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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WILLIAM HENRY WATTS

Appeal 2019-006262
Application 14/966,988
Technology Center 3600

Before JAMES A. WORTH, KENNETH G. SCHOPFER, and BRADLEY B. BAYAT, *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision to reject claims 1–4 and 6–19. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Delta Air Lines, Inc. Appeal Br. 3.

BACKGROUND

The Specification states that "[e]mbodiments of the present invention described herein relate generally to the appraisal of various weather hazards, including but not limited to such hazards as they affect air, ground, and water travel." Spec. ¶ 2.

CLAIMS

Claims 1, 14, and 17 are the independent claims on appeal. Claim 1 is illustrative of the appealed claims and recites:

> 1. A computer-implemented method for facilitating the execution of a path of air travel, said method comprising the steps of:
>
> receiving, via one or more processors, hazard data indicative of a deterministic intensity of at least two hazards of at least two hazard types, wherein the deterministic intensity of each of the at least two hazards is determined based at least in part on a forecast model;
>
> converting, via the one or more processors, the deterministic intensity of each of the at least two hazards indicated by the hazard data to fit an atmospheric state intensity scale, the atmospheric state intensity scale consisting of and being defined by a plurality of deterministic intensity values that are each common across each of a plurality of hazard types, such that the hazard data is indicative of the deterministic intensity of each of the at least two hazards along said atmospheric state intensity scale, wherein a value of each of said plurality of deterministic intensity values is indicative of the deterministic intensity of each of said at least two hazards; and
>
> generating, via a display device in communication with the one or more processors, a graphical display indicative of: a path of air travel and the deterministic intensity of said at least two hazards along said atmospheric state intensity scale.

Appeal Br. 23.

REJECTIONS

1. The Examiner rejects claims 1–4, 6–12, 14, 15, 17, and 18 under 35 U.S.C. § 103 as unpatentable over Feyereisen[2] in view of King.[3]
2. The Examiner rejects claims 13, 16, and 19 under 35 U.S.C. § 103 as unpatentable over Feyereisen in view of King and Wilson.[4]

DISCUSSION

Each of independent claims 1, 14, and 17 recites "an atmospheric intensity scale, the atmospheric state intensity scale consisting of and being defined by a plurality of deterministic intensity values that are each common across each of a plurality of hazard types." Appeal Br. 23, 25, 26. The use of the transitional phrase "consisting of" in a claim clause provides an "exceptionally strong presumption that a claim term set off with 'consisting of' is closed to unrecited elements." *Multilayer Stretch Cling Film Holdings, Inc. v. Berry Plastics Corp.*, 831 F.3d 1350, 1359 (Fed. Cir. 2016). To overcome this presumption, "the specification and prosecution history must unmistakably manifest an alternative meaning." *Id.* Here, we agree with Appellant that the use of "consisting of" language in the clause quoted above precludes the presence of additional deterministic intensity values in the claimed atmospheric intensity scale that are not common across a plurality of hazard types, as discussed below.

With respect to claim 1, for example, the Examiner finds, *inter alia*, that Feyereisen does not specifically disclose an atmospheric state intensity scale with a plurality of intensity values that are common across each of a

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[2] Feyereisen et al., US 6,289,277 B1, iss. Sept. 11, 2001.
[3] King, US 2006/0129286 A1, pub. June 15, 2006.
[4] Wilson, US 2008/0208474 A1, pub. Aug. 28, 2008.

plurality of hazard types. Final Act. 3. However, the Examiner finds that King teaches a scale that has a plurality of intensity values that are common for a plurality of hazard types. *Id.* Further, in response to Appellant's argument regarding the use of "consisting of" in the claim, the Examiner finds:

> The transitional phrase "consisting of" found in the body of the claim does not limit the open-ended "comprising" language in the claims. See MPEP 2111.03 (II). For instance, the claim recites "consisting of and being defined by a plurality of ...." However, "a plurality" is not explicitly enumerated and is therefore open-ended. Moreover, the specification as originally filed does not support appellant's argument that the "consisting of" language should be interpreted as being restrictive because an "atmospheric state intensity scale consisting of" was not originally disclosed. The claims have been given their broadest reasonable interpretation in light of the specification.

Ans. 3.

Appellant argues:

> In response, Appellant further notes that the pertinent phrase in the claim language is "an atmospheric state intensity scale consisting of and being defined by a plurality of deterministic intensity values that are each common across each of a plurality of hazard types." In this context, Appellant respectfully submits that it is quite evident that despite the limit of the "plurality of deterministic intensity values" not being closed-ended, however many values are present must all-due to the closed-ended consisting of language-be common across each of the provided hazard types.

Reply Br. 2.

We agree with Appellant. Given the strong presumption identified above, we agree that the claim language would lead one of ordinary skill in

the art to interpret the claim to require that the atmospheric intensity scale consists of a plurality of intensity values and that each of the values on the scale are common across a plurality of hazard types, without exception. Thus, consistent with the "consisting of" language the intensity values on the scale as they relate to multiple of hazard types must be common and without any values that are not common, i.e., there must be at least two hazard types for which there is a scale that includes only values that are common for those two hazard types.

Further, the Examiner does not point us to any evidence, or provide adequate reasoning, explaining why the presumption regarding the "consisting of" language is overcome here. To the extent the Examiner finds that the language "atmospheric state intensity scale consisting of" was not in the application as originally filed, the Examiner does not explain adequately why or how this affects the presumption regarding the language "consisting of" discussed above. And, to the extent the Examiner finds that the language referring to a "plurality" is open-ended, we are not persuaded that this overcomes the presumption that the clause including the "consisting of" language is closed to unrecited elements. Interpreting the claim in this manner would effectively render the claim language "consisting of" meaningless or read it out of the claim. *See Texas Instruments, Inc. v. U.S. Intern. Trade Com'n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993) ("[T]o construe the claims in the manner suggested by TI would read an express limitation out of the claims. This, we will not do").

We also note that the claim preamble includes the open-ended language "comprising." This language does not affect our interpretation of the "consisting of" language above. This language merely allows for the

inclusion of other atmospheric intensity scales that have values that are not common for a different plurality of hazard types. *See Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368, 1378–79 (Fed. Cir. 2020).

Based on the foregoing, we agree with Appellant that the claim language at issue requires a scale such that "however many values are present must all . . . be common across each of" a plurality of hazard types. Reply Br. 2. Further, in the rejections before us, the Examiner relies on King as disclosing an atmospheric intensity scale as claimed. Final Act. 3. However, we agree with Appellant that King discloses a scale that includes certain intensity values that are the same and others that are different for a plurality of hazard types. *See, e.g.*, King Fig. 5. Thus, we agree with Appellant that King does not discloses an atmospheric intensity scale as claimed, i.e., a scale that includes only intensity values that are common across a plurality of hazard types.

Accordingly, we do not sustain the rejection of independent claims 1, 14, and 17 as obvious over Feyereisen in view of King. We also do not sustain the rejections of any of the dependent claims for which the Examiner relies on the same reasoning and does not provide further analysis or point to evidence in the art of record that would cure this deficiency.

CONCLUSION

We REVERSE the rejections of claims 1–4 and 6–19.

In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1–4, 6–12, 14, 15, 17, 18	103	Feyereisen, King		1–4, 6–12, 14, 15, 17, 18
13, 16, 19	103	Feyereisen, King, Wilson		13, 16, 19
Overall Outcome				1–4, 6–19

REVERSED