

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ONE WORLD TECHNOLOGIES, INC.,
d/b/a TECHTRONIC INDUSTRIES POWER EQUIPMENT,
Petitioner,

v.

CHERVON (HK) LIMITED,
Patent Owner.

PGR2020-00061
Patent 10,524,420 B2

Before LINDA E. HORNER, JAMES J. MAYBERRY, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION
Denying Institution of Post-Grant Review
35 U.S.C. § 324

I. INTRODUCTION

One World Technologies, Inc., d/b/a Techtronic Industries Power Equipment (“Petitioner”) filed a Petition requesting a post-grant review of claims 1–15 of U.S. Patent No. 10,524,420 B2 (“the ’420 patent”). Paper 1 (“Pet.” or “Petition”). Chervon (HK) Limited (“Patent Owner”) filed a Preliminary Response. Paper 11 (“Prelim. Resp.”). After receiving our authorization to do so (*see* Paper 7), Petitioner filed a Motion to Update Mandatory Notices to Add Real Parties-in-Interest (Paper 8, “RPI Motion”). Patent Owner filed an Opposition to that Motion (Paper 12, “RPI Opposition”), and Petitioner filed a Reply to the Opposition (Paper 14, “RPI Reply”).

We may not authorize a post-grant review to be instituted “unless . . . the information presented in the petition filed under section 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.” 35 U.S.C. § 324(a).

Upon consideration of the arguments and evidence, we determine Petitioner has not shown that the ’420 patent is eligible for post-grant review. Accordingly, we do not institute a post-grant review of the Challenged Claims of the ’420 patent.

A. Real Parties in Interest

In the Petition, Petitioner states it is the real party-in-interest. Pet. 4.¹ Patent Owner identifies itself and Chervon North America Inc., an exclusive licensee of the ’420 patent, as real parties-in-interest. Paper 4, 1.

¹ In its RPI Motion, Petitioner seeks authorization to update its mandatory notices to add three real parties-in-interest without changing the filing date

B. Related Matters

Both Petitioner and Patent Owner identify the following related case: *Chervon (HK) Limited v. One World Technologies, Inc.*, No. 1:19-cv-01293-LPS (D. Del. filed July 11, 2019). Pet. 4; Paper 4, 1. Petitioner identifies U.S. Patent Nos. 9,060,463 B2, 9,596,806 B2, 9,826,686 B2, 9,986,686 B2, 10,070,588 B2, 10,477,772 B2, and 10,485,176 B2 as related patents also involved in the district court litigation, and U.S. Patent No. 9,648,805 B2 as an unrelated patent involved in the district court litigation. Pet. 4. Petitioner asserts it “is filing IPRs or PGRs against all nine (9) patents.” *Id.*²

Patent Owner identifies the following administrative matters that may affect or be affected by a decision in the proceeding: IPR2020-00883, PGR2020-00059, and PGR2020-00060. Paper 4, 1.

C. The '420 Patent

The '420 patent, titled “Lawncare Apparatus,” issued January 7, 2020, from an application filed August 16, 2016. Ex. 1001, codes (54), (45), (22). It is a continuation of U.S. Application No. 14/048,158, filed on October 8, 2013, now U.S. Patent No. 9,888,627 (“the parent application”). *Id.* at code (63). This parent application claims foreign priority to CN 2012 1 0387914, filed October 15, 2012 (“the CN914 application”), and CN 2012 2 0602040 U, filed May 3, 2013 (“the CN040 application”). *Id.* at code (30); *see also*

of the Petition. RPI Motion, 1 (seeking “to identify Techtronic Industries Co. Ltd., Techtronic Industries North America, Inc., and Homelite Consumer Products, Inc., as real parties-in-interest without admitting that they are, in fact, real parties-in-interest”). Because we deny the Petition for other reasons, we do not decide this motion.

² The other eight petitions are IPR2020-00883, IPR2020-00884, IPR2020-00885, IPR2020-00886, IPR2020-00887, IPR2020-00888, PGR2020-00059, and PGR2020-00060.

id. at 1:5–11 (providing the related application information for the '420 patent).

The invention “relates to garden tools, and more particularly to a lawncare apparatus.” Ex. 1001, 1:15–16. The '420 patent describes that a commonly used lawncare apparatus, such as a walk-behind lawnmower, provides “two ways to transport the lawnmower from a storage room to a lawn.” *Id.* at 1:26–27. The first way to transport the mower is to place the four wheels on the ground and push or pull the mower, and the second way is to lift the mower from the ground. *Id.* at 1:27–30. The '420 patent describes that the first way requires a large storage room and the second way requires a lightweight mower. *Id.* at 1:30–32. The '420 patent aims to “improve operating comfort of the operator, reduce volume of the lawncare apparatus during transporting and/or storage, and further improve convenience of transporting.” *Id.* at 1:38–41.

Figure 1, reproduced below, illustrates an isometric view of a lawncare apparatus where the operating arm of the apparatus is folded. Ex. 1001, 2:11–14.

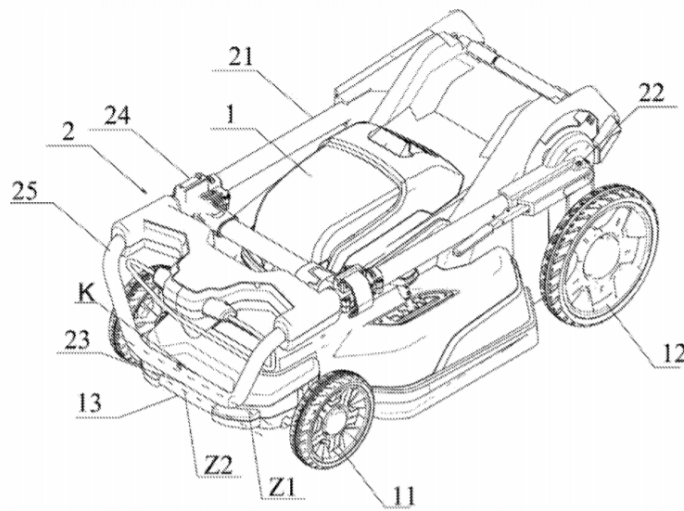


Fig.1

Figure 1 illustrates a hand push lawnmower having main body 1, first pair of wheels 11 and second pair of wheels 12 supporting main body 1, and operating arm 2. Ex. 1001, 2:31–42. Operating arm 2 includes inner pipe 25 and outer pipe 21. *Id.* at 3:24–25. Inner pipe 25 includes cylindrical gripping portion 23. *Id.* at 2:47–48. “[O]uter pipe 21 is rotatably connected to the rear end of . . . main body 1 by pivot shaft 22.” *Id.* at 3:25–27. The other end of outer pipe 21 includes pipe sleeve 24. *Id.* at 3:27–28. The front end of main body 1 includes elongated handle 13. *Id.* at 2:43–45. According to the ’420 patent, “when the operating arm 2 is at the folded position, the user can grip both the gripping portion 23 and the cylinder-shaped handle 13 conveniently.” *Id.* at 2:65–67.

The ’420 patent describes that “[w]hen the lawnmower is stored, the lawnmower stands uprightly for storing in a storage room and the operating arm 2 is folded and only the second wheels 2 [sic 12] are supported on the supporting surface F.” Ex. 1001, 3:65–4:1. The lawncare apparatus can be

pulled obliquely using gripping portion 23 and handle 13 to move the lawnmower to and from a storage room. *Id.* at 4:31–35.

The lawnmower also includes a safety switch mechanism disposed on the operating arm to improve safety of pulling and to avoid “misoperation of the lawncare apparatus.” Ex. 1001, 4:38–40. Figure 3, reproduced below, shows a schematic view of a safety switch assembly of the lawncare apparatus of Figure 1. *Id.* at 2:18–19.

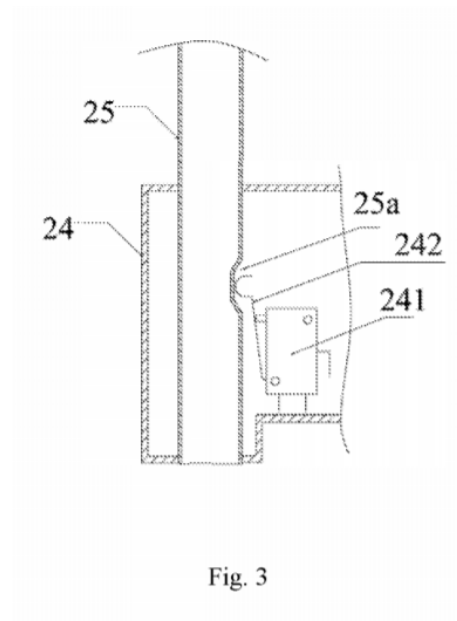


Fig. 3

Figure 3 shows a safety switch assembly disposed in pipe sleeve 24 and safety shift structure 25a disposed in inner pipe 25. *Id.* at 3:29–30. The safety switch assembly includes safety switch 241 and trigger assembly 242 “configured to trigger the safety switch 241 when the safety shift structure 25a of the inner pipe 25 is disengaged from a safety location and reset the safety switch 241 when the safety shift structure 25a returns to the safety location.” *Id.* at 3:31–36. According to the ’420 patent, “safety switch structure 241 is electrically connected to a control circuit for controlling the motor in the main body 1.” *Id.* at 3:36–38.

During transporting of the lawnmower, when inner pipe 25 is retracted into outer pipe 21 and safety shift structure 25a leaves the safety position, the wall of inner pipe 25 presses the contacting spring sheet of trigger assembly 242 to trigger safety switch 241, to prevent the motor from starting if the user operates the operating switch by mistake. *Id.* at 3:51–57.

D. Challenged Claims

Petitioner challenges claims 1–15 of the '420 patent. Pet. 4, 7. Claim 1 is the sole independent claim. Ex. 1001, 4:49–6:26. Claim 1 is illustrative and reproduced below.

1. A lawn care apparatus, comprising:
 - a main body;
 - a plurality of wheels supporting the main body;
 - a cutting blade disposed in the main body;
 - a motor supported by the main body and drivingly connected to the cutting blade;
 - a control circuit electrically coupled to the motor for controlling operation of the motor;
 - an operating arm connected to the main body, the operating arm comprising a first member and a second member telescopically coupled with the first member, wherein the first member will slidably move relative to the second member and in a direction that is towards the main body in response to the operating arm being subjected to a first force that is in the direction that is towards the main body; and
 - a safety assembly comprising a trigger switch for triggering the control circuit to cause the control circuit to disable operation of the motor, wherein the safety assembly is positioned relative to the first member such that the safety assembly is caused to trigger the control circuit when the first member is slidably moved towards the main body to a predetermined position relative to the second member.

Id. at 4:49–5:5.

E. Asserted Grounds of Unpatentability

Petitioner asserts that claims 1–15 would have been unpatentable on the following grounds (Pet. 7):

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1–15	103	Reichart, ³ Akiba, ⁴ Matsunaga, ⁵ and 16 CFR § 1205 ⁶
1–15	112(a)	Enablement
1–15	112(b)	Indefiniteness

Petitioner relies on declaration testimony of Mr. E. Smith Reed (Ex. 1003) in support of these grounds. Patent Owner relies on the declaration testimony of Mr. Michael Clancy (Ex. 2004) and Mr. Fred P. Smith (Ex. 2015) to support its Preliminary Response.

II. PROCEDURAL CONSIDERATIONS

A. Our Discretion under 35 U.S.C. § 324(a)

The Board has discretion not to institute an *inter partes* or post-grant review. *See* 35 U.S.C. §§ 314(a) and 324(a) (each authorizing institution of a trial under particular circumstances, but not requiring institution under any circumstances); 37 C.F.R. § 42.208(a) (stating “the Board *may* authorize the review to proceed”) (emphasis added); *Harmonic Inc. v. Avid Tech, Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (explaining that under § 314(a), “the PTO is permitted, but never compelled, to institute an IPR proceeding”). Section

³ Reichart, GB 2,386,813 A, published Oct. 1, 2003 (Ex. 1007, “Reichart”).

⁴ Akiba et al., US 4,899,446, issued Feb. 13, 1990 (Ex. 1005, “Akiba”).

⁵ Matsunaga et al., US 8,098,036 B2, issued Jan. 17, 2012 (Ex. 1006, “Matsunaga”).

⁶ “Safety Standard for Walk-Behind Power Lawn Mowers,” 16 C.F.R. § 1205 (2012) (Ex. 1008, “16 CFR § 1205”).

314(a) relates to *inter partes* reviews (IPRs) and the similarly worded section 324(a) relates to post-grant reviews (PGRs); we interpret these two statutory sections similarly. *See Supercell Oy v. GREE Inc.*, PGR2020-00034, Paper 13 at 7–9 (PTAB Sept. 3, 2020) (determining that “the pertinent statutory language is the same in both section 314(a)[, governing *inter partes* reviews,] and section 324(a),” governing post-grant reviews, and that “the overall policy justifications associated with the exercise of discretion—inefficiency, duplication of effort, and the risk of inconsistent results—apply to post-grant review proceedings.”).

Patent Owner contends that we should exercise that discretion and not institute trial because of the state of the parallel district court litigation.⁷ Prelim. Resp. 14–16.

Because we determine that Petitioner fails to show the ’420 patent is eligible for post-grant review, we need not address Patent Owner’s contentions concerning discretionary denial.

B. Constitutional Challenge

Patent Owner argues that “[t]his proceeding should be dismissed because the assigned Administrative Patent Judges are principal officers of the United States and yet were not appointed by the President and confirmed by the Senate as required by the Appointments Clause of the United States Constitution.” Prelim. Resp. 57. Patent Owner argues, without further explanation, that the remedy afforded by the Federal Circuit in *Arthrex, Inc. v. Smith and Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted sub*

⁷ Patent Owner argued for discretionary denial under 35 U.S.C. § 314(a); however, we understand Patent Owner to have intended to present the argument under § 324(a), as relating to PGRs.

nom. United States v. Arthrex, Inc., 2020 WL 6037206 (Oct. 13, 2020), was ineffective and inapplicable to the current panel. *Id.*

This issue has been addressed by the Federal Circuit’s decision in *Arthrex*, 941 F.3d at 1337 (“This as-applied severance . . . cures the constitutional violation.”); *see also Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 764 (Fed. Cir. 2020) (Moore, J., concurring in denial of rehearing) (“Because the APJs were constitutionally appointed as of the implementation of the severance, *inter partes* review decisions going forward were no longer rendered by unconstitutional panels.”).

Accordingly, we do not consider this issue any further for this Decision.

III. ELIGIBILITY FOR POST-GRANT REVIEW

As a threshold matter, we must determine whether the ’420 patent is eligible for post-grant review. The post-grant review provisions set forth in section 6(d) of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (September 16, 2011) (“AIA”), apply only to patents subject to the first-inventor-to-file provisions of the AIA. *See* AIA § 6(f)(2)(A) (stating that the provisions of section 6(d) “shall apply only to patents described in section 3(n)(1)”). Patents subject to the first-inventor-to-file provisions are those that issue from applications that contain or contained at any time—

(A) a claim to a claimed invention that has an effective filing date as defined in section 100(i) of title 35, United States Code, that is on or after [March 16, 2013]; or

(B) a specific reference under section 120, 121, or 365(c) of title 35, United States Code, to any patent or application that contains or contained at any time such a claim.

AIA § 3(n)(1).

Our rules require that each petitioner for post-grant review certify that the challenged patent is available for post-grant review. 37 C.F.R.

§ 42.204(a) (“The petitioner must certify that the patent for which review is sought is available for post-grant review”). In addition, “[a] petition for a post-grant review may only be filed not later than the date that is 9 months after the date of the grant of the patent or of the issuance of a reissue patent (as the case may be).” 35 U.S.C. § 321(c).

Determining whether a patent is subject to the first-inventor-to-file provisions of the AIA, and therefore eligible for post-grant review, is straightforward when the patentee filed the application from which the patent issued before March 16, 2013, or when the patentee filed the application on or after March 16, 2013 without any priority claim. The determination is more complex, however, for a patent that issues from a “transition application,” that is, an application filed on or after March 16, 2013, that claims the benefit of an earlier filing date. *See* MPEP § 2159.04 (9th ed. Rev. 10.2019, June 2020). Entitlement to the benefit of an earlier date under 35 U.S.C. §§ 119, 120, 121, or 365 is premised on disclosure of the claimed invention “in the manner provided by § 112(a) (other than the requirement to disclose the best mode)” in the earlier application. *See* 35 U.S.C. §§ 119(e), 120. Thus, a patent that issues from a transition application is *not* available for post-grant review if the claimed subject matter complies with the written description and enablement requirements of § 112(a) for an ancestor application *filed prior to March 16, 2013*.

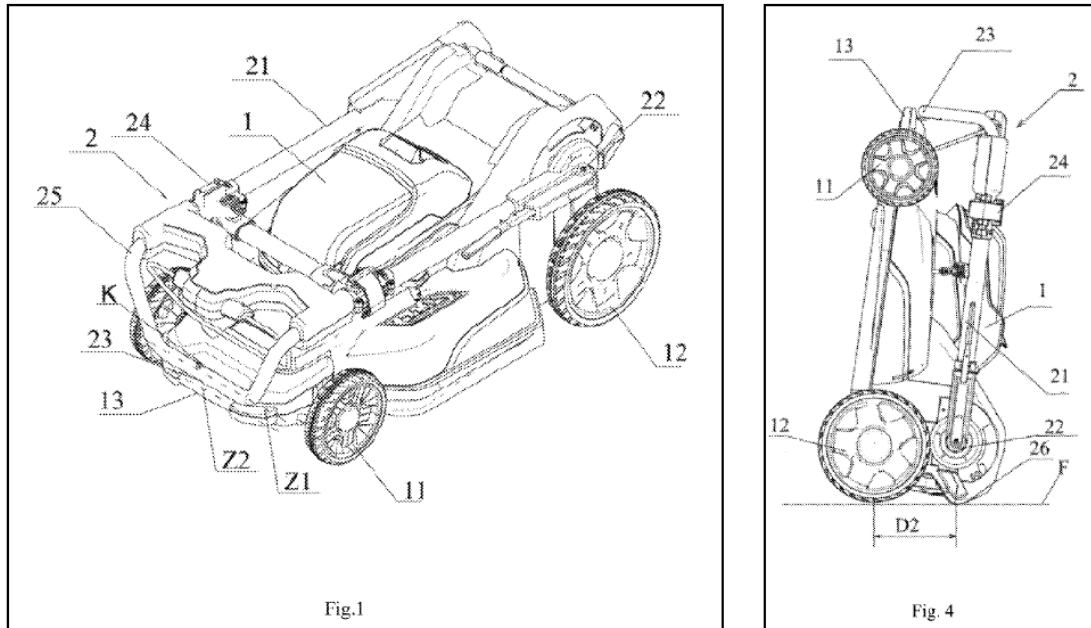
The application that matured into the ’420 patent is a transition application, as it claims priority to an application filed before March 16, 2013. Specifically, the ’420 patent issued January 7, 2020, from U.S.

Application No. 15/238,276, filed August 16, 2016. Ex. 1001, codes (45), (21), (22). The '276 application was filed as a continuation of U.S.

Application No. 14/048,158, filed on October 8, 2013, now U.S. Patent No. 9,888,627 (“the parent ’627 patent”). *Id.* at code (63). This parent ’627 patent claims foreign priority to CN 2012 1 0387914, filed October 15, 2012 (“the CN914 application”), and CN 2012 2 0602040 U, filed May 3, 2013 (“the CN040 application”). *Id.* at code (30); *see also id.* at 1:5–11 (providing the related application information for the ’420 patent).

Petitioner asserts that the ’420 patent is eligible for post-grant review under AIA § 3(n)(1)(B) because the parent ’627 patent contains at least one claim whose effective filing date is on or after March 16, 2013. Pet. 10–11. Specifically, Petitioner asserts that the parent ’627 patent claims subject matter disclosed only in the later CN040 priority application filed after March 16, 2013. *Id.* at 11. As an example, Petitioner asserts that claim 1 of the parent ’627 patent “recites a lawncare apparatus having ‘an operating arm’ that ‘includes a substantially cylindrical gripping portion’ and, separately, ‘an elongated handle positioned on a [front] end’” of the main body of the apparatus. *Id.* at 11–12 (referencing Ex. 1023, claim 1); *see also id.* at 12 (referencing Ex. 1023, claim 6). Petitioner asserts that these claimed components correspond to gripping portion 23 and horizontal handle 13, shown in Figures 1 and 4 of the parent ’627 patent and the ’420 patent. *Id.* at 12–13 (referencing Ex. 1023, Figs. 1, 4; Ex. 1001, Figs. 1, 4).

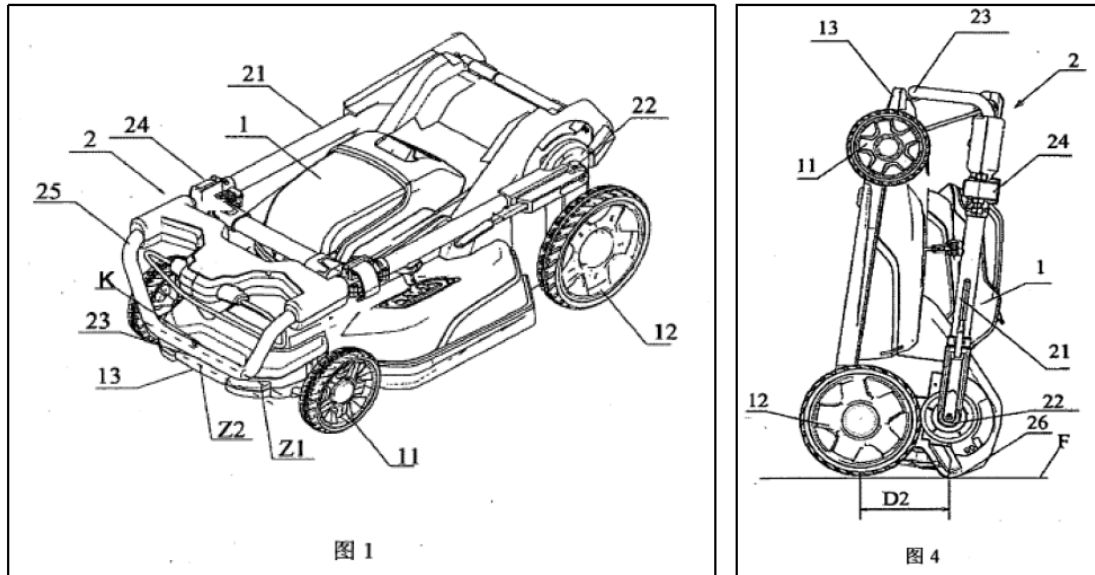
Figures 1 and 4 of the parent '627 patent, as reproduced in the Petition, are shown below.



Pet. 12. Figures 1 (above, left) and 4 (above, right) of the parent '627 patent show a schematic, isometric view, and a side, schematic view, respectively, of a lawncare apparatus having main body 1 and operating arm 2 connected to a rear end of main body 1. Ex. 1023, 2:9–12, 17–18, 31–35. The front end of main body 1 includes elongated handle 13. *Id.* at 2:41–42. Operating arm 2 includes cylindrical gripping portion 23. *Id.* at 2:45–47. “[W]hen the operating arm 2 is at the folded position, the user can grip both the gripping portion 23 and the cylinder-shaped handle 13 conveniently.” *Id.* at 2:63–65.

Petitioner asserts that “[o]nly the later [CN040] application discloses these components.” Pet. 13 (referencing CN040 application, Figs. 1, 4, provided in Ex. 1024, 290–91).

Figures 1 and 4 of the CN040 application, as reproduced in the Petition, are shown below.



Pet. 13. Figures 1 (above, left) and 4 (above, right) of the CN040 application appear to show a schematic, isometric view, and a side, schematic view, respectively, of a lawncare apparatus having reference numbers corresponding to the parent '627 patent, which reference main body 1, operating arm 2 connected to a rear end of main body 1, and elongated handle 13 with cylindrical gripping portion 23 disposed on a front end of main body 1. As support for this assertion, Petitioner refers to the certified copy of the CN040 application submitted during examination of the parent '627 patent. *Id.* (referencing Ex. 1024, 289–90 [sic, 290–91]). The certified copy of the CN040 application, as presented in the record, is in Chinese. Ex. 1024, 283–291. Petitioner does not provide us with an English language translation of the CN040 application. We understand Petitioner's assertion that the CN040 application discloses gripping portion 23 and handle 13 to rely on the fact that the Figures of CN040 include similar

reference numbers 13 and 23, which point to elements in the figures that appear similar to cylinder-shaped handle 13 and gripping portion 23 of the corresponding figures of the parent '627 patent.

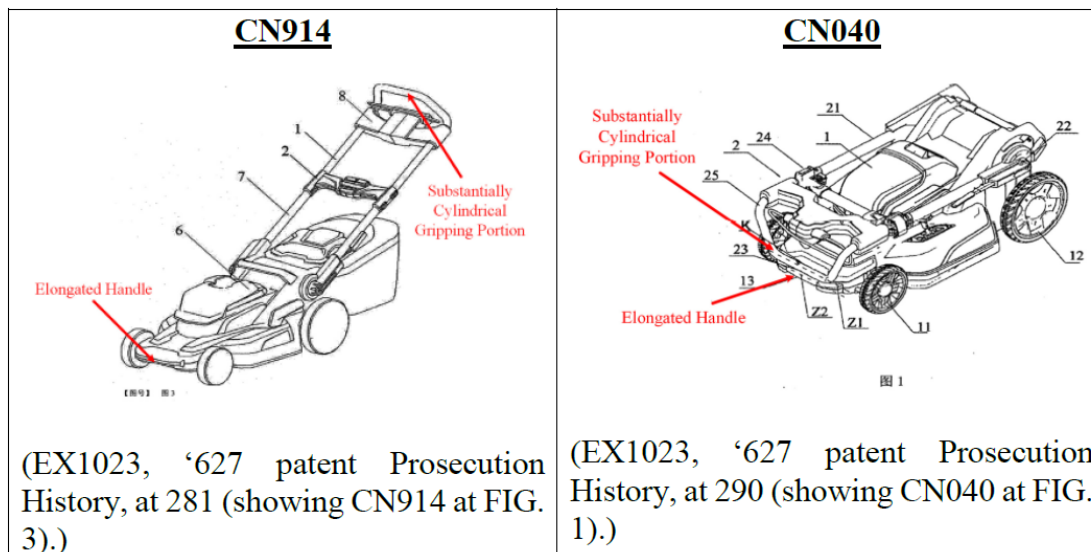
Petitioner also asserts that “[t]he earlier [CN914] application does not disclose a ‘gripping member’ and ‘handle[.]’” Pet. 13. Petitioner does not refer to any specific support in the record for this assertion. The Petition, however, earlier introduced into the record the certified copy of the CN914 application that was submitted during examination of the parent '627 patent. *Id.* at 12 (referencing Ex. 1024, 271–82). The certified copy of the CN914 application, as presented in the record, is in Chinese. Ex. 1024, 271–82. Petitioner does not provide us with an English language translation of the CN914 application.

Patent Owner argues that Petitioner has failed to show that the '420 patent is eligible for post-grant review. Prelim. Resp. 10. Patent Owner argues that Petitioner fails “as a matter of law” to satisfy its burden to establish eligibility for post-grant review because Petitioner fails to provide evidence or expert testimony to support its assertion that the earlier CN914 application does not disclose a “gripping member” and “handle.” *Id.* at 11–12. Patent Owner also argues that Petitioner fails to meet its burden because Figure 3 of the earlier CN914 application, in fact, discloses a “substantially cylindrical gripping portion” and an “elongated handle.” *Id.* at 12–13 (referencing Ex. 1024 at 281; Ex. 2015 ¶¶ 23–24).

Patent Owner provides a side-by-side comparison of Figure 3 of the earlier CN914 application and Figure 1 of the later CN040 application to show that the components depicted in each are “nearly identical” with the primary difference being that the operating arm is folded out in Figure 3 of

the CN914 application and is folded over the main body in Figure 1 of the CN040 application. *Id.* at 13 (referencing Ex. 1024 at 281, 290) (emphasis omitted).

The annotated figures from the Chinese priority applications, as provided in the Preliminary Response, are shown below.



Prelim. Resp. 13. The figure on the left is Figure 3 from the earlier CN914 application with annotations identifying elements that Patent Owner asserts correspond to the “elongated handle” and “substantially cylindrical gripping portion” as claimed in the parent ‘627 patent. The figure on the right is Figure 1 from the later CN040 application with annotations identifying similar elements.

We agree with Patent Owner that Petitioner’s evidence in support of its assertion that “[t]he earlier [CN914] application does not disclose a ‘gripping member’ and ‘handle’” is inadequate. Petitioner attempts to show that the earlier CN914 application does not disclose these claimed features by showing that the later CN040 application does disclose them. But, Petitioner’s premise that the earlier CN914 application omits these features

does not necessarily or logically flow from this showing. In other words, the depiction of what appears to be a substantially cylindrical gripping member and an elongated handle in the later CN040 application does not exclude these features also from being disclosed in the earlier CN914 application. Further, as Patent Owner demonstrated by the side-by-side annotated figures from each priority application, the earlier CN914 application appears to show similar-looking features as the substantially cylindrical gripping member and the elongated handle identified by Petitioner in the figures of the later CN040 application. A relevant difference between these two annotated figures is that the features depicted in the earlier CN914 application that Patent Owner annotates as corresponding to the “elongated handle” and the “substantially cylindrical gripping portion” do not have accompanying reference numbers “13” and “23” associated with them in that figure, while these same features depicted in the later CN040 application include the same reference numbers “13” and “23” that appear in the parent ’627 patent figures. Although the lack of reference numbers in the earlier CN914 application may suggest that the written description of this earlier application does not discuss these features explicitly, drawings alone can provide “written description” support for features depicted in them. *See Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1564 (Fed. Cir. 1991) (“[D]rawings alone *may* be sufficient to provide the ‘written description of the invention’ required by § 112, first paragraph.”). Petitioner has failed to address the drawings presented in the earlier CN914 application or establish sufficiently that the claim features of the parent ’627 patent are not disclosed therein.

For these reasons, we find that Petitioner has not shown sufficiently that the '420 patent is eligible for post-grant review.

IV. CONCLUSION

After considering the evidence and arguments presently before us, we determine Petitioner has not shown that the '420 patent is eligible for post-grant review. Accordingly, we do not institute a post-grant review.

V. ORDER

In consideration of the foregoing, it is:

ORDERED that, pursuant to 35 U.S.C. § 324(d), the Petition is *denied*.

PGR2020-00061
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