

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BLAST MOTION, INC, and
TAYLORMADE GOLF COMPANY, INC.
Petitioner,

v.

NEWSPIN SPORTS LLC,
Patent Owner.

Case IPR2019-00537
Patent 8,831,905 B2

Before FRANCES L. IPPOLITO, CHRISTOPHER M. KAISER, and
JOHN R. KENNY, *Administrative Patent Judges*.

KENNY, *Administrative Patent Judge*.

DECISION

Denying Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Blast Motion, Inc. and TaylorMade Golf Company, Inc. (“collectively, Petitioner”) filed a Petition (Paper 1, “Pet.”), requesting an *inter partes* review of claims 1–20 (“challenged claims”) of U.S. Patent No. 8,831,905 B2 (Ex. 1002, “the challenged patent”). Newspin Sports, LLC (“Patent Owner”) filed a Preliminary Response (Paper 7, “Prelim. Resp.”). We denied the Petition and did not institute *inter partes* review. Paper 9 (“Dec.”). Petitioner now requests rehearing of our decision not to institute review. Paper 10 (“Request for Rehearing,” “Req. Reh’g”).

For the reasons below, the Request for Rehearing is *denied*.

II. ANALYSIS

A request for rehearing must identify specifically all matters the requesting party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d). When rehearing a decision on institution, the Board will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c).

A. Hackman

Petitioner argues that we erred in determining that “Hackman does not teach an externally mounted device that avoids any interference with the golfer’s swing; it merely teaches a device that permits use outside an artificial environment in which the golfer is less likely to make a normal swing.” Dec. 17; Req. Reh’g 12. Petitioner argues that, in making this determination, we overlooked Hackman’s disclosure that “[a] need exists for an apparatus which can be used during normal golf activities so as to encourage the golfer to swing in the normal playing manner.” Ex. 1012, 4:26–30; Req. Reh’g 12. We, however, cited this disclosure when we explained “although the cited portion of Hackman recognizes the benefit of ‘encourag[ing] the golfer to swing in the normal playing manner,’ it does not

contrast this with a swing that is encumbered by externally mounted devices that cause the ‘weight, drag, or other swing-related issues’ to which Dr. Paradiso refers. Ex. 1012, 4:7–30; Ex. 1008 ¶¶ 99–100.” Dec. 17. The Request for Rehearing does not cite any disclosure in which Hackman contrasts the swing it permits with one that is encumbered by externally mounted devices that cause weight, drag, or other swing-related issues. Req. Reh’g 12–13. Accordingly, we are not persuaded that we erred in determining that Hackman does not teach an externally mounted device that avoids interference with a golfer’s swing.

B. Exhibit 1017

Petitioner argues that we erred in determining that Exhibit 1017 did not support Dr. Paradiso’s testimony that the weight, drag, and other swing-related issues caused by shaft-mounted devices identified by Farrington were readily overcome. Dec. 17–18; Req. Reh’g 13. Petitioner argues that Exhibit 1017 supports that testimony by Dr. Paradiso because Dr. Paradiso testified that the teachings in wearable systems were applicable to non-wearable systems. Req. Reh’g 13. We, however, are not persuaded by that argument because even if we were to credit that latter testimony, Petitioner has not shown that Exhibit 1017 describes or even suggests any device (wearable or non-wearable) that would be sized so as to avoid the weight, drag, and swing-related issues that Farrington attributes to externally mounted swing analysis devices. *Id.*

C. Kirby

Petitioner argues that we erred in determining that the evidence of record did not sufficiently show that Kirby includes an optional accelerometer or other analog device for swing analysis. Req. Reh’g 14. In making this argument, however, Petitioner does not address our reasons for

concluding that the evidence of record did not provide a sufficient showing: Kirby describes another device as being useful as an analog sensor that does not appear capable of being used for swing analysis (i.e., a range finder), and Kirby expressly teaches that accelerometers, gyroscopes, and angular rate sensors are impractical for swing analysis. Dec. 24–25 (citing Ex. 1013 ¶¶ 15, 105). Accordingly, we are not persuaded that we erred in determining that the evidence of record did not sufficiently show that Kirby includes an optional accelerometer or other analog device for swing analysis.

Petitioner also argues that Kirby only indicates that accelerometers are too slow for detecting the precise moment of contact and, consistent with Kirby’s teachings, accelerometers would be useful for other aspects of swing analysis. Req. Reh’g 15. Petitioner, however, cites nothing in Kirby that suggests that accelerometers would have sufficient speed for other aspects of swing analysis. *Id.* To the contrary, Kirby teaches that accelerometers, gyroscopes, and angular rate sensors all require a slow latching and conversion process, whereas golf involves club head speeds that can reach 250 km/hr. Ex. 1013 ¶ 15. Further, even if speed were not an issue, as we noted, Kirby disparages the use of externally mounted systems due to alignment problems, which Petitioner does not address in its Request for Rehearing. Dec. 23; Ex. 1013 ¶ 14; Req. Reh’g 15. Accordingly, we are not persuaded that the record sufficiently shows that Kirby suggests using accelerometers for swing analysis.

D. Contention that Challenged Claims Were Obvious over Kirby Alone

Petitioner argues that we overlooked its contention for asserted Ground 3 (obviousness over Kirby and Kimber) that Kirby alone would have rendered claims 1, 6–7, 9–12, 14, 16, and 18–19 obvious. Reh’g Req. 2–3.

Petitioner also argues that we overlooked its contention for asserted Ground 4 (obviousness over Kirby, Kimber, and Nusbaum) that Kirby and Nusbaum by themselves would have rendered claim 13 obvious. *Id.* at 3. Petitioner, however, does not identify where in the Petition it contended that Kimber alone would have rendered claims 1, 6–7, 9–12, 14, 16, and 18–19 obvious or that Kirby and Nusbaum by themselves would have rendered claim 13 obvious. *Id.* at 2–3. To the contrary, according to the Petition, the basis for Ground 3 is “Obvious under §103(a) over the combination of U.S. Patent Application Publication 2007/0206837 (‘Kirby,’ EX1013) and Great Britain Patent Application Publication 2430890 (‘Kimber,’ EX1014).” Pet. 4. Similarly, the basis for Ground 4 is “Obvious under §103(a) over the combination of Kirby, Kimber, and Nusbaum.” *Id.* at 5. Accordingly, we are not persuaded that we overlooked any contention that Kirby alone or Kirby and Nusbaum by themselves would have rendered claims 1, 6–7, 9–12, 13, 14, 16, and 18–19 obvious.

E. Farrington’s Disparagement, the Level of Skill in the Art, Background Art, and Reasonable Expectation of Success

Petitioner argues that we overlooked evidence regarding the general knowledge of an ordinarily skilled artisan, background art, and reasonable expectation of success when we determined, for Ground 1 (based on Farrington and Hackman), that Petitioner made an insufficient showing to overcome Farrington’s disparagement of using a swing analysis device mounted on the outside of its golf club. Req. Reh’g 4–7. In the Petition, Petitioner argued that an ordinarily skilled artisan would have overcome that disparagement because an ordinarily skilled artisan “would have been aware of readily-available accelerometers, gyroscopes, and other sensors, that were sufficiently light and compact so that any impact on a swing would be

negligible.” Pet. 42–43 (citing Ex. 1008 ¶¶ 99–100). In support of this assertion, Petitioner cited Dr. Paradiso’s testimony that it would have been possible “to provide a shaft-mounted system that [did] not unduly interfere with the golfer’s swing” and that, “[a]ccordingly, a person of ordinary skill in the art would have recognized that weight, drag, or other swing-related issues caused by shaft-mounted devices were readily overcome.” Ex. 1008 ¶¶ 99–100 (cited by Pet. 43).

As our Decision noted, however, the only support Dr. Paradiso cited for these propositions is a portion of Hackman and a portion of Exhibit 1017. Ex. 1008 ¶¶ 99–100; Dec. 17. In its Request for Rehearing, Petitioner identifies nothing from its evidence of the general knowledge of an ordinarily skilled artisan, background art, or reasonable expectation of success that provides any further support for these propositions. Req. Reh’g 4–7. Instead, Petitioner merely argues that an ordinarily skilled artisan would have recognized some benefits to using a shaft mounted system with a golf club and would have had a reasonable expectation of success for adding such a system to Farrington’s golf club. *Id.* None of that evidence, however, suffices to overcome Farrington’s disparagement. The mere fact that, for general purposes, externally mounted systems may have benefits or could be successfully added to Farrington’s golf club does not demonstrate that, as Dr. Paradiso testified, the weight, drag or other swing-related issues highlighted by Farrington associated with such a system would be readily overcome. Accordingly, we are not persuaded that we overlooked evidence that would overcome Farrington’s disparagement of using a swing analysis device mounted on the outside of its golf club.

F. Kirby's and Kimber's Disparagements, the Level of Skill in the Art, Background Art, and Reasonable Expectation of Success

Petitioner argues that we overlooked evidence regarding the general knowledge of an ordinarily skilled artisan, background art, and reasonable expectation of success when we determined, for Ground 3 (based on Kirby and Kimber), that Petitioner made an insufficient showing to overcome Kirby's disparagement of using accelerometers, gyroscopes and angular sensors for swing analysis and to overcome Kimber's disparagement of placing a swing measurement device near the grip. Req. Reh'g 7–12. None of the evidence cited by Petitioner regarding the level of skill in the art, background art, or a reasonable expectation of success, however, would overcome Kirby's and Kimber's disparagements. *Id.* The mere fact that, for general purposes, accelerometers may have some benefits or that there would be a reasonable expectation that they could be successfully added to Kirby's golf club does not mean that such a modification would avoid the speed and cost issues noted by Kirby or outweigh them. Similarly, the mere fact that for general purposes there may be some advantages to placing an accelerometer near a grip and reasonable expectation that one could be successfully added near a grip would not overcome Kimber's disparagement of placing a swing measurement device near the grip or outweigh that concern. Accordingly, we are not persuaded that we overlooked evidence that would overcome Kirby's disparagement of using accelerometers, gyroscopes and angular sensors for swing analysis and Kimber's disparagement of placing a swing measurement device near the grip.

III. ORDER

It is

ORDERED that the Request for Rehearing is denied.

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