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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DEREK C. TARRANT

Appeal 2019-004251
Application 14/866,103
Technology Center 1700

Before JEFFREY T. SMITH, KAREN M. HASTINGS, and
MERRELL C. CASHION, JR., *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ requests our review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 1–13 under 35 U.S.C. § 103 as unpatentable over at least the combined prior art of Banerjee (US 2013/0113431 A1; published May 9, 2013) with either one of

¹ We use the word “Appellant” to refer to the “[A]pplicant” as defined in 37 C.F.R. § 1.42(a). Appellant is ViZn Energy Systems, Inc., which is also identified as the real party in interest (Appeal Br. 2).

Richardson (US 2006/0040126 A1; published Feb. 23, 2006) or Wakizaka (US 2011/0311867 A1; published Dec. 22, 2011).²

We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

Claim 1 is illustrative of the subject matter on appeal (emphasis added to highlight key disputed limitations):

1. A secondary battery comprising:
an alkaline electrolyte; and
a negative electrode including a conductive metal substrate *having thereon an amorphous metal alloy coating of nickel and phosphorous configured to be exposed to the alkaline electrolyte to accept zinc deposits in presence of charge current and retain the zinc deposits in absence of charge current.*

Independent claims 6 and 8 are also to a secondary battery similar to that of claim 1 but with a cobalt coating (Claims Appendix). Appellant relies upon the same arguments for claims 6 and 8 as for claim 1 (Appeal Br. 3–6).

OPINION

Upon consideration of the evidence of record and each of Appellant’s contentions as set forth in the Appeal Brief, as well as the Reply Brief, we determine that Appellant has not demonstrated reversible error in the Examiner’s rejections (*see, e.g., generally Ans.*). *In re Jung*, 637 F.3d 1356,

² An additional reference, Sinha (US 2004/0033687 A1; published Feb. 19, 2004) was applied to dependent claims 3, 4, 10, and 11 and is listed in the Summary Table at the end of this decision. A discussion of this reference is not needed for disposition of this appeal.

1365–66 (Fed. Cir. 2011) (explaining the Board’s long-held practice of requiring Appellant(s) to identify the alleged error in the Examiner’s rejection.). We sustain the rejections for the reasons expressed by the Examiner in the Final Office Action and the Answer.

We add the following primarily for emphasis.

It has been established that “the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007); *see also In re Fritch*, 972 F.2d 1260, 1264–65 (Fed. Cir. 1992) (a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in the art would have reasonably been expected to draw therefrom).

Appellant’s arguments focus solely on Banerjee, contending that Banerjee only teaches a nickel-plated copper sheet as an electrode substrate that would have been “covered in some fashion” (Appeal Br. 3). Appellant further argues that Banerjee’s teaching of a catalytic plate 42 supports their position that one of ordinary skill in the art would have realized that a nickel plated electrode would not function satisfactorily because nickel “exhibits intrinsically low hydrogen overvoltage” (*id.*; *see also* Reply Br. 1–4). Appellant also contends that it was unexpected that the amorphous metal alloy coating of nickel and phosphorus recited in claim 1 would work differently than bare nickel in terms of the lack of suitability as a negative electrode (Appeal Br. 5). We do not find these arguments persuasive of reversible error for the reasons set forth by the Examiner (Ans. 12–15).

First, even assuming that Appellant is correct that the Examiner has misunderstood what the catalytic plate 42 is made of (Reply Br. 2, 3), this does not show error in the Examiner's rejection. The claims are open ended and recite comprising and permit use of such a plate as desired, and furthermore permit the use of nickel in combination with other materials plating the copper sheet cathode electrode of Banerjee. Notably, Appellant does not dispute the Examiner's findings and conclusions with respect to the combination of Banerjee with either of Richardson or Wakizaka, which both teach electroless plating of nickel cobalt phosphorus alloy, noting that Wakizaka specifically teaches its metal coating for a negative electrode active material for a secondary battery (e.g., Wakizaka ¶¶ 1, 50). Thus, Appellant's arguments do not fully address the Examiner's rejections on appeal.

Furthermore, as pointed out by the Examiner, Banerjee never discusses any coating over its nickel plated cathode metal sheets 16 and indeed teaches that it is a "clean" substrate (Ans. 13; Banerjee ¶ 61). Banerjee also discusses that the substrate is completely stripped of zinc (Banerjee ¶ 67). In light of these circumstances, a preponderance of the evidence supports the Examiner's position that one of ordinary skill in the art would have read Banerjee as not including any further materials over its nickel-plated copper cathode metal sheets.

To the extent Appellant's arguments may be viewed as an argument that Banerjee has a non-enabling disclosure, it is well established that the burden of rebutting the presumption of enablement of the cited prior art by a preponderance of the evidence falls on the applicant. *In re Sasse*, 629 F.2d 675, 681 (CCPA 1980); *discussed further in In re Antor Media Corp.*, 689

F.3d 1282, 1288 (Fed. Cir. 2012) (“[W]e now hold that a prior art printed publication cited by an examiner is presumptively enabling”). Appellant has not met this burden, noting that attorney’s arguments in a brief cannot take the place of evidence. *Cf. Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977), *cert. denied*, 434 U.S. 854 (1977) (attorney argument does not take the place of evidence lacking in the record); *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974).

Thus, Appellant has not shown error in the Examiner’s § 103 rejections on appeal.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 5–9, 12, 13	103	Banerjee, Richardson	1, 2, 5–9, 12, 13	
1, 2, 5–9, 12, 13	103	Banerjee, Wakizaka	1, 2, 5–9, 12, 13	
3, 4, 10, 11	103	Banerjee, Richardson, Sinha	3, 4, 10, 11	
3, 4, 10, 11	103	Banerjee, Wakizaka, Sinha	3, 4, 10, 11	
Overall Outcome			1–13	

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)(1)(iv).

AFFIRMED