

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HEATHER JACKSON

Appeal No. 2000-0004
Application No. 08/872,004

ON BRIEF

Before COHEN, MCQUADE, and CRAWFORD, Administrative Patent Judges.
CRAWFORD, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 4, 7 through 10, and 12 through 15. Claims 5, 6, 11 and 16 stand objected to as being dependent upon a rejected base claim.

The appellant's invention relates to a pet collar adapted to receive and store a drinking fluid. An understanding of the invention can be derived from a reading of exemplary claim 1, which appears in the appendix to the appellant's brief.

The prior art

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

Hasselquist	2,551,673	May 8, 1951
McBride	3,842,806	Oct. 22, 1974
Harrigan	4,768,688	Sep. 6, 1988

The rejections

Claim 1 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Harrigan.

Claims 1 and 4 stand rejected under 35 U.S.C. § 102(b) as being anticipated by McBride.

Claims 2 and 3 stand rejected under 35 U.S.C. § 103 as being unpatentable over McBride.

Claims 7 through 10 and 12 through 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over McBride in view of Hasselquist.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted

rejections, we make reference to the examiner's final rejection and answer (Paper No. 6, mailed June 8, 1998 and Paper No. 12, mailed July 2, 1999) for the complete reasoning in support of the rejections, and to the appellant's brief (Paper No. 11, filed April 26, 1999) for the arguments thereagainst.

OPINION

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

We turn first to the examiner's rejection of claim 1 under 35 U.S.C. § 102(b). We initially note that 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. Inc. v. Union Oil Co., 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987). The inquiry as to whether a

reference anticipates a claim must focus on what subject matter is encompassed by the claim and what subject matter is described by the reference. As set forth by the court in Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984), it is only necessary for the claims to "'read on' something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or 'fully met' by it."

In support of this rejection, the examiner states:

The Harrigan patent discloses a tubular container in the form of a ring used to contain suntan lotion. . . Figures 11, 12 disclose a tubular band 22 having a hollow interior, a port at one band end closed by a plug 160, and a screw cap 167 fitting about a neck portion 163 of the plug and sealing it. Fasteners 154, 168 connect opposite ends of the band together. The contents of the tubular band can be removed or refilled through the neck portion 163 when the cap 167 is removed. [final rejection at page 2].

Appellant argues that Harrigan does not teach or suggest using the bracelet to store a drinking fluid or securing the bracelet around the neck of a pet.

We agree with the appellant that Harrigan does not disclose that the bracelet may be used to store drinking fluid or that the

bracelet may be secured to the neck of a pet. However, the Harrigan bracelet is nonetheless capable of storing a drinking fluid and of being secured to the neck of a pet. Even the appellant admits that the Harrigan bracelet may be adapted to fit around the neck of a pet and hold a drinking fluid. (See brief at page 4). Whether or not the bracelet is used to store drinking fluid and is secured to the neck of a pet is dependent upon the performance or nonperformance of a future act or use. The particular manner in which a device is used, however, may not be relied on to distinguish structure from the prior art. See In re Pearson, 494 F.2d 1399, 1401, 181 USPQ 641, 643 (CCPA 1974); In re Yanush, 477 F.2d 958, 959, 177 USPQ 705, 706 (CCPA 1973) and In re Casey, 370 F.2d 576, 152 USPQ 235, 238 (CCPA 1967).

As the Harrigan bracelet is capable of storing a drinking liquid and of being secured around the neck of a pet, we will sustain this rejection.

We turn next to the examiner's rejection of claims 1 and 4 under 35 U.S.C. § 102(b) as being anticipated by McBride. In support of this rejection, the examiner states:

The sheath formed by surface 11 of McBride is considered to constitute a fluid compartment into which a fluid (in vessel 19) is introduced. A port (unnumbered) at one end of the sheath is closed by a flap 13.

Opposite sheath ends are secured together by strap 3 and buckle 5. The collar of McBride is *adapted* to receive and store a drinking fluid if one desired to fill the vessel 19 with such a fluid and then introduce it into the sheath. [final rejection at pages 2 to 3]. (emphasis in original).

Appellant argues that McBride does not teach or suggest a resealable closure for a fluid vessel containing drinking fluid because the flap 13 of McBride is an element of the sheath and not an element of the watertight vessel and thus can not be considered the closure required by claim 1.

We do not find this argument persuasive because enclosures 11 and 15 of the McBride collar form a tubular band with at least one fluid compartment in which the fluid inside tube 19 is stored and flap 13 is a port in the tubular band formed by enclosures 11 and 15. As such, the structure of McBride anticipates the subject matter of claim 1. Therefore, we will sustain the rejection as it is directed to claim 1.

We will also sustain this rejection as it is directed to claim 4 as this claim stands or falls with claim 1. (See brief at page 3).

We turn next to the rejection of claims 2 and 3 under 35 U.S.C. § 103 as being unpatentable over McBride. We will

sustain this rejection because the appellant has not specifically addressed this rejection and the appellant has indicated that these claims stand or fall with claim 1 (See brief at page 3).

In regard to the rejection of claims 7 through 10, and 12 through 15 under 35 U.S.C. § 103 as being unpatentable over McBride in view of Hasselquist, we initially note that in rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed combination or other modification. See In re Lintner, 9 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). Furthermore, the conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071,

1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Rejections based on § 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. See In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 177 (CCPA 1967), cert. denied, 389 U.S. 1057 (1968). Our reviewing court has repeatedly cautioned against employing hindsight by using the appellant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. See, e.g., Grain Processing Corp. v. American Maize-Products Co., 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988).

In support of this rejection, the examiner states:

The Hasselquist reference discloses a collapsible container 10, 14, 15, which can be employed as a stock watering tank. It would have been obvious to one skilled in the art to employ the Hasselquist collapsible container with an animal wearing the McBride protective collar, in order to provide the animal with drinking water while in the field. The sheath of McBride is *physically insertable* into the empty bowl of Hasselquist whereupon the folded sheath would provide sidewall support. [final rejection at page 3](emphasis in original).

Hasselquist does not teach that the container disclosed therein needs reinforcement. Rather, Hasselquist discloses that the sidewalls are supported by air in space 16 and fluid once the bowl is filled (Col. 4, lines 29 through 38). Likewise, McBride does not disclose that the collar 1 can provide support for the sidewalls of a bowl. As such, we agree with the appellant that the prior art does not disclose a tubular band which is insertable into a bowl to provide support for the sidewalls of the bowl as is required by claims 7 and 12 from which claims 8 through 10 and claims 13 through 15 depend. In our view, the examiner's finding that the collar disclosed in McBride would provide support for the bowl of Hasselquist is speculative and can not form the factual basis on which a conclusion of obviousness rest. See Warner, 379 F.2d at 1017, 154 USPQ at 177 (CCPA 1967).

In view of the foregoing, the examiner's rejection of claims 7 through 10 and 12 through 15 is not sustained.

In summary:

(1) The examiner's rejection of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Harrigan is sustained.

(2) The examiner's rejection of claims 1 and 4 under 35 U.S.C. § 102(b) as being anticipated by McBride is sustained.

(3) The examiner's rejection of claims 2 and 3 under 35 U.S.C. § 103 as being unpatentable over McBride is sustained.

(4) The examiner's rejection of claims 7 through 10 and 12 through 15 under 35 U.S.C. § 103 as being unpatentable over McBride in view of Hasselquist is not sustained.

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

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN P. MCQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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