

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CAREFUSION CORPORATION,
Petitioner,

v.

BAXTER INTERNATIONAL INC.,
Patent Owner.

Case IPR2016-01463
Patent 6,231,560 B1

Before ROBERT J. WEINSCHENK, TIMOTHY J. GOODSON, and
AMANDA F. WIEKER, *Administrative Patent Judges*.

GOODSON, *Administrative Patent Judge*.

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

I. INTRODUCTION

Patent Owner filed a Request for Rehearing (Paper 39, “Req. Reh’g”) of our Final Decision (Paper 38, “Dec.”). In that Decision, we concluded that Petitioner established by a preponderance of the evidence that claims 1–3, 6, 7, and 16 of U.S. Patent No. 6,231,560 B1 (“the ’560 patent”) are unpatentable as obvious under 35 U.S.C. § 103 over the Bollish reference.¹ See Dec. 36. Patent Owner requests rehearing, arguing that we misapprehended or overlooked the admissions of Dr. Bollish, and that we misapprehended or overlooked our duty to provide a claim construction of a certain claim limitation. See Req. Reh’g 1. For the reasons set forth below, Patent Owner’s request for rehearing is *denied*.

II. LEGAL STANDARD

In a request for rehearing, “[t]he burden of showing a decision should be modified lies with the party challenging the decision.” 37 C.F.R. § 42.71(d). Further, “[t]he 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.” *Id.*

III. TESTIMONY OF DR. BOLLISH

Patent Owner argues that in his testimony, Dr. Bollish contradicted Petitioner’s arguments and admitted that the Bollish reference fails to disclose certain claim limitations—specifically, limitations [b] and [f] of claim 1. Req. Reh’g 2–3, 11. Patent Owner emphasizes that Dr. Bollish is a named inventor of the Bollish reference and served as Petitioner’s technical expert, such that his testimony should be given significant weight. *Id.* at 3.

¹ U.S. Patent No. 5,957,885, issued Sept. 28, 1999 (Ex. 1004).

In Patent Owner's view, we improperly discredited Dr. Bollish's testimony based on unsupported rationalizations. *Id.* at 3–10.

We did not overlook or misapprehend the testimony from Dr. Bollish highlighted in Patent Owner's Request. We weighed the cross-examination testimony from Dr. Bollish with the other evidence and ultimately found that the Bollish reference teaches the limitations in question, notwithstanding Dr. Bollish's testimony. *See* Dec. 21–23, 25–26. When parties present competing interpretations of a reference, it is the Board's function to weigh those arguments and make a finding as to which is more plausible. *Idemitsu Kosan Co., Ltd. v. SFC Co. Ltd.*, 870 F.3d 1376, 1381 (Fed. Cir. 2017).

Patent Owner urges that we must credit Dr. Bollish's testimony that is unfavorable to Petitioner, but the "PTAB [i]s entitled to weigh the credibility of witnesses." *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1358 (Fed. Cir. 2018) (citing *Trs. of Columbia Univ. v. Illumina, Inc.*, 620 Fed.Appx. 916, 922 (Fed. Cir. 2015)). In this case, we found Dr. Bollish's cross examination testimony regarding the Bollish reference unreliable and lacking credibility in view of the description in the reference itself. Regarding limitation [b], we found:

Despite the confusing testimony from Dr. Bollish regarding this limitation cited by Patent Owner, ultimately Patent Owner's arguments do not undermine the arguments and evidence presented in the Petition. In our view, the description in the reference itself, relied upon in the Petition, shows that under the construction of limitation [b] we have adopted, the limitation is taught by [the] Bollish [reference].

Dec. 23. As to limitation [f], we noted that "although Dr. Bollish's testimony is confusing and gives us some pause, we have considered the entirety of the evidence before us and we conclude that the description in the

reference itself shows that limitation [f] is taught by Bollish.” *Id.* at 26. Courts and tribunals properly discount expert testimony that is at odds with a patent’s disclosure, as we did here. *See, e.g., Ericsson Inc. v. Intellectual Ventures I LLC*, 890 F.3d 1336, 2018 WL 2407172, at *7 (Fed. Cir. 2018) (“To contradict a reference, an unsupported opinion is not substantial evidence.”); *Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1378 (Fed. Cir. 2017) (“[W]e must disregard the testimony of an expert that is plainly inconsistent with the record. . . .”).

The success of Petitioner’s obviousness case does not depend on Dr. Bollish’s testimony. “No rule requires a Petition to be accompanied by any declaration, let alone one from an expert guiding the Board as to how it should read prior art.” *Belden v. Berk-Tek LLC*, 805 F.3d 1064, 1079 (Fed. Cir. 2015). In this case, Petitioner did present a short declaration from Dr. Bollish (Ex. 1003) with its Petition, but as we noted in the Decision, Petitioner did not rely on Dr. Bollish’s testimony for the arguments presented in the Petition as to why the Bollish reference teaches the limitations in question. *See* Dec. 23 (citing Pet. 17–18). In its Rehearing Request, Patent Owner argues that the absence of any citation to Dr. Bollish’s testimony in the Petition’s arguments as to why the Bollish reference teaches the limitations “only reinforces . . . that the Petition relies exclusively on attorney argument,” while Patent Owner’s position was supported by testimony from both experts. Req. Reh’g 5. We disagree that Petitioner’s argument relied exclusively on attorney argument, because the Bollish reference itself constitutes persuasive evidentiary support. Indeed, as we also pointed out on the Decision, this is not a case that hinged on the credibility of the experts because the technology described in the challenged

patent and the cited references is easy to understand. *See* Dec. 18.

Accordingly, Patent Owner does not persuade us that we erred by overlooking or misapprehending Dr. Bollish's testimony.

IV. CONSTRUCTION OF THE "MEDICATION ALGORITHM" TERM

Patent Owner argues that with respect to the limitation [b] of claim 1 ("programming the infusion pump with a medication algorithm"), it was incumbent on the Board "to provide an explicit construction . . . such that the parties and any appellate review panel can understand, without resorting to speculation, how the Board interpreted the relevant limitations when applying the prior art in its obviousness determination." Req. Reh'g 12. According to Patent Owner, we did not fulfill that obligation because we "rejected both of the constructions offered by the parties without offering an explicit construction of [our] own." *Id.*

We disagree that we failed to construe the claim limitation. Our analysis of the parties' dispute on the proper construction of that claim term occupied approximately seven pages of our Final Decision. *See* Dec. 9–16. We concluded that section by stating:

[W]e generally accept Petitioner's arguments regarding the proper construction of this phrase and conclude that the broadest reasonable interpretation of "programming the infusion pump with a medication algorithm" encompasses a clinician entering parameters into the pump for an infusion protocol to govern administration of medication to the patient.

Id. at 16.

Patent Owner contends that "by not offering its own explicit construction for the term and instead only acknowledging one vaguely defined activity that it deems would be covered by the broadest reasonable construction, the Decision leaves the actual scope and meaning of limitation

1[b] nebulous and left to speculation.” Req. Reh’g. 13.

Patent Owner’s argument is predicated on the notion that a proper claim construction must delineate boundaries fully encircling the scope of a disputed claim term, yet Patent Owner cites no authority in support of that understanding. To the contrary, one of Patent Owner’s cited cases explains that “only those terms need be construed that are in controversy, and ***only to the extent necessary to resolve the controversy.***” *Vivid Techs, Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (cited at Req. Reh’g 13). Because the focus of claim construction is on resolving the disputed issues rather than “purg[ing] every shred of ambiguity,” *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 806 (Fed. Cir. 1999), the Federal Circuit has held that “[w]here a district court has resolved the questions about claim scope that were raised by the parties, it is under no obligation to address other potential ambiguities that have no bearing on the operative scope of the claim.” *GPNE Corp. v. Apple Inc.*, 830 F.3d 1365, 1372 (Fed. Cir. 2016). Relatedly, the Federal Circuit has declined to resolve purported claim construction disputes when the dispute does not affect the case’s outcome. *See EmeraChem Holdings, LLC v. Volkswagen Group of Am., Inc.*, 714 Fed.Appx. 995, 997 (Fed. Cir. 2017) (“We need not resolve whether the Board should have adopted a broader construction because it would not affect the outcome of the IPR.”).

The Federal Circuit routinely construes claims or affirms constructions that, like the one we adopted in our Decision, state in an open-ended fashion what the claim scope encompasses. *E.g.*, *Sumitomo Dainippon Pharma Co. v. Emcure Pharm. Ltd.*, 887 F.3d 1153, 1157 (Fed. Cir. 2018) (“[T]he plain claim language and specification demonstrate that,

at a minimum, claim 14 covers what it depicts: the (–)-enantiomer. This suffices to resolve the parties’ dispute. . . .”); *Knowles Elecs. LLC v. Cirrus Logic, Inc.*, 883 F.3d 1358, 1362–65 (Fed. Cir. 2018) (finding that the Board properly construed “package” when it determined that, under the broadest reasonable interpretation, the term “may refer to chip assemblies that possess any type of second-level connection mechanism” and was not limited to packages produced from two specifically identified mounting methods); *Paice LLC v. Ford Motor Co.*, 881 F.3d 894, 902 (Fed. Cir. 2018) (agreeing with the Board’s construction that “abnormal and transient conditions” captures starting the engine and stopping the engine); *Monsanto Tech. LLC v. E.I. DuPont de Nemours & Co.*, 878 F.3d 1336, 1342 (Fed. Cir. 2018) (“[W]e agree with the PTAB’s finding that a person having ordinary skill in the art . . . would reasonably consider ‘about 3%’ to encompass a range that includes 4%.”) (Fed. Cir. 2018).

The construction we adopted fully resolved the parties’ dispute, because the central issue was whether a clinician’s entry of parameters that govern administration of a medication, as disclosed in the Bollish reference, was within the scope of the “programming” limitation. Thus, we are also unpersuaded by Petitioner’s second argument for rehearing.

V. ORDER

Accordingly, it is

ORDERED that Patent Owner’s Request for Rehearing is *denied*.

IPR2016-01463
Patent 6,231,560 B1

For PETITIONER:

Kurt Niederluecke
Adam Steinert
Nikola Datzov
FREDRICKSON & BYRON, P.A.
kniederluecke@fredlaw.com
asteinert@fredlaw.com
ndatzov@fredlaw.com

For PATENT OWNER:

Denis Sullivan
Thomas Hoehner
BARCLAY DAMON, LLP
dsullivan@barclaydamon.com
thoehner@barclaydamon.com