

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 CHRISTOPHER CARL WULFORST, KYLE GARROD GIPSON, and
DUFF BERNARD WAGNER

Appeal No. 2006-1922
Application No. 10/207,519
Technology Center 3643

ON BRIEF

Before FRANKFORT, BAHR, and LEVY, Administrative Patent Judges.
LEVY, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1, 2, 15, 17-20 and 23-25. Claims 3-14, 16, 21, 22 and 26-46 have been withdrawn from consideration due to a restriction requirement (brief, page 2).

We AFFIRM.

BACKGROUND

The appellant's invention relates to an odor-absorbing animal bed (specification, page 1).

Claim 1 is representative of the invention, and is reproduced as follows:

An animal bed encasing for enclosing a cushioning core, the encasing comprising:

a face textile with an exterior surface and an interior surface wherein the face textile is selected from the group consisting of a woven textile material, a knitted textile material and nonwoven textile material; and
an odor receiving layer disposed on the interior surface of the face textile, wherein the odor receiving layer comprises of plurality of odor receiving particles selected from the group consisting of activated carbon and activated charcoal held in place by a bonding adhesive and wherein at least a portion of the odor receiving particles are disposed in contacting relation with the interior surface.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Kostial 2002/0108578A1 Aug. 15, 2002
(filed Feb. 14, 2001)
Pearson et al. (Pearson) 3,783,085 Jan. 1 1974

Claims 1, 2, 15, 17-20 and 23-25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kostial in view of Pearson.

Claims 1, 2, 15, 17-20 and 23-25 stand rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19 of copending application No. 09/940,744. This is a provisional rejection because the conflicting claims have not in fact been patented.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (mailed December 5, 2005) for the examiner's complete reasoning in support of the rejections, and to the brief (filed September 23, 2005) and reply brief (filed January 31, 2006) for the appellants' arguments thereagainst.

Only those arguments actually made by appellants have been considered in this decision. Arguments which appellants could have made but chose not to make in the brief have not been considered. See 37 CFR § 41.37(c)(1)(vii) (eff. Sept. 13, 2004).

OPINION

In reaching our decision in this appeal, we have carefully considered the subject matter on appeal, the rejections advanced by the examiner, and the evidence of obviousness and obviousness-type double patenting relied upon by the examiner as support for

the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, appellants' arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer. Upon consideration of the record before us, we make the determinations which follow.

We turn first to the rejection of claims 1, 2, 15, 17-20 and 23-25 under the judicially created doctrine of obviousness-type double patenting. We note at the outset (brief, pages 3 and 4) that appellants have not provided any arguments to dispute the provisional obviousness-type double patenting rejection, but rather indicate their willingness to file a terminal disclaimer.

Accordingly, we are not convinced of any error on the part of the examiner, and affirm the rejection of claims 1, 2, 15, 17-20 and 23-25 under the judicially-created doctrine of obviousness-type double patenting.

We turn next to the rejection of claims 1, 2, 15, 17-20 and 23-25 under 35 U.S.C. § 103(a) as being unpatentable over Kostial in view of Pearson. We begin with claim 1, the sole independent claim before us for decision on appeal. In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to

establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir. 1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985); ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole. See

id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

The examiner's position (final rejection, page 3) is that Kostial is silent as to the odor receiving layer comprising a plurality of odor receiving particles selected from the group consisting of activated carbon and activated charcoal held in place by a bonding adhesive. To overcome this deficiency of Kostial, the examiner turns to Pearson for a teaching of a knitted textile material and a nonwoven textile material with an odor receiving layer comprising a plurality of odor receiving particles of activated charcoal held in place by bonding adhesive.

Appellants' position (brief, page 4) is that, Kostial does not teach an odor receiving layer on the face textile. In fact, the only mention of an odor receiving material refers to use of the odor receiving material in the cushioning core, not on the textile. Appellant further asserts (id.) that Pearson is non-analogous art because Pearson is directed to articles of clothing that protects the wearer from toxic chemicals, and that "issues surrounding the design of protective clothing are substantially

different from the issues surrounding the design of animal bed encasements, with the exception that they both 'cover' something." It is further asserted (brief, page 5) that the problem addressed by Pearson is to provide protection from toxic chemicals, whereas the problem addressed by appellants is controlling pet odors on a bed. Appellant additionally asserts (id.) that even if Pearson is considered to be analogous art, there is no teaching, suggestion or motive in Kostial to place an odor receiving layer on the textile of the bedding encasement, or to use an odor receiving layer having odor receiving particles and a bonding adhesive.

The examiner responds (answer, page 4) that "[t]hus, applicant has merely claimed that the odor particles contact the interior surface." The examiner argues (id.) that Kostial teaches a fabric treated with an odor retardant and suggests cedar, but does not limit it to cedar. It is argued that an artisan would be motivated to look to teachings of other retardants to meet engineering design parameters based on availability and cost of cedar compared to other equivalent odor retardants, and that Pearson teaches a known alternative textile that contains charcoal bonded thereto by an adhesive.

From our review of Kostial, we find that the reference discloses the bolster filling to be treated with an odor retarding agent such as cedar (para. 37). However, the reference is silent as to how the bolster filling will be treated, and we decline to speculate. In any event, the odor retarding agent is on the bolster filling and is not disposed on the inner surface of the face textile. We are not persuaded by the examiner's assertion (answer, page 4) that the odor retarding means of Kostial does contact the inner surface of the cushion textile, especially when an animal is resting on the bed. The examiner is correct that when an animal is resting on the bed, the cedar treatment on/in the bolster fillings will likely contact the inner surface of the face textile. However, the claim requires a layer disposed on the inner surface, which is not met by a treated bolster filler contacting the inner surface.

In addition, from our review of Pearson, we find that the reference is directed to garments for protection from toxic chemicals and other substances such as might be used in agricultural sprays (col. 1, lines 33-35). The reference is not directed to retarding odors, and the only connection to appellant's invention is that the reference has activated charcoal that is adhesively secured between two layers by an

adhesive (col. 2, lines 20-23). Because Kostial does not disclose the odor retarding layer to be disposed on the inner surface of the face textile, and Pearson is directed to preventing contact with toxic materials and is not related to odor retardation, we find that an artisan would not have been motivated to have provided the inner surface of the outer layer of the pet bed with the layer of Pearson, absent appellants' disclosure. "Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor."

Para- Ordnance Mfg. Inc. v. SGS Importers Int'l, 73 F.3d 1085, 1087, 37 USPQ2d 1237, 1239 (Fed. Cir. 1995) (citing W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1551, 1553, 220 USPQ 303, 311, 312-13 (Fed. Cir. 1983)). "It is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious." In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992) (citing In re Gorman, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991)).

From all of the above, we find that the combined teachings of Kostial and Pearson fail to establish a *prima facie* case of

obviousness of claim 1. The rejection of Claim 1, and claims 2, 15, 17-20 and 23-25, which depend therefrom, is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1, 2, 15, 17-20 and 23-25 under the judicially created doctrine of obviousness-type double patenting is affirmed. The decision of the examiner to reject claims 1, 2, 15, 17-20 and 23-25 under 35 U.S.C. § 103(a) is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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) BOARD OF PATENT
JENNIFER D. BAHR) APPEALS
Administrative Patent Judge) AND
) INTERFERENCES
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