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CARSTENS & CAHOON, LLP P.O. Box 802334 DALLAS, TX 75380-2334			TSAI, MICHAEL JASPER	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL BUDAGHER

Appeal 2019-004794
Application 14/807,405
Technology Center 3700

Before MICHAEL L. HOELTER, JILL D. HILL, and
RICHARD H. MARSCHALL, *Administrative Patent Judges*.

HOELTER, *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 1–20. 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 “Ovard, LLC.” Appeal Br. 2.

CLAIMED SUBJECT MATTER

The disclosed subject matter “relates to a three-axis rotation system and method, and more particularly a system and method that allows a practitioner to position or rotate a human body along three axes, independently from one another, in order to diagnose or treat at least one system of the human body.” Spec. ¶ 2. Method claims 1, 6, 11, and 16 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A method for stimulating a vestibular system in a human subject comprising:

securing the human subject to a chair, wherein the chair is contained within a pitch frame that rotates the chair about a pitch axis, a yaw frame that rotates the chair about a yaw axis, and a roll frame that rotates the chair about a roll axis; wherein the pitch, roll and yaw axes are orthogonal to each other, and comprise an origin located within the human subject; wherein the yaw frame is contained within the roll frame such that when the roll frame is rotated around the roll axis, the yaw frame will also be rotated about the roll axis; and

stimulating at least one of an inner ear canal, a utricle or a saccule in the human subject by rotating the human subject along a vector path by actuating combinations of the pitch frame, roll frame and yaw frame independently around the pitch, roll and yaw axes, without any limitation on degree of rotation.

EVIDENCE

Name	Reference	Date
Maher	US 2014/0087340 A1	Mar. 27, 2014
Epley et al. (“Epley”)	US 7,559,766 B2	July 14, 2009

REJECTION

Claim 1–20 are rejected under 35 U.S.C. § 103 as unpatentable over Maher and Epley.

ANALYSIS

Appellant argues claims 1–20 together. *See* Appeal Br. 7–11. We select claim 1 for review, with the remaining claims (i.e., claims 2–20) standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 recites separate pitch, yaw, and roll frames, “wherein the yaw frame is contained within the roll frame.” The Examiner primarily relies on Maher for disclosing the limitations of claim 1, but acknowledges that Maher does not specifically disclose “wherein the yaw frame is contained within the roll frame.” Final Act. 3. The Examiner relies on Epley for teaching this limitation reasoning that it would have been obvious “to replace” Maher’s roll mechanism with another “well-known mechanism” because Epley discloses a “roll mechanism with a frame instead of being supported by a shaft,” as in Maher. Final Act. 3–4.

Appellant initially contends that “**Epley and Maher teach away from the proposed combination.**” Appeal Br. 9; *see also* Reply Br. 1. This is because “Epley discloses that the human subject is fixed in place relative to the pitch axis prior to treatment,” and thus is not rotated about all three axes during treatment. Appeal Br. 9; *see also* Reply Br. 1. In other words, “modifying the structure [of] Maher to use the roll frame of Epley to provide a three-axis rotational treatment method would go directly against the teachings of Epley.” Appeal Br. 9.

Appellant’s contentions are not persuasive for multiple reasons. First, the Examiner is relying on Maher, not Epley, for teaching “a three-axis rotational treatment method.” *See* Appeal Br. 9, Final Act. 2; *see also* Maher ¶ 6 (“The subject can then be rotated around one, two, or three rotational axes individually or simultaneously in a controlled manner.”); Ans. 6–7. Second, the Examiner relies on Epley for disclosing “wherein the yaw frame is contained within the roll frame” (Final Act. 3; *see also* Ans. 7) and thus Appellant is not addressing the Examiner’s reason for relying on Epley. Third, contrary to Appellant’s contentions, Epley does teach rotation about a third axis during treatment, it is just that once the patient is rotated about this third axis into the proper position, further rotation about that axis is restricted. *See* Epley 4:48–50 (the subject is adjusted “by selectively pivoting and then fixing the third axis in relationship to certain known anatomical landmarks”), *see also id.* at 4:36–38. Additionally, and perhaps more importantly, Appellant does not identify where either reference (or their combination) criticizes, discredits, or otherwise discourages the solution claimed. *See* Ans. 7–8; *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004). Further, Appellant is misconstruing the Examiner’s rejection, which primarily relies on the teachings of Maher, by stating (and premising arguments on), “a deeper examination reveals that Epley is truly the primary reference being modified in this rejection.”² Reply Br. 2. Thus, based on

² Appellant further states, “[t]his interpretation of the rejection is further supported at pages 12 and 13 of the Answer, where Epley is again relied upon for motivation to combine the references.” Reply Br. 2. Appellant cites no case law that because a motivation is found in a reference, that “motivational” reference becomes the primary reference, despite the Examiner’s rejection to the contrary.

the record presented, we are not persuaded the Examiner erred in relying on the combination of Maher and Epley, or that this combination teaches away as asserted. *See* Appeal Br. 9.

Appellant also argues, “[c]ombining Maher and Epley as proposed would frustrate [the] fundamental principle of operation of Maher and Epley.” Appeal Br. 9. Again, this is because, in Epley, “the human subject/chair [is] fixed in relation to the pitch plane before the treatment is carried out.” Appeal Br. 9. Appellant asserts that this advantage provided by Epley is “an advantage over the prior art—namely, by providing improved calibration and enabling accurate software control.” Appeal Br. 9.

However, since Maher already discloses independent operation and control of each of the three axes (*see* Maher ¶ 6), Appellant does not explain how the fixing of one of the axes in Maher, as per Epley above, would not confer similar advantages upon Maher. *See* Ans. 8–9. Additionally, it must be noted that the Examiner’s rejection modifies Maher with Epley’s yaw/roll frame construction, the Examiner is not modifying Epley with Maher’s teachings, as Appellant seems to be arguing. *See* Appeal Br. 9. Hence, we are not persuaded of Examiner error on this point.

Appellant further contends, “it is unclear how such a modified Maher device would even function” and that the “rejection at issue here does not appreciate the fact that the proposed combination would require completely redesigning the Maher device to resemble the Epley device in some respects.” Appeal Br. 10; *see also* Reply Br. 2. The Examiner, however, explained that “[i]n the proposed modification, the chair of Maher would be mounted directly to the pitch frame (221) when replacing the [Maher] roll mechanism with that of the Epley reference.” Ans. 9; *see also id.* at 10.

Based on the above, and although some skillful engineering and craftwork might be involved, Appellant does not explain how the Examiner's suggested modification is so extensive that its implementation is unclear, or that there would be no expectation of success. Thus, Appellant's contentions on this point are also not persuasive of Examiner error.

Appellant additionally addresses "tipping" (Appeal Br. 10), but does not explain how effecting the Examiner's proposed modification would cause tipping to occur, especially when both the Maher and Epley devices are each supported upon the ground, without any indication in either reference that tipping is a concern. *See also* Ans. 10. Appellant's contentions are not persuasive on this point.

Appellant further argues, "[t]he rejection has not presented a rational motivation to combine Maher and Epley." Appeal Br. 11. As noted above, the Examiner's reasoning is to replace one well-known method of support for another, because a skilled person would prefer a frame over a cantilevered shaft thereby providing "stronger structural support for the roll mechanism." Final Act. 3-4; *see also* Ans. 12-13. Appellant contends, "this reasoning does not provide a rational underpinning, which is necessary to make out a valid *prima facie* obviousness case." Appeal Br. 11 (referencing *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006))). Appellant argues that Maher "already discloses a roll mechanism supported with a frame" (Appeal Br. 11), but this understanding of Maher is not altogether correct. This is because Maher clearly discloses that rotation about the roll axis is accomplished "by the roll shaft 226" which is cantilevered from frame 221. Maher ¶ 58; *see also id.* Fig. 2. The Examiner is suggesting replacement of

the shaft of Maher with a similarly well-known mechanism, i.e., the frame of Epley, with the reason being that a frame provides more structural support than Maher's cantilevered shaft 226, which suspends chair 202 in space. *See* Maher Fig. 2; Final 3-4; Ans. 12-13. Appellant is not persuasive of Examiner error on this point.

Accordingly, and based on the record presented, we are not persuaded the Examiner erred in relying on the combination of Maher and Epley. We sustain the Examiner's rejection of claims 1-20 as being obvious over Maher and Epley.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-20	103	Maher, Epley	1-20	
Overall Outcome			1-20	

No 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