

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 TARA GLASGOW, JAMES P. BARR,
CAROL B. GELL, ROBERT RIAL,
SAFIYYA SHABAZZ-HOUSTON, JOSEPH LUIZZI,
LAI HING LOUIE, and PRAMOD S. MAVINKURVE

Appeal 2006-3402
Application 10/397,949
Technology Center 3600

Decided: June 27, 2007

Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and
LINDA E. HORNER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Tara Glasgow et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-9, all of the pending claims. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

Appellants' claimed invention is directed to a sanitary napkin having a strip of material or tail that extends rearwardly and is adapted for receipt in the intergluteal crevice to permit the pad portion of the napkin to fit more snugly against the body, thereby providing improved protection (Specification 1). Claim 1, the only independent claim, reads as follows:

1. A feminine hygiene pad comprising:
 - (a) a main pad body having an absorbent core system positioned between a pad cover material and a barrier layer, a rear end which in use is located in proximity to a wearer's buttocks and an opposed front end, a first face adapted to contact with the wearer's body and an opposing second face adapted to face toward an undergarment of the wearer, a main pad body thickness being defined as the dimension of the main pad body from the first face to the second face, said main pad body adapted to be worn in close proximity to the vagina of the wearer;
 - (b) said absorbent core system being adapted to not significantly extend beyond the anterior portion of the perineum of the wearer in use;
 - (c) said pad further comprising a substantially planar tail, said tail being relatively small in thickness compared to the thickness of the main pad body, and said tail extending rearwardly from said rear end of the main pad body, terminating at a distal end; and,
 - (d) wherein said pad being configured such that said tail is adapted to be received between the

buttocks of the wearer to thereby facilitate retaining said main pad body adjacent to the wearer's vagina.

The Examiner relies upon the following as evidence of unpatentability:

Hyun	US 5,383,868	Jan. 24, 1995
Knox-Sigh	US 5,520,675	May 28, 1996
Muller	WO 90/04956	May 17, 1990

Appellants seek review of the Examiner's rejections under 35 U.S.C. § 103(a) of claims 1-4 and 9 as unpatentable over Knox-Sigh in view of Hyun and claims 5-8 as unpatentable over Knox-Sigh in view of Hyun and Muller.

The Examiner provides reasoning in support of the rejections in the Answer (mailed June 30, 2005). Appellants present opposing arguments in the Appeal Brief (filed July 6, 2004).

OPINION

The Examiner finds that Knox-Sigh meets all the limitations of claims 1-4 and 9 with the exception of the pad cover and barrier layer, as recited in claim 1, and adhesive, as recited in claim 9 (Answer 3-4). The Examiner determines that it would have been obvious to include the pad cover and barrier layer on the Knox-Sigh feminine hygiene pad in order for the pad to function optimally as a sanitary pad, as pad covers and barrier layers are elements typically included in sanitary napkins, as evidenced by Hyun. (Answer 3). The Examiner further determines that it would have been obvious to further modify Knox-Sigh to include the adhesive securing means, as taught by Hyun, to securely anchor the pad to the undergarment

(Answer 4). The Examiner also finds that Knox-Sigh lacks the pad dimensions called for in claims 5-8, but determines that it would have been obvious to modify the dimensions of Knox-Sigh according to the wearer's size and according to the intended use and function of the article, such size and shape limitations being well within the scope of the invention of Knox-Sigh, and, further, that it would have been obvious to include the recited dimensions as shown by Muller in order for the pad to function as intended (Answer 4).

Appellants do not contest that the modifications to Knox-Sigh proposed by the Examiner would have been obvious. The combinability of the teachings of Hyun and Muller with Knox-Sigh are thus not at issue in this appeal. Rather, Appellants contend that Knox-Sigh fails to meet other limitations of claim 1 not addressed by the Examiner's proposed modifications (Br. 4-6). Specifically, Appellants argue that (1) Knox-Sigh fails to teach or suggest a main pad body being "substantially planar," inasmuch as Knox-Sigh's main portion 25 "curves upwardly from tail portion 28 towards the positioning point 26" (Appeal Br. 4-5) and (2) since Knox-Sigh's tail 28 is formed of absorbent material, "it is not physically possible for the absorbent core system to not significantly extend beyond the anterior portion of the perineum in use as expressly required by claim 1" (Appeal Br. 5). Accordingly, the only issue before us is whether Appellants' arguments demonstrate the Examiner erred in rejecting claims 1-4 and 9 as unpatentable over Knox-Sigh in view of Hyun and claims 5-8 as unpatentable over Knox-Sigh in view of Hyun and Muller.

It is well established that limitations not appearing in the claims cannot be relied upon for patentability. *In re Self*, 671 F.2d 1344, 1348, 213

USPQ 1, 5 (CCPA 1982). When making determinations of patentability, we keep in mind that “the name of the game is the claim.” *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998).

Appellants (Appeal Br. 5) correctly point out that Knox-Sigh teaches “a contour 40 of main pad 25 curves upwardly from tail portion 28 towards the positioning point 26” (Knox-Sigh, col. 3, ll. 53-55) and reasonably conclude from that teaching that main pad 25 of Knox-Sigh is not “substantially planar.” As noted by the Examiner (Answer 4), however, Appellants’ claims do not recite a substantially planar main body. Appellant’s argument is thus directed to a limitation not appearing in the claims and is not persuasive of patentability. We note that claim 1 recites a “substantially planar tail,” but the Examiner finds that Knox-Sigh’s pad “includes a substantially flexible planar tail 28” (Answer 3) and Appellants do not contest that Knox-Sigh’s tail 28 is “substantially planar.”

Appellants (Appeal Br. 5-6) are also correct that Knox-Sigh’s tail 28, which is adapted to extend “rearwardly into the area of the space 29 between the buttocks 30 of the wearer” (Knox-Sigh, col. 3, ll. 7-8) is formed of absorbent material (Knox-Sigh, col. 2, l. 67), albeit of material that is not as absorbent as the primary absorbency area of the main portion 25 of the pad in the neighborhood of the positioning point 26 (Knox-Sigh, col. 4, ll. 57-63). The claims, however, do not exclude the presence of absorbent material in the region of the tail. The limitation in claim 1 of an “absorbent core system being adapted to not significantly extend beyond the anterior portion of the perineum of the wearer in use” is met by the “primary absorbency area in the neighborhood of the positioning point” formed of a first material of relatively great absorbency (Knox-Sigh, col. 4, ll. 58-60).

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For the above reasons, Appellants' arguments do not demonstrate the Examiner erred in rejecting claims 1-4 and 9 as unpatentable over Knox-Sigh in view of Hyun and claims 5-8 as unpatentable over Knox-Sigh in view of Hyun and Muller. The rejections are sustained.

SUMMARY

The decision of the Examiner to reject claims 1-9 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

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