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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS, INC.,
Petitioner,

v.

HARRY HESLOP & SPORTBRAIN HOLDINGS LLC,
Patent Owner.

Case IPR2016-01464
Patent 7,454,002

Before KARL D. EASTHOM, JEFFREY S. SMITH, and PATRICK M. BOUCHER, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION
On Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Patent Owner, Harry Heslop & Sportbrain Holdings LLC, filed a Request for Rehearing (Paper 30, "Req. Reh'g") of our Final Written Decision of *Inter Partes* Review ("Final Written Decision") (Paper 29, "Dec."), dated February 6, 2018, which held claims 1–16 of US Patent No. 7,454,002 (Ex. 1001, "the '002 patent") unpatentable.

In its Request, Petitioner argues that the Final Written Decision (a) introduced a new ground of rejection, (b) misapprehended Patent Owner's arguments regarding a draft application, and (c) was wrong about determining the draft application did not disclose transmitting data periodically. Req. Reh'g 1–8.

For the reasons set forth below, Petitioner's Request for Rehearing is denied.

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." An abuse of discretion may be determined if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *See Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). The request must identify, with specificity, all matters that the moving party believes the Board misapprehended or overlooked. See 37 C.F.R. § 42.71(d). Section 42.71(d) further provides that the request must identify where each matter was previously addressed.

III. DISCUSSION

A. Patent Owner's contention that the Board introduced a new ground of rejection

Patent Owner contends the Board improperly introduced a new third embodiment of Vock as evidence that the first embodiment of Vock may be modified with the second embodiment of Vock. Req. Reh'g 2–3. According to Patent Owner, the newly cited embodiment by the Board is not gated to measure step data, but rather, measures performance data. *Id.* at 3.

Patent Owner contends we overlooked Patent Owner's argument that performance data cannot be measured with the gated, second embodiment of Vock. *Id.* at 3–4. Patent Owner presented this argument in the Patent Owner's Response, which we summarized in our Decision. *See* Dec. 15–16 (citing PO Resp. 15–27). In our Decision, we responded by summarizing Petitioner's position, and agreeing with Petitioner:

> Petitioner contends that Figures 1 and 21 of Vock do not disclose distinct embodiments, but rather, disclose calibrating the system differently for different sports. Reply 4–5. In particular, Petitioner contends that Vock discloses that a user can "toggle to data corresponding to the desired performance data," and can calibrate the accelerometer-based sensing unit, such as a power sensing unit, 620 as shown in Figure 21, to serve as a pedometer for joggers. Reply 5–6 (citing Ex. 1006, 9:30–32, 12:23–25, 14:29–31, 17:1–3, 47:29–30, 50:4–5, and 50:17–18).
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> Petitioner also contends that the Petition does not assert that it would have been obvious to design a system that is measuring both steps and airtime, drop distance, power, or speed. Reply 12. Rather, Petitioner contends that Dr. Eldering explained that it would have been obvious to modify the sensing unit of Vock to measure and transmit the number of steps taken by a user, and to modify the base station of Vock to provide feedback based on the number of steps, in light of the teachings of Smith. Reply 12–13 (citing Ex. 1009 ¶¶ 50–52).

> We determine that Patent Owner's contention that Vock teaches away from using the pedometer of system 620 shown in Figure 21 with the system shown in Figure 1 is inconsistent with Vock's disclosure that "system 620 [shown in Figure 21] is useful to joggers who can gate it to serve as a pedometer" and that "[d]ata may also be acquired by the accelerometer and telemetered to the electronics 626 via an RF link 631 back to a remote base 632 for storage and processing (e.g., such as the base station 70, FIG. 1)." Ex. 1006, 50:5, 49:21–23, and Fig. 21.
>
> We determine that the Petition and supporting testimony of Dr. Eldering show that it would have been obvious to a person of ordinary skill in the art to modify the sensing unit of Vock to measure and transmit the number of steps taken by a user, and to modify the base station of Vock to provide feedback based on the number of steps, in light of the teachings of Smith, for the benefit of providing a user with additional information with which to quantitatively assess performance during a physical activity, and that such modifications would have been accomplished with a high chance of success. *See* Ex. 1009 ¶¶ 50–52.

Dec. 16–17. In our Decision, we relied on the Petition and supporting testimony of Dr. Eldering to determine that it would have been obvious to a person of ordinary skill in the art to modify the sensing unit of Vock to measure and transmit the number of steps taken by a user, and to modify the base station to provide feedback based on a number of steps, in light of the teachings of Smith. Dec. 17 (citing Ex. 1009 ¶¶ 50–52).

In addition, we also agreed with Petitioner's position on whether the system of Figure 21 and the system of Figure 1 are distinct embodiments. As we highlighted in our Decision, Petitioner contended that Figures 1 and 21 of Vock do not disclose distinct embodiments, but rather, disclose calibrating the system differently for different sports. Dec. 16 (citing Reply 4–5). To support this contention, Petitioner contended that Vock discloses a

user can "toggle to data corresponding to the desired performance data," and can calibrate the accelerometer-based sensing unit, such as a power sensing unit, 620 as shown in Figure 21, to serve as a pedometer for joggers. Reply 5–6 (citing Ex. 1006, 9:30–32, 12:23–25, 14:29–31, 17:1–3, 47:29–30, 50:4–5, and 50:17–18).

To the extent that our Decision did not include language explicitly saying we agree with Petitioner's contentions and adopt the Petitioner's reasoning on this point, we do so now. We determine that Figures 1 and 21 of Vock do not disclose distinct embodiments, but rather, disclose calibrating the system differently for different sports, so that a user can toggle to data corresponding to the desired performance data, and can calibrate the accelerometer-based sensing unit, such as a power sensing unit 620, as shown in Figure 21, to server as a pedometer for joggers. Ex. 1006 9:30–32, 12:23–25, 14:29–31, 17:1–3, 47:29–30, 50:4–5, and 50:17–18.

Patent Owner states that our Decision highlighted Vock's disclosure of system 620 of Figure 21 transmitting data to base station 70 of Figure 1. Req. Reh'g 2 (citing Dec. 17). However, this finding is merely cumulative to our other findings, which independently support our conclusion. Our cumulative finding that Vock alone discloses a sensing unit of Figure 21 transmitting data to the base station of Figure 1 was not a new ground of rejection, but rather, addressed the weight of Patent Owner's argument that Vock teaches away from transmitting data from the pedometer of system 620 shown in Figure 21 to the base station shown in Figure 1.

However, even without this cumulative finding, we relied on the Petition and supporting evidence in determining that it would have been obvious to a person of ordinary skill in the art to modify the sensing unit of

Vock to measure and transmit the number of steps taken by a user, and to modify the base station to provide feedback based on a number of steps, in light of the teachings of Smith, as discussed above and in our Decision.

B. Patent Owner's contention that the Board misapprehended Patent Owner's argument about the status of the December 20, 1999 draft of the '142 Application

Patent Owner contends that neither Patent Owner nor the Declarants ever stated that the December 20, 1999 draft of the '142 application was the same as the December 2, 1999 draft of the '142 application. Req. Reh'g 4–5. Rather, Patent Owner contends that no new matter was added to the December 20, 1999 draft of the '142 application. *Id.* at 5.

Patent Owner's contention misconstrues the reasoning provided in the Decision. As we wrote in our Decision, Rule 131 requires original exhibits of records, or photocopies thereof, to accompany and form part of the affidavit or declaration, or their absence must be satisfactorily explained. Dec. 33. Here, the original December 2, 1999 draft of the '142 application, or a photocopy thereof, does not accompany and form part of the Rule 131 declaration of the inventor, and neither the declaration nor Patent Owner's argument satisfactorily explains its absence, as required by 37 C.F.R. § 1.131(b). Dec. 33–34 (citing Ex. 2001).

C. Patent Owner's contention that the December 20, 1999 draft discloses "periodically transmitting"

To show conception of "periodically transmitting the personal data from the wireless communication device to a network server over a wireless network," Patent Owner relied, *inter alia*, on page 3, lines 15–20 of the '142

application. *See* Req. Reh'g 6. The cited section of the '142 application discloses that the

> user can download data to the fitness system workstation by telephoning the fitness system workstation, holding the pulse code output against the telephone and actuate an appropriate push button on the keyboard to transfer data. At intervals, the fitness system workstation generates detailed reports relating to the user's performance.

Ex. 2001, Exhibit B, 3:15–20. Patent Owner contends that a person of ordinary skill would recognize that a workstation that generates reports at intervals contemplates transmission of data to the workstation from time to time. Otherwise, the workstation would use the same data to generate the same report over and over again. Req. Reh'g 7.

However, the claim limitation we addressed in our Decision recites "periodically transmitting the personal data from the wireless communication device to a network server over a wireless network." We determined that the cited disclosure of a user telephoning a workstation to transfer data does not show conception of "periodically transmitting the personal data from the wireless communication device to a network server over a wireless network" as claimed. Dec. 31–32.

Accordingly, the Decision did not misapprehend or overlook any arguments or evidence presented by Patent Owner.

IV. CONCLUSION

For the foregoing reasons, Patent Owner has not shown that the Board abused its discretion or overlooked or misapprehended a matter in determining Petitioner has shown by a preponderance of evidence claims 1–16 of the '002 patent are unpatentable.

V. ORDER

Accordingly, it is

ORDERED that the Request for Rehearing is denied.

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