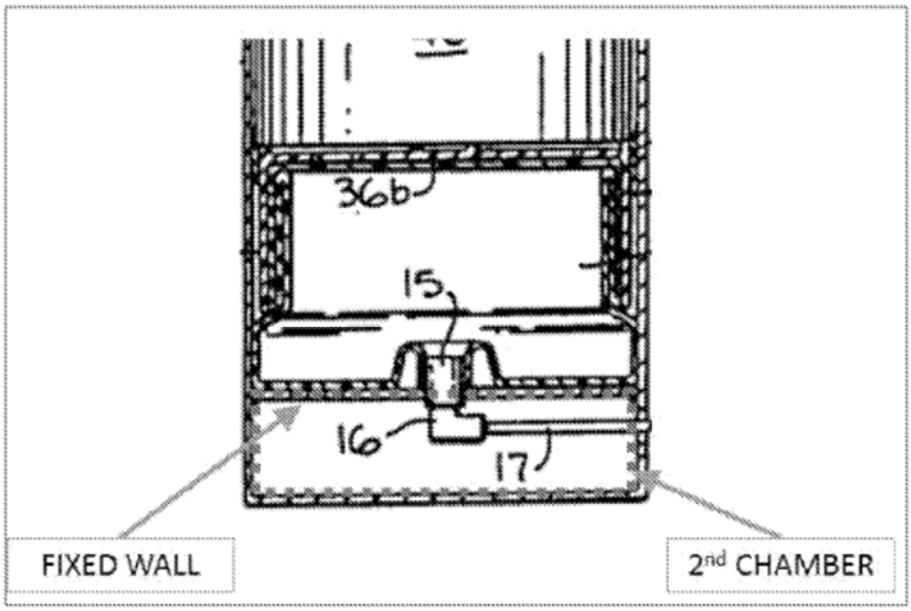

Figure A: us 5060826, Fig. 7. Depiction of: fixed wall; and, second chamber.

The Examiner's Figure A is an axial sectional view of the bottom portion of Coleman's bulk container with Examiner annotations including a box in dotted lines tracing the lateral wall traversing shell 11 on which the bottom of inflatable vessel 35 sits and the portion of shell 11 below the lateral wall, as well as a lead line identifying the dotted line box as the "second chamber" and a lead line identifying the lateral wall as the "fixed wall." *See* Final Act. 7.

Appellant asserts that "[t]he pouch and its associated fitment are referred to as the 'second assembly' in claim 1. Claim 1 further indicates that the 'second assembly is removable from the pressurizable chamber'. Thus, in claim 1[, it] is clear that the collapsible pouch is located in the chamber that is pressurized." Appeal Br. 7. Appellant's assertion is incorrect in several respects. First, claim 1 does not recite that the second

assembly is removable from the pressurizable chamber; rather, claim 1 recites that "the second assembly is removable from the first assembly." Appeal Br. 14 (Claims App.). As defined in claim 1, the "first assembly" does not correspond solely to the "pressurizable chamber," but, rather, also includes the "second chamber and a cap." *Id.* Further, reciting that one structure (i.e., the second assembly) is "removable from" another structure (i.e., the first assembly) is not the same as reciting that the first structure is removable from *within* the second structure. Additionally, claim 1 recites a "*pressurizable* chamber," not a *pressurized* chamber. *Id.* (emphasis added). The language "wherein when the pressurizable chamber is pressurized with gas, gas pressure applied to the surface of the pouch containing a dispensible fluid urges the dispensible fluid in the pouch to exit the pouch through the valve assembly" at the end of claim 1 sets forth function to be performed "*when* the pressurizable chamber is pressurized with gas," but does not require that the pressurizable chamber actually be pressurized with gas. Thus, for all of these reasons, it is not clear from the recitation "the second assembly is removable from the first assembly" in claim 1 "that the collapsible pouch is located in the chamber that is pressurized," as Appellant argues. *See id.* at 7.

Moreover, Coleman's compressible vessel 40 is located within shell 11 above the fixed wall and, thus, is located in the structure on which the Examiner reads the claimed "pressurizable chamber." *See* Coleman, Fig. 1; 4:45–48; Final Act. 7 (Figure A). Appellant argues that the Examiner's finding that the chamber within the upper portion of shell 11 is "pressurizable," in that it "does appear to be able to withstand pressure" (Advisory Act. 2), is "speculative and without any factual support." Appeal

Br. 10. In fact, Appellant asserts that if Coleman's shell 11 were pressurizable, the pressure would increase as disc or piston 36 moves up as inflatable vessel 35 is inflated, eventually halting the upward movement of disc or piston 36 when it equals the pressure in vessel 35, thereby preventing vessel 40 from being completely compressed and dispensing 100% of its product as Coleman discloses, thus rendering Coleman's device inoperable. *Id.*

Appellant's argument is not persuasive. Appellant's assertion that pressurization of the upper chamber of shell 11 by inflation of inflatable vessel 35 and corresponding upward movement of disc or piston 36 would prevent vessel 40 from compressing sufficiently to empty all of its contents is itself unsupported attorney argument lacking in technical merit. Notably, claim 1 does not specify any particular pressure level to which the chamber must be capable of being pressurized, nor does claim 1 require that the chamber actually be pressurized, only that it be capable of being pressurized. Appellant does not point to any evidence in the record, or present persuasive technical reasoning, to show that the pressure in the upper chamber of shell 11 would reach a level that could not be exceeded by injecting more compressed air or fluid into vessel 35. Moreover, even assuming the pressure in the upper chamber would reach a level that would effectively halt upward movement of disc or piston 36, Appellant does not persuasively explain why such pressure itself, acting on compressible vessel 40, would be insufficient to completely compress vessel 40 so that it empties all of its contents.

Appellant argues that "claim 22 requires the sealed pouch to be 'located inside a pressurizable container.' That way, the pressure acting on

the outside of the claimed pouch can compress the pouch in all directions and dispense the fluid held in the pouch. Coleman discloses no such structure." Appeal Br. 12. Appellant's argument is not commensurate with the scope of claim 22 and, thus, is unavailing. It is well established that limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982). Claim 22, unlike claim 1, positively recites "a pouch . . . located in the pressurizable chamber." *Id.* at 15 (Claims App.). However, claim 22 does not recite that the pressure compresses the pouch in all directions. Rather, claim 22 recites that "the pouch is made of a pressure malleable material that collapses under pressure." *Id.*

Moreover, Appellant's argument does not apprise us of error because, as discussed above, Coleman's compressible vessel 40 is located within shell 11 and, thus, is located in the structure on which the Examiner reads the claimed "pressurizable chamber," and Appellant's arguments contesting the Examiner's finding that the upper chamber of shell 11 is "pressurizable" are unpersuasive for the reasons discussed above.

Appellant also contends that "Coleman does not disclose a fixed wall that separates the pressurizable chamber from the second chamber," as recited in claims 1 and 22. Appeal Br. 11. Appellant submits that "[in]stead of disclosing a fixed wall between the chamber in which the collapsible pouch is held and the adjacent second chamber, Coleman discloses the opposite – a movable piston or disc." *Id.* This argument lacks merit. As illustrated in the Examiner's annotated Figure A, reproduced above, a fixed wall disposed directly below vessel 35 separates the upper chamber of shell 11 (the "pressurized chamber") from the lower chamber (the "second

chamber") in which elbow 16 and conduit 17 are disposed. The "movable piston or disc" (i.e., disc or piston 36) to which Appellant alludes is located within the upper chamber (the "pressurizable chamber"). We do not discern, and Appellant does not direct our attention to, any recitation in either claim 1 or claim 22 that would exclude such a movable structure.

Appellant argues:

> Independent claim 1 is not anticipated because Coleman does not disclose a chamber that is pressurized with gas such that the gas pressure itself acts on the surface of the pouch containing a dispensable fluid to urge the dispensable fluid in the pouch to exit the pouch through the valve assembly. Indeed, the Coleman device operates by mechanically compressing a compressible vessel using a moving piston or disc and, therefore does not use or require a compressible vessel located in a pressurized container.

Appeal Br. 8. Notably, the clause of claim 1 apparently alluded to by Appellant, namely, "wherein when the pressurizable chamber is pressurized with gas, gas pressure applied to the surface of the pouch containing a dispensible fluid urges the dispensible fluid in the pouch to exit the pouch through the valve assembly" (*id.* at 14 (Claims App.)), does not specify that the gas pressure is applied directly to the surface of the pouch, rather than via a disc or piston acted on by the gas pressure. Further, as discussed above, this "wherein" clause sets forth a function to be performed *when* the pressurizable chamber is pressurized with gas, but the claim does not positively require that the pressurizable chamber in fact be pressurized with gas. Thus, for these reasons, Appellant's argument is not commensurate with the scope of claim 1.

For the above reasons, Appellant does not apprise us of error in the rejection of independent claims 1 and 22 as anticipated by Coleman. Accordingly, we sustain the rejection of claims 1 and 22, as well as claims 4–6, 8, 9, and 15, which depend from claim 1 and for which Appellant does not present any separate arguments, as anticipated by Coleman. *See* 37 C.F.R. § 41.37(c)(1)(iv) (permitting the Board to select a single claim to decide the appeal as to a single ground of rejection of a group of claims argued together); Appeal Br. 12 (urging the Board to "reverse the [E]xaminer's anticipation rejection of all claims because [Appellant] has demonstrated that . . . Coleman . . . does not disclose every feature of independent claims 1 and 22").

Claim 13

Appellant does not present any additional arguments contesting the rejection of claim 13 as unpatentable over Coleman and Sims, instead relying on the arguments presented for claim 1. *See* Appeal Br. 11 (urging the Board to "reverse the rejection of claim 13 for being obvious at least by virtue of its dependence upon independent claim 1"). For the above reasons, Appellant fails to demonstrate error in the Examiner's finding that Coleman anticipates the subject matter of claim 1. Thus, for the same reasons, Appellant fails to apprise us of error in the rejection of claim 13 as unpatentable over Coleman and Sims, which we, thus, sustain.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 4–6, 8, 9, 15, 22	102(b)	Coleman	1, 4–6, 8, 9, 15, 22	
13	103(a)	Coleman, Sims	13	
Overall Outcome			1, 4–6, 8, 9, 13, 15, 22	

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