

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZERO GRAVITY INSIDE INC.,
Petitioner,

v.

FOOTBALANCE SYSTEM OY,
Patent Owner.

Case IPR2015-01770
Patent 8,171,589 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

On February 11, 2016, Zero Gravity Inside Inc. (“Petitioner”) filed a Request for Rehearing (Paper 18, “Req. Reh’g”) of our Decision (Paper 17, “Dec.”) denying *inter partes* review of Petitioner’s challenge to U.S. Patent No. 8,171,589 (Ex. 1001, “the ’589 patent”). Our Decision denied *inter partes* review of each of Petitioner’s challenges to claims 1–3.

Petitioner’s Request alleges that our Decision was based on flawed fact finding with respect to our determination that it “failed to explain sufficiently its contentions regarding the challenged claims” by “failing to provide an adequate (or any) construction of ‘the right position’ of the ankle,” and that the Decision was based on an erroneous conclusion of law because there was no controversy regarding the meaning of the “right position” limitation. Req. 1–2.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” Abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). In its request for rehearing, the dissatisfied party must identify the place in the record where it previously addressed each matter it submits for review. 37 C.F.R. § 42.71(d).

III. ANALYSIS

Ultimately, Petitioner appears to disagree with our Decision, rather than identifying an abuse of discretion. That disagreement is no basis for a rehearing. Nevertheless, we address Petitioner's contentions below.

Petitioner alleges that “the Petition establishes that a person of ordinary skill in the art would understand that ‘adjusting the angle of the ankle to the right position’ requires positioning the ankle in ‘subtalar neutral’ position.” Req. 4. (citing Pet. 41–42). Petitioner further alleges that “the Petition reiterates that a person of ordinary skill in the art would find it obvious to ‘adjust[] the angle of the ankle to the right position’ by **‘adjust[ing] the client’s ankle to a neutral position (i.e. subtalar neutral).**’” Req. 5 (quoting Pet. 41–42 (emphasis added)).

Even if one could infer that Petitioner considers the “right position” to be subtalar neutral, there is no explanation in the Petition as to why one skilled in the art would have interpreted the limitation in that manner in view of the specification of the ’589 patent. Petitioner’s discussion of the limitation never references the specification of the ’589 patent or any other intrinsic evidence. The only mention of the “right” position in the portion of the Petition cited by Petitioner (pages 41–42) discusses the obviousness of a subtalar neutral position based on Cumberland. We decline to make assumptions regarding arguments that Petitioner *may* have when those arguments are not *clearly* set forth in the Petition.

We are also not persuaded that “the Decision was based on an erroneous conclusion of law” as Petitioner contends. Req. 2, 11. In order to determine whether Petitioner has established a reasonable likelihood of success, the Petition needs to establish how a reference or combination of

references allegedly meets the claim limitations. Petitioner contends that “the plain and ordinary meaning of the term as understood by a person of ordinary skill in the art” should be applied. Req. 11. As noted in our Decision, however, the plain and ordinary meaning is not clear from the record before us. Dec. 8–9. Accordingly, we determined that “Petitioner ha[d] failed to explain sufficiently its contentions regarding the challenged claims.” *Id.* at 9. Moreover, with respect to the alleged lack of controversy, our Decision noted that “Patent Owner appears to disagree with Petitioner’s contentions regarding Cumberland’s teaching regarding ‘the right position’ of the ankle” (*Id.* at 6 (citing Prelim. Resp. 33), indicating controversy regarding the meaning of the “right position” limitation.

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner’s Request is *denied*.

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PETITIONER:

Orion Armon
Andrew Koning
COOLEY LLP
oarmon@cooley.com
dkoning@cooley.com

PATENT OWNER:

Howard N. Wisnia
Brad M. Scheller
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY, and POPEO, P.C.
PTOhwisnia@mintz.com
PTOScheller@mintz.com