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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RANDALL L. MAY

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Appeal 2020-000761  
Application 15/666,408  
Technology Center 3700

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Before STEFAN STAICOVICI, EDWARD A. BROWN, and  
LEE L. STEPINA, *Administrative Patent Judges*.

STEPINA, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 21–39. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Randall May International, Inc., as the real party in interest. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Appellant’s disclosure is directed to “a shoulder mounted percussion instrument carrier for one or an array of drums of various sizes.” Spec. ¶ 6. Claim 21, reproduced below, is the sole independent claim on appeal.

21. A shoulder supported harness assembly, comprising:  
at least one shoulder support configured to rest on a user’s shoulders and coupled to a connecting member, which is in turn coupled to a terminal back piece spaced distally from the at least one shoulder support so as to engage the user’s back between the user’s shoulder blades when the at least one shoulder support rests on the user’s shoulders,  
wherein the connecting member couples the at least one shoulder support and the back piece such that the back piece is repositionable according to a double action hinge movement relative to the at least one shoulder support.

Appeal Br. 10 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
May ’193	US 2005/0040193 A1	Feb. 24, 2005
May ’151	US 2006/0186151 A1	Aug. 24, 2006
May ’568	US 9,754,568 B2	Sept. 5, 2017

REJECTIONS

- I. Claims 21–39 are rejected on the ground of nonstatutory double-patenting over claims 1–20 of May ’568. Final Act. 4.
- II. Claims 21–24 and 26–39 are rejected under 35 U.S.C. § 102(b) as anticipated by May ’193. Final Act. 4–5.
- III. Claim 25 is rejected under 35 U.S.C. § 103(a) as unpatentable over May ’193 and May ’151. Final Act. 5–6.

OPINION

*Rejection I–Nonstatutory Double-Patenting (Claims 21–39)*

The Examiner rejects claims 21–39 on the ground of nonstatutory double-patenting over claims 1–20 of May ’568 “because the claims of the instant invention includes essentially the same structural components with only minor variations in verbiage.” Final Act. 4.

On page 2 of the Appeal Brief, Appellant states, “a Terminal Disclaimer is filed herewith, which obviates the outstanding non-statutory double patenting rejection.”<sup>2</sup> Appellant presents no other arguments with respect to Rejection I. *See* Appeal Br.

In response, the Examiner states,

[e]very ground of rejection set forth in the Office action dated 11/20/2018 from which the appeal is taken is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading “WITHDRAWN REJECTIONS.” New grounds of rejection (if any) are provided under the subheading “NEW GROUNDS OF REJECTION.”

Ans. 3. However, the Answer contains no statement that any rejections have been withdrawn. *See* Ans. Nor do we find any Advisory Action in the record indicating the nonstatutory double-patenting rejection has been withdrawn. Accordingly, as the Examiner appears not to have withdrawn Rejection I, and Appellant makes no arguments as to the merits of Rejection I, we sustain the rejection of claims 21–39 on the ground of nonstatutory double-patenting over claims 1–20 of May ’568.

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<sup>2</sup> The Image File Wrapper for this case includes a “Terminal Disclaimer review decision” dated June 6, 2019, indicating that the Terminal Disclaimer filed on May 31, 2019, has been approved.

*Rejection II–May ’193 (Claims 21–24 and 26–39)*

In finding that May ’193 discloses all of the elements recited in independent claim 21, the Examiner relies on clamp 100 of May ’193 to meet the requirement for a “terminal back piece.” Final Act. 4–5 (citing May ’193 ¶¶ 35–42, Fig. 1). Appellant contends that clamp 100 of May ’193 does not qualify as a “terminal” back piece because it is centrally located in the middle of carrier 10, i.e., it is not the terminus of anything. *See* Appeal Br. 5–6. In response, the Examiner states, “[t]he term ‘terminal back piece’ does not necessitate that the back piece be the very last element connected to the device as argued by appellant, and the location of element 100 at the terminus of the connecting member 42+44 results in the element 100 being terminal just the same.” Ans. 7.

We do not sustain the rejection of claim 21, and claims 22–24 and 26–39 depending therefrom, because the Examiner’s interpretation of claim 21 is unreasonably broad. Specifically, under the Examiner’s interpretation, clamp 100 of May ’193, which is sandwiched between legs 42/43 and parallel portions 32/34, qualifies as a terminal back piece. *See* May ’193 Fig. 1; Ans. 7. This interpretation effectively reads the word “terminal” out of claim 21. “All words in a claim must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 1385 (CCPA 1970). One online dictionary defines the word “terminal” as “[1] situated at or forming the end or extremity of something: *a terminal feature of a vista*. [2] occurring at or forming the end of a series, succession, or the like; closing; concluding.” Dictionary.com. As shown in Appellant’s Figure 12, back member 17 is at the end of a series of

components.<sup>3</sup> Accordingly, based on the plain and ordinary meaning of the word “terminal” and in light of the position of back member 17 depicted in Figure 12, the broadest reasonable interpretation of the term “terminal back piece” requires a back piece located at the end of a sequence of other components. Thus, under the broadest reasonable interpretation of claim 21, clamp 100 of May ’193 fails to qualify as the recited terminal back piece.

*Rejection III–May ’193 and May ’151 (Claim 25)*

The Examiner does not use the teachings of May ’151 in any manner that would remedy the deficiency discussed above regarding May ’193 and Rejection II. *See* Final Act. 5. Accordingly, for the same reasons, we do not sustain Rejection III.

CONCLUSION

DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
21–39		Nonstatutory Double Patenting	21–39	
21–24, 26–39	102(b)	May ’193		21–24, 26–39
25	103(a)	May ’193, May ’151		25
<b>Overall Outcome</b>			21–39	

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<sup>3</sup> The Specification does not use the term “terminal back piece,” but Appellant’s Summary of the Claimed Subject Matter refers to back member 17 as the “terminal end piece” recited in claim 21. Appeal Br. 2.

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Application 15/666,408

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED