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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ADRIAN RIVERA¹

Appeal 2019-006872
Application 15/390,332
Technology Center 2800

Before BRADLEY W. BAUMEISTER, DENISE M. POTHIER, and
JENNIFER S. BISK, *Administrative Patent Judges*.

BAUMEISTER, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 23–33. Appeal Br. 8.² We have jurisdiction under 35 U.S.C. § 6(b). We Affirm In Part. Pursuant to our discretionary authority under 37 C.F.R. § 41.50(b), we enter new grounds of rejection for claims 24, 25, and 30.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies inventor Adrian Rivera as the real party in interest. Appeal Brief filed July 11, 2019 (“Appeal Br.”) at 2.

² We refer to the above mentioned Appeal Brief, as well as the following documents for their respective details: the Final Action mailed December 31, 2018 (“Final Act.”); the Examiner’s Answer mailed August 12, 2019 (“Ans.”); and the Reply Brief filed September 20, 2019 (“Reply Br.”).

CLAIMED SUBJECT MATTER

Appellant describes the present invention as follows:

A scoop and level for scooping a portion of granulated material and leveling the contents of the scoop. The scoop may have a volume suitable for brewing a single serving of brewed beverage, and in particular, for brewing a single serving of espresso. The level is attached to the scoop and slides over the scoop to displace excess material, thus providing a desired amount material for processing, for example, for preparing a beverage. A scoop handle may further include a tamper opposite to the scoop. The tamper may be used to tamp brewing material after scooping, leveling, and pouring the brewing material into a holder.

Abstract.

THE REFERENCES

The Examiner bases the prior-art rejections on the following references:

Name	References	Date
Cheng et al. (“Cheng”)	US 5,884,523	Mar. 23, 1999
Rea	US 2005/0017028 A1	Jan. 27, 2005
Fumagalli	US 2011/0162533 A1	July 7, 2011

STATEMENT OF THE REJECTIONS

Claims 23–25, 27, 28, and 33 stand rejected under 35 U.S.C.

§ 102(a)(2)³ as anticipated by Cheng. Final Act. 2–3.

Claim 26 stands rejected under 35 U.S.C. § 103 as being unpatentable over Cheng. Final Act. 3–4.

³ The Final Action states claims 23–25, 27, 28, and 33 are rejected under §§ 102(a)(1) and 102(a)(2).

Claim 29 stands rejected under 35 U.S.C. § 103 as being unpatentable over Cheng in view of Rea. Final Act. 4.

Claim 30–32 stands rejected under 35 U.S.C. § 103 as being unpatentable over Cheng in view of Fumagalli. Final Act. 4–5.

STANDARD OF REVIEW

The Board conducts a limited *de novo* review of the appealed rejections for error based upon the issues identified by Appellant, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

CLAIMS 23, 27, and 28

Independent claim 23, which illustrates the claimed subject matter, reads as follows:

23. A scooping and leveling device, comprising:

an elongated scoop arm;

a scoop disposed at a first end of the scoop arm; and

a leveling element;

wherein the scoop has a concave interior and a substantially planar rim;

wherein the leveling element has a leveling arm coupled to the scoop arm, and a leveling bar disposed at a first end of the leveling arm and planar with the leveling arm;

wherein the leveling bar has substantially the same size and shape as at least a portion of the substantially planar rim of the scoop;

wherein the leveling arm is coupled to the scoop arm such that the leveling element is movable between a first position and a second position;

wherein in the first position, the leveling element is disposed such that the leveling bar is disposed on the at least a portion of the substantially planar rim of the scoop; and

wherein in the second position, the leveling element is disposed such that the first end of the leveling arm is pushed beyond a far end of the substantially planar rim of the scoop.

Determinations and Contentions

The Examiner finds Cheng's Figure 1 embodiment discloses all of the limitations of independent claim 23. Final Act. 2–3. In particular, the Examiner finds, *inter alia*, that Cheng's cover ring 21 corresponds to the claimed leveling bar, that Cheng's pusher 2 corresponds to the claimed leveling arm, and that Cheng's cover ring is disposed at a first end of the pusher, as claimed. *Id.* at 2.

The Examiner finds the bottom surfaces of Cheng's cover ring 21 and pusher 2 are planar. *Id.* at 2. The Examiner reasons,

“planar” is literally a two dimensional mathematical abstraction, and that [one] having ordinary skill in the art before the effective filing date of the invention would have found that the shared common bottom plane of 21 and 2, best seen in figure 3, would have read on the broadest reasonable interpretation of “planar”.

Ans. 3.

Appellant asserts that the claim term “planar,” as recited in claim 23, requires “two elements occupy the same plane.” Reply Br. 6. Appellant argues Cheng's cover ring 21 and pusher 2 are not planar because the top surface of cover ring 21 is elevated above the top surface of pusher 2. *Id.* In support of this position, Appellant argues, *inter alia*,

the claim recites that the leveling bar is planar with the leveling arm, not that they have a planar common surface. The drawing figures clearly show that the Cheng et al. ring 21 is elevated far above the pusher 2 and Cheng et al. discloses that this non-planar

arrangement is intentional, included as an advantageous design feature.

Appeal Br. 12.

Analysis

Our inquiry requires interpreting what it means for the leveling bar to be “planar” with the leveling arm, as recited in claim 23. We understand the Examiner’s position to be that the broadest reasonable interpretation of claim 23’s disputed limitation includes the leveling arm and the leveling bar merely sharing at least one common planar surface. We understand Appellant’s position to be that the broadest reasonable interpretation of “planar” is further limited to mean that the leveling arm and the leveling bar are of the same height, with both of these elements’ respective top and bottom surfaces being disposed in the same respective planes. Appeal Br. 12.

Appellant’s Specification does not expressly define what it means for the two recited structures to be “planar.” *See generally* Spec. In fact, the Specification does not even recite the word “planar.” *See id.* Turning to extrinsic evidence, then, a general-purpose dictionary defines planar as “1 :of, relating to, or lying in a plane[.] 2 :two-dimensional in quality.”⁴ This definition does not include the further requirement that the top and bottom surfaces of two physical objects both be planar.

We, therefore, agree with the Examiner’s interpretation of “planar” in claim 23, and we interpret the disputed limitation broadly to mean that the leveling arm and leveling bar share at least one common plane. In the

⁴ <https://www.merriam-webster.com/dictionary/planar> (last visited March 10, 2020).

present case, the lower surfaces of Cheng’s cover ring and pusher share a common plane.

Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993). During examination, the claims must be interpreted as broadly as their terms reasonably allow. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004). “It is the applicants’ burden to precisely define the invention, not the PTO’s.” *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997). Appellants always have the opportunity to amend the claims during prosecution, and broad interpretation by the Examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. *In re Prater*, 415 F.2d 1393, 1404–05 (CCPA 1969).

Accordingly, we sustain the anticipation rejection of claim 23. Appellant traverses the anticipation rejection of, *inter alia*, claims 27 and 28 based only on the claims’ dependency from claim 23. Appeal Br. 15–16. Accordingly, we also sustain the anticipation rejection of dependent claims 27 and 28.

CLAIM 33

Dependent claim 33 reads as follows:

33. The device of claim 23, wherein the leveling bar is flat.

Determinations and Contentions

The Examiner interprets Cheng’s cover ring 21 as reading on a “leveling bar [that] is flat.” Final Act. 3. In the Examiner’s Answer, the

Examiner further explains that “[f]lat doesn’t preclude any spatial extent. [Cover ring] 21 is flat enough to level the scoop when extended.” Ans. 4.

Appellant argues Cheng’s cover ring 21 is not flat. In support of this position, Appellant argues,

[a] flat element is smooth and even, without marked lumps or indentations, and certainly does “preclude any spatial extent”. The Cheng et al. ring 21 has a raised rim and is decidedly not flat, by intentional design and for a p[ar]ticular advantage, as noted above in discussing claim 23.

Reply Br. 8; *see also id.* at 6–7 (arguing in relation to claim 23 that Cheng’s raised, non-planar portion of cover ring 21 is intentional and advantageous in better ensuring a full scoop).

Analysis

Appellant’s arguments are not commensurate in scope with the language of claim 33. Appellant appears to be arguing that claim 33 requires that the upper surface of Cheng’s cover ring 21 not only be flat, but also be planar with the upper surface of pusher 2. But claim 33 contains no such additional requirement for relative planarity between the two sections. At most, claim 33 requires that the upper and lower surfaces of a leveling bar be flat.⁵

Figures 1–4 of Cheng reasonably depict the cover ring 21 as having flat upper and lower surfaces. *See* Cheng, Figs. 1–4. That is, the two surfaces of Cheng’s cover ring 21 are not depicted as being textured, notched, or otherwise other than having a flat profile. *See id.* To be sure, Cheng’s cover ring 21 has a raised cross-sectional profile relative to the

⁵ We need not decide whether claim 33 is broad enough to read also on a leveling bar that has only *one* flat surface (e.g., only a flat lower surface, as found by the Examiner).

profile of pusher 2. But this structural relationship is not precluded by claim 33, as currently written.

Accordingly, we sustain the anticipation rejection of claim 33.

CLAIMS 24 and 25

Dependent claim 24 reads as follows:

24. The device of claim 23, wherein the leveling bar has substantially the same size and shape as a portion of the substantially planar rim of the scoop.

Determinations and Contentions

Appellant and the Examiner agree that Cheng's cover ring 21 has substantially the same size and shape of the entirety of scooping cup 1. Final Act. 4; Appeal Br. 14. But they disagree as to whether the language of claim 24 is broad enough to read on such a configuration. *Id.*

The Examiner finds "the claim doesn't state --*only* a portion-- and thus Cheng's ring 21 having the same size and shape as the entirety of the rim of scooping cup 1 reads on having the same size and shape as a portion of the substantially planar rim of the scoop." Ans. 4 (emphasis added).

Appellant asserts that "Cheng et al. disclose[s] a cover ring 21 that has the same size and shape as the entirety of the rim of the scooping cup 1. See Fig. 1." Appeal Br. 14. Appellant further argues "[t]he word 'only' is not required; there is no portion of the scooping cup rim that has the same size and shape as the cover ring, and therefore the claimed feature is not disclosed or suggested." Reply Br. 8.

Analysis

As noted above, claim 23 recites "wherein the leveling bar has substantially the same size and shape as *at least* a portion of the substantially

planar rim of the scoop” (emphasis added). Claim 24 effectively narrows claim 23 only by omitting the qualifier “at least.”

Under the doctrine of claim differentiation, the size or shape of the leveling bar relative to the scoop, as recited in dependent claim 24, is presumed to be narrower in some manner than the size and shape of the leveling bar, as recited in claim 23. Otherwise, claim 24 would fail to further limit the scope of claim 23, rendering claim 24 superfluous. *Free Motion Fitness, Inc. v. Cybex Int’l, Inc.*, 423 F.3d 1343, 1351 (Fed. Cir. 2005).

As such, we interpret *independent claim 23’s* disputed limitation under the broadest reasonable interpretation as being broad enough to read on Cheng’s cover ring 21, which has substantially the same size and shape of the entirety of Cheng’s scooping cup 1. However, this configuration reasonably cannot be interpreted as anticipating the narrower recitation of “the same size and shape as a portion of” the shape of the scoop, as recited in dependent claim 24.

We, therefore, do not sustain the anticipation rejection of claim 24. We, likewise, do not sustain the anticipation rejection of claim 25, which depends from claim 24 and, therefore, includes this structural limitation, as well.

However, this is not the end of our inquiry with respect to claim 24. Pursuant to our authority under 37 C.F.R. § 41.50(b), we enter a new ground of rejection of claims 24 and 25, rejecting these claims under 35 U.S.C. § 103 for the same reasons set forth in relation to dependent claim 26, which follow.

CLAIM 26

Dependent claim 26 reads as follows:

26. The device of claim 25, [which, in turn, depends from claim 24,] wherein the leveling bar is a semi-circular arc.

Determinations and Contentions

Claim 26 stands rejected as obvious over Cheng. Final Act. 3–4. More specifically, the Examiner finds Cheng’s cover ring 21 is a circular arc and while Cheng does not disclose a semi-circular arc, modifying Cheng’s circular arc to make it a semi-circular arc would have been an obvious matter of choice:

the configuration of Cheng’s leveling bar is a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant.

See MPEP 2144.04[(IV)(B)].

Final Act. 4.

Appellant argues the proposed modification of Cheng would not function for its intended purpose. In support of this position, Appellant argues, *inter alia*,

[t]o be sure that the powdered material can be heaped, the hollow cover ring 21 has to be a complete ring; a semi-circular arc would not allow heaping on all sides. One of skill in the art would not [have been] motivated, based on the Cheng et al. disclosure, to modify the hollow cover ring 21 such that it would be a semi-circular arc because such a modified device would not function as well for its intended purpose.

Appeal Br. 18.

Analysis

Appellant provides no citation in support of the argument that Cheng requires the ring to be a complete circle. Appeal Br. 18; Reply Br. 8–10. To

the contrary, Cheng discloses that a previously known practice was to merely, “generally level” excessive milk powder that is contained in a conventional the scoop cup:

a scoop enclosed with the package of milk powder container is generally used for [the purpose of measuring a constant amount of milk powder. M]eanwhile, *the excessive milk powder on the scoop cup is generally leveled by a plate or the like to remove the excess of milk powder*, thus, it is not so convenient in the scooping process.

Cheng, col. 1, ll. 21–27 (emphasis added).

Furthermore, Cheng discloses that tools with shapes other than closed rings, such as plates, were commonly used to perform this general leveling function. *Id.* And as noted by the Examiner, even if a portion of Cheng’s ring cover 21 were removed so that it formed a semi-circular ring, Cheng’s device would still function for the purposes of heaping and leveling material. Ans. 5.

As such, Appellant has not demonstrated reversible error in the Examiner’s conclusion that the noted change in shape would constitute an obvious change in the shape of the cover ring. *See* MPEP §§ 2144.04(II), (IV)(B); *see also In re Kuhle*, 526 F.2d at 555 (deleting a prior art switch member and thereby eliminating its function was an obvious expedient).

We, therefore, sustain the obviousness rejection of claim 26.

CLAIM 29

Dependent claim 29 reads as follows:

29. The device of claim 23, wherein leveling arm is coupled to the scoop arm such that the leveling arm pivots about a point on the scoop arm.^[6]

Determinations and Contentions

The Examiner finds the combination of Cheng and Rea discloses the elements recited in claim 29. Final Act. 4 (citing Rea Figs. 1, 5). Appellant argues the proposed modification would frustrate the purpose of Cheng and the combination is improper:

Having the pusher 2 pivot on the handle 11 instead, according to the teaching of Rea, would allow for levelling of the powdered material, but would not allow for counting of the number of scoops taken, absent a complete redesign of the ratchet mechanism. Thus, application of the teaching of Rea would frustrate the purpose of the Cheng et al. device, and therefore application of the Rea teaching to the Cheng et al. device in an

⁶ Claim 23 recites “the leveling element is disposed such that the first end of the leveling arm is *pushed beyond a far end of* the substantially planar *rim* of the scoop” (emphasis added). Appellant’s Specification illustrates this embodiment in Figure 37. Claim 29 purports to further limit claim 23, reciting “the leveling arm pivots about a point on the scoop arm.” The Specification illustrates this alternative embodiment in Figure 41. We do not see where the Specification describes, either in Figure 41 or elsewhere, a leveling element that can be both (1) pushed beyond the far end of the rim of the scoop, as recited in claim 23, and simultaneously (2) pivoted about a point on the scoop arm, as recited in claim 29. We provisionally interpret claim 29 as intending to replace the former limitation of claim 23 with the latter limitation of claim 29. Upon further prosecution, the Examiner should consider whether claim 29, as currently written as depending on claim 23, warrants any additional rejection under § 112(a) for lacking adequate written description or § 112(d) for failing to further limit the claim from which it depends.

attempt to render obvious the invention as recited in claim 29 would be improper.

Appeal Br. 23.

In response, the Examiner states “[t]he principle operation of Cheng is to level a scoop. Counting the number of scoops is a nonclaimed feature. If one had no desire to count scoops, they could remove this feature in Cheng and still have an excellent scoop and leveler.” Ans. 6.

Analysis

We agree with the Examiner that the primary function of Cheng is to function as a scoop and leveler. *Id.* We further agree that the combination of Cheng and Rea, as suggested by the rejection, would continue to function as a scoop and leveler—even if the counter of Cheng’s handle were omitted. *Id.*

Furthermore, even if one desired to maintain Cheng’s scoop-counting functionality, although Cheng may need to be redesigned when combined with Rea to maintain its counter function, Appellant has not persuaded us that providing means for counting the number of scoops taken, in combination with a leveling arm that pivots about the scoop arm, would be beyond the routine skill of one of ordinary skill in the art, or that an ordinarily skilled artisan would be discouraged from taking the path proposed by the rejection. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007).

Notably, bodily incorporation of Cheng and Rea is not required—even if the counting mechanism of Cheng could not function in such a combination, this does not establish non-obviousness. “The test for obviousness is not whether the features of a secondary reference may be

bodily incorporated into the structure of the primary reference. . . . Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). *See also In re Sneed*, 710 F.2d 1544, 1550 (Fed. Cir. 1983) (“[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review.”); and *In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) (“Combining the *teachings* of references does not involve an ability to combine their specific structures.”). Rather, “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *KSR Int’l*, 550 U.S. at 417.

We, therefore, sustain the rejection of claim 29.

CLAIMS 30–32

Dependent claim 30 reads as follows:

30. The device of claim 23, further comprising a handle disposed at a second end of the scoop arm, and a tamper disposed at an end of the handle opposite the scoop arm.

Determinations and Contentions

The Examiner finds the combination of Cheng and Fumagalli teaches or suggests claim 30. Final Act. 4–5. According to the Examiner, “Fumagalli discloses a similar device that includes a tamper 60,” and further modification including the location of Fumagalli’s element 60 would have been obvious as “the exact placement of the connection between the tamper and the handle would not materially affect the functioning of the device and would freely move the pivot based on design desires.” Final Act. 4–5.

Appellant argues that Fumagalli's "perforation plate 60 is not a tamper" and "is not disposed at an end of the handle opposite the scoop arm." Appeal Br. 26–27.

Analysis

We agree with Appellant that Fumagalli does not disclose plate 60 as performing a tamper function. *Id.* Rather, Fumagalli's plate 60 supports projections 62 that are suitable for perforating a beverage capsule. *Id.* at 25; *see also* Fumagalli ¶ 48. As such, the Examiner's proposed combination, in which Fumagalli's plate 60 is modified for attachment at the end of Cheng's handle opposite the scoop in order to serve as a tamper, appears to be a product of impermissible hindsight.

For this reason, we do not sustain the obviousness rejection of dependent claim 30 or of claims 31 and 32, which further depend from claim 30. Pursuant to our discretionary authority under 37 C.F.R. § 41.50(b), though, we newly reject claim 30 under 35 U.S.C. § 102(a)(2) as being anticipated by Cheng.

Claim 30 requires a tamper disposed at the end of a scoop arm. But claim 30 does not further recite the shape of the tamper, the material being tamped, or any further limitations on the tamper other than its location at the end of the scoop arm. Claim 30's tamper, then, is recited so broadly as to read on any structure that is capable of tamping a powder or like material.

Cheng discloses casings 31, 32 and their adjacent concave side surfaces, which, in combination, constitute a handle disposed at a second end of scoop arm 11. Cheng Figs. 1–4. Either the concave side surfaces or the rear end of the casings 31, 32 is capable of being used to tamp down

material such as powdered milk or coffee. As such, these portions are capable of functioning as a tamper.

Because the Patent Trial and Appeals Board is a review body, rather than a place of initial examination, we have not reviewed claims 31 and 32 to the extent necessary to determine whether new grounds of rejection would be appropriate for these additional claims. We leave it to the Examiner to determine the appropriateness of any further rejections based upon the prior art and rationales set forth above.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)	Affirmed	Reversed	New Ground
23–25, 27, 28, 33	102(a)(2)	Cheng	23, 27, 28, 33	24, 25	
24, 25	103	Cheng			24, 25
26	103	Cheng	26		
29	103	Cheng, Rea	29		
30–32	103	Cheng, Fumagalli		30–32	
30	102(a)(2)	Cheng			30
Overall Outcome			23–30, 33	31, 32	24, 25, 30

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). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2018).

FINALITY AND RESPONSE

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). Rule 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

Rule 37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

AFFIRMED IN PART
37 C.F.R. § 41.50(b)