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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LEONORA M. BROZELL

Appeal 2012-006016
Application 12/330,163
Technology Center 3700

Before LYNNE H. BROWNE, JILL D. HILL, and
TIMOTHY J. GOODSON, *Administrative Patent Judges*.

GOODSON, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Leonora M. Brozell (Appellant) filed a Request for Rehearing (“Request”) under 37 C.F.R. § 41.52 on August 21, 2014. The Request seeks reconsideration of our Decision on Appeal mailed on June 23, 2014 (“Decision”), in which we affirmed the Examiner’s rejection of claims 1, 2, 9–13 and 19 under 35 U.S.C. § 103(a) as being unpatentable over Boots (U.S. Patent App. Pub. No. 2006/0000833 A1, published Jan. 5, 2006) in view of Toren (U.S. Patent No. 5,971,154, issued Oct. 26, 1999); the rejection of claims 3–6 and 15 under 35 U.S.C. § 103(a) as being unpatentable over Boots in view of Toren and Vahrmeyer (U.S. Patent App. Pub. No. 2003/0097790 A1, published May 29, 2003); and the rejection of

claims 7, 8, and 14 under 35 U.S.C. § 103(a) as being unpatentable over Boots in view of Toren and Petrick (U.S. Patent No. 6,343,695 B1, issued Feb. 5, 2002). For the reasons discussed below, we grant the request to the extent that we have reconsidered our Decision, but we deny the request to the extent that it seeks modification of our Decision.

OPINION

The Request argues that the Decision includes an undesignated, new ground of rejection. Req. 2–3. The Federal Circuit has articulated the following standard for determining whether an affirmance improperly includes an undesignated new ground of rejection:

The Board may not “rel[y] on new facts and rationales not previously raised to the applicant by the examiner.” Of course, the Board is not required to “recite and agree with the examiner’s rejection *in haec verba*” in order to ensure that the PTO has provided adequate notice. And the Board may elaborate on the examiner’s findings, so long as the appellant had an adequate opportunity to respond to the Board’s findings during the PTO proceeding. The ultimate criterion is whether the appellant has had before the PTO a “fair opportunity to react to the thrust of the rejection.”

Rambus, Inc. v. Rea, 731 F.3d 1248, 1255 (Fed. Cir. 2013) (internal citations omitted). Consistent with this standard, a new ground of rejection “generally will not be found based on the Board ‘further explain[ing] the examiner’s rejection’ or the Board’s thoroughness in responding to an applicant’s argument.” *In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (quoting *In re Jung*, 637 F.3d 1356, 1364–65 (Fed. Cir. 2011)).

Appellant argues that the following statement in the Decision constitutes a new finding that changes the thrust of the rejection: “We note that Boots discloses that the container can be injection molded to form a

monolithic, one-piece structure. Boots ¶¶ 43, 50.” Decision 4. *See also* Req. 2. Contrary to Appellant’s argument, this was not a new finding, as the Examiner had previously found that “Boots discloses a package comprising a container of one-piece integrally molded plastic construction.” Ans. 4. The Examiner referenced “(par. 430” without closed parentheses in support of this finding, which appears to have been a typo intended to cite “(par. 43),” particularly because Boots does not include a ¶ 430. *Id.*

Appellant further argues that “[t]he Decision relies on the new finding to conclude that the combination of Boots’ second embodiment container 110 (top wall of closure 122) with Boots’ first embodiment container 10 ultimately would yield a container top wall.” Req. 2. Yet the Decision neither relied on new findings nor changed the Examiner’s rejection. The portion of the Decision on which Appellant focuses as presenting an undesignated new ground of rejection responded to the same argument Appellant now makes in the Request, namely that the Examiner’s proposed combination would yield a closure having a top wall, not a container having a top wall:

The Answer clarifies that the Examiner finds the rim 22 of the first embodiment in Boots to be a “top wall,” albeit one that does not extend over the interior of the container. Ans. 8; *see also* Boots ¶ 31, Fig. 1. We note that Boots discloses that the container can be injection molded to form a monolithic, one-piece structure. Boots, ¶¶ 43, 50.¹ The upper portion 122 of the second embodiment extends over the interior of the container. Boots, Figs. 8, 11.² Thus, the Examiner’s modification of the

¹ As discussed above, this was not a new finding. *See* Ans. 4.

² This also was not a new finding, as the Examiner had previously found that “[t]he second embodiment of Boots teaches a container with a lower portion (120), and an upper portion (122) connected together to form the container

first embodiment of Boots is to “combine the teaching of the top wall of the second embodiment with the top wall of the first embodiment.” Ans. 9. We understand this combination of the first and second embodiments of Boots to yield a container having a top wall extending across the body.

Decision 4 (internal footnotes added). Because the Decision did not rely on any new findings or rationales, or otherwise depart from the thrust of the Examiner’s rejection, the Decision did not state a new ground of rejection.

The remainder of the Request presents Appellant’s criticisms of our analysis in the Decision. Req. 4–9. Despite how these sections of the Request are titled, Appellant does not identify particular evidence or arguments from the briefing and demonstrate that they were misapprehended or overlooked. Instead, the Request expresses Appellant’s disagreement with the Decision, reiterating arguments that were considered and found not to be persuasive in the Decision. For example, Appellant argues that the Board misapprehended or overlooked that Boots’ rim 22 is not a top wall that can be substituted for Boots’ closure wall 127. Req. 4–5. We did not misapprehend or overlook this argument. We addressed it on page four of the Decision. The Request disagrees with our analysis in the Decision on various grounds. However, a request for rehearing is not an opportunity to express disagreement with a decision. The proper course for an appellant dissatisfied with a Board decision is to seek judicial review, not to file a request for rehearing to reargue issues that have already been decided.

(par. 47), and a lid (114). The upper portion of the container of the second embodiment of Boots teaches a top wall that extends over the interior of the container. . . .” Ans. 8–9.

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Having considered the arguments in the Request, we are not persuaded that we misapprehended or overlooked a particular matter in affirming the Examiner's rejections.

DECISION

The Request for Rehearing has been granted to the extent that we have reconsidered our Decision, but is denied with respect to making any modification to the Decision.

DENIED

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