

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PARROT S.A., PARROT DRONES S.A.S. and PARROT INC.,
Petitioner,

v.

QFO LABS, INC.,
Patent Owner.

IPR2018-01690
Patent 9,904,292 B2

Before MEREDITH C. PETRAVICK, HYUN J. JUNG, and
SCOTT C. MOORE, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request on Rehearing of Final Written Decision
37 C.F.R. § 42.71(d)

I. INTRODUCTION

QFO Labs, Inc. (“Patent Owner”) requests rehearing of our Final Written Decision (Paper 40, “Decision” or “Final Dec.”) in IPR2018-01690, in which we (1) determined that Parrot S.A., Parrot Drones S.A.S., and Parrot Inc. (collectively, “Petitioner”) had shown by a preponderance of the evidence that claims 13–17 of U.S. Patent No. 9,904,292 B2 (Ex. 1001, “the ’292 patent”) are unpatentable, (2) granted Patent Owner’s motion to amend to cancel claims 1–10, and (3) denied Patent Owner’s contingent motion to amend to substitute claims 21–23. *See* Paper 41 (“Rehearing Request” or “Req. Reh’g”).

In its Rehearing Request, Patent Owner contends (1) the Board’s finding of unpatentability of substitute claims 21–23 is based on an erroneous construction of the claim term “orientation control scheme” and (2) the Board erred in evaluating the testimony of Patent Owner’s expert, Mr. Condon. *See id.* at 1. In addition, Patent Owner attempts to raise Appointments Clause challenges implicated by the Federal Circuit’s decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019).

II. ANALYSIS

The party challenging a decision in a request for rehearing bears the burden of showing the decision should be modified as set forth in 37 C.F.R. § 42.71(d), which provides in relevant part:

A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The 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.

See also Req. Reh’g. 4 (quoting, in part, 37 C.F.R. § 42.71(d)). With this in mind, we address Patent Owner’s arguments below.

A. Construction of “Orientation Control Scheme”

In Patent Owner’s Motion to Amend (Paper 24, “Mot.”), Patent Owner proposed substitute claims 21–23, which each include, *inter alia*, “an orientation control scheme.” *See* Mot. 26–30 (Claims App.); *see also* Final Dec. 64–66. According to Patent Owner, “[t]he Board overlooked and did not address the plain and ordinary meaning of . . . the claimed ‘orientation control scheme.’” Req. Reh’g. 1. Specifically, Patent Owner contends that “the Board ignored express claim limitations and, as a result, construed the ‘orientation control scheme’ of the substitute claims too broadly,” which resulted in the erroneous conclusion that “the proposed combination would arrive at the claimed invention.” *Id.* at 4–5.

Patent Owner argues that the claims “expressly require the claimed ‘orientation control scheme’ be limited to a scope that requires the control system of the RC flying hovercraft craft to automatically and dynamically” achieve and maintain an orientation. Req. Reh’g. 5. Specifically, Patent Owner asserts:

A proper BRI construction of the claimed “orientation control scheme” requires that the craft is automatically stabilized to “*achieve and selectively maintain*” ... [the craft] “in a position that mimics the position of the handheld structure” ... “*without any additional communications from the controller being*

required for the user to control moment-to-moment balance and stabilization of the RC flying hovercraft.

Id.

Patent Owner contends that “the Board used an unreasonably broad interpretation of ‘position,’” because the Board construed “position” as a verb, not a noun. *Id.* at 6 (citing Final Dec. 33). Patent Owner argues that “[t]he proper scope of ‘orientation control scheme’ under the BRI standard does not include [Louvel’s] pilot-in-the-loop rate control scheme,” and instead “accomplishes what the Summary of Invention of the ’292 patent states: ‘The homeostatic hover control system removes the need for the pilot to be concerned with moment-to-moment balance/stabilization and control of the craft and focus instead only on the intended motion in which the craft is to be directed.’” *Id.* at 7 (citing Paper 23 at 6; Ex. 1001, 6:41–45).

Patent Owner essentially repeats several arguments from its Patent Owner’s Motion to Amend in its Rehearing Request. *Compare* Mot. 11–12, *with* Req. Reh’g. 7. We considered these arguments in our Decision, and Patent Owner’s arguments express disagreement with our interpretation of “orientation control scheme” but do not show how an argument was overlooked or misapprehended. *See* Final Dec. 74, 84–86.

Patent Owner supplements its prior arguments with contentions that we construed “position” as a verb, not a noun. *See* Req. Reh’g. 6. Patent Owner does not identify where these additional contentions were previously presented, as required under 37 C.F.R. § 42.71(d). Thus, Patent Owner has failed to show that we misapprehended or overlooked these arguments. *See id.*

Even if the additional contentions had been previously presented, our Decision considered Patent Owner’s proposed interpretation of “orientation

control scheme.” *See* Final Dec. 85 (“Even under Patent Owner’s proposed interpretation of ‘orientation control scheme’ (Mot. 11–12), Petitioner persuades us that Louvel and Nagamitsu teach the final recitation of proposed substitute claim 21.”). Patent Owner’s arguments do not show how an argument was overlooked or misapprehended. In any event, we remain convinced that “Patent Owner’s proposed interpretations are not the broadest reasonable interpretation in view of the Specification of the ’292 patent because the Specification does not use these terms or describe state vectors.” *See* Final Dec. 74.

Patent Owner also contends that “the Board’s judgment that the proposed combination arrives at the claimed ‘orientation control scheme’ of the substitute claims is an unreasonable and unsupported judgment.” Req. Reh’g. 7–8. Patent Owner asserts that Louvel’s pilot-in-the-loop rate-control loop “necessarily requires additional communications from the controller” and that the Board “never addressed whether the craft control system must automatically keep the craft balanced and stable in a single position *without any additional communications being required . . . for stabilization.*” *Id.* at 8 (citing Final Dec. 83–84). According to Patent Owner, “[b]ecause the proposed combination admittedly does not modify Louvel’s control loop, it cannot arrive at the claimed invention of the substitute claims as properly construed that require an ‘orientation control scheme,’ not a pilot-in-the-loop control scheme.” *Id.* at 10.

Patent Owner does not identify where it previously presented an argument that an “orientation control scheme” necessarily includes keeping the craft stable and balanced “without any additional communications being required,” as required under 37 C.F.R. § 42.71(d). We could not have

misapprehended or overlooked an argument Patent Owner failed to make. *See id.*; *see also* Paper 24, 11–13. Even if this argument had been previously presented, we “credit[ed] the testimony of Petitioner’s declarant regarding how the asserted references teach [these] limitations . . . because the record supports it.” Final. Dec. 27. In particular, proposed substitute claim 21 proposed to add limitations to claim 1 as follows, with newly added limitations underlined:

causing the control system in the RC flying hovercraft to automatically and dynamically control a thrust produced by each of said thrusters to achieve and selectively maintain the actual orientation of the RC flying hovercraft in a position that mimics the position of the handheld structure in response to the desired orientation communicated to the RC flying hovercraft by the RC controller and the actual orientation determined by the sensor system in the RC flying hovercraft without any additional communications being required for the user to control moment-to-moment balance and stabilization of the RC flying hovercraft, such that the control system in the RC flying hovercraft and the RC controller implement an orientation control scheme.

Mot. 27–28. The first underlined limitation above was added to claim limitation 21[i], which Petitioner’s declarant, Mr. Chowdhary, discussed in paragraphs 99–102 of his declaration. Ex. 1003 ¶¶ 99–102; *see also* Final Dec. 27. There, Mr. Chowdhary declared that Louvel’s “closed loop control” automatically and dynamically controlled the thrust of each thruster, to maintain moment-to-moment balance and stabilization “without additional communication by the user.” *Id.* In the Final Decision, we pointed to where Mr. Chowdhary’s declaration finds support. Final Dec. 27 (citing Ex. 1004, Abstract, ¶¶ 29, 30, 38, 42–46, 75–78, 91, 96–121, Figs. 1–3, 13, claim 9; Ex. 1006, 17–20, 24–26, Figs. 2, 5; Ex. 1010, 12:10–30, 15:25–46, Fig. 4; Ex. 1012, Fig. 50; Ex. 1013, Figs. 1–7; Ex. 1015). The

second underlined limitation refers to the “orientation control scheme” addressed above.

B. Evaluation of Testimony

Patent Owner further contends that the Board erred in evaluating the testimony of Patent Owner’s expert, Mr. Condon, because (1) “the Board evaluated his testimony under the wrong standard,” (2) “the Board ignored . . . objective record evidence that corroborates Mr. Condon’s testimony,” and (3) the Board’s treatment of Mr. Condon’s testimony is contrary to that “in previous IPRs without any notice or explanation for this change in position, and therefore violates due process.” Req. Reh’g. 10.

As to the first contention, Patent Owner presents arguments that the Board improperly evaluated Mr. Condon’s “testimony under the standards for a fact witness (requiring corroboration under FRE 701), instead of for an expert witness (requiring analysis of underlying facts and data under FRE 702).” *Id.* at 11. According to Patent Owner, this resulted in the Board attributing little or no weight to certain portions of Mr. Condon’s testimony. *Id.* (citing Final Dec. 63–64).

FRE Rule 702 provides, in part, “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: . . . (b) the testimony is based on sufficient facts or data.” Fed. R. Evid. 702. Our consideration of Mr. Condon’s testimony is consistent therewith, because we stated that “when objective record evidence does not sufficiently corroborate Mr. Condon’s testimony, we attribute little or no weight to his testimony, but when objective record evidence sufficiently corroborates Mr. Condon’s testimony, we consider it in our analysis.” Final Dec. 63–64. Thus, Mr. Condon’s

testimony was considered to the extent that it was based on sufficient facts or data. Patent Owner's arguments indicate disagreement with our consideration of Mr. Condon's testimony but do not show how we overlooked or misapprehended any argument.

Patent Owner further contends that we "improperly ignored or overlooked substantial portions of Mr. Condon's declaration . . . that provide supporting evidence for his opinions of non-obviousness." Req. Reh'g. 12 (citing ¶¶ 165, 171, 172). Patent Owner asserts that "the Board acknowledged that Patent Owner cited to these portions of Mr. Condon's declaration and the exhibits," in other parts of the Final Decision. *Id.* at 13 (citing Final. Dec. 44 ("[Paper 34] 10–11 (citing Ex. 2015 ¶¶ 27–40; Ex. 2017; Ex. 2021; Ex. 2022; Ex. 2023; Ex. 2031; Ex. 2032; Ex. 2033; Ex. 2037, 45, 56, 59–60, 102, 134, 138).")). Patent Owner's apparently contradictory assertions as to our consideration of Mr. Condon's testimony do not show how we overlooked or misapprehended any argument.

Patent Owner further contends that even though the potential bias of Mr. Condon's expert testimony was previously raised, whether Mr. Condon was an "interested witness" whose testimony should be discounted was not an issue in related proceedings. Req. Reh'g. 13–14 (citing *Parrot S.A. v. QFO Labs, Inc.*, IPR2016-01550, Paper 41 at 5 (Aug. 21, 2017) (Petitioners' Reply); *Parrot S.A.*, Paper 43 at 7 (Sept. 15, 2017) (Patent Owner's Reply to Opposition to Motion to Amend); *Parrot S.A.*, Paper 60 at 22, 23, 30, 31, 36, 53–55, 57, 59 (PTAB Feb. 15, 2018) (Final Written Decision)). According to Patent Owner, had this issue previously been raised, "Patent Owner could have engaged a different expert witness in this proceeding," and that raising

the issue now “is fundamentally unfair and a violation of due process.” *Id.* at 14.

The critical question for compliance with the Administrative Procedure Act and due process is whether a party received “adequate notice of the issues that would be considered, and ultimately resolved, at that hearing.” *Genzyme Therapeutic Prods. Ltd. P’ship v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1367 (Fed. Cir. 2016) (quoting *Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005)). We find Petitioner’s Reply argument that Patent Owner’s declarant is “biased” and that his testimony should be given little “weight,” adequately put Patent Owner on notice of Petitioner’s arguments on this issue. *See* Paper 29 at 6. Indeed, this issue was fairly raised and Patent Owner was given a fair opportunity to address its import in this proceeding, and employed that opportunity in its Sur-Reply. *See* Paper 34 at 4. Patent Owner, thus, received adequate notice that bias in Mr. Condon’s testimony would be considered.

Moreover, the mere fact that in five previous decisions the Board did not address whether Mr. Condon’s testimony might be biased is of no moment. Patent Owner has not alleged that our determination here was unclear or incomprehensible.

In view of the foregoing, we find that our determination did not amount to an arbitrary and capricious action, but instead followed the basic principles of fairness and due process towards a “just, speedy, and inexpensive resolution.” 37 C.F.R. § 42.1(b).

C. Appointments Clause

Patent Owner contends that this proceeding should be reheard by another, duly appointed panel. Req. Reh’g. 14. Patent Owner correctly

notes that “the issue . . . was briefly raised and then stricken during oral argument because it was not properly presented to the Board under the Rules.” *Id.* (citing Paper 39, 29:22–24).

According to Patent Owner, “the F[inal] W[ritten] D[ecision] exceeds the scope of the Patent Trial and Appeal Board’s authority and violates the Constitution’s Appointments Clause.” *Id.* (citing U.S. Const. art. II, § 2, cl. 2). Thus, Patent Owner raises the Appointments Clause challenges implicated by the Federal Circuit’s decision in *Arthrex*, 941 F.3d at 1335 “to preserve the issue for appeal.” *Id.*

We decline to consider Patent Owner’s constitutional challenge because the issue has been addressed by the Federal Circuit in *Arthrex*, 941 F.3d at 1328 (expressly limiting its holding “to those cases where final written decisions were issued (prior to *Arthrex*)”). *See also Caterpillar Paving Prod. Inc. v. Wirtgen Am., Inc.*, 957 F.3d 1342, 1342–1343 (May 6, 2020) (“The court in *Arthrex* considered and rejected that argument, expressly limiting its holding ‘to those cases where final written decisions were issued.’”) (quoting 941 F.3d at 1340). Our Decision was entered February 20, 2020, after the Federal Circuit issued its October 2019 decision in *Arthrex* (*see* 941 F.3d at 1320).

III. CONCLUSION

For the foregoing reasons, Patent Owner has not shown that the Final Written Decision misapprehended or overlooked any matters. 37 C.F.R. § 42.71(d). Accordingly, Patent Owner’s Request for Rehearing is *denied*.

Final Outcome of Final Written Decision after Rehearing:

Claim(s)	35 U.S.C. §	References/Basis	Claim(s) Shown Unpatentable	Claim(s) Not shown Unpatentable
1, 6	103	Louvel, Kroo, Nagamitsu		
2, 3, 7, 8	103	Louvel, Kroo, Nagamitsu, Talbert		
4, 9	103	Louvel, Kroo, Nagamitsu, Gabai		
5, 10	103	Louvel, Kroo, Nagamitsu, Rehkemper		
13	103	Louvel, Kroo, Nagamitsu, Hall	13	
15, 17	103	Louvel, Kroo, Nagamitsu, Hall, Talbert	15, 17	
14	103	Louvel, Kroo, Nagamitsu, Hall, Gabai	14	
16	103	Louvel, Kroo, Nagamitsu, Hall, Rehkemper	16	
13	103	Louvel, Kroo, Hall		
15, 17	103	Louvel, Kroo, Hall, Talbert		
14	103	Louvel, Kroo, Hall, Gabai		
16	103	Louvel, Kroo, Hall, Rehkemper		
Overall Outcome			13–17	

Motion to Amend Outcome	Claims
Original Claims Cancelled by Amendment	1–10
Substitute Claims Proposed in the Amendment	21–23
Substitute Claims: Motion to Amend Granted	
Substitute Claims: Motion to Amend Denied	21–23
Substitute Claims: Not Reached	

IV. ORDER

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

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