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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HAYIM JACOB BARKOL

Appeal 2019-004441
Application 14/740,867
Technology Center 3700

Before MICHAEL L. HOELTER, ANNETTE R. REIMERS, and
LISA M. GUIJT, *Administrative Patent Judges*.

REIMERS, *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 1–6 and 8–16. Appeal Br. 4. Claim 7 has been canceled. *Id.* at 15 (Claims App.). 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 Hayim Jacob Barkol. Brief (“Appeal Br.”) 2, filed June 4, 2018.

CLAIMED SUBJECT MATTER

The claimed subject matter “relates to socks with massage elements included/coupled directly to the sock fabric.” Spec. 1.

Claim 1, the sole independent claim on appeal, is representative of the claimed subject matter and recites:

1. A massage sock comprising:
a stretchable fabric; and
a plurality of massage elements attached to the bottom of the foot of said sock,
wherein said massage elements are each discretely sized, separately located over, and covering only, individual corresponding locations associated with a reflexology body part.

THE REJECTIONS

- I. Claims 1–6 and 8–16 stand rejected under 35 U.S.C. § 112(a), for lack of written description.²
- II. Claim 5 stands rejected under 35 U.S.C. § 112(d), for improper dependent form.
- III. Claims 1, 2, 5, and 8–16 stand rejected under 35 U.S.C. § 102(a)(1) as anticipated by Chiaruttini (US 6,138,281, issued Oct. 31, 2000).

² “The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter of “covering only, individual corresponding locations associated with a reflexology body part.” Final Office Action (“Final Act.”) 4, dated January 2, 2018. Because this objection is related to the rejection under 35 U.S.C. § 112(a), for lack of written description, we shall discuss them together below.

IV. Claims 3, 4, and 6 stand rejected under 35 U.S.C. § 103 as unpatentable over Chiaruttini and Fusco (US 2008/0189829 A1, published Aug. 14, 2008).

ANALYSIS

Rejection I – Written Description

The Examiner determines that claim 1’s limitation “said massage elements . . . covering *only*, individual corresponding locations associated with a reflexology body part,” is not supported by the original disclosure. Final Act. 3 (emphasis added). We note that consistent with this determination, the Examiner also indicates that the Specification is objected to as failing to providing proper antecedent basis for the claimed subject matter. *See id.* at 4 (citing 37 CFR 1.75(d)(1); M.P.E.P. § 608.01(o)).

Appellant contends that the limitation at issue is disclosed at page 5, lines 10–17, of the Specification and that “[t]he specification goes on to give exact sizes and locations on pages 6 – 9 and Figures 1 – 2 for each of the discreetly sized and located massage elements.” Appeal Br. 10–11.

Compliance with the written description requirement set forth in the first paragraph of 35 U.S.C. § 112 does not require that the claimed subject matter be described identically in the Specification, but the disclosure as originally filed must convey to those skilled in the art that applicant had invented the subject matter later claimed. *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983). The Manual for Patent Examining Procedure states that “[a]ny negative limitation or exclusionary proviso must have basis in the original disclosure. If alternative elements are positively recited in the specification, they may be explicitly excluded in the claims. *See In re*

Johnson, 558 F.2d 1008, 1019, 194 USPQ 187, 196 (CCPA 1977).” *See also* Ans. 2.³

In this case, the Examiner reasonably determines that the term “only” effectively equates the claim language to a negative limitation, i.e., excluding locations of massage elements that are not associated with a reflexology body part. *See* Ans. 2. At page 5, lines 10–17, the Specification discloses

[i]n another preferred embodiment[,] the location of massage elements on the base of socks 10 and 12 correspond to massage locations on the wearer’s foot designated as reflexology points. Reflexology generally refers to foot massage locations on the bottom of feet each of which corresponds to a particular body part/gland/organ etc. . . such that massage or stimulation of that location provides corresponding beneficial effects for that body part. As shown in Figures 1 (left sock 10) and 2 (right sock 12), there are a number of discrete locations for each of massage elements 20.

Although this passage discloses that socks 10 and 12 have massage elements that cover locations associated with reflexology points, the passage does *not* disclose that locations of massage elements that are not associated with a reflexology body part are excluded. Stated differently, this passage does *not* disclose that socks 10 and 12 have massage elements that cover *only* locations associated with reflexology points. Similarly, although at pages 6–9 and in Figures 1–2, the Specification discloses socks that have massage elements that cover particular locations associated with reflexology points, those pages of the Specification and Figures 1 and 2 do *not* disclose that the locations of massage elements that are not associated with a reflexology

³ Examiner’s Answer (“Ans.”), dated Oct. 3, 2018.

body part are *excluded*. See Spec. 6–9; Figs. 1–2. Contrary to Appellant’s contention, the Examiner points out that the Specification discloses

[i]t is understood that the above listed locations for massage elements 20 as well the dimensions and hardness should be considered *exemplary and non-limiting*. Other socks with massage elements 20 *using different locations*, shapes, hardnesses etc. . . may be included within the scope of the present invention.

Spec. 9:14–18 (emphasis added); Ans. 2. Because this passage discloses that the listed locations for massage elements are “exemplary and non-limiting” and that “different locations” for the massage element may be included, the locations of the massage elements can thus include those that are not associated with a reflexology body part. Accordingly, the Examiner reasonably determines that the Specification fails to support claim 1’s limitation “said massage elements . . . covering *only*, individual corresponding locations associated with a reflexology body part.” Ans. 2 (emphasis added). Appellant does not apprise us of Examiner error.⁴

For these reasons, we sustain the Examiner’s rejection of claims 1–6 and 8–16 for lack of written description. Accordingly, we likewise sustain the objection of the Specification for failing to providing proper antecedent basis for the claimed subject matter.

⁴ As Appellant has not filed a Reply Brief, Appellant has waived any arguments against the Examiner’s findings. See *Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (“Informative”) (“[A]rguments that could be made in the reply brief, but are not, are waived.”).

Rejection II – Improper Dependent Form

The Examiner determines that because the limitations of claim 5 are already recited in claim 1, claim 5 is of improper dependent form for failing to further limit the subject matter of the claim upon which it depends. Final Act. 3–4.

Appellant does not present arguments directed to this rejection, and has waived any such arguments. *See* Appeal Br., *passim*. Thus, the rejection of claim 5 under 35 U.S.C. § 112(d) is summarily affirmed.

Rejection III – Anticipation by Chiaruttini

Appellant does not offer arguments in favor of dependent claims 2, 5, and 8–16 separate from those presented for independent claim 1. Appeal Br. 11–13. We select claim 1 as the representative claim, and claims 2, 5, and 8–16 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Chiaruttini discloses the massage sock of claim 1 that includes a plurality of massage elements (projections 3) attached to the bottom of the foot of a sock, wherein the massage elements are each discretely sized, separately located over, and covering only, individual corresponding locations associated with a reflexology body part. Final Act. 5 (citing Chiaruttini Figs. 4, 5, 8). The Examiner explains that “since the sock is malleable and can be adjusted on the foot” and “the location of the massage elements would vary depend[ing] on the anatomy on an individual wearing the device,” Chiaruttini’s sock “is capable of performing the function as claimed and meets the claim as recited.” *Id.*

Appellant contends that “Chiaruttini does not show such an arrangement as claimed in claim 1.” Appeal Br. 11. Appellant argues that

because “Chiaruttini does not mention reflexology at all” and Chiaruttini’s Figures 6–8 show projections 3 being “evenly dispersed across the entire foot,” Chiaruttini’s projections 3 “are not sized and located to cover only corresponding reflexology body parts.” Appeal Br. 11. Appellant further argues that “[t]he present claim 1 does not claim an ‘intended use’” because “[c]laim 1 recites that the massage elements are sized and located only over specific locations.” *Id.* at 13. Appellant also argues that even if claim 1 recites an intended use, Chiaruttini “does not show such a feature, nor does it even suggest such a modification.” *Id.* at 12.

As an initial matter, although claim 1 recites massage elements having structure, i.e., “discretely sized” and “separately located,” claim 1 also recites an intended use in that the massage elements are “located over, and covering only, individual corresponding locations *associated with a reflexology body part.*” Appeal Br. 14 (Claims App. (emphasis added)). Stated differently, the massage elements are for reflexology use. Further, the Specification discloses that “[r]eflexology generally refers to foot *massage* locations on the bottom of feet each of which corresponds to a particular body part/gland/organ etc. . . such that massage or stimulation of that location provides corresponding *beneficial effects for that body part.*” Spec. 5:12–15 (emphasis added). We thus construe the limitation massage elements with “locations associated with a reflexology body part” as massage elements positioned at any location on the bottom of a foot for massage or stimulation would provide beneficial effects to that body part.

Chiaruttini discloses projections 3 (having a base 5 and an extension 6) attached to the bottom of a sock in which the projections are discretely sized and separately located. *See* Chiaruttini Figs. 1–8. Chiaruttini further

discloses that “the base 5 allows the extension 6 to extend outside the fabric of the stocking sole thus effectively *massaging* the foot sole.” Chiaruttini 2:59–61 (emphasis added). Thus, Chiaruttini’s projections 3 are located at the bottom of a foot and allow massage or stimulation at those locations. As long as the massage or stimulation provides a beneficial effect to a particular body part, including the foot itself, Chiaruttini’s projections 3 are capable of being associated with a reflexology body part. In this regard, we agree with the Examiner that “[t]he prior art teaches discretely formed massage elements (3) as required by the claim and would be capable for use of reflexology,” especially as “locations of reflexology points vary from user to user based on anatomy, and the [sock of Chiaruttini] is capable of being positioned over and only covering specific reflexology points.” Ans. 3. Appellant does not provide evidence or persuasive argument that Chiaruttini “does not show such a feature, nor does it even suggest such a modification,” i.e., that Chiaruttini’s projections 3 are not capable of being associated with a reflexology body part. *See* Appeal Br. 12. “Attorney’s argument in a brief cannot take the place of evidence.” *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974).

Further, Chiaruttini notably discloses that “[a]n object of the invention is to provide a sock with improved comfort which offers an effective protection to the osteo-articulation structure of the foot and at the same time improves the blood circulation in the foot.” Chiaruttini 1:42–45; *see also id.* at 3:23–24 (disclosing “a *massage* that effectively *improves the blood circulation* in the foot”) (emphasis added). Because Chiaruttini’s sock along with its projections 3 provide the benefit of improved blood circulation, Chiaruttini’s projections 3 are inherently positioned at locations, which

correspond to a particular body part/gland/organ, such that massage or stimulation of those locations provides corresponding beneficial effects for that body part (i.e., improves blood circulation in the foot) and thus, “cover[] only, individual corresponding locations associated with a reflexology body part,” as claimed. Accordingly, Appellant does not apprise us of Examiner error.

In summary, and based on the record presented, we are not persuaded the Examiner erred in rejecting independent claim 1 as anticipated by Chiaruttini. Accordingly, we sustain the Examiner’s rejection of claim 1. We further sustain the rejection of claims 2, 5, and 8–16, which fall with claim 1.

Rejection III – Obviousness over Chiaruttini and Fusco

Appellant does not provide substantive arguments concerning the rejection of claims 3, 4, and 6 and appears to rely on arguments provided for parent claim 1. *See* Appeal Br. 11–13. As we find no deficiencies in the Examiner’s rejection of independent claim 1 as anticipated by Chiaruttini, we likewise sustain the Examiner’s rejection of claims 3, 4, and 6 as unpatentable over Chiaruttini and Fusco.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–6, 8–16	112(a)	Written Description	1–6, 8–16	
5	112(d)	Improper Dependent Form	5	

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 5, 8–16	102(a)(1)	Chiaruttini	1, 2, 5, 8–16	
3, 4, 6	103	Chiaruttini and Fusco	3, 4, 6	
Overall Outcome			1–6, 8–16	

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