

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLEARH2O, INC.,
Petitioner,

v.

CEVA ANIMAL HEALTH INC.,
Patent Owner.

IPR2020-00039
Patent 8,794,185 B2

Before JAMES A. WORTH, MICHAEL L. WOODS, and
JAMES J. MAYBERRY, *Administrative Patent Judges*.

WOODS, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing of Decision Denying Institution
37 C.F.R. § 42.71

I. INTRODUCTION

A. Background

ClearH2O, Inc., (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of claims 1–15 of U.S. Patent No. 8,794,185 B2 (Ex. 1001, “the ’185 patent”). Pet. 2. We issued a decision denying institution, exercising our discretion under 35 U.S.C. § 325(d). Paper 21 (“Decision” or “Dec.”).

Petitioner filed a timely Request for Rehearing in which it asks that we modify our Decision and institute review of the challenged claims. Paper 22 (“Reh’g Req.” or “Request”).

For the reasons that follow, we *deny* Petitioner’s Request to modify our Decision.

B. References Relied Upon

Petitioner’s challenges rely on the following references (Pet. 4):

Name	Reference	Ex. No.
Lewis	US Pub. No. 2002/0104485 A1, published Aug. 8, 2002	Ex. 1003
Goff	U.S. Pat. No. 883,132, issued Mar. 24, 1908	Ex. 1004
Lee	WO 99/08704, published Feb. 25, 1999	Ex. 1005
Lopez	U.S. Pat. No. 5,474,102, issued Dec. 12, 1995	Ex. 1006
Johnston	U.S. Pat. No. 6,910,446 B2, issued June 28, 2005	Ex. 1007

C. Asserted Grounds

Petitioner contends that claims 1–15 of the '185 patent are unpatentable under the following grounds:

References	Basis	Claims
Lewis, Goff	§ 103(a) ¹	1, 2, 9, 12–15
Lewis, Goff, Lee	§ 103(a)	3–6, 8, 11
Lewis, Goff, Lopez	§ 103(a)	7, 10
Johnston, Lee	§ 103(a)	1–6, 8, 9, 11–15
Johnston, Lee, Lopez	§ 103(a)	7, 10

Pet. 4.

D. Standard for Reconsideration

The party filing a request for rehearing of a decision not to institute trial has the burden of showing a decision should be modified, and the request for rehearing must specifically identify all matters the party believes the Board misapprehended or overlooked and the place where each matter was previously addressed in its papers. 37 C.F.R. § 42.71(d). Therefore, Petitioner bears the burden of establishing that we misapprehended or overlooked the matters that it requests that we review.

II. ANALYSIS

A. Decision Denying Institution

In our Decision, we summarized relevant portions of the prosecution history. *See* Dec. 6–10. We noted that the patent examiner rejected the

¹ Because the challenged claims of the '185 patent have an effective filing date before the effective date of the applicable AIA amendment, we refer to the pre-AIA version of 35 U.S.C. § 103.

claims at least six times, relying primarily on Johnston in one office action (*id.* at 6–7) and relying primarily on Lewis in five other office actions (*id.* at 7–10).

The examiner ultimately allowed the claims, stating that the prior art of record fails to show or render obvious the limitations: a manifold nozzle head wherein the plurality of nozzle openings on the manifold nozzle head approximately spans the length or width of a hatchling tray, dispensing the predetermined volume of the soft gel as small beadlets onto the hatchlings in the hatchling tray at approximately a constant rate, passing the hatchling tray beneath the nozzle openings for even distribution of the beadlets to the hatchlings contained therein, and allowing the hatchlings to consume the beadlets, of the method of claim 1.

Ex. 2001, 677.

B. Petitioner’s Request and the Critical Third Limitation

In its Request, Petitioner argues that the Board erred in two manners.

First, Petitioner argues that “the Board improperly considered [Goff] to be cumulative.” Reh’g Req. 2. Petitioner contends that “the Decision fails to consider the *critical element, the Third Limitation*, and how the newly introduced references are not cumulative to the Third Limitation.” *Id.* at 7 (emphasis added).

Second, Petitioner argues that we improperly considered the *Becton, Dickinson* factors. *Id.* at 8. In particular, Petitioner argues that our analysis failed to consider that the Third Limitation captures differences taught by Johnston and Goff, and not the other cited art. *See id.* at 10 (“The difference between the claim that were not allowed over Lewis, Peterson and Kurtz and the claims that were allowed is minor, and those minor differences are

captured by the Third Limitation and taught by Johnston and, alternatively, Goff.”).

As summarized above, Petitioner focuses its arguments on the so-called “Third Limitation,” which recites, “Passing the hatchling tray beneath the nozzle openings for even distribution of the beadlets to the hatchlings contained therein.” *Id.* at 3.

We address each of Petitioner’s contentions separately, below.

C. Improperly Considered Goff to be Cumulative

The issue is whether we misapprehended or overlooked Goff in our original determination that Goff was cumulative to the art evaluated during prosecution. Petitioner argues, “Unlike Bartlett, Lewis, Peterson, and Kurtz, Goff discloses the critical Third Limitation, which was not considered or addressed in the Decision. Goff is thus not cumulative to the references considered during prosecution.” Reh’g Req. 7.

We disagree for the following two reasons.

First, the Petition does not rely on Goff for disclosing the Third Limitation. Rather, the Petition relies on Lewis for disclosing the Third Limitation. Pet. 24 (Limitation 1.6). In addressing the Third Limitation, the Petition provides *in its entirety*:

Lewis states that “The gel is sprayed over the top of the chicks in a uniform fashion to better ensure uniform distribution of the gel.” As shown in FIG. 1 of *Lewis*, the tray 14 is located beneath nozzle 18 so that the drops of gel 28 (i.e., beadlets) are distributed onto the hatchlings.

Id. (citing Ex. 1003 ¶ 11). The Petition makes no reference to Goff in addressing the Third Limitation, so we do not agree with Petitioner’s assertion that we failed to properly consider Goff in addressing this

limitation. *See* Reh’g Req. 7 (“Goff discloses the critical Third Limitation, which was not considered or addressed in the Decision.”).

Second, and as explained in our Decision, Petitioner’s reliance on Goff is strikingly similar to the examiner’s reliance on Bartlett, Kurtz, and Peterson. *See* Dec. 26, 28. During prosecution, the examiner relied on Lewis for disclosing a majority of the claimed limitations, and relied on Bartlett, Kurtz, and Peterson for teaching nozzles “of approximately uniform size arranged approximately evenly apart along a manifold.” *See id.* at 26 (citing Ex. 2001, 149, 317, 358, 409); *see also id.* at 7–10 (summarizing office actions dated July 30, 2010, October 15, 2010, February 24, 2011, and June 21, 2011, and January 4, 2012). In the Petition, Petitioner also relied primarily on Lewis, relying on Goff for “describ[ing] an apparatus for spraying animals that includes spray nozzles 18 evenly spaced along a linear manifold (top member 16).” Pet. 22 (citing Ex. 1004, 1:72–105, 2:20–58, Fig. 1); *see also id.* at 18–24 (relying primarily on Lewis in challenging claim 1). Petitioner does not persuade us that we misapprehended or overlooked anything in our determination that Goff is cumulative to the art cited during prosecution, namely, Bartlett, Kurtz, and Peterson. *See* Dec. 26.

Accordingly, Petitioner’s first argument is unavailing.

D. Incorrectly Considered Becton, Dickinson Factors

The issue is whether we erred in applying the *Becton, Dickinson* factors. Petitioner contends that, as to the Third Limitation, Goff and Johnston “contain material differences over the references being actively considered at the time claim 1 was allowed.” *See* Reh’g Req. 9; *see also id.* at 13, 15. Petitioner argues that “Johnston was only considered by the

examiner in April 2009, more than 5 years before the Third Limitation was added to claim 1.” *Id.* at 9; *see also id.* at 10.

Petitioner’s argument is not persuasive.

As to Goff, and as discussed above (*supra* Part II.C), Petitioner did not rely on Goff for addressing the Third Limitation, so we fail to see how we overlooked or misapprehended Goff in applying the *Becton, Dickinson* factors in consideration of this limitation.

Turning to Johnston, Petitioner’s argument implies that the examiner erred by overlooking Johnston because more than five years elapsed between the office action applying Johnston (Ex. 2001, 81–96 (Office Action entered April 28, 2009)) and the relevant claim amendment (*id.* at 657–663 (Amendment entered June 4, 2014)). *See* Reh’g Req. 9.

This argument, however, is untimely as it was not presented in the Petition. A Request for Rehearing is not an opportunity to present new arguments and evidence. 37 C.F.R. § 42.71(d) (A request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.”).

In the Petition’s statement as to why we should institute review despite the similarities with the prosecution history, Petitioner only argues,

Goff, Lee, and Lopez were not considered by the Examiner during prosecution of the ‘185 patent. While *Lewis* and *Johnston* were made of record during prosecution of the ‘185 patent, the Examiner did not consider either reference in combination with the other presently identified prior art references. Each ground of rejection presented herein therefore includes one or more prior art references that were not considered during examination.

Pet. 5.

Because the Petition did not argue that the examiner erred in overlooking Johnston, such as by forgetting Johnston, Petitioner's argument in the Request is untimely. *See* 37 C.F.R. § 42.71(d)

For the foregoing reasons, Petitioner's second argument is also unavailing.

III. OUTCOME OF DECISION ON REHEARING

Claims	35 U.S.C. §	References	Denied	Granted
1, 2, 9, 12–15	§ 103(a)	Lewis, Goff	1, 2, 9, 12–15	
3–6, 8, 11	§ 103(a)	Lewis, Goff, Lee	3–6, 8, 11	
7, 10	§ 103(a)	Lewis, Goff, Lopez	7, 10	
1–6, 8, 9, 11– 15	§ 103(a)	Johnston, Lee	1–6, 8, 9, 11– 15	
7, 10	§ 103(a)	Johnston, Lee, Lopez	7, 10	
Overall Outcome			1–15	

IV. CONCLUSION

For the reasons given, Petitioner's Request for Rehearing is *denied*.

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