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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEROME MATULA, GREGORY JOHN JABLONSKI,
ANTONIO BUGAMELLI, and DERRICK BLAKE ANDREWS

Appeal 2019-005117
Application 14/429,128
Technology Center 3700

Before BENJAMIN D. M. WOOD, FREDERICK C. LANEY, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

WOOD, *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 8–15. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ “Appellant” refers to the applicant as defined by 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Koninklijke Philips N.V. Appeal Br. 1.

CLAIMED SUBJECT MATTER

The claims are directed to an articulating full face mask. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A cushion for use in a patient interface device, the cushion comprising:
 - a first portion adapted to sealingly engage around the nares of a patient;
 - a second portion adapted to sealingly engage around the mouth of the patient; and
 - a third portion configured to provide for the relative positioning of the first portion and the second portion to be selectively adjusted, wherein the first portion comprises one of a nasal mask, a pillows mask, or a cradle mask, and wherein the third portion is formed as a part of at least one of: the first portion and the second portion.

REFERENCES

Name	Reference	Date
Berthon-Jones	US 5,560,354	Oct. 1, 1996
Barlow	US 2013/0220327 A1	Aug. 29, 2013
McAuley	WP 2004/071565	Aug. 26, 2004

REJECTIONS

Claims Rejected	35 U.S.C. §	Reference(s)/Basis
1-6, 8-12, 14, 15	103	McAuley, Berthon-Jones
13	103	McAuley, Berthon-Jones, Barlow

OPINION

A. Claims 1-6, 8-12, 14, and 15: Rejected as Unpatentable over McAuley and Berthon-Jones

Appellant argues the claims subject to this rejection as a group. Appeal Br. 5-7. We select claim 1 as representative of the group, and

decide the appeal of this rejection on the basis of claim 1 alone. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that McAuley teaches a cushion for use in a patient interface device comprising a first portion adapted to sealingly engage around the nares of a patient, a second portion adapted to sealingly engage around the mouth of the patient, and a third portion configured to provide for the relative positioning of the first portion and the second portion to be selectively adjusted, wherein the third portion is formed as a part of at least one of the first portion and the second portion. Final Act. 3 (citing McAuley, 4:15–20, Fig. 2). The Examiner acknowledges, however, that McAuley does not disclose wherein the first portion comprises one of a nasal mask, a pillows mask, or a cradle mask, and therefore relies on Berthon-Jones to teach the missing limitation. *Id.* (citing Berthon-Jones, Figs. 2–6). The Examiner determines that it would have been obvious for one of ordinary skill in the art “to have modified the mask of McAuley to have a separate nasal and mouth mask as disclosed by Berthon-Jones in order to provide a better seal with the patient’s nose and mouth.” *Id.* (citing Berthon-Jones, 1:63–68, 2:5–10).

We have considered each of Appellant’s arguments in support of the patentability of claim 1, but find them unpersuasive of Examiner error. Appellant first argues that McAuley fails to teach a cushion comprising a first portion adapted to sealingly engage around the nares of a patient, a second portion adapted to sealingly engage around the mouth of a patient, and a third portion configured to provide for the relative positioning of the first portion and the second portion to be selectively adjusted. Appeal Br. 5. According to Appellant, “McAuley simply teaches a patient interface 2

having **a single seal 30 which engages the face of a patient 1 around both the mouth and nares,**” and thus, at most, “teaches a cushion comprising a first portion adapted to sealingly engage *near* the nares of a patient and a second portion adapted to sealingly engage *near* the mouth of the patient as plainly neither of such alleged portions identified by the Examiner when viewed as only a portion is actually disposed *around* (i.e., disposed on all sides thereof, encircling) either of the mouth or nares of the patient.” *Id.*

This argument is not persuasive of Examiner error, as it constitutes an attack on McAuley individually and fails to consider the combined teachings of McAuley and Berthon-Jones and the rejection as articulated by the Examiner. *See In re Merck & Co., Inc.*, 800 F.2d 1091, 1097–98 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.” (citations omitted)). Even if we were to agree with Appellant that McAuley fails to teach this limitation, the Examiner also finds that Berthon-Jones teaches—as Appellant acknowledges—“two separate encompassing members – a first sealing member which is disposed around the nares of a patient and a second sealing member which is disposed around the mouth of the patient.” Appeal Br. 6; *see* Final Act. 3. Thus, the combination of McAuley and Berthon-Jones teaches the limitations that Appellant argues is missing from McAuley alone.

Appellant also disputes the Examiner’s asserted reason to combine McAuley and Berthon-Jones. According to Appellant, “such suggested combination appears to be based on the teaching of the present application and no teaching or suggestion from the prior art.” This is incorrect. The Examiner relies on Berthon-Jones to support the determination that

modifying McAuley to have separate nasal and mouth masks would result in a better seal. *See* Final Act. 3 (citing Berthon-Jones, 1:63–68, 2:5–10; Ans. 5 (citing Berthon-Jones, 6:40–50). “Any judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper.” *In re McLaughlin* 443 F.2d 1392, 1395 (CCPA 1971).

Appellant further argues that:

[B]ased on the art relied upon by the Examiner, one starting with the arrangement of McAuley looking to improve the seal with a patient's nose and mouth would simply either: i.) utilize only the arrangement of Berthon-Jones instead of the full face arrangement of McAuley (McAuley is not solely concerned with a full face mask but also discloses that its mask may be a nasal mask, or any other type of mask, see, e.g., page 3, lines 24–30), or ii.) modify either or both of the encompassing members, i.e., nasal cushion 44 and/or the mouth cushion 46, of Berthon-Jones such that a portion of one or both of such encompassing members has an adjustable portion such that the seal of either or both of such portion is improved.

Appeal Br. 6. But Appellant does not explain why one of ordinary skill in the art would be more likely to combine McAuley and Berthon-Jones in either of the above manners, or otherwise directly address the Examiner's stated reason to combine the references (other than to incorrectly assert that it was based solely on the Specification, as discussed above). Appellant also fails to provide evidentiary support for its argument. Thus, we are not

persuaded that the Examiner's reason to combine McAuley and Berthon-Jones is erroneous.

Appellant also argues that:

In any case, no combination of McAuley and [Berthon-]Jones would result in an arrangement having a [third] portion configured to provide for the relative positioning of a first portion (which is adapted to sealingly engage around the nares of a patient) and a second portion (which is adapted to sealingly engage around the mouth of a patient) to be selectively adjusted, such as recited in claim 1.

Appeal Br. 6. But Appellant does not explain why the Examiner erred in finding that adjustable portion 31 of McAuley's mask cushion corresponds to the claimed third portion. See Final Act. 3 (annotated version of McAuley Fig. 2 identifying adjustable portion 31 as claimed "third portion").

Appellant does not provide evidence or persuasive argument demonstrating that this finding is erroneous.

In the Reply Brief, Appellant elaborates on this argument. Appellant contends that:

[T]he third portion of McAuley cited by the Examiner simply provides for a portion of seal 30 to be adjusted in order to adjust the spacing between such portion of seal 30 and the patient's face (e.g., see page 4, lines 15–32 of McAuley). Hence McAuley simply describes an arrangement which allows for adjustment of a portion of a single encompassing member (i.e., seal 30), and thus plainly does not disclose or suggest the elements of claim 1 contended by the Examiner.

Reply Br. 2–3. Appellant does not explain, however, why a "portion" of McAuley's mask cushion 30 cannot correspond to the claimed "third portion." Nothing in claim 1 or the Specification requires the claimed third

portion to be entirely separate from the claimed cushion. On the contrary, claim 1 expressly requires the third portion to be “formed *as a part of* at least one of the first portion and the second portion” of the claimed cushion. Appeal Br. 9 (Claims. App.). Therefore, we are not persuaded that the Examiner erred in finding that adjustable portion 31 corresponds to the claimed third portion.

Because we are not persuaded that the Examiner erred in determining that claim 1 is unpatentable over McAuley and Berthon-Jones, we sustain the Examiner’s rejection of claims 1–6, 8–12, 14, and 15 on that basis.

B. Claim 13: Rejected as Unpatentable over McAuley, Berthon-Jones, and Barlow

Claim 13 indirectly depends from claim 10. Appeal Br. 10 (Claims App.). Appellant relies on the patentability of claim 10 to support the patentability of claim 13. *Id.* at 7. Because we are not persuaded that the Examiner erred in determining that claim 10 is unpatentable over McAuley and Berthon-Jones, we likewise are not persuaded that the Examiner erred in rejecting claim 13 as unpatentable over McAuley, Berthon-Jones, and Barlow. This rejection is sustained.

CONCLUSION

The Examiner’s rejections are affirmed.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-6, 8-12, 14, 15	103	McAuley, Berthon-Jones	1-6, 8-12, 14, 15	
13	103	McAuley, Berthon-Jones, Barlow	13	
Overall Outcome			1-6, 8-15	

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