UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ACHIM SCHMITT

Appeal 2008-1658
Application 09/242,014
Technology Center 3700

Decided: June 23, 2008

Before JENNIFER D. BAHR, LINDA E. HORNER and
MICHAEL W. O'NEILL *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Achim Schmitt (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claim 1. This is the Appellant's second appeal before the Board of Patent Appeals and Interferences. In the first appeal (2005-1242, Decision mailed July 18, 2005), the decision of the

Examiner to reject claim 1 under 35 U.S.C. § 102(b) was reversed.[1] We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

The Appellant's invention is drawn towards a disposable absorbent article 20 including a main body portion 21 having side edges 23 extending generally parallel to a longitudinal axis L and transverse edges 22 extending generally parallel to a transverse axis T (Spec. 6, ll. 10-22 and figs. 1 and 2). The main body portion includes a liquid pervious topsheet 38 that faces the wearer, a liquid impervious backsheet 40 that faces the garment, an absorbent structure 42, and side wrapping elements 50 that are integral with the main body portion 21 (Spec. 7, ll. 4-6; Spec. 14, ll. 26-27; and fig. 3). The side wrapping elements 50 are folded along folding lines 25 and are attached to the side facing the garment using attachment 27 such that the side wrapping elements 50 are pre-positioned in an in-use position prior to the use of the disposable absorbent article 20 (Spec. 15, ll. 1-5 and 20-23; Spec. 16, ll. 18-22; and fig. 3).

Claim 1, the sole claim in the instant appeal, reads as follows:

> 1. Disposable absorbent article (20) for wear in an undergarment, comprising:
>
> a longitudinal axis (L) and a transverse axis (T),
>
> said disposable absorbent article comprising a main body portion (21) having longitudinal side edges (23)

[1] The Examiner reopened prosecution in light of new prior art (Page 2 of Non-Final Rejection mailed August 1, 2005).

> substantially extending parallel to said longitudinal axis (L) and having transverse side edges (22) substantially extending parallel to said transverse axis (T),
>
> said main body portion (21) further having a wearer facing surface and a garment facing surface, and
>
> said disposable absorbent article comprising side wrapping elements that are integral with said main body portion (21) said wrapping elements being folded along fold lines and attached to said garment facing side of said main body portion such that said side wrapping elements are pre-positioned in an in-use-position prior to the use of the disposable absorbent article.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Nakanishi	US 5,201,727	Apr. 13, 1993

The Appellant seeks review of the Examiner's rejection of claim 1 under 35 U.S.C. §102(b) as being anticipated by Nakanishi.

The Examiner provides reasoning in support of the rejections in the Answer (mailed January 24, 2006). The Appellant presents opposing arguments in the Appeal Brief (filed October 19, 2005) and the Reply Brief (filed February 28, 2006).

OPINION

Nakanishi discloses an absorbent article 1 having a liquid permeable outer surface (topsheet) 2, a liquid impermeable surface (antileakage sheet) 3, a liquid retentive absorbent element 4, wing-like fixing elements 5, and

first and second adhesive portions 6, 7 (col. 4, ll. 41-53; col. 4, l. 61 through col. 5, l. 3; and figs. 1a, 1b, and 2). Each of the adhesive portions 6 and 7 has a two-layered structure including a lower layer with a high strength adhesive and an upper layer with a low strength adhesive (col. 5, ll. 11-16). The purpose of the two-layered structure is to allow the adhesive portions 6 and 7 to be bonded to the antileakage sheet 3 while also to each other without the need of a release sheet (col. 5, ll. 16-24 and figs. 1a and 2). In positioning the absorbent article of Nakanishi, the wing elements 5 are spread and pulled out from both side edge portions, the absorbent article 1 is adhered to the inner surface of a garment using adhesive portion 7, and then the wing-like fixing elements 5 are affixed to the outer surface of the garment using adhesive portions 6 (col. 5, l. 65 through col. 6, l. 9).

The Appellant argues that Nakanishi's side wrapping elements "are not attached to the garment facing side of the main body portion in such a way as to be pre-positioned in an in-use-position prior to use of the absorbent article" (App. Br. 3). According to the Appellant, because the absorbent article of Nakanishi requires multiple manipulative steps in order to be positioned for use, the absorbent article of Nakanishi is "in a position for delivery or in a package" (App. Br. 3). In response, the Examiner contends that "the position of the wrapping elements prior to use…is the same as the position of the wrapping elements during use" (Ans. 3-4). The Examiner takes note that a clear definition of the term "in-use-position" has not been provided and, as such, the "in-use-position" and the "prior-to-use" position of the absorbent article of Nakanishi are one and the same position in which the wrapping elements are folded along the fold lines and placed beneath the garment facing side (Ans. 4).

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). The issue presented in the appeal of the rejection of Claim 1 is whether the wing elements of the absorbent article of Nakanishi are attached to the garment facing side of the main body portion such that they are "pre-positioned in an in-use-position prior to use of the absorbent article."

When construing claim terminology in the United States Patent and Trademark Office, claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)). We agree with the Appellant that a person of ordinary skill in the art would understand an "in-use" position for an absorbent article of the type taught by the Appellant and Nakanishi to be a position in which "the crotch portion of the undergarment would be wrapped between the side wrapping elements 50 and the garment facing surface of the backsheet 40" (Reply Br. 4, quoting Spec. 15, ll. 3-5). Similarly, Nakanishi describes an "in-use" position as a position in which the absorbent article is adhered to the inner surface of a garment using adhesive portion 7 and the wrapping elements 5 are affixed to the outer surface of the garment using adhesive portions 6 (col. 5, l. 65 through col. 6, l. 9). Therefore, the "in-use" position of Nakanishi is the same as the Appellant's "in-use" position.

We note that in Figures 1a, 2, and 9b of Nakanishi ("prior-to-use" position) the absorbent article has the wrapping elements folded such that

the adhesive portions are bonded together. In contrast to this position, in the "in-use" position the adhesive portions are separated in order to position the garment in between the adhesive portions. Hence, we disagree with the Examiner that the "in-use-position" and the "prior-to-use" position of the absorbent article of Nakanishi are one and the same position. In conclusion, we find that the wing elements of the absorbent article of Nakanishi are not attached to the garment facing side of the main body portion such that they are "pre-positioned in an in-use-position prior to use." We therefore agree with the Appellant that Nakanishi does not disclose all the limitations of claim 1. As such, the rejection of claim 1 is reversed.

DECISION

The decision of the Examiner to reject claim 1 is reversed.

REVERSED

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