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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PAUL L. DAMON and DWIGHT H. DAMON

Appeal 2020-000500
Application 14/976,074
Technology Center 3700

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

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claims 36–59. We have jurisdiction over the appeal under 35 U.S.C. § 6(b). A telephonic oral hearing was held September 15, 2020.

We AFFIRM IN PART.

¹ We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Ormco Corporation. Appeal Br. 3.

THE CLAIMED SUBJECT MATTER

Claims 36, 45, and 53 are independent. Claim 36 is reproduced below.

36. An archwire for use with a passive ligation orthodontic bracket system with a first self-ligating orthodontic bracket having a first bracket body that defines a first archwire slot including a first anterior surface and a first gate that is moveable relative to the first bracket body between an opened position and a closed position, in which the first anterior surface and the first gate define a first slot width, the archwire comprising:

an elongated body having a first end, a second end extending therefrom, and a cross-sectional configuration having only two opposing curved surfaces and only two opposing planar surfaces, the two opposing curved surfaces defining a diameter dimension of the body and the two opposing planar surfaces defining a thickness dimension of the body,

wherein each of the diameter dimension and the thickness dimension is uniform from the first end to the second end with the diameter dimension being less than or equal to the first slot width.

EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Cosse	US 2014/0272751 A1	Sept. 18, 2014
Patel	WO 2009/078031 A1	June 25, 2009

REJECTIONS

I. Claims 45–59 stand rejected under 35 U.S.C. § 112(b) as being indefinite. Final Act. 2–3.²

² In the Final Action, the Examiner rejected claim 58 as being indefinite because “[t]he term ‘high torque couple’ and ‘low torque couple’ in claim 58 are relative terms which renders the claim indefinite.” Final Act. 3. The

II. Claims 36–52 stand rejected under 35 U.S.C. § 103 as being unpatentable over Patel. *Id.* at 3–5.

III. Claims 53–59 stand rejected under 35 U.S.C. § 103 as being unpatentable over Patel and Cosse. *Id.* at 6–12.

OPINION

Rejection I

The Examiner contends that the use of the term “substantially” in claims 45, 50, 53, and 58 renders the claims indefinite because “[t]he term ‘substantially is not defined by the claim, the [S]pecification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.” Final Act. 3.

Appellant argues that “Appellant’s [S]pecification provides a standard for determining the scope of the claims and that an ordinary skilled artisan would be reasonably apprised of that scope.” Reply Br. 7. In particular, Appellant explains that “[t]he claimed archwire . . . eliminat[es] the gap 64 seen when smaller rectangular archwires are used . . . without interfering with the closure of gate 23 seen when larger rectangular archwires are used.” *Id.* at 8 (citing Spec. Figs. 9A, 9B, 9C). According to Appellant, the claimed

Examiner issued an Advisory Action on February 8, 2019 entering an Amendment after final rejection. Appellant indicates that the Amendment moots this basis of the indefiniteness rejection. Reply Br. 13–15. Although the Examiner repeats the basis of this ground of rejection in the Answer (Ans. 3), we agree with Appellant that this basis of the indefiniteness rejection is moot because the specific language identified by the Examiner as rendering the claims indefinite has been removed via entry of the Amendment after final rejection.

archwire “allows torquing couples to be established because the angular edges 110 of the circular-square or circular-rectangle shaped archwire are ‘still able to make forcible contact with the superior surface 21 and inferior surface 22, and to close the gate 23 because the convexly curved surfaces 107 and 108 do not impede such closure.’” *Id.* (citing Spec. ¶¶ 43, 44).

In light of the foregoing, we agree with Appellant that the Specification provides some standard for measuring a word of degree, namely, “substantially,” in that the largest cross-sectional dimension of the archwire is designed to eliminate a gap that might otherwise be located between the archwire and the gate defining the first slot width, without impeding the closure of the gate. *See Seattle Box Co. Inc. v. Indus. Crating & Packing, Inc.*, 731 F.2d 818, 826 (Fed. Cir. 1984) (addressing whether the claim term “substantially equal” is indefinite). Moreover, our reviewing court has adopted a broad interpretation for the term “substantial” as used in patent claims. The Court of Appeals for the Federal Circuit has repeatedly reaffirmed that the term “substantial” implies “approximate.” *Wilson Sporting Good Co. v. Hillerich & Brads by Co.*, 442 F.3d 1322, 1329 (Fed. Cir. 2006).

To the extent that the Examiner’s indefiniteness rejections stems from the explanation in the Answer that “[a]s the claim is directed to the archwire and is only recited as being ‘for use with a first self-ligating orthodontic bracket[,]’ it is unclear what is encompassed of the archwire in and of itself when not ‘for use with a first self-ligating orthodontic bracket” (Ans. 10), we note as an initial matter that claim 53, and claim 58 which depends therefrom, are directed to the combination of a bracket and archwire.

Accordingly, in our view there can be no uncertainty as claims 53 and 58 themselves mandate a combination of the archwire with a bracket.

With respect to claim 45, and claim 50 which depends therefrom, Appellant argues that “[t]he limitations of the bracket, and specifically the slot width of the bracket, must be taken into account when understanding the scope of the limitations pertaining to the archwire” and “the recitation of purposes or intended use is limiting and must be taken into account in evaluating the claim.” Reply Br. 13; *see also id.* at 9 (“The bracket limitations are indeed necessary to understand the claimed invention, and, therefore, are a part of the claimed invention.”), 12 (“[T]he bracket give[s] life and meaning to the claimed archwire” and “the claimed archwire is, in fact, defined in part by the bracket with which it is used.”), 13 (“The body of the claims on appeal do not define a structurally complete device.”).

On the current record, we are persuaded by Appellant’s argument that the recitation in the preamble of the archwire being for use with a bracket having (i) an archwire slot including an anterior surface and (ii) a gate, in which the anterior surface and the gate “define a first slot width” when the gate is in a closed position, is limiting because it states necessary and defining aspects of the invention embodied in claim 45. “When limitations in the body of the claim rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention.” *Eaton Corp. v. Rockwell Int’l Cor.*, 323 F.3d 1332, 1339 (2003) (citing e.g., *Electro Sci. Indus. v. Dynamic Details, Inc.*, 307 F.3d 1343, 1348 (Fed. Cir. 2002)). Here, the recitation in the preamble of claim 45 of the archwire being for use with a bracket having (i) an archwire slot including an anterior surface and (ii) a gate, in which the anterior

surface and the gate “define a first slot width” when the gate is in a closed position, provides antecedent basis for the “first slot width” recited in the body of the claim and permits the relative dimensions of the archwire and the bracket to be determined.

In sum, we agree with Appellant’s arguments and construe independent claim 45 such that the recitation in the preamble of the archwire being for use with a “bracket . . . that defines a first archwire slot including an anterior surface . . . and a first gate that is moveable to the first bracket body between an opened position and a closed position in which the anterior surface and the first gate define a first slot width” is limiting because the aforementioned language is tied inextricably to the requirement recited in the body of the claim that “the largest cross-sectional dimension [of the archwire] is substantially equal to the first slot width.” Appeal Br. 23 (Claims App.). Because the preamble is limiting, we do not agree with the Examiner that there is uncertainty as to what would be required by the archwire when not for use with a bracket.

For the foregoing reasons, we do not sustain the rejection of claims 45–59 under 35 U.S.C. § 112(b) as being indefinite on the basis of the use of the term “substantially.”

The Examiner also asserts that “[r]egarding claim 59, the claim as a whole is indefinite” and “[i]t is unclear what structural limitations are required by the claim.” Final Act. 3. Appellant responds that “[c]laim 59 defines a functional relationship between two orthodontic brackets of differing torque couples with the recited archwire” and that “[i]t is not improper to recite features of a claimed invention in terms of their function rather than in terms of their structure.” Appeal Br. 8. The Examiner replies

in the Answer that although “the claim can functionally recite use with a bracket, it is unclear what structure is required of the archwire when the claim is directed to the orthodontic brackets alone.” Ans. 10.

Appellant replies that “the claim is not directed to the orthodontic brackets alone, as the Examiner contends.” Reply Br. 15. Appellant explains that (i) “[c]laim 59 depends from claim 58, which depends from claim 53”; (ii) “[c]laim 53 “recites structural limitations for both a bracket and an archwire”; (iii) “[c]laim 58 recites a second bracket”; and (iv) “[c]laim 59 recites a functional relationship between the two claimed bracket and the claimed archwire.” *Id.* We agree with Appellant that claim 59 is not directed to the orthodontic brackets alone and is directed to their combination with an archwire by virtue of its dependency from independent claim 53 which is directed to a “combination” that includes “an archwire.” Appeal Br. 24 (Claims App.). Accordingly, in our view there can be no uncertainty stemming from what would be required by the archwire when not used in combination with a bracket, as the claims mandate a combination of the archwire with a bracket.

For the foregoing reasons, we do not sustain the rejection of claim 59 under 35 U.S.C. § 112(b) as being indefinite on the second basis identified by the Examiner.

Rejection II

The Examiner finds that Patel discloses an archwire in accordance with the following claim limitations:

an elongated body having a first end, a second end extending therefrom, and a cross-sectional configuration having only two opposing curved surfaces and only two opposing planar surfaces, the two opposing curved surfaces defining a diameter dimension

of the body and the two opposing planar surfaces defining a thickness dimension of the body.

Appeal Br. 21 (Claims App.); Final Act. 4 (citing Patel Figs. 1, 3B). As to the diameter dimension and thickness dimension being uniform from the first end to the second end as required by the claim, the Examiner takes the position that the dimensions are uniform for section 3 of the archwire. Final Act. 4; Patel Figs. 1, 3B. As to the claim requirement that “the diameter dimension [is] less than or equal to the first slot width” (Appeal Br. 21 (Claims App.)), the Examiner takes the position that:

[a]s the archwire of the configuration of Patel contains all the structural elements, as best understood by the patent examiner, as claimed it is construed to be functionally capable of cooperating with an orthodontic bracket as recited in the claims. The claims are directed to an archwire and the limitations directed towards the bracket are not positively recited, required, nor part of the claimed archwire. The Examiner asserts that the wire can be used with an appropriately sized and shaped bracket to meet all functional limitations of the claims directed to the interaction between the claimed wire and a presumed bracket.

Final Act. 5.³

³ We understand the Examiner’s reference to it being “obvious to optimize the dimensions, particularly thickness, width dimension, radial dimension, largest cross-sectional dimension, or diameter dimension of Patel to achieve the desired shape/curve ratio to suit different types of intended treatment” to refer to optimizing dimensions so as to achieve various requirements of the dependent claims (such as the “largest cross-sectional dimension [being] equal to twice the radial dimension”) as opposed to optimizing dimensions so as to achieve the requirement that the thickness dimension be less than or equal to the first slot width. Final Act. 5. To the extent that the Examiner is taking the position that it would be obvious to optimize the diameter dimension of an archwire to be less than or equal to the first slot width, where the first slot width is defined by an anterior surface and a gate, the Examiner does not explain adequately how Patel teaches the general

For similar reasons to those described above in connection with the indefiniteness rejection of independent claim 45, we also construe independent claim 36 such that the recitation in the preamble of the archwire being for use with a “bracket . . . that defines a first archwire slot including a first anterior surface . . . and a first gate that is moveable relative to the first bracket body between an opened position and a closed position in which the first anterior surface and the first gate define a first slot width” is limiting because the aforementioned language is tied inextricably to the requirement recited in the body of the claim of “the diameter dimension [of the archwire] being less than or equal to the first slot width.” Appeal Br. 21 (Claims App.). In connection with the aforementioned claim construction of claim 36, the recitation in the preamble of the archwire being for use with a bracket defining an archwire slot including a first anterior surface and first gate to define a first slot width must be given patentable weight.

Even assuming that the Examiner adequately explains how the limiting functional limitation of the preamble (i.e., that the archwire be for use with a bracket defining an archwire slot including a first anterior surface and first gate defining a slot width) is met, the body of the claim further requires that the diameter dimension of the archwire be less than or equal to the first slot width of the bracket. Rather than considering the requirement that the diameter dimension of the archwire be less than or equal to a first slot width of the bracket as a structural limitation, the Examiner appears to consider the requirement to be a functional limitation. The Examiner

conditions of an archwire relative to a gate or that the distance between an archwire and a gate is a result-effective variable amenable to optimization. *See* Appeal Br. 11–12.

reasons that Patel's archwire is capable of having a diameter dimension that is less than or equal to a first slot width of a bracket when Patel's archwire is utilized with a particularly dimensioned and/or appropriately sized bracket so as to achieve such relative dimensions. Final Act. 5.

Appellant argues that it was improper for the Examiner to consider such a limitation as a functional limitation, rather than a structural limitation. *See* Appeal Br. 9. Appellant continues that “[e]ven though this dimension is with reference to the slot width of the bracket, the diameter dimension is a recited dimension of the claimed archwire” and “cannot be ignored.” *Id.* at 10. We agree with Appellant that the Examiner improperly considered the limitation within the body of the claim as a functional limitation, rather than a structural limitation. The Examiner has not explained adequately how Patel alone discloses or renders obvious the structural limitation of an archwire having a diameter dimension that is less than or equal to a bracket's first slot width, in which the first slot width is defined by an anterior surface and moveable gate of the bracket, merely by asserting that Patel's archwire would be capable of such relative dimensions when utilized with a particularly dimensioned and/or appropriately sized bracket.

For the foregoing reasons, we find the Examiner's rejection to be insufficiently supported by the presented evidence and reasoning. We do not sustain the rejection of independent claims 36 and 45, and claims 37–44 and 46–52 depending therefrom, under 35 U.S.C. § 103 as obvious over Patel.

Rejection III

The Examiner finds that Patel teaches a bracket including an archwire slot including an anterior surface, inferior surface, and superior surface, as well as an archwire for insertion into the archwire slot. Final Act. 6. The Examiner finds that “the largest cross-sectional dimension [of the archwire] is substantially equal to the first slot width.” *Id.* at 7 (citing Patel Fig. 5B). The Examiner acknowledges that although Patel’s Figures show the archwire being held with the help of ligature wire, “Patel teaches that the archwire can be used with self-ligating brackets.” *Id.* at 8. The Examiner further acknowledges that even though Patel references self-ligating brackets, Patel “fail(s) to teach a self-ligating orthodontic bracket comprising: a first gate that is moveable relative to the first bracket body between an opened and a closed position in which the anterior surface and the first gate define a first slot width.” *Id.*

The Examiner turns to Cosse, finding that it teaches a self-ligating orthodontic bracket with a gate that is moveable relative to the bracket body between an opened position and a closed position in which the anterior surface of the archwire slot and the gate define a slot width. Final Act. 10. (citing Cosse Figs. 4–5). The Examiner concludes that it would have been obvious “to modify Patel, by requiring a self-ligating bracket which has adjustable torque between the archwire and the bracket body as taught by Cosse, for the purpose of controlling the amount of torque/force applied to a patient[’]s teeth based on a desired treatment outcome.” *Id.* The Examiner finds that “[t]he configuration of Patel/Cosse . . . would result in a structure where a self-ligating orthodontic bracket comprising: a first gate that is moveable relative to the first bracket body between an opened position and a

closed position in which the anterior surface and the first gate define a first slot width.” *Id.* at 10–11.

Appellant argues that “the Inventors discovered the problem with gate closure with some self-ligating orthodontic brackets on a patient’s arch”; “[t]hat gate closure problem led to use of smaller than expected archwires that would permit gate closure on all self-ligating brackets on the patient’s arch”; “[t]he undersized archwire then led to consistent movement problems”; and the inventors “solved the problem by shaping and sizing the archwire to allow all gates to be closed while also maintaining first, second, and third order control.” Appeal Br. 15. Appellant argues that “[n]o reason appears in the record that archwire interference with gate closure was known nor was inconsistent first order, second order, and third order tooth movement control known in the art” and “[t]hus, solving those problems is nonobvious.” *Id.* at 15–16.

Although the Examiner’s stated reasoning for combining Patel and Cosse to arrive at the claimed invention is not based on a recognition of archwire interference with gate closure and/or inconsistent tooth movement control, one of ordinary skill in the art may be prompted to do what the inventor has done, but for a different purpose or to solve a different problem. It is not necessary that the prior art suggest the modification to achieve the same advantage or result discovered by an applicant. *See, e.g., In re Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996) (citing *In re Dillon*, 919 F.2d 688, 693 (Fed. Cir. 1990) (en banc) (“Although the motivation to combine here differs from that of the applicant, the motivation in the prior art to combine the references does not have to be identical to that of the applicant to establish obviousness.”)).

Here, the Examiner finds that Patel teaches an archwire having the claimed shape and having a diameter dimension that is substantially equal to the distance between a side of the bracket and ligature wire. Final Act. 6–7 (citing Patel Fig. 5B). The Examiner further reasons that one of skill in the art would have been led to replace the bracket and ligature wire with a self-ligating bracket in light of Patel’s disclosure that the present invention can be used with self-ligating brackets. *Id.* at 8; Patel 21:9–12. The Examiner further reasons that, although Patel does not teach a self-ligating bracket with a gate, Cosse teaches a self-ligating bracket with a gate, and modification of Patel’s bracket with ligature so as to instead encompass a self-ligating bracket with a gate would result in an archwire shaped as claimed and in which the diameter dimension is substantially equal to the distance between an anterior surface of the slot and the gate. Final Act. 10–11. The Examiner further explains that “[i]t is known in the art that archwires can be dimensioned to cooperate with self-ligating brackets with ligating members which slide, as evidenced by Lokar (US 8,029,276[; issued Oct. 4, 2011]) which shows in Fig. 7 a self-ligating bracket which receives an archwire.” Ans. 12; Lokar 4:25–54 (explaining that clip 14 can be retained “against free unintentional sliding [when in a closed position as shown in Fig. 7] but provide sliding motion when desired” such that the clip is “allowed to slide to the open position as shown in FIGS. 1 and 8”). The Examiner articulates adequate reasoning based on rational underpinnings to support the conclusion of obviousness. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”).

Appellant argues that “[b]ecause the gate defines the slot width, it follows . . . that Patel also fails to disclose an archwire having a largest cross-sectional dimension that is substantially equal to the slot width.” Appeal Br. 18. Appellant also argues that “Cosse fails to disclose an archwire in which the largest cross-sectional dimension substantially equals a slot width defined by the gate” because “there is a large gap between the gate 100 and the archwire 20.” *Id.*; *see also* Reply Br. 21–23. Appellant, however, does not explain adequately how, once Patel is modified to incorporate a self-ligating bracket having a gate as taught by Cosse, modified Patel would lack an archwire having a largest cross-sectional dimension that is substantially equal to the slot width (i.e., the distance between an anterior surface of the slot and the gate).

In particular, we note that independent claim 53 does not recite that the archwire is for use with a “passive ligation bracket” or otherwise make any reference to “passive ligation” in any way. Appellant does not explain adequately why modification of Patel to replace a bracket-wire configuration with a self-ligating bracket with a clip that holds the wire as contemplated by Patel (Patel 2:13–17), and then further modified so that the clip comprises a gate that is moveable between opened and closed positions, would fail to arrive at the claimed limitation of an archwire having a largest cross-sectional dimension that is substantially equal to the first slot width defined between the anterior surface of the slot and the gate. In other words, as supported by the evidence of record, the gate would be located approximate the same location of the bracket as the ligation wire of Patel’s Fig. 5B. *See* Ans. 12 (“It is known in the art that archwires can be dimensioned to cooperate with self-ligating brackets with ligating members which slide, as

evidenced by Lokar.”). *See also* Lokar Fig. 7 (referenced on page 12 of Answer) (in which diameter dimension of archwire 24 is substantially equal to slot width defined between anterior surface of slot 22 and sliding clip 14); *see also* Spec. Fig. 5B (“Prior Art”), ¶ 37 (depicting use of “a larger dimensioned archwire 70” often used by clinicians and having a diameter dimension that is substantially equal to slot width defined between anterior surface of slot and moveable gate 23 in a “prior art passive, adjustable self-ligation bracket 11 of conventional design”).

We have considered Appellant’s argument that “the relative fit of the archwire shown is meaningless in active ligation (i.e., ligation with a ligature as is shown in Patel).” Appeal Br. 15. Appellant argues that in Patel “ligatures are applied so that there is neither a gap nor a possibility of impeding.” Reply Br. 18. According to Appellant, “[i]n view of active ligation, it is counterintuitive to arrive at the claimed invention, which is utilized with passive self-ligating brackets.” Appeal Br. 15. Although we appreciate that Appellant’s invention is contemplated for use with a passive self-ligating bracket, we note that neither independent claim 53, nor claims 54–59 which depend therefrom, recite that the claimed self-ligating orthodontic bracket is a passive self-ligating bracket. Appellant has not explained adequately why the Examiner’s reasoning to combine the teachings of Patel and Cosse to arrive at the claimed invention lacks rational underpinnings.

As to Appellant’s arguments that “one of ordinary skill would not be motivated to change any dimensions or the shape of the archwire based on the record” (Appeal Br. 18), we do not find such an argument persuasive in that the Examiner’s rejection is not based on modification of the dimensions

or shape of the archwire because Patel already contemplates an appropriately dimensioned and shaped archwire, and the Examiner's modification simply involves making Patel's already-referenced self-ligating bracket comprise a moveable gate. *See* Ans. 12 ("The [E]xaminer concluded that . . . Patel discloses the archwire shape as claimed and is shown to cooperate with an archwire slot and a ligating member" and "[i]t is known in the art that archwires can be dimensioned to cooperate with self-ligating brackets with ligating members which slide.").

We have also considered Appellant's argument raised for the first time in the Reply Brief that "Patel does not support the modification proposed by the Examiner wherein the rectangular cross-section with rounded corners shown in two separate segments of a five-segment archwire as described in Patel would be extended throughout the full length of the archwire as recited in the claims on appeal." Reply Br. 20; *see also id.* at 21 ("Patel does not motivate or suggest the modification proposed by the Examiner of using a rectangular cross-section with rounded corners throughout the entire length of the archwire as doing so would render Patel inoperable for its intended purpose."). Appellant argues that "Patel teaches away from providing for an archwire, like the claims at issue, that has a rectangular cross-section with rounded corners throughout the length of the archwire" as "such a configuration is contra-indicated for canine retraction because each region must be treated per its requirements and a rectangular cross-section must be used to rapidly and effectively retract canine teeth with minimum or no anchorage loss." *Id.* at 20. We do not find such an argument persuasive in that the Examiner's articulated rejection is not based on modifying Patel's entire archwire to have the rectangular cross-section

with rounded corners, but rather is based on the position that the ends of Patel's archwire are determined with respect to the "section 3 [portion] of FIG. 1" in which the first end is the "end which abuts section 2" and the second end is the "end which abuts section 1." Final Act. 6. Appellant does not address why such a stated position by the Examiner is in error.

For the foregoing reasons, we do not find the Examiner's rejection to be insufficiently supported by the presented evidence and reasoning. We sustain the rejection of independent claim 53, and claims 54–57 for which Appellant relies on the same arguments and reasoning (Appeal Br. 19), under 35 U.S.C. § 103 as obvious over Patel and Cosse.

Dependent claim 58 recites that the "combination of claim 53 further includ[es]: a second self-ligating orthodontic bracket comprising: a second bracket body that includes a second archwire slot . . . and a second gate." Appeal Br. 25 (Claims App.). Dependent claim 58 further recites that "the first self-ligating orthodontic bracket is configured to provide a first torque couple, and the second self-ligating bracket is configured to provide a different torque couple than the first self-ligating bracket." *Id.* at 26 (Claims App.). Dependent claim 58 further recites that "the archwire is configured to provide the same degree of first order movement control to each of the first self-ligating orthodontic bracket and the second self-ligating orthodontic bracket." *Id.* (Claims App.).

The Examiner finds that there is a second bracket including a second slot because "two [brackets are] shown to engage sections 3/5." Final Act. 7; *see also* Patel Fig. 1 (illustrating sections 3 and 5 of an archwire in accordance with a present invention). The Examiner further finds that "the first self-ligating orthodontic bracket is configured to provide one of a high

torque couple, a neutral torque couple, and a low torque couple, and the second self-ligating bracket is configured to provide a different torque couple than the first self-ligating orthodontic bracket.” Final Act. 9. The Examiner further finds that “the archwire is configured to provide the same degree of first order movement control to each of the first self-ligating orthodontic bracket and the second self-ligating orthodontic bracket.” *Id.*

Appellant argues that “Cosse discloses an orthodontic bracket capable of different torque positions, but the alleged combination of Patel and Cosse fails to disclose two self-ligating orthodontic brackets of different torque couples on an archwire.” Appeal Br. 19. Appellant also argues that “Cosse further fails to disclose an archwire that is configured to provide the same degree of first order movement control to each of the two self-ligating orthodontic brackets having different torque couples.” *Id.*

“Configured to” is normally construed more narrowly than “capable of,” and generally, is equivalent to “made to” or “designed to.” *See, e.g., In re Giannelli*, 739 F.3d 1375, 1379 (Fed. Cir. 2014); *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1349 (Fed. Cir. 2012). Although Appellant concedes that Cosse’s brackets would be capable of different torque positions, Appellant is correct that the Examiner has not directed us to any disclosure that the two brackets identified by the Examiner as engaging archwire sections 3/5 in Patel, even as modified by the teachings of Cosse, are configured to provide different torque couples. The mere fact that that the two brackets of Patel as modified by Cosse might be capable of different torque couples is not sufficient to satisfy the limitations.

For the foregoing reasons, we find the Examiner’s rejection of dependent claim 58 to be insufficiently supported by the presented evidence

and reasoning. We do not sustain the rejection of dependent claim 58, or claim 59 which depends therefrom, under 35 U.S.C. § 103 as obvious over Patel and Cosse.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
45–59	112(b)	Indefiniteness		45–59
36–52	103	Patel		36–52
53–59	103	Patel, Cosse	53–57	58, 59
Overall Outcome			53–57	36–52, 58, 59

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 IN PART