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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes details for application 14/809,324, inventor Bret Darren SEITZ, and examiner ANDERSON, CATHARINE L.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRET DARREN SEITZ and
GARY DEAN LAVON

Appeal 2019-004456
Application 14/809,324
Technology Center 3700

Before MICHAEL L. HOELTER, JAMES P. CALVE, and
MICHAEL L. WOODS, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3–8, 10–19, and 21. 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 “The Procter & Gamble Company of Cincinnati, Ohio.” Appeal Br. 1.

CLAIMED SUBJECT MATTER

The disclosed subject matter “is directed to disposable absorbent articles and arrays of disposable absorbent articles which are designed to fit different adult body sizes, shapes and types, and as such are sized to fit a broad range of adult consumers.” Spec. 1:11–13. Apparatus claims 1, 9, 17, and 30 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. An absorbent article having a central chassis, the central chassis comprising a topsheet, a backsheet and an absorbent core, the absorbent article comprising:
 - a front waist region and a front waist edge;
 - a back waist region and a back waist edge;
 - a front belt disposed in the front waist region;
 - a back belt disposed in the back waist region;wherein the front and back belts are joined at seams to form a waist opening and leg openings;
 - wherein the front belt comprises a first film;
 - wherein the back belt comprises a second film;
 - a plurality of elastic strands disposed along a portion of the leg openings;wherein the article comprises a Product Length-to-hip Silhouette less than about 0.94;
 - wherein the article comprises a Relaxed Product Length of greater than about 258 mm; and
 - wherein the article comprises at least one of the following:
 - (a) Relaxed Product Waist Width less than about 304 mm;
 - (b) Relaxed Product Side Length less than about 202 mm;
 - (c) Relaxed Product Length less than about 316 mm; and
 - (d) Relaxed Product Hip Width less than about 373 mm;
 - wherein the Relaxed Product Length is a longitudinal distance between a longitudinally distal most point in the crotch

region and a longitudinally distal most point along the front waist edge, wherein the article is relaxed.

EVIDENCE

Name	Reference	Date
Betts	US 7,931,632 B2	Apr. 26, 2011
Takahashi et al. ("Takahashi")	US 2013/0226127 A1	Aug. 29, 2013

REJECTIONS²

Claims 1–8 are rejected under 35 U.S.C. § 103 as unpatentable over Takahashi.

Claims 9–30 are rejected under 35 U.S.C. § 103 as unpatentable over Takahashi and Betts.³

ANALYSIS

Appellant does not differentiate between the different rejections of independent claims 1, 9, 17, and 30, and instead, argues these four claims together. *See* Appeal Br. 2–3. Appellant also does not present any argument

² Not addressed in the Examiner's Answer are numerous provisional rejections of claims 1–30 on the ground of nonstatutory double patenting. *See* Final Act. 13–16; *see also* 37 C.F.R. § 41.39(a)(1). Although at least Application Nos. 14/805,673, 14/805,601, and 14/699,145 have issued (others are still pending and one has been abandoned), we do not address these double patenting rejections in view of our affirmance of the rejections of claim 1–30 as being obvious in view of Takahashi alone or combined with Betts. *See* 37 C.F.R. § 41.50(a)(1). We leave it to the Examiner should a need exist to further address these double patenting rejections.

³ The Examiner states that claim 30 is rejected as being unpatentable over Takahashi and Betts (*see* Final Act. 12) separate from the similar rejection of claims 9–29 (also in view of Takahashi and Betts) (*see* Final Act. 5). We combine the two rejections.

for any dependent claim. Hence, we select claim 1 for review, with the remaining claims (i.e., claims 2–30) standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 includes the limitation “wherein the article comprises a Product Length-to-hip Silhouette less than about 0.94.”⁴ Although relying solely on Takahashi for disclosing the various limitations of claim 1, the Examiner acknowledges that Takahashi does not disclose “the article having a Product Length-to-Hip Silhouette less than 0.92.”⁵ Final Act. 3. However, the Examiner states, “[c]hanges in size are an obvious modification in the art of wearable articles” and as such, it would have been obvious “to provide the article of Takahashi with a Product Length-to-Hip Silhouette less than 0.92.” Final Act. 4. The Examiner additionally states, “[t]he length and width of the article is a result-effective variable since changes in the length and width of the article result in a change in the size of the article.” Final Act. 3–4. The Examiner states that it would have been obvious to provide a ratio of “less than 0.92 since optimizing the ratio of the length to the width of the article would have been an obvious modification to change the size of the article.” Final Act. 4.

Appellant does not address the rejection directed to a “result-effective variable” or “optimizing the ratio” employed by the Examiner above. Instead, Appellant addresses the Examiner’s reliance on “[c]hanges in size [being] an obvious modification in the art of wearable articles.” Appeal Br. 3. Appellant disagrees with this assessment stating “that the Product Length-to-Hip Silhouettes . . . are **not** obvious modifications to absorbent

⁴ Claims 9, 17, and 30 recite a similar limitation, but with different numerals.

⁵ This numerical disparity is due to claim 9 reciting the lower value.

articles.” Rather, “Applicants’ position is supported by several examples of the adult incontinence pants on the market at the time of filing that fall outside of Applicants’ claimed range (see Fig. 9 and Table 1).”⁶ Appeal Br. 3. In view of Figure 9 and Table 1 “Appellants respectfully requests the Board of Patent Appeals and Interferences to reverse said rejections and to remand the application with instructions that the appealed claims be allowed.” Appeal Br. 7.

The Examiner acknowledges that the data provided by Appellant shows “several examples of adult incontinence pants on the market at the time of filing that fall outside of Appellants’ claimed range.” Ans. 4. “However, this is not representative of all prior art products, and is limited to only adult incontinence pants while the present claims are more broadly drawn to absorbent articles, which can include other articles such as infant diapers and training pants.” Ans. 4. Indeed, the data provided pertains to adult absorbent articles (*see* Spec. Title), whereas claim 1 is not so limiting. Further, Appellant has not filed a Reply Brief and thus does not rebut this assertion by the Examiner that the presented data is not representative of other absorbent articles. Hence, Appellant’s argument that the recited Silhouette values “claimed by Applicants are not obvious modification to absorbent articles” (Appeal Br. 3) is premised on incomplete data, and thus is not persuasive of Examiner error.

Additionally, and consistent with the Examiner’s findings, is Appellant’s own discussion of “U.S. 5,358,500 to LaVon et al.” Spec. 2:21.

⁶ Appellant’s Figure 9 is “a chart which shows examples of existing product arrays” (Spec. 6:2) and Table 1 is entitled “Examples of Product Length-to-Hip Silhouettes for Existing Product Arrays” (Spec. 13).

Appellant states, “some consumers prefer a product style that provides for a lower fit, such that the front waist edge is below the navel [and] [p]roducts designed to fit below the navel and around the waist to the small of the back also fall into the Low Motion area of the anatomy, as described in” LaVon. Spec. 2:19–21. Appellant states that such products “provid[e] increased product stability, comfort and gasketing” and that “[p]roducts designed to deliver a lower fit relative to the navel will by necessity require a smaller Product Length-to-Hip Silhouette.” Spec. 2:21–23. By such language and in view of La Von, Appellant admits that, “by necessity [] a smaller” ratio is a parameter for skilled persons to explore should one desire to improve “product stability, comfort and gasketing.” This reason compliments the Examiner’s stated reason, i.e., “[c]hanges in size are an obvious modification in the art of wearable articles.” Final Act. 4. It also supports the Examiner’s determination that the claimed Product Length-to-hip Silhouette is recognized in the prior art as a result effective variable that may be optimized by reducing the ratio. *See In re Applied Materials*, 692 F.3d 1289, 1295 (Fed. Cir. 2012) (“Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” . . . This rule is limited to cases in which the optimized variable is a ‘result-effective variable.’”); *see also Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1377 (Fed. Cir. 2003) (holding that an admission that the prior art encompasses a claim limitation supported an obviousness determination with other prior art); *In re Gardner*, 449 F. App’x 914, 916 (Fed. Cir. 2011) (non-precedential) (holding that the Board’s reliance on applicant’s disclosure that prior art battery was a fast charge-discharge battery was proper citing *Dow Chem.*).

In emphasizing the known pursuit of a smaller ratio, the Examiner also states, “[t]he claimed Product Length-to-Hip Silhouette is shown to be known in the prior art by references such as US 2007/0016158 to Endres et al. (made of record but not relied upon in any rejection).” The Examiner identifies data contained therein, stating that this data “results in a Product Length-to-Hip Silhouette of 0.77.” Ans. 4 (referencing Endres “pages 6–7, Table 1”). Hence, the Examiner concludes “the claimed range is not novel.” Ans. 4–5. The Examiner reiterates, “modification of the size of an absorbent article to achieve the claimed range would have been obvious to one of ordinary skill in the art.” Ans. 5. Appellant does not address or otherwise apprise us of error in the Examiner’s finding that the prior art teaches a value (0.77) that is within the claimed range of “Product Length-to-hip Silhouette less than about 0.94,” and this finding supports the Examiner’s determination of obviousness by anticipating that claimed range. *See In re Wertheim*, 541 F.2d 257, 267 (CCPA 1976) (“Of course, the disclosure in the prior art of any value within a claimed range is an anticipation of the claimed range.”); *Titanium Metals Corp. of Am. V. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985) (“It is an elementary principle of patent law that when, as by a recitation of ranges or otherwise, a claim covers several compositions, the claim is ‘anticipated’ if *one* of them is in the prior art.”).

Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 1–8 as being obvious over Takahashi, nor of claims 9–30 as being obvious over Takahashi and Betts.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-8	103	Takahashi	1-8	
9-30	103	Takahashi, Betts	9-30	
Overall Outcome			1-30	

No period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED