

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ICON HEALTH & FITNESS, INC.,
Petitioner,

v.

NAUTILUS, INC.,
Patent Owner.

Case IPR2017-00494
Patent 7,632,219 B2

Before BARRY L. GROSSMAN, BART A. GERSTENBLITH, and
ROBERT L. KINDER, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

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

I. INTRODUCTION

ICON Health & Fitness, Inc. (“Petitioner”) filed a Request for Rehearing (Paper 10, “Req. Reh’g”) of our Decision Denying Institution of *Inter Partes* Review (Paper 9, “Decision” or “Dec.”), dated July 10, 2017. The Petition raised four grounds challenging claims 1–4 and 6–20 of U.S. Patent No. 7,632,219 B2 (“the ’219 patent”). We determined that Petitioner had not established a reasonable likelihood that it would prevail in showing the unpatentability of the claims based on any of the challenges. Dec. 2, 16.

In particular, we first construed “first means” and “second means” as invoking § 112, ¶ 6, as proposed by Petitioner and Patent Owner. Dec. 9. Second, we found that even if we accepted Petitioner’s identification of the alleged corresponding structure, material, or acts, Petitioner’s analysis failed to show that the prior art structures were the same or equivalent. *Id.* at 15–16 (discussing Maresh-I and Stearns). Rather, Petitioner’s analysis focused entirely on the functional language of these claim elements without addressing the corresponding structure. *Id.*

Petitioner contends that we misapprehended or overlooked two issues: (1) analysis in the Petition and supporting evidence showing how the prior art includes the same or an equivalent structure that performs the same functions as the “first means” and “second means” (Req. Reh’g 3–7), and (2) identification of corresponding structure in Petitioner’s claim construction (*id.* at 7–9).

For the reasons stated below, Petitioner’s rehearing request is *denied*.

II. STANDARD OF REVIEW

Pursuant to 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 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). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked, and the place where each matter was addressed previously in a motion, opposition, or reply. *See* 37 C.F.R. § 42.71(d).

III. DISCUSSION

Petitioner’s Alleged Analysis and Evidence Regarding the Same or Equivalent Structures

Petitioner contends that we misapprehended or overlooked discussion in the Petition and Mr. Ganaja’s declaration showing how the prior art includes the same structure that performs the same function as the “first means” and “second means” of claim 1. Req. Reh’g 3–4. Petitioner contends that it identified crank arms 28 and 30 as well as reciprocator 126 with a pulley mounted on the rear stanchion as structures corresponding to these means-plus-function limitations. *Id.* at 4. Additionally, Petitioner argues that the Petition presented evidence to show that the crank arms of the ’219 patent were the same as, or equivalent to, structures identified in each of Maresh-I (radially displaced pins of cranks 760) and Stearns (left and right rotatable connections between rollers 2023 and cranks 2020). *Id.* at 4–7.

We disagree. As we explained in our Decision, Petitioner’s analysis focuses on the functional language of these claim limitations and fails to explain how the structures of Maresh-I and Stearns are the same as, or equivalent to, those identified in the ’219 patent. Dec. 15–16. For example, Petitioner’s discussion of Maresh-I equates the claimed “first means” and “second means” with Maresh-I’s “radially displaced pins of cranks 760,” but fails to make any argument explaining how these are the same or equivalent structures. *See* Pet. 13–14.

Petitioner also points to paragraphs 37 and 90 of Mr. Ganaja’s declaration where he testifies that Maresh-I’s radially displaced pins are crank arms and that a connection between rollers 2023 and cranks 2020 is the crank arm in Stearns. Req. Reh’g 5–6 (discussing Ex. 1006 ¶ 37), 6 (discussing Ex. 1006 ¶ 90). There is no question that Mr. Ganaja’s testimony in these paragraphs addresses the issues that we found lacking in the Petition. The problem for Petitioner, however, is that the Petition itself did not include these arguments equating the structures as Mr. Ganaja did. Citing to these paragraphs of Mr. Ganaja’s declaration without providing any explanation of the significance thereof in the Petition itself is insufficient. *See* 37 C.F.R. § 42.6(3) (“Arguments must not be incorporated by reference from one document into another document.”). *See also DeSilva v. DiLeonardi*, 181 F.3d 865, 866–67 (7th Cir. 1999) (“A brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.”).

Accordingly, we did not misapprehend or overlook discussion in the Petition regarding these structures.

Identification of Corresponding Structure in Petitioner's Claim Construction

Petitioner contends that we misapprehended or overlooked structure identified in the claim construction section of the Petition for performing the function attributed to the “first means” and “second means” as recited in claim 1. Req. Reh’g 7–9. According to Petitioner, its discussion made it “abundantly clear that the structure identified . . . is the crank arms 28 and 30.” *Id.* at 8.

As discussed in our Decision, Petitioner identified “two potential means”: (1) “vertically reciprocating motion of the foot links produced by the rotation of the crank arms 28 and 30,” and (2) “a ‘reciprocator 126’ with a pulley mounted on the rear stanchion.” Dec. 11 (quoting Pet. 3). We pointed out that it was unclear from Petitioner’s identification of the first “potential means” whether Petitioner intended to refer to (a) the foot links; (b) the crank arms; or (c) some combination of the foot links and the crank arms. *Id.* at 12. Petitioner’s further explanation, in its Request for Rehearing, does not remedy the Petition’s deficient identification of structure. If Petitioner wanted to identify solely crank arms 28 and 30 as corresponding structure, that would have been very simple to do. Petitioner did not need to identify the entire phrase “vertically reciprocating motion of the foot links produced by the rotations of the crank arms 28 and 30” and thereby include the additional structure of the foot links. Thus, we did not overlook Petitioner’s identification of the corresponding structure and any misapprehension on our part was solely the result of the language used by Petitioner.

Additionally, Petitioner’s argument on rehearing is inapposite because we specifically found that “we need not determine which structure(s)

corresponds to the recited functions because Petitioner's analysis of Maresh-I and Stearns is deficient for the reasons discussed" later in the Decision. Dec. 13. Those reasons pertained to deficiencies in Petitioner's analysis of whether the same or equivalent structures were disclosed in the prior art. Accordingly, even if we had misapprehended Petitioner's position, and we did not, any alleged misapprehension did not impact our determination that the analysis set forth in the Petition failed to establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of the challenged claims.

IV. ORDER

For the reasons explained, it is hereby ORDERED that Petitioner's request for rehearing is *denied*.

IPR2017-00494
Patent 7,632,219 B2

For PETITIONER:

John Gadd
Mark Ford
Adam Smoot
MASCHOFF BRENNAN
jgadd@mabr.com
mford@mabr.com
asmoot@mabr.com

For PATENT OWNER:

Andrew Mason
John Vandenberg
Garth Winn
KLARQUIST SPARKMAN, LLP
andrew.mason@klarquist.com
john.vandenberg@klarquist.com
garth.winn@klarquist.com