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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/183,040	06/15/2016	Steven W. Post	48593-155918	4098
103907	7590	09/23/2020	EXAMINER	
Thompson Coburn LLP One US Bank Plaza St.Louis, MO 63101			JOHNSON, BENJAMIN W	
			ART UNIT	PAPER NUMBER
			3762	
			NOTIFICATION DATE	DELIVERY MODE
			09/23/2020	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEVEN W. POST, JEFFREY JAY LONG, and
WILLIAM S. GATLEY

Appeal 2020-000402
Application 15/183,040
Technology Center 3700

Before DANIEL S. SONG, BRETT C. MARTIN, and
MICHELLE R. OSINSKI, *Administrative Patent Judges*.

SONG, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), the Appellant¹ appeals from the Examiner's decision to reject claims 1–9. We have jurisdiction under 35 U.S.C. § 6(b). A telephonic oral hearing was conducted with the Appellant's representative on September 15, 2020, a transcript of which will be entered into the record in due course.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). The Appellant identifies the real party in interest as Regal Beloit America, Inc. Appeal Br. 2.

We REVERSE.

CLAIMED SUBJECT MATTER

The claims are directed to a water heater blower assembly having a low exhaust port. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A draft inducer blower assembly for use with a gas-fueled water heater, the blower assembly comprising
a housing,
a motor, and
a fan,
the housing having an exhaust volute surrounding the fan and a base configured and adapted to be mounted atop the water heater, the base having an inlet port adapted and configured to receive exhaust gas from the water heater when the base is mounted atop the water heater,
the fan being connected to the motor for rotation about a rotation axis,
the exhaust volute and the base being non-adjustably fixed relative to each other, the exhaust volute having a cut-off at a cut-off angle relative to the rotation axis, the cutoff angle extending at an angle that is no more than twenty degrees positive from horizontal, the exhaust volute having an exhaust outlet passageway that extends to an exhaust port, the exhaust outlet passageway extending beneath the cut-off before reaching the exhaust port.

Appeal Br. 16, Claims App. (paragraphing added).

REJECTIONS²

1. Claims 1–3 and 6–8 are rejected under 35 U.S.C. § 102(a)(1) as anticipated by Gatley, JR. (US 2004/0258546 A1, published Dec. 23, 2004 (“Gatley”)). Final Act. 2.

2. Claim 4 is rejected under 35 U.S.C. § 103 as unpatentable over Gatley in view of Hasbargen et al. (US 7,354,244 B2, issued Apr. 8, 2008 (“Hasbargen”)). Final Act. 6.

3. Claims 5 and 9 are rejected under 35 U.S.C. § 103 as unpatentable over Gatley. Final Act. 8.

OPINION

Rejection 1: Claims 1–3 and 6–8

The Examiner rejects claims 1–3 and 6–8 as anticipated by Gatley. Final Act. 2. The Examiner finds that Gatley discloses the invention of claim 1, including:

the exhaust volute having a cut-off (A) (see Examiner Annotated Fig below and *note that a “cut-off” of the exhaust volute is being interpreted as a cut-off point at which the volute shape of the exhaust volute ends (i.e. a point at which it stops rotating along the volute shape)* - as can be observed in the Figs. 5, 6 and the examiner annotated Fig, the exhaust volute stops rotating along the volute shape at point (A)) at a cut-off angle relative to the rotation axis . . . the cut-off angle extending at an angle that is no more than twenty degrees positive from horizontal (as can be

² The Appellant also submits arguments requesting the Board to overrule the Examiner’s objections to dependent claims 2–5 and 7–9. Appeal Br. 14–15. However, because such claim objections relate to petitionable matters and not to appealable matters, we decline to reach them. *In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002) (stating that there are many kinds of decisions made by examiners that are not appealable to the Board when they are not directly connected with the merits of issues involving rejections of claims).

observed in the examiner annotated Fig, the cut-off angle of cut-off (A) relative to the rotation axis extends at an angle from horizontal that is approximately 0° which is less than twenty degrees positive as claimed).

Final Act. 3 (emphasis added).

The Appellant argues that the rejection is improper because “[t]he Examiner arbitrarily defines the term ‘cut-off’ in a manner inconsistent with the patent specification to arrive at the anticipation rejection.” Appeal Br. 4. According to the Appellant, “[a]s the term is used in the specification, the ‘cut-off’ is the end of the exhaust volute adjacent the outlet opening 36,” and in particular, “the end of the exhaust volute closest to the fan center of rotation.” Appeal Br. 5, citing Spec. ¶ 18, Fig. 3; Reply Br. 2. In support thereof, the Applicant submits US 8,591,183 and US 6,767,184 in which “the cut-off is identified as the end of the exhaust volute closest to the fan center of rotation, and not the end of the exhaust volute farthest from the fan center of rotation.” Appeal Br. 5; Reply Br. 2. We agree with the Appellant’s construction.

The Examiner responds that “the term ‘cut-off’ is not defined in the specification,” and “was given the following broadest reasonable interpretation” in the rejection. Ans. 11. In that regard, the Examiner asserts that “[i]n the instant case, the Examiner has read the claims in light of the specification as opposed to reading limitations of the specification into the claims,” and that “[t]he point at which the volute shape of the volute ends ... is a ‘cut-off’ of the volute.” Ans. 12–13; *see also* Ans. 15.

However, it is not apparent why a person of ordinary skill in the art would have understood the term “cut-off” as encompassing the annotated point “A” of Gatley when the Specification illustrates the cut-off as being

the end of the exhaust volute closest to the fan center of rotation, such end being also present in Gatley. *Compare* Spec. Fig. 3, cut-off 40 *with* Gatley Fig. 6 and Appeal Br. 8 (annotated Gatley Fig. 6). We further find the evidence proffered by the Appellant probative in showing that the term “cut-off” is used, and thus, would have been understood, by those in the art, to refer to the end of the exhaust volute closest to the fan center of rotation as argued by the Appellant. *See also* Reply Br. 3 (“These [other] references do not indicate that an exhaust volute has more than one cut-off and do not support the Examiner’s unduly broad definition.”). As the Appellant notes, the Examiner has not provided any evidence in support of the broader definition. Reply Br. 2. Accordingly, we agree with the Appellant that “[t]here is no basis for the meaning ascribed to ‘cut-off’ by the Examiner, and the Examiner’s definition is inconsistent with the specification and otherwise unreasonable.” Appeal Br. 7.

Thus, we further agree with the Appellant that under the proper construction of “cut-off,” “Gatley does not disclose an exhaust volute with a cut-off angle of no more than twenty degrees,” and instead, discloses a cut-off angle of approximately 60 degrees positive from horizontal. Appeal Br. 7–8 (annotated Figure 6 of Gatley); *see also* Reply Br. 4. “Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim.” *Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1458 (Fed. Cir. 1984). The recited cut-off angle is not present in Gatley.

Therefore, we reverse the anticipation rejection of independent claim 1, as well as of independent claim 6, which includes substantively the same

limitations as claim 1. We also reverse the anticipation rejection of claims 2, 3, 7, and 8 that ultimately depend from claim 1 or 6. The Appellant's remaining arguments directed to the interpretation of "exhaust port" (Appeal Br. 8–10), and dependent claims 2, 3, 7, and 8 (Appeal Br. 11–12) are moot.

Rejection 2: Claim 4

The Examiner's application of Harsbargen does not correct the erroneous claim interpretation discussed above relative to independent claim 1 from which claim 4 depends. Final Act. 6. Accordingly, we reverse this rejection as well.

Rejection 3: Claims 5 and 9

The Examiner rejects claims 5 and 9 as unpatentable over Gatley. Final Act. 8. These claims recite that "the cut-off angle is negative from horizontal." Appeal Br. 17, Claims App. In rejecting these claims, the Examiner finds and concludes:

[Gatley] teaches that the cut-off angle of cut-off (A) relative to the rotation axis extends at an angle from horizontal at approximately 0°. Thus, Gately [sic, Gatley] fails to explicitly teach that this angle is negative from horizontal. However, this limitation is deemed by examiner to be a simple matter of design choice.

Final Act. 8; *see also* Ans. 19 ("such modification would have been considered a mere design consideration which fails to patentably distinguish over the prior art.").

Accordingly, this rejection is also premised on the same erroneous construction of the claim term "cut-off" as discussed above. *See also* Appeal Br. 12 ("The Examiner has carried over the incorrect definition in

rejecting claims 5 and 9 as being obvious in view of Gatley”). In addition, as the Appellant points out, the Examiner does not articulate a reason to modify Gatley to have a negative cut-off angle, whereas “an advantage of facilitating a transition to low-clearance horizontal flue piping is expressly disclosed and illustrated for a blower assembly configuration with a negative cut-off angle.” Reply Br. 7–8 (citing Spec. ¶ 19). Indeed, we find the Examiner’s assertion of design choice to be conclusory and insufficient to support the conclusion of obviousness. *See In re Chu*, 66 F.3d 292, 298–99 (Fed. Cir. 1995).

Therefore, for the above reasons, this obviousness rejection of claims 5 and 9 is also reversed.

CONCLUSION

The Examiner’s rejections are reversed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–3, 6–8	102(a)(1)	Gatley		1–3, 6–8
4	103	Gatley, Hasbargen		4
5, 9	103	Gatley		5, 9
Overall Outcome				1–9

REVERSED