

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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DEBORAH McGRATH and YVONNE GOLDMAN

Appeal No. 2006-1670
Application No. 10/336,729
Technology Center 3600

Heard: July 11, 2006

Before FRANKFORT, BAHR and FETTING, *Administrative Patent Judges*.
BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 1-3, 5, 8-21, 23-25 and 27-52. Claims 4, 6, 7, 22 and 26 stand objected to as depending from a rejected claim but are otherwise indicated as allowable by the examiner. As indicated on page 2 of the answer (mailed September 12, 2005), the amendment submitted with the brief (filed May 24, 2005) has been entered, thereby overcoming the rejection of claim 48 under the second paragraph of 35 U.S.C. § 112.

We AFFIRM-IN-PART.

BACKGROUND

The appellants' invention relates to bed clothing with means for facilitating the changing of an absorbent panel thereof (present specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

The examiner relies upon the following as evidence of unpatentability:

Fukuroi	US 4,015,457	Apr. 5, 1977
O'Connell	US 4,097,943	Jul. 4, 1978
Blake	US 5,086,530	Feb. 11, 1992
Ghanem	US 6,651,278 B2	Nov. 25, 2003 (Oct. 12, 2001)

The following rejections are before us for review.

Claims 27-52 stand rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the appellants' specification so as to convey that the appellants had possession of the invention at the time the application was filed, i.e., failing to comply with the written description requirement.

Claims 27-29, 31, 34-47 and 49-51 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Ghanem.

Claims 1, 2, 5, 8-10, 12-15, 17-21, 23-25, 27, 28, 31, 34-36, 38, 40, 41, 43-47 and 49-51 stand rejected under 35 U.S.C. § 103 as being unpatentable over Blake in view of Ghanem.

Claims 1, 2, 5, 8-10, 12, 13, 16-21, 23-25, 27, 28, 31, 34-36, 38, 42-47 and 49-51 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ghanem in view of Blake.

Claims 3 and 29 stand rejected under 35 U.S.C. § 103 as being unpatentable over Blake in view of Ghanem or Ghanem in view of Blake, as applied to claim 2 above, and further in view of Fukuroi.

Claims 11, 13, 37 and 39 stand rejected under 35 U.S.C. § 103 as being unpatentable over Blake in view of Ghanem or Ghanem in view of Blake, as applied to claim 1 above, and further in view of O'Connell.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding this appeal, we make reference to the examiner's answer for the examiner's complete reasoning in support of the rejections and to the appellants' brief and reply brief (filed November 2, 2005) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the following determinations.

We turn first to the rejection of claims 27-52 under the first paragraph of 35 U.S.C. § 112. The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language. *See Vas Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1116-17 (Fed. Cir. 1991) and *In re Kaslow*, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

The basis of the examiner's written description rejection is that the appellants' specification, as originally filed, does not provide written description support for the "padded" panel or underpanel recited in claims 27-52. The examiner's position is certainly understandable, inasmuch as the appellants' original specification does not contain the term "padded" or any recognized synonym of the term "padded."

The appellants argue that the "padded" characteristic of the upper panel is supported in their original disclosure by (1) the description of the upper panel as "absorbent," (2) the illustration in "Figure 1" [*sic*: Figure 2] of cross lines, allegedly invoking the illusion of quilting, (3) the description of the absorbent panel as being "embossed" and (4) the allusion to "an

auxiliary feather mattress” in paragraph 32 on page 11. With respect to the fourth item, we note that paragraph 32 is so obtuse as to offer little in the way of description of the absorbent panel, other than some indication that the panel may provide some degree of comfort.

To the extent that the term “padded” is understood in the broad sense of “stuffed, lined or covered with a pad or padding [i.e., any soft material used to pad]” (Webster's New World Dictionary, Third College Edition (Simon & Schuster, Inc. 1988)), we find that the above sources of disclosure in the appellants’ original specification provide support for the recitation of a “padded” panel. Consistent with the appellants’ underlying disclosure, we interpret a “padded” panel to be any material in the bedding art described as being either absorbent, in the context of absorbing bodily fluids, or soft so as to provide comfort. With this understanding, we shall not sustain the examiner’s rejection of claims 27-52 under the first paragraph of 35 U.S.C. § 112 as lacking written description support.

We turn next to the rejection of claims 27-29, 31, 34-47 and 49-51 as being anticipated by Ghanem. The appellants have not argued any of the claims included in this rejection separately from the other claims so included. Therefore, in accordance with 37 CFR § 41.37(c)(1)(vii), we select claim 45 as the representative claim to decide the appeal of this rejection, with claims 27-29, 31, 34-44, 46, 47 and 49-51 standing or falling therewith.

Ghanem discloses a quick change bed sheet set comprising a lower panel 12 for fitting onto a mattress 10, an air permeable, absorbent, porous (col. 4, ll. 23-24) upper panel 16 and a minor panel 24 for releasable attachment to the upper panel. The lower panel 12 is provided with a fastener 14 that extends “around the perimeter of the lower panel” such that, when the lower panel is fitted onto the mattress, the fastener 14 is “disposed about the periphery of the mattress” (col. 3, first full para.). The upper panel 16 is formed with a fly 13 to overlay the lower panel and has a first fastener 18 attached to the periphery thereof. The first fastener 18 “is the cooperating opposite part of the fastener 14” (col. 3, l. 28). According to Ghanem, “[t]he

fastener 14 may be a series of cooperating fasteners, such as button and button holes or male and female snaps or opposite sides of a zipper or Velcro or cohesive materials” (col. 3, ll. 11-14).

Ghanem’s upper panel 16 has a second fastener attached thereto including elements 20, 22 for engagement with corresponding fastener elements 26, 28 on a minor panel 24 for releasably connecting the minor panel to the upper panel. The minor panel is water or liquid proof with an absorbent layer 30 and another layer 32 that prevents passage of liquids. The minor panel 24 protects the other parts of the bed clothes and mattress from liquid discharges.

The air permeability of the minor panel is restricted by virtue of it being water-proof. Such lack of air permeability will normally contribute to temperature build-up because body heat is not dissipated in the area of the minor panel. At night or during periods of lessened activity, when most accidental discharges of bodily fluids take place, the lack of air permeability is well tolerated. During the day, however, the presence of the minor panel may become uncomfortable for the bedridden user. The minor panel can be removed during the day to increase air permeability without significant disruption of the bedding. See col. 4, first full para.

The appellants argue that Ghanem does not show a continuous fastener as called for in the appealed claims (brief, pp. 7-8). We note, in this regard, that claim 45 does not positively recite the securing layer. Rather, claim 45 is directed only to a padded layer with a first fastener portion mounted to an outer periphery thereof, wherein said first fastener portion is *adapted* to engage a second fastener portion mounted on a securing layer to be located on side surfaces of the mattress and wherein said first and second fastener portions are opposed, elongated, cooperating, configured surfaces intended to directly contact and interlock with each other in a single plane, such that movement between the securing layer and said padded panel is restricted in the direction force is transmitted thereto and wherein said first fastener portion and second fastener portion are easily associated or dissociated from each other in the form of a *continuous, separable* fastener.

As illustrated in Figure 2 and described in col. 3, ll. 27-29, a fastener 18 is “attached to the periphery of the upper panel 16” as called for in claim 45 and “is the cooperating opposite part of the fastener 14,” which, as illustrated in Figure 2 and described in col. 3, ll. 10-11, “is disposed about the periphery of the mattress,” the fastener 18 thus also being adapted to engage a second fastener portion (fastener 14) to be located on side surfaces of the mattress, as called for in claim 45. The fasteners 14, 18, which may be opposite sides of a zipper, for example, engage and interlock in the form of a continuous, separable fastener. We note, in this regard, that the claim does not require that the continuous fastener to be formed be continuous about the entire periphery of the mattress.

The appellants also argue that the upper panel 16 of Ghanem is not “padded.” In light of our discussion above, it should be apparent that we consider Ghanem’s “absorbent porous upper panel” (col. 4, ll. 23-24) to be “padded” as supported by the appellants’ original disclosure. Additionally, one of ordinary skill in the art of bed sheets would have understood from Ghanem’s description of the bed sheets as capable of being “used in a protective mode [with the water-proof minor panel] or a comfort mode [without the minor panel]” (col. 2, ll. 30-31) and made of “woven or knitted cotton” (col. 3, ll. 4-5 and 29-30) that the upper panel is soft so as to provide comfort. A soft bed sheet panel that is described as “absorbent” falls within the definition of “padded” set forth above.

In light of the above, the appellants’ arguments fail to persuade us that the examiner has erred in rejecting claim 45 as being anticipated by Ghanem. We thus sustain the rejection of claim 45, as well as claims 27-29, 31, 34-44, 46, 47 and 49-51 which stand or fall therewith, as being anticipated by Ghanem.

With respect to the examiner’s rejection of claims 1, 2, 5, 8-10, 12, 13, 16-21, 23-25, 27, 28, 31, 34-36, 38, 42-47 and 49-51 as being unpatentable over Ghanem in view of Blake, the appellants have argued all of the claims together. Accordingly, we select claim 45 as the representative claim to decide the appeal of this rejection, with the remainder of the claims

standing or falling with claim 45. The appellants contend that, in addition to the argument discussed above that Ghanem discloses neither a padded panel nor a continuous fastener, the applied references provide no suggestion to modify Ghanem as proposed by the examiner.

We find the argument that Ghanem discloses neither a padded panel nor a continuous fastener unpersuasive for the reasons discussed above. With respect to the modification of Ghanem proposed by the examiner, that is, “to form the top panel of Ghanem with an upper surface formed of absorbent material for comfort” (answer, p. 8), Ghanem describes the upper panel as being “absorbent.” We additionally note that claim 45 does not require an absorbent upper panel. Thus, for the reasons discussed above, no modification to Ghanem is required to meet the “padded” or “absorbent” limitations of claim 45 or any other claim included in this rejection. The rejection of claim 45, as well as claims 1, 2, 5, 8-10, 12, 13, 16-21, 23-25, 27, 28, 31, 34-36, 38, 42-44, 46,47 and 49-51 standing or falling therewith, as being unpatentable over Ghanem in view of Blake is sustained.

We turn next to the rejection of claims 1, 2, 5, 8-10, 12-15, 17-21, 23-25, 27, 28, 31, 34-36, 38, 40, 41, 43-47 and 49-51 as being unpatentable over Blake in view of Ghanem. As the appellants have not separately argued any of the claims so rejected apart from the other claims included in this rejection, we again select claim 45 as the representative claim, with the remainder of the claims so rejected standing or falling with claim 45. Blake discloses a quick change sheet 20 comprising a top panel 21 having an upper surface formed of *absorbent* material, such as a *soft* fabric, for *comfort* (col. 4, ll. 22-24) and a bottom panel 22. The top and bottom panels are releasably interconnected by washable, reusable, releasable fasteners, such as strips of hook (25) and loop (32) fasteners, as illustrated in Figure 2. The fasteners are not positioned as called for in claim 45. The examiner’s position in making the rejection is that it would have been obvious, in view of the teachings of Ghanem, to modify Blake “by providing a continuous fastener so that the sheet is securely attached on all sides to the securing layer” (answer, p. 6).

The appellants argue, on page 9 of the brief, that Ghanem's criticism of using a moisture proof panel covering the entirety of the mattress is an express teaching away from a modification of the Blake patent. We do not agree. While Ghanem may also provide a suggestion to modify Blake to provide a moisture proof panel covering only a portion of the mattress, so as to maintain as much air permeable area as possible for comfort, Ghanem also illustrates an alternate means of fastening the upper panel to the lower panel in a manner that is easily releasable and yet evidently more secure than the two strips of hook and loop fasteners disclosed by Blake and thus would have provided ample suggestion to one of ordinary skill in the art to modify Blake by providing a fastener portion, such as one side of a zipper, on the lower panel located on side surfaces of the mattress and a fly and fastener portion, such as a mating side of a zipper, on the top panel to cooperate with the fastener portion on the lower panel to securely fasten the upper panel to the lower panel about the periphery of the mattress.

In light of the above, we shall sustain the rejection of claim 45, as well as claims 1, 2, 5, 8-10, 12-15, 17-21, 23-25, 27, 28, 31, 34-36, 38, 40, 41, 43, 44, 46, 47 and 49-51 which stand or fall with claim 45, as being unpatentable over Blake in view of Ghanem.

With respect to the examiner's rejections of claims 3 and 29 as being unpatentable over Blake in view of Ghanem or Ghanem in view of Blake further in view of Fukuroi and claims 11, 13, 37 and 39 as being unpatentable over Blake in view of Ghanem or Ghanem in view of Blake further in view of O'Connell, the appellants rely on the arguments discussed above against the rejections based on Blake in view of Ghanem or Ghanem in view of Blake. For the reasons set forth above, we do not find those arguments persuasive. It follows that we shall sustain these rejections as well.

CONCLUSION

To summarize, the rejection under 35 U.S.C. § 112, first paragraph, is reversed and the rejections under 35 U.S.C. §§ 102 and 103 are sustained. The decision of the examiner to reject claims 1-3, 5, 8-21, 23-25 and 27-52 is affirmed as to claims 1-3, 5, 8-21, 23-25, 27-29, 31, 34-47 and 49-51 and reversed as to claims 30, 32, 33, 48 and 52.

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

AFFIRMED-IN-PART

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Administrative Patent Judge)	
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)	BOARD OF PATENT
JENNIFER D. BAHR)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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DECISION: AFFIRMED-IN-PART

PREPARED: Aug 15, 2006

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