

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 DIANE M. MITCHELL

Appeal 2006-2347
Application 10/245,350
Technology Center 3700

Decided: December 21, 2006

Before JENNIFER D. BAHR, LINDA E. HORNER and ANTON W. FETTING,
Administrative Patent Judges.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 USC § 134(a) from the examiner's final rejection of claims 1-20, all of the claims pending in the application.

We REVERSE and enter a new ground of rejection pursuant to 37 CFR § 41.50(b).

Appeal 2006-2347
Application 10/245,350

BACKGROUND

The appellant's invention relates to a feminine hygiene short. Claim 1, reproduced below, is representative of the subject matter on appeal. A copy of all of the claims can be found in the appendix to the appellant's brief.

1. A feminine hygiene device comprising a liquid impervious cloth for covering the pelvic region and upper parts of the legs of a woman, and elastic side bands for tensioning the cloth snugly about the pelvic region and the legs.

The examiner relies upon the following as evidence of unpatentability:

Branch 4,813,950 Mar. 21, 1989

The following rejection is before us for review.

1. Claims 1-20 stand rejected under 35 USC § 102(b) as being anticipated by Branch.

Rather than reiterate in detail the conflicting viewpoints advanced by the examiner and the appellant regarding this appeal, we make reference to the examiner's answer (mailed March 15, 2006) for the examiner's complete reasoning in support of the rejection and to the appellant's brief (filed January 9, 2006)¹,

¹ The appellant filed an Appeal Brief on July 11, 2005; however, the examiner found the brief to be defective. *See* Notification of Non-Compliant Appeal Brief (37 C.F.R. § 41.37), mailed September 19, 2005. The appellant filed an Appeal Brief Supplement on September 29, 2005, which was also found to be defective. *See* Notification of Non-Compliant Appeal Brief (37 C.F.R. § 41.37), mailed

Appeal 2006-2347
Application 10/245,350

Supplemental Appeal Brief (filed June 26, 2006), and reply brief (filed April 14, 2006) for the appellant's arguments.

OPINION

In reaching our decision in this appeal, we have carefully considered the appellant's specification and claims, the applied prior art, and the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations that follow.

In the rejection of independent claims 1, 11, and 17, the examiner determined that Branch discloses a feminine hygiene device in the nature of a short comprising a liquid impervious cloth for covering the pelvic region and legs. Answer, p. 3 (citing Branch, col. 1, lines 58-67). The section of Branch cited by the examiner describes an outer layer made of a soft tricot, spandex, or other panty material which is partially or fully lined with a soft plastic film. Branch describes that the soft film is a smooth non-woven material, microporous in nature, to prevent the passage of liquids. The examiner further determined that Branch discloses vertical side bands (6, 7) comprising the outer layer (5) of the device, which is elastic. Answer, p. 3 (citing Branch, col. 2, lines 61-63). The examiner found that the side bands (6, 7) are elastic by nature and provide a snug fit around the wearer. Answer, p. 3. The examiner further found that the main body portion

December 23, 2005. The appellant then filed a Corrected Appeal Brief on January 9, 2006. We refer to this Corrected Appeal Brief throughout the opinion as the appellant's brief. The appellant also filed a Supplemental Appeal Brief on June 23, 2006 to add evidence and related proceedings appendices.

Appeal 2006-2347
Application 10/245,350

(2) of the cloth encircles the pelvic region and that the two leg portions (10, 11) encircle the legs of the wearer. Answer, p. 3.

The appellant distinguishes the device of Branch from the invention recited in claims 1, 11, and 17 in two respects. First, the appellant argues that Branch does not disclose a liquid impervious cloth for covering or encircling the legs of a person. Rather, according to the appellant, Branch has only leg openings (10, 11). Brief, p. 4.

We agree with the appellant. Claims 1, 11, and 17 recite: “a liquid impervious cloth for covering … upper parts of the legs of a woman” (claim 1); “a liquid impermeable cloth for partially encircling … adjacent leg portions of a person” (claim 11); and “a cloth having a main body portion for encircling the pelvic region and two leg portions for encircling adjacent leg portions of a person” (claim 17). Although Branch discloses a panty having leg openings (10, 11), it does not disclose that the cloth around the leg openings covers or encircles the legs of the wearer. Rather, it appears that the openings (10, 11) allow the wearer to insert her legs through the panties such that, when donned, the leg openings (10, 11) rest above the wearer’s legs. We admit that this is a close case, because the determination of where on a particular person’s anatomy the leg openings (10, 11) of Branch would fall would seem to vary from person-to-person. We note, however, that the art draws a distinction between the hip-hugger-type panties shown in Branch and boxer-type panties, in the nature of a short, that extend to cover or encircle the wearer’s legs. As such, we find that the panty of Branch does

Appeal 2006-2347
Application 10/245,350

not meet the limitations of claims 1, 11, and 17, which require the cloth to cover or encircle the legs of a person.

Second, the appellant argues that Branch does not have an elastic side band (or bands) as required by claims 1, 11, and 17. The appellant argues that Branch's elastic outer layer (5) does not hold the cloth portion snug about the person's pelvic region or leg portions; it merely holds the cloth portions skin tight. Brief, p. 5. The appellant further explains that Branch does not employ side bands to perform the functions called for by the claims, i.e., "for tensioning the cloth snugly about the pelvic region and the legs" (claim 1); "for completing the encircling of the cloth about the pelvic region and adjacent leg portions of a person" (claim 11); and "for holding the cloth portions snug about the person's pelvic region and leg portions" (claim 17). Reply Brief, p. 3.

We agree that the left and right sides (6, 7) of outer layer (5) are not "bands" as recited in claim 1. In particular, Branch describes that the panty is generally constructed of outer layer (5) and includes a reinforced front support panel (2), which extends from the left side (6) of the panty to the right side (7) of the panty (col. 2, lines 49-54). We do not see how the sides (6, 7) of the outer layer (5) form "bands" as required by the claims. Rather, it appears that the outer layer (5) completely encircles the torso and pelvic region of the wearer. As such, we do not sustain the examiner's rejection of claims 1-20 under 35 USC § 102(b) as anticipated by Branch.

NEW GROUND OF REJECTION

We find it necessary, however, to make a new ground of rejection of claims 1-20 under 35 USC § 103(a) as unpatentable over U.S. Patent No. 6,120,489 to Johnson *et al.* in view of U.S. Patent No. 6,626,883 to Wada (filed June 13, 2001).

With regard to claim 1, we find that Johnson discloses a feminine hygiene device (col. 1, lines 14-16) comprising a liquid impervious cloth (26) for covering the pelvic region of a woman (col. 5, line 21). In particular, Johnson discloses that the garment includes a backsheet (26) whose size is dictated by the size of the absorbent core (28) and the exact disposable garment design selected (col. 5, lines 37-39). In one embodiment, Johnson discloses that the backsheet (26) is disposed in at least the crotch portion (57) (col. 5, lines 39-41). Johnson further discloses that “[t]he backsheet 26 prevents the exudates absorbed and contained in the absorbent core 28 from wetting articles which contact the disposable training pants 20” (col. 5, lines 27-30). We further find that Johnson discloses elastic side panels (30) for tensioning the cloth snugly about the pelvic region and the legs. In particular, Johnson discloses,

The elasticized side panels 30 provide an elastically extensible feature that provides a more comfortable and contouring fit by initially conformably fitting the disposable garment to the wearer and sustaining this fit throughout the time of wear well past when the disposable garment has been loaded with exudates since the elasticized side panels allow the sides of the disposable garment to expand and contract. (Col. 8, lines 11-18.)

Similarly, with regard to claim 11, we find that Johnson discloses a hygiene device (col. 1, lines 14-16) comprising a liquid impermeable cloth (26) for partially encircling the pelvic region of a person (col. 5, line 21) and an elastic side band (30) for completing the encircling of the cloth about the pelvic region of a person (col. 8, lines 27-30) (describing the side panels 30 as a separate elastically extensible material or laminate jointed to the chassis 14).

With regard to claim 17, we find that Johnson discloses a device comprising a cloth (26) for encircling the pelvic region of a person and a vertical elastic side band (30) for holding the cloth portions snug about the person's pelvic region (col. 5, line 21). As in our discussion of claims 1 and 11, we find that the elastic side bands (30) hold the cloth portions snug about the person's pelvic region and leg openings. With regard to the requirement of a "vertical" side band in claim 17, we note that the side panels (30) of Johnson extend in a vertical fashion along the sides of the garment between the waist and leg openings, as shown in Figure 1.

Although Johnson discloses the use of elasticized leg cuffs (32) for providing improved containment of liquid and other body exudates (col. 6, lines 47-49), the cut of the garment as shown in the figures of Johnson is such that it is not clear whether the garment, when donned, would cover the wearer's legs.

Wada relates to a sanitary panty (10) having a waterproof sheet (21) that is laminated on the inside surface of a crotch cloth (19) and a napkin fitting cloth (22) on the inside of the crotch cloth (19) (col. 4, lines 53-67). The sanitary panty (10) further includes leg bands in leg openings (25). The leg bands can be formed of the folded back portions (19a) of the crotch cloth (19) or can be formed with elastic

bands independent of the crotch cloth (19) (col. 5, lines 31-34 and 38-41). In Figures 3 and 4 of Wada, the sanitary panty is shown fitted on the wearer's body (col. 5, lines 62-64). When worn on a wearer's body, the leg openings (25) are fitted on the femoral regions of the wearer (col. 6, lines 11-12). Johnson further describes that the length of the panty from the waist to the leg opening is longer than the length from the waist to the crotch (col. 6, lines 12-33) (describing an inseam dimension H of at least 30 mm, preferably greater than or equal to 40 mm, with an upper limit of 300 mm). As such, Wada is clearly teaching a garment in the nature of a short that extends to cover or encircle the wearer's legs. Wada further teaches that its leg bands prevent the problems resultant from conventional high-cut leg type sanitary panties, in which the sanitary napkin tends to collapse toward the center and the edges of the leg openings tend to roll up easily, thereby causing the fitting of the sanitary napkin to become more unstable (col. 1, line 48 – col. 2, line 25).

We find this explicit teaching in Wada would have led one having ordinary skill in the art at the time the invention was made to have modified the conventional panty garment of Johnson to extend the leg portions so that the cloth backsheet (26) covers or encircles the legs of the wearer, to prevent rolling up of the edge portion of the leg openings and to ensure stable fitting of the absorbent core (28) of Johnson. We further note that panty style, e.g., bikini, hip-hugger, brief, or short-type, etc., is a matter of consumer taste, and it would have been obvious to one having ordinary skill in the art to make the panty of Branch in a short-type style to make it more widely appealing to consumers of varying tastes

Appeal 2006-2347
Application 10/245,350

and thereby enhance commercial opportunities. *See Dystar Textilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1368, 80 USPQ2d 1641, 1651 (Fed. Cir. 2006) (noting that an implicit motivation to combine exists based on a universal desire to enhance commercial opportunities when the improvement is technology independent and the combination results in a product or process that is more desirable).

With regard to dependent claims 2, 10, and 12, Johnson discloses additional absorptive padding (28) borne by the backing (26) so as to be disposed below the vaginal area of a woman wearing the device (col. 4, lines 19-22).

With regard to dependent claims 3, 4, 7, 13, and 15, Johnson discloses that the cloth can be made of a topsheet (24) and backsheets (26), where the topsheet (24) is made of woven or non-woven webs of natural fibers including cotton (col. 5, line 64 – col. 6, line 1), and the backsheets (26) is made of a thin plastic film (col. 5, lines 21-22).

With regard to dependent claims 5, 6, 9, 14, and 19, Johnson discloses an elasticized leg cuff (32) for providing improved containment of liquids and other body exudates (col. 6, lines 48-49).

With regard to claims 8, 16, and 20, Johnson discloses an elasticized waistband (34) that is an extension of the backsheets (26) (col. 7, lines 31-36).

With regard to dependent claim 18, Johnson discloses a vertical elastic side band (30) on each side of the garment for holding the cloth portions snug about the person's pelvic region and leg portions (Figure 1).

Appeal 2006-2347
Application 10/245,350

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-20 is REVERSED. Under the provisions of 37 CFR § 41.50(b), we enter a new ground of rejection of claims 1-20 under 35 USC § 103(a) as unpatentable over Johnson in view of Wada.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004). 37 C.F.R. § 41.50(b) provides, "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." 37 C.F.R. § 41.50(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner....

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

Appeal 2006-2347
Application 10/245,350

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

REVERSED; 37 CFR § 41.50(b)

)
JENNIFER D. BAHR)
Administrative Patent Judge)
)
)
)
)
)
) BOARD OF PATENT
LINDA E. HORNER) APPEALS
Administrative Patent Judge) AND
) INTERFERENCES
)
)
)
ANTON W. FETTING)
Administrative Patent Judge)

Appeal 2006-2347
Application 10/245,350

Joseph B. Taphorn
8 Scenic Drive
HAGAN Farms
Poughkeepsie, NY 12603

LEH/ki