

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WRIGHT MEDICAL TECHNOLOGY, INC.,
Petitioner,

v.

BIOMEDICAL ENTERPRISES, INC.,
Patent Owner.

Case IPR2015-00786
Patent 8,584,853 B2

Before MEREDITH C. PETRAVICK, JEREMY M. PLENZLER, and
TIMOTHY J. GOODSON, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Wright Medical Technology, Inc. (“Petitioner”) filed a Petition to institute an *inter partes* review of claims 15–21 of U.S. Patent No. 8,584,853 B2 (Ex. 1001, “the ’853 patent”). Paper 1 (“Pet.”). In our Decision on Institution (Paper 7, “Decision to Institute” or “Dec.”), we instituted a trial to review the patentability of claims 15–21. In our Final Written Decision, we determined that Petitioner had failed to establish, by a preponderance of the evidence, that claims 15–21 are unpatentable. Paper 38 (“Final Decision” or “Final Dec.”). Petitioner requests rehearing of the Final Decision. Paper 39 (“Request” or “Req. Reh’g”). Having considered Petitioner’s Request, we decline to modify our Final Decision.

II. STANDARD OF REVIEW

In *inter partes* review, the petitioner has the burden of showing unpatentability by a preponderance of the evidence. 35 U.S.C. § 316(e). The standard of review for rehearing requests is set forth in 37 C.F.R. § 42.71(d), which states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

III. ANALYSIS

Petitioner’s Request is based on a disagreement with our interpretation of the following limitations from claim 15: “movement of the legs from the first convergent position to the second substantially parallel

position stores a compressive force in the implant” and “the insertion device maintains the legs in their second substantially parallel position such that the implant stores the compressive force.” Req. Reh’g 3–12. Although the Request states that “Petitioner asserts the Patent Owner has not met its burden of production by showing where each claim limitation is found in the swear behind evidence” (*id.* at 2) and that our factual findings are not supported by substantial evidence (*id.* at 12–14), these assertions also are based the alleged errors in claim interpretation. We note that Petitioner’s Request does not allege that Patent Owner failed to meet its burden of production in establishing prior invention, or any other error in our Final Decision, when the claim language noted above is interpreted in the manner set forth in our Final Decision.

In its Request, Petitioner does not identify any argument or evidence that we misapprehended or overlooked. Rather, Petitioner argues that our interpretation of the claim “ignores the plain and ordinary meaning of the language that links movement of the legs to storage of a compressive force” and that we did not give proper consideration to the prosecution history. Req. Reh’g 2–3, 9–10. But we already considered these arguments in our Final Decision. For example, Petitioner’s Request discusses the properties of nitinol (*id.* at 3–5), but does not dispute our discussion of nitinol relative to the limitations found in claim 15 (*see* Final Dec. 6). Petitioner appears to argue that we have given no consideration to the functional limitations noted above. *See* Req. Reh’g 5–6. We have, however, considered those limitations as defining structural characteristics of the implant and insertion device, as well as Petitioner’s arguments regarding the prosecution history. *See* Final Dec. 7–8. In particular, we determined that the claim language

noted above defines the characteristics of the implant by specifying the type of force that is stored by the implant (i.e., a compressive force that biases the legs of the implant inward toward the converged position) and defines the structure of the insertion device as one that maintains the legs of the implant in the parallel position, regardless of how the implant was placed on the insertion device (i.e., whether the implant was in an austenite phase or a martensitic phase at the time of assembly). *Id.*

The key dispute was, and still is, whether the claims require that the implant is in an austenite phase when placed on the insertion device. Petitioner maintains that the claims include this requirement. Our Final Decision determined they do not. Petitioner's disagreement with our interpretation of the claims, without more, does not provide sufficient basis to modify our Final Decision.

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner's Request is *denied*.

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