

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.,
Petitioner,

v.

BODYMEDIA, INC.,
Patent Owner.

Case IPR2016-00545
Patent 8,073,707 B2

Before TREVOR M. JEFFERSON, MICHAEL J. FITZPATRICK, and
FRANCES L. IPPOLITO, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a)

I. INTRODUCTION

Petitioner, Fitbit, Inc., filed a Petition to institute an *inter partes* review of claims 1–24 of U.S. Patent No. 8,073,707 B2 (Ex. 1001, “the ’707 patent”) pursuant to 35 U.S.C. § 311(a). Paper 1 (“Pet.”). With our authorization to do so, Patent Owner, BodyMedia, Inc., filed a corrected Preliminary Response pursuant to 35 U.S.C. § 313. Paper 7 (“Prelim. Resp.”). In an August 8, 2016, Decision, we granted the Petition. Paper 8 (“Inst. Dec.”).

Patent Owner filed a Patent Owner Response (Paper 12, “PO Resp.”) to which Petitioner filed a Reply (Paper 18, “Reply”). Neither party requested a hearing for oral arguments, and none was held.

As discussed below, claims 1–18 and 20–22 are no longer at issue because they have been held unpatentable in a decision in a separate proceeding that is now final, and Petitioner has shown by a preponderance of the evidence that the remaining claims of the ’707 patent—claims 19, 23, and 24—are unpatentable.

A. Related Matters

The ’707 patent previously was subjected to an *inter partes* reexamination bearing Control No. 95/002,376 (“the ’376 reexamination”), during which claims 1–18 and 20–22 were finally rejected as anticipated by Amano ’342 (Ex. 1004).¹ A decision by the Board affirmed the final rejection. *See Basis Science, Inc. v. Bodymedia, Inc.*, Reexamination

¹ U.S. Patent No. 6,030,342, filed (under 35 U.S.C. § 371) Feb. 9, 1998, issued Feb. 29, 2000.

Control No. 95/002,376 (PTAB Mar. 27, 2015). Claims 19, 23, and 24 were not subject to the '376 reexamination. *See id.* Patent Owner appealed the Board's decision to the Federal Circuit, which summarily affirmed. *See Bodymedia, Inc. v. Basis Science, Inc.*, No. 2015-1788 (Fed. Cir. July 12, 2016) (nonprecedential). The Federal Circuit's judgment is now final.

The parties identify the additional following matters involving the '707 patent: (1) *AliphCom d/b/a Jawbone and BodyMedia, Inc. v. Fitbit, Inc.*, 3:15-cv-02579 (N.D. Cal.); and (2) *Certain Activity Tracking Devices, Systems, and Components Thereof*, 337-TA-963 (ITC). Pet. 3–4; Paper 5, 1.

B. The '707 Patent

The '707 patent relates to “a system for monitoring health, wellness and fitness.” Ex. 1001, 1:15–18. In particular, it relates “to a system for collecting[, using a sensor device,] and storing at a remote site data relating to an individual's physiological state, lifestyle, and various contextual parameters, and making such data and analytical information based on such data available to the individual, preferably over an electronic network.” *Id.* at 1:18–23.

Figure 1 of the '707 patent is reproduced below.

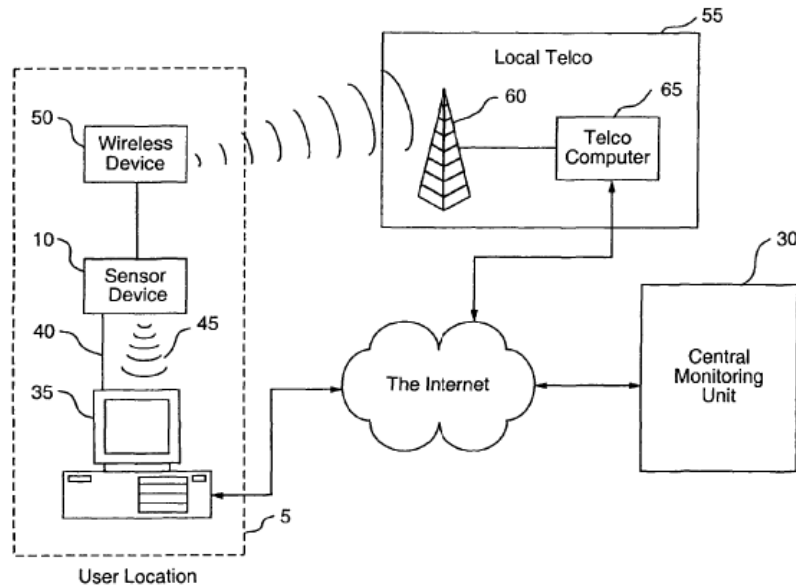


FIG. 1

Figure 1 shows “a system for monitoring physiological data and lifestyle over an electronic network according to the present [and challenged] invention.” *Id.* at 3:51–54. The system includes sensor device 10, which “is preferably worn by an individual user on his or her body.” *Id.* at 4:37–38. The sensor device generates data indicative of various physiological parameters of the individual, such as the individual’s heart rate, pulse rate, ECG, respiration rate, skin temperature, core body temperature, etc. *Id.* at 4:47–55. Data indicative of these physiological parameters either can be signals directly from the sensors or data calculated by a microprocessor based on such signals. *Id.* at 4:55–60. The “[m]ethods for generating data indicative of various physiological parameters and sensors to be used therefor are well known.” *Id.* at 4:60–62.

C. The Challenged Claims

The patentability of only claims 19, 23, and 24 remains in dispute. *See Basis Science, Inc. v. Bodymedia, Inc.*, Reexamination Control No.

95/002,376 (PTAB Mar. 27, 2015) (affirming final rejection of claims 1–18 and 20–22), *aff'd Bodymedia, Inc. v. Basis Science, Inc.*, No. 2015-1788 (Fed. Cir. July 12, 2016); *see also* PO Resp. 8–12 (arguing the patentability of only claims 19, 23, and 24 on Ground 1), 12–22 (arguing the patentability of only claims 1, 19, 23, and 24 on Ground 2).² Claims 19, 23, and 24 depend from claim 1. Claims 1, 19, 23, and 24 are reproduced below.

1. A system for detecting, monitoring, and reporting a status of an individual to a user, the system comprising:
 - a first sensor adapted to generate data indicative of a first physiological parameter of the individual if said first sensor is in proximity to the individual;
 - a second sensor adapted to generate data indicative of a second physiological parameter of the individual if said second sensor is in proximity to the individual;
 - a processing unit in electronic communication with said first sensor and said second sensor;
 - a central monitoring unit in electronic communication with at least one of said sensors and said processing unit; and
 - an output device in electronic communication with at least one of said processing unit and said central monitoring unit, wherein at least one of said processing unit and said central monitoring unit is programmed

² Although Patent Owner argues that claim 1 is patentable, it does not include any arguments specific to claim 1. PO Resp. 12–22. The only claim-specific arguments it presents are for claims 19, 23, and 24. *Id.* at 14–19.

(a) to generate at least one of a derived physiological status parameter of the individual and a derived parameter related to an activity in which the individual has engaged said derived parameters based on both of said data indicative of said first physiological parameter of the individual and said data indicative of said second physiological parameter of the individual, and

(b) to cause said output device to present to a user indicators of at least one of said derived parameters of the individual in relation to indicators of at least one of (i) said data indicative of said first physiological parameter of the individual, and (ii) said data indicative of said second physiological parameter of the individual.

19. The system of claim 1 wherein said indicators presented to a user by the output device are tactile for at least one of (a) at least one of said derived parameters of the individual, (b) said data indicative of said first physiological parameter of the individual, and (c) said data indicative of said second physiological parameter of the individual.

23. The system of claim 1 wherein at least one of said indicators are compared to a baseline parameter of the individual.

24. The system of claim 1 wherein at least one of said central monitoring unit and said processing unit is programmed to provide suggestions, said suggestions being based on said relation of said indicators of at least one of said derived parameters of the individual to said indicators of at least one of said data indicative of said first physiological parameter of the individual and said data indicative of said second physiological parameter of the individual.

D. Grounds of Asserted Unpatentability

We instituted trial on the following asserted grounds of unpatentability:

References	Basis ³	Claims Challenged
Amano '342 (Ex. 1004) ⁴	§ 102(a), (e)	1, 19, 23, and 24
Amano '837 (Ex. 1006) ⁵ and Goodman (Ex. 1007) ⁶	§ 103(a)	1–24

Inst. Dec. 18. Taking into consideration, however, that claims 1–18 and 20–22 already have been held unpatentable in a final judgment, the narrowed grounds of unpatentability before us are as follows:

References	Basis	Claims Challenged
Amano '342	§ 102(a), (e)	19, 23, and 24
Amano '837 and Goodman	§ 103(a)	19, 23, and 24

³ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (September 16, 2011), took effect on March 18, 2013. Because the application from which the '707 patent issued was filed before that date, our citations to 35 U.S.C. §§ 102 and 103 are to their pre-AIA version.

⁴ U.S. Patent No. 6,030,342, filed (under 35 U.S.C. § 371) Feb. 9, 1998, issued Feb. 29, 2000.

⁵ U.S. Patent No. 5,941,837, filed (under 35 U.S.C. § 371) Oct. 14, 1997, issued August 24, 1999.

⁶ U.S. Patent No. 6,616,613 B1, filed Apr. 27, 2000, issued Sept. 9, 2003.

II. ANALYSIS

A. Claim Construction

“A claim in an unexpired patent that will not expire before a final written decision is issued shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b). Pursuant to that standard, the claim language should be read in light of the specification, as it would be interpreted by one of ordinary skill in the art. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we generally give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning is the meaning that the term would have to a person of ordinary skill in the art in question.”) (internal quotation marks omitted). Any special definition for a claim term must be set forth with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

Neither party proposes an express construction for any limitation of claim 19, 23, or 24. *See* Pet. 12–13 (proffering express construction for only “life activities data” (claims 5, 6, and 10)); PO Resp. 7–8 (likewise proffering express construction for only “life activities data”). We do not adopt an express construction for any claim limitation.

B. Anticipation by Amano ’342

A panel of this Board affirmed a finding, during the ’376 reexamination, that Amano ’342 anticipates claim 1. *See Basis Science*, Reexamination Control No. 95/002,376, at 2 (PTAB Mar. 27, 2015). The panel’s decision was affirmed in a judgment by the Federal Circuit, which is

now final. *See Bodymedia*, No. 2015-1788 (Fed. Cir. July 12, 2016).

Nevertheless, to obtain a holding in this *inter partes* review that claims 19, 23, and 24 are anticipated by Amano '342, Petitioner must prove by a preponderance of the evidence that Amano '342 discloses all of the limitations of claims 19, 23, and 24. *See* 35 U.S.C. § 316(e). By statute, all of the limitations recited in claim 1 are incorporated into claims 19, 23, and 24. *See* 35 U.S.C. § 112, ¶4 (now codified as 35 U.S.C. § 112(d)) (“A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.”). Accordingly, this Decision will address the limitations recited by claim 1, as well as those recited by claims 19, 23, and 24.

1. Summary of Amano '342

Amano '342 discloses a device, such as a wristwatch, that has a sensor that detects body motion from which it can generate data indicative of whether an individual is in a state of rest or activity exercise, a sensor that measures the skin temperature around the radial artery from which it can generate data indicative of the individual's deep body temperature, and a sensor that measures the pulse pressure around the individual's radial artery from which it can generate data indicative of the individual's pulse rate. Ex. 1004, 6:57–7:7, 11:6–13, 12:41–42, 12:66–13:18.

Figures 3a and 3b are reproduced below.

FIG. 3A

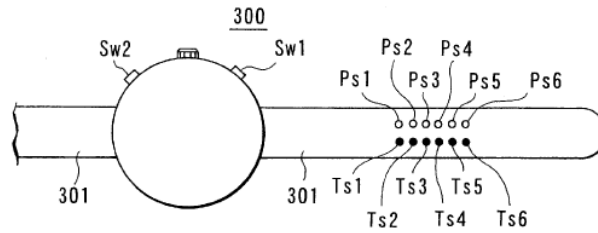
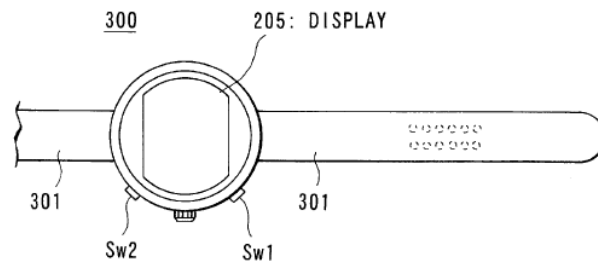


FIG. 3B



Figures 3a and 3b respectively show bottom and top views of wristwatch embodiment 300 disclosed by Amano '342. The wristwatch includes pressure sensors Ps1–Ps6 and temperature sensors Ts1–Ts6. *Id.* at 13:33–34.

A processing unit, CPU 201, within the wristwatch derives physiological parameters, such as calorie expenditure, from sensor data. *Id.* at 12:21–30. For example, Amano '342 describes the calculation of calorie expenditure using data collected from both pressure and body motion sensors. *Id.* at 18:6–52. The wristwatch can transmit the individual's derived calorie expenditure data and/or physiological data to an “external device main body,” which is described as a personal computer, for storage and further analysis. *Id.* at 21:52–23:12. The face of the wristwatch includes display 205, which can present indicators of derived physiological status data, such as the individual's calorie expenditure over time. *Id.* at 19:27–33; *see also id.* at Fig. 19 (exemplary diagram of the display). The

wristwatch can likewise present to the individual indicators of his physiological data used to determine the calorie expenditure, such as his pulse rate and deep body temperature over time. *Id.* at 23:66–24:14, 27:56–67, 26:45–27:12, Figs. 19, 37, 40.

2. Analysis of Anticipation Challenge

Petitioner presents a detailed analysis in its Petition of how Amano '342 discloses all of the limitations of claims 19, 23, and 24. *See* Pet. 17–23 (showing the limitations recited in claim 1 are met by Amano '342), 24–27 (showing the additional limitations recited in claims 19, 23, and 24 are met by Amano '342).

In its Response, Patent Owner does not dispute that Amano '342 discloses the limitations recited in claim 1. PO Resp. 8–12. Patent Owner disputes only whether Amano '342 discloses the additional limitations recited in claims 19, 23, and 24. *Id.*

a) Limitations Recited in Claim 1

Claim 1 recites “a first sensor adapted to generate data indicative of a first physiological parameter of the individual if said first sensor is in proximity to the individual.” To meet this limitation, Petitioner identifies two features of the wristwatch embodiment illustrated in Figures 3a and 3b of Amano '342, both of which meet the recited claim language. First, Petitioner argues that “body motion detector 101 (*i.e.*, a first sensor) . . . generates data indicative of body movements and when an individual is active or resting (*i.e.*, a first physiological parameter).” Pet. 18 (citing

Ex. 1004, 6:57–7:7; Ex. 1002 ¶41).⁷ Second, Petitioner argues that “temperature sensors Ts1~Ts6 form a body temperature detector 121 (*i.e.*, a first sensor) [that] measures the temperature of the skin surface around the individual’s radial artery[] and generates data indicative of deep body temperature (*i.e.*, a first physiological parameter).” *Id.* (citing Ex. 1004, 13:8–23; Ex. 1002 ¶41). We are persuaded by both arguments. Petitioner has shown that this limitation is taught by Amano ’342.

Claim 1 recites “a second sensor adapted to generate data indicative of a second physiological parameter of the individual if said second sensor is in proximity to the individual.” To meet this limitation, Petitioner relies on pulse wave detector 111 of the same wristwatch embodiment of Amano ’342. In particular, Petitioner argues “pulse pressure sensors Ps1~Ps6 that form pulse wave detector 111 (*i.e.*, a second sensor), . . . generate data indicative of pulse rate (*i.e.*, a second physiological parameter) in proximity to the individual.” Pet. 18 (citing Ex. 1002 ¶41; *see also* Ex. 1004, 12:66–13:3 (cited at Pet. 19)). We are persuaded by this argument. Petitioner has shown that this limitation is taught by Amano ’342.

Claim 1 recites “a processing unit in electronic communication with said first sensor and said second sensor.” To meet this limitation, Petitioner relies on the wristwatch’s CPU 201, which is in electrical communication with the asserted first and second sensors (*i.e.*, body motion detector 101, body temperature detector 121, and pulse wave detector 111). Pet. 19 (citing

⁷ Exhibit 1002 is a declaration by Mark A. Musen, M.D., Ph.D. *See* Ex. 1002 ¶¶4–5. “Paragraph” 41 of Dr. Musen’s declaration is not actually a paragraph, but rather a claim chart mapping claim 1 to teachings of Amano ’342.

Ex. 1004, 6:61–67, 12:21–23, 18:13–15, Figs. 2, 17; Ex. 1002 ¶41).

Petitioner has shown that this limitation is taught by Amano '342.

Claim 1 recites “a central monitoring unit in electronic communication with at least one of said sensors and said processing unit.” To meet this limitation, Petitioner relies on external device main body 600, which is “equivalent to an ordinary personal computer.” Ex. 1004, 16:4–5; Pet. 19–20. Petitioner correctly notes that the external computer includes transmission and receiving controllers, which allow sending and receiving information between the external computer and CPU 201. Ex. 1004, 15:65–16:27, 22:3–6, 22:45–51, Fig. 9; Pet. 19–20 (citing the same). Petitioner has shown that this limitation is taught by Amano '342.

Claim 1 recites “an output device in electronic communication with at least one of said processing unit and said central monitoring unit.” To meet this limitation, Petitioner relies on the wristwatch's LCD display 205. Pet. 20. Petitioner correctly notes that the LCD display is in electronic communication with CPU 201, the asserted processing unit. *Id.* (citing Ex. 1004, 12:45–49, Fig. 2; Ex. 1002 ¶41). Petitioner has shown that this limitation is taught by Amano '342.

Claim 1 concludes with the following recitation:

wherein at least one of said processing unit and said central monitoring unit is programmed

(a) to generate at least one of a derived physiological status parameter of the individual and a derived parameter related to an activity in which the individual has engaged said derived parameters based on both of said data indicative of said first physiological parameter of the individual and said data indicative of said second physiological parameter of the individual, and

(b) to cause said output device to present to a user indicators of at least one of said derived parameters of the individual in relation to indicators of at least one of (i) said data indicative of said first physiological parameter of the individual, and (ii) said data indicative of said second physiological parameter of the individual.

To meet Limitation (a), Petitioner relies on the wristwatch's CPU 201 being programmed to generate calorie expenditure from data collected from the motion, temperature, and pressure sensors. Pet. 21 (citing Ex. 1004, 1:6–9, 12:21–23, 6:57–7:56, 8:62–9:44; Ex. 1002 ¶41). We find that evidence sufficient to establish that Limitation (a) is taught by Amano '342.

To meet Limitation (b), Petitioner relies on the wristwatch's LCD display of an individual's calorie expenditure over time and the individual's body temperature over time. Pet. 22 (citing Ex. 1004, 12:45–49, 18:46–52, 19:22–33, 23:22–28, 23:66–24:14, Figs. 19, 37; Ex. 1002 ¶41). Indeed, Figure 19 discloses a display of calorie expenditure, which is a derived parameter, over time, and Figure 37 discloses a display of body temperature, which is data indicative of a physiological parameter, over time. Ex. 1004, Figs. 19, 37. In Patent Owner's appeal to this Board in the '376 Reexamination, a panel held the following: "Because both calorie expenditure and body temperature are displayed with respect to time [in Amano '342], calorie expenditure is presented in relation to body temperature." *Basis Science*, Reexamination Control No. 95/002,376 (PTAB Mar. 27, 2015), 5–6. We agree with that holding; Amano '342 discloses Limitation (b) by virtue of its displaying both calorie expenditure and body temperature, each with respect to time.

In sum, Petitioner has shown that Amano '342 discloses all limitations

of claim 1, which are incorporated into challenged claims 19, 23, and 24.

b) Claim 19

Claim 19 recites the following:

19. The system of claim 1 wherein said indicators presented to a user by the output device are tactile for at least one of (a) at least one of said derived parameters of the individual, (b) said data indicative of said first physiological parameter of the individual, and (c) said data indicative of said second physiological parameter of the individual.

To meet the additional language of claim 19, Petitioner notes that Amano '342 states that its wristwatch embodiment is not limited to visually displaying calculated results and that notification to the user may be made by any of the five senses. Pet. 24 (citing Ex. 1004, 34:20–32). In fact, as Petitioner further points out, Amano '342 states that “a design is ... possible which relies on the tactile sense by employing vibration in the notification” of the calculated expenditure. Ex. 1004, 34:30–32; Pet. 24 (quoting the same).

Patent Owner responds that it is not clear whether the “calculated results are equivalent to a derived parameter, data indicative of a first physiological parameter or a second physiological parameter.” PO Resp. 8–9 (citing Ex. 2005 ¶49). But, the only evidence to which Patent Owner cites—Exhibit 2005 ¶49—has been expunged.⁸ Accordingly, Patent Owner has no evidence to support its argument that the relied-upon teaching in

⁸ Exhibit 2005 was a declaration by Thomas Blackadar that was expunged because Mr. Blackadar was not made available for cross-examination. See Paper 17 (expunging both of Mr. Blackadar's declarations along with his curriculum vitae (i.e., Exhibits 2001, 2002, and 2005)).

Amano '342 is unclear. Second, Patent Owner's interpretation of Amano '342 is erroneous. Amano '342 teaches notification to the user "of the calculated calorie expenditure . . . by means of a synthesized voice" and then immediately states that such notification alternatively could "rel[y] on the tactile sense by employing vibration in the notification" of the calculated expenditure. Ex. 1004, 34:27–32. The calculated calorie expenditure is a derived parameter of the individual. It is not measured directly; it is derived from data collected from the motion, temperature, and pressure sensors. Ex. 1004, 1:6–9, 6:57–7:56, 8:62–9:44, 12:21–30.

Petitioner has shown, by a preponderance of the evidence, that Amano '342 anticipates claim 19.

c) Claim 23

Claim 23 recites the following: "The system of claim 1 wherein at least one of said indicators are compared to a baseline parameter of the individual." To meet the additional language of claim 23, Petitioner points to three separate features of the wristwatch of Amano '342. Pet. 24–26. We address two of these features, both of which meet the required claim language.

With respect to the first feature we address here, Petitioner quotes Amano '342 as disclosing the following: "In order to obtain calorie expenditure with good accuracy, the device is provided with a basal metabolic state specifying element (142) which specifies the subject's basal metabolic state . . . correcting the stored regression formulas using the basal metabolic state." Pet. 24–25 (quoting Ex. 1004, Abstract). Petitioner persuasively argues that, "[w]hen an individual's [calorie] expenditure is

calculated, it is done by comparison to the basal metabolic baseline and the regression formulas that baseline defines.” Pet. 25 (citing Ex. 1004, 22:60–23:6, Figs. 10a–b; Ex. 1002 ¶43).

Patent Owner responds that, “[o]n the contrary, Amano ‘342 does not disclose a comparison of basal metabolic rate baseline to derived caloric expenditure; rather, Amano ‘342 discloses a basal metabolic rate being used to help *calculate* a caloric expenditure via a regression formula.” PO Resp. 9 (citing Ex. 1004, Abstract, 8:43–46). Patent Owner’s argument is based on an unstated and unsupported construction of the word “compared” that is unreasonably narrow. In particular, the unstated construction presumes that comparing and calculating are mutually exclusive subject matter. Patent Owner, however, does not explain that presumption or support it with evidence. We instead determine that Amano ‘342’s calculation of caloric expenditure from basal metabolic baseline includes a comparison of the two within the meaning of claim 23. The regression formula defines that comparison.

With respect to the second feature we address here, Petitioner argues that Amano ‘342 teaches comparing indicators of an individual’s parameters to recent baseline values on the wristwatch’s LCD display. Pet. 25. Petitioner argues, for example, that the display may show “a current, calculated respiration rate in comparison to the most recent baseline basal respiration rate.” *Id.* (citing Ex. 1004, 27:57–67). The Petitioner-cited portion of Amano ‘342 states:

In the current value measuring mode, CPU 201 measures the current pulse rate, respiration, body temperature, and the temperature of the surrounding environment. The results of this measurement are displayed in area 205₁ or 205₂. CPU 201

switches the area in which display is conducted in response to operations by the subject. Here, when displaying each of the current standard values in area 205₂, the subject is able to compare the standard values for the current day, which are displayed in area 205₁. Thus, it is possible for the subject to know the degree of daily change based on his own physiological state.

Ex. 1004, 27:57–67.

Patent Owner responds, arguing that the “standard value[]” reference in Amano ’342 is not a “baseline parameter” within the meaning of claim 23. To support that argument, Patent Owner points out that Dr. Musen (Petitioner’s declarant) testified on cross-examination that “a baseline parameter refers to a physiologic measurement or a derivation of a physiologic measurement which corresponds to a situation where the individual is at baseline.” PO Resp. 10 (quoting Ex. 2006, 37:6–13). Applying Dr. Musen’s interpretation, Patent Owner concludes that the “standard values referred to in the cited portions of Amano ’342 do not appear to be related to any measurement of a physiologic measurement or a derivation of a physiologic measurement.” *Id.* at 10 (citing *expunged* Ex. 2005 ¶53). Patent Owner offers no evidence of record for that conclusion.

In any event, Patent Owner’s argument is erroneous. Amano ’342 teaches that “current value[s]” of “pulse rate, respiration, body temperature, and the temperature of the surrounding environment” are compared to “standard values.” Ex. 1004, 27:57–67. Clearly, the first three of these “current values” are physiological. And, it is implicit that the standard values—to which the current values are compared—must be for the same fields. In other words, Amano ’342 teaches comparing a current value of

pulse rate to a standard value of pulse rate, a current value of respiration to a standard value of respiration, a current value of body temperature to a standard value of temperature. *See id.* at 27:65–67 (“Thus, it is possible for the subject to know the degree of daily change based on his own physiological state.”).

Petitioner has shown that Amano ’342 anticipates claim 23.

d) Claim 24

Claim 24 recites the following:

The system of claim 1 wherein at least one of said central monitoring unit and said processing unit is programmed to provide suggestions, said suggestions being based on said relation of said indicators of at least one of said derived parameters of the individual to said indicators of at least one of said data indicative of said first physiological parameter of the individual and said data indicative of said second physiological parameter of the individual.

To meet the additional language of claim 24, Petitioner relies on, among other things, Amano ’342’s teaching that “the wristwatch is programmed to calculate an ‘achievement rate’ that is based on the individual’s calorie expenditure (i.e., a derived parameter) as compared to a target calorie expenditure value entered by a user.” Pet. 26 (citing Ex. 1004, 19:34–49). Petitioner also points to the additional feature of a “face chart . . . displayed in response to the achievement rate.” Ex. 1004, 19:60–61, Fig. 22; Pet. 26–27. As shown in Figure 22, the face chart can display an array of faces, such as fully smiling, slightly smiling, slightly frowning, and fully frowning, depending on the user’s achievement rate. Ex. 1004, Fig. 22. Petitioner argues that the face chart provides a suggestion, with a smiling

face suggesting that the user need not increase its rate of exercise (and could even reduce it) because he is currently above the achievement rate and a frowning face suggesting that the user needs to exercise more rigorously because he is below the achievement rate. Pet. 26–27 (citing Ex. 1004, 19:34–49, Fig. 22).

Patent Owner responds, arguing that the achievement rate, which is a comparison of calorie expenditure to a target calorie expenditure, does not constitute a “suggestion” within the meaning of claim 24. PO Resp. 11–12.

The meaning of “suggestion” was at issue at institution of this *inter partes* review. In our Decision granting the Petition, we stated:

Neither party offers an express construction for the term “suggestion.” On the record presented, the achievement rate appears to fall within the scope of the broadest reasonable construction of that term in the context of the specification of the challenged patent. For example, the ’707 patent states the following:

The Activity Level Health Index piston level is preferably determined with respect to a *suggested* healthy daily routine that includes: exercising aerobically for a pre-set time period, preferably 20 minutes, or engaging in a vigorous lifestyle activity for a pre-set time period, preferably one hour, *and burning at least a minimum target number of calories*, preferably 205 calories, through the aerobic exercise and/or lifestyle activity. The minimum target number of calories may be set according to information about the user, such as sex, age, height and/or weight.

Ex. 1001, 16:37–46 (emphasis added).

Inst. Dec. 15–16.

During trial, Patent Owner did not proffer an express construction for

“suggestion.” See PO Resp. 7–8 (proffering express construction for only “life activities data” (claims 5, 6, and 10)). Petitioner also did not propose one during trial. See Pet. 12–13 (proffering express construction for only “life activities data” (claims 5, 6, and 10)); see *generally* Reply (proffering no express constructions). Regardless, the parties continue to dispute whether “suggestion” encompasses Amano ’342’s achievement rate and/or its face chart.

Patent Owner argues that the achievement rate does not meet the limitation because it “is simply a numerical value that fails to provide any suggestion.” PO Resp. 11. Patent Owner’s argument is not persuasive. The achievement rate equals summed value/targeted value multiplied by 100. Ex. 1004, 19:49. Summed value, in turn, may be “calorie expenditure during [a] specific time interval,” whereas targeted value is the targeted number of calories to be burned during that same time interval. *Id.* at 19:64–20:3. Thus, an achievement rate below 100 suggests to the user to exercise more vigorously; an achievement above 100 suggests to the user that he may exercise less vigorously and still achieve his targeted rate of calorie expenditure. Ex. 1004, 19:49, Fig. 22.

Patent Owner also argues that the achievement rate and the face chart are not suggestions because they are not based on a relation between an indicator of a derived parameter and indicators of first and second physiological parameters, as required by claim 24. PO Resp. 11–12. More specifically, Patent Owner argues that the achievement rate and face chart are based only on calorie expenditure and target calorie expenditure, the latter of which is simply inputted to the system by a user. PO Resp. 11–12. Patent Owner’s argument is not persuasive. The achievement rate and face

chart are also based on a relation between calorie expenditure (indicator of a derived parameter) and measurements by the body motion, body temperature, and pulse wave sensors (indicators of first and second physiological parameters), as argued by Petitioner. See Pet. 26 (“CPU 201 of the Amano ’342 system is programmed to provide an ‘achievement rate,’ which is based on the relation of the individual’s derived calorie expenditure to data indicative of the individual’s body motion and body temperature and data indicative of the individual’s pulse rate.”) (citing Ex. 1004, 19:34–49, 8:62–9:44; Ex. 1002 ¶44).

Petitioner has shown, by a preponderance of the evidence, that Amano ’342 anticipates claim 24.

C. Obviousness in View of Amano ’837 and Goodman

Petitioner contends that claims 19, 23, and 24 additionally would have been obvious over Amano ’837 and Goodman. Pet. 27–60. Petitioner raised this ground to address Patent Owner’s proffered construction of Limitation (b) of claim 1 in the ’376 reexamination. *Id.* at 27. Petitioner explained as follows:

In its pending appeal o[f] the rejections in the separate *inter partes* reexamination, Patent Owner has argued (1) that the ’707 patent claims require simultaneous display of indicators of derived parameters in relation to indicators of physiological data from the sensors and (2) that *Amano* ’342 does not disclose this requirement. As detailed below, the combination of *Amano* ’837 and *Goodman* invalidates all ’707 patent claims even under Patent Owner’s position on appeal.

Id. (underlining added). After Petitioner filed its Petition on February 1, 2016, the Federal Circuit affirmed the Board’s affirmance of the rejection of

claim 1 as anticipated by Amano '342 in the '376 reexamination. *See Bodymedia, Inc. v. Basis Science, Inc.*, No. 2015-1788 (Fed. Cir. July 12, 2016). And, after we instituted trial on both grounds on August 8, 2016, the Federal Circuit's decision became final.

As discussed above, we find—as the Examiner in the '376 reexamination found—that Amano '342 discloses all limitations of claim 1 including Limitation (b). As further discussed above, we also find that claims 19, 23, and 24—which were not subject to the '376 reexamination—are unpatentable as anticipated by Amano '342.

In light of the forgoing, we discern no reason to determine whether claims 19, 23, and 24 also would be unpatentable when applying an alternative and erroneous construction of Limitation (b) of claim 1, which this Board and the Federal Circuit did not adopt previously, and which we do not adopt now.

III. CONCLUSION

A preponderance of the evidence shows that claims 19, 23, and 24 of the '707 patent are anticipated by Amano '342.

IV. ORDER

Accordingly, it is

ORDERED that claims 19, 23, and 24 of U.S. Patent No. 8,073,707 B2 are unpatentable; and

FURTHER ORDERED that, because this Decision is final, a party to the proceeding seeking judicial review of the Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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For Petitioner:

Naveen Modi
Yar R. Chaikovsky
David T. Okano
Michael C. Hendershot
PAUL HASTINGS LLP
PH-Fibit-Aliph-IPR@paulhastings.com

For Patent Owner:

D. Clay Holloway
Shayne E. O'Reilly
KILPATRICK TOWNSEND & STOCKTON LLP
cholloway@kilpatricktownsend.com
soreilly@kilpatricktownsend.com