

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ELIZABETH M. PILLARI

Appeal No. 2005-2470
Application No. 10/115,068

ON BRIEF

Before KIMLIN, WARREN and PAWLIKOWSKI, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-10. Claims 17-20 have been allowed by the examiner, and claims 11-16 have been objected to as being dependent upon a rejected base claim. Claim 1 is illustrative:

1. A breast and bottle feeding infant head support comprising:

a slip-on sleeve open at opposite ends thereof and inclusive of inner and outer linings forming first and second opposing face surfaces of predetermined length and width;

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and a cushion insert between said inner and outer linings beneath one of said opposing face surfaces; and

wherein said sleeve, when worn on the arm, is of a length to extend past the crook of a wearer's elbow;

wherein said sleeve and said insert are of a soft fabrication to comfortably support the head of an infant resting upon said sleeve slipped on a mother's arm during breast and bottle feeding; and

wherein said opposite ends of said sleeve are of a dimension to afford both easy slide-in of said sleeve around the arm when feeding is to be had and easy slide-off of said sleeve from around the arm for storage when feeding has been completed;

whereby said sleeve is worn about the arm substantially only when said breast and bottle feeding of the infant occurs.

The examiner relies upon the following references in the rejections of the appealed claims.

Lerman	4,832,010	May 23, 1989
Nix, Jr. (Nix)	5,807,300	Sep. 15, 1998
Korobow	6,224,564	May 1, 2001

Appellant's claimed invention is directed to a sleeve for slipping on the arm of an individual. The sleeve comprises inner and outer linings and a cushion insert between the linings. Both the sleeve and the insert are of a soft fabrication. The sleeve can be worn to provide support for an infant's head during breast and bottle feeding.

Appealed claims 1, 2, 4, 6, 8 and 9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Lerman. Claims 3, 5 and 7 stand rejected under 35 U.S.C. § 103(a) as being

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unpatentable over Lerman in view of Korobow. Claim 10 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Lerman in view of Nix.

Appellant submits at page 5 of the principal brief that "[t]he groupings of Claims 1-2, of Claims 3-7, of Claims 8-10, and of Claims 11-16 are each submitted to stand separately" (paragraph 4). However, the Argument section of appellant's Brief sets forth separate substantive arguments only for claims 7, 3 and 5 (see page 7 of principal brief, last paragraph). Since appellant groups claims 3-7 together, the examiner's § 103 rejection of claims 3, 5 and 7 over Lerman in view of Korobow stands or falls together with claim 3, upon which claims 5 and 7 depend. Also, the examiner's § 102 rejection of claims 1, 2, 4, 6, 8 and 9 stands or falls together with claim 1.

We have thoroughly reviewed each of appellant's arguments for patentability. However, we find that the examiner's rejections are well-founded. Accordingly, we will sustain the examiner's rejections.

We consider first the examiner's rejection under 35 U.S.C. § 102 over Lerman. Although appellant's stated intended purpose for the claimed sleeve is to provide support for an infant's head during breast and bottle feeding, and Lerman's sleeve provides

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orthopedic support for the arm and elbow of an individual, we fully concur with the examiner that Lerman describes a sleeve comprising the claimed structure within the meaning of § 102. In particular, Lerman describes a slip-on sleeve that is open at opposite ends comprising inner and outer linings, with a cushion insert between the linings. Lerman specifically describes the linings as being made of a soft, porous knitted fabric which meets the claim requirement for the sleeve being of a soft fabrication. Also, we agree with the examiner that Lerman's description of base layer 28 as a perforated, closed cell material of neoprene rubber meets the claim 1 requirement for a cushion insert of a soft fabrication. The remaining recitations in claim 1 are either statements of intended use which do not further define the structure of the claimed sleeve, or are statements of functions that can be performed by the sleeve of Lerman.

For instance, the claim 1 recitation "[a] breast and bottle feeding infant head support" is a statement of intended use for the claimed sleeve that does not serve to distinguish the claimed structure of the sleeve from the sleeve described by Lerman. Manifestly, Lerman's sleeve is capable of supporting the head of an infant during breast or bottle feeding. As for the recitation

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that the sleeve "is of a length to extend past the crook of a wearer's elbow," the examiner correctly points to Figure 5 of Lerman for a sleeve length which extends beyond the elbow. Also, there is no reason to believe that the sleeve of Lerman is not capable of comfortably supporting the head of an infant during breast and bottle feeding, particularly since the term "comfortably" is a highly subjective one.

Concerning the claim 1 recitation that "opposite ends of said sleeve are of a dimension to afford both easy slide-in of said sleeve around the arm when feeding is to be had and easy slide-off of said sleeve from around the arm . . .," we agree with the examiner that the sleeve of Lerman is properly dimensioned to easily slide on and off the arm of an individual. Manifestly, the ease of putting on and taking off the sleeve is dependent on the size of the individual's arm. A sleeve of Lerman designed to fit snugly on a large arm will fit loosely on a smaller arm and, thereby, meet the claim requirement.

In addition, the "whereby" clause in the last paragraph of claim 1 concerning when the sleeve is to worn, imparts no structural limitation on the claimed sleeve.

Turning to the examiner's § 103 rejection of claim 3, with which claims 5 and 7 stand or fall, over Lerman in view of

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Korobow, we find that Lerman itself discloses that the sleeve is of a soft absorbent fabric material. Lerman expressly discloses "a soft, flexible, resilient, porous skin-protecting inner layer 32" made from knitted, cloth fabric that is porous to air and water (see column 4, lines 39 et seq.). Likewise, outer layer 34 of Lerman can be made from the same material (see column 4, lines 50-57). Moreover, we cannot disagree with the examiner that it would have been obvious for one of ordinary skill in the art to use a cotton fabric for layers 32 and 34 of Lerman.

We also agree with the examiner that Nix evidences the obviousness of sizing the insert of Lerman to be less than the length of layers 32 and 34. We find that it would have been an obvious matter of design choice for one of ordinary skill in the art to have insert 28 of Lerman somewhat shorter than layers 32 and 34. Such a design would reduce the amount of material needed and lower cost.

We note that appellant bases no argument upon objective evidence of nonobviousness, such as unexpected results, with respect to the § 103 rejections.

As a final point, we observe that appellant's Supplemental Brief of December 17, 2004 requests that we consider the claims as they were presented in an amendment under Rule 116. However,

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the examiner did not enter the amendment and, therefore, they are not before us. The examiner's decision to not enter the amendment is outside the scope of our review. The proper recourse for appellant was to petition the examiner's decision to the Director.

In conclusion, based on the foregoing, the examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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CHARLES F. WARREN)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
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