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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,459	12/08/2003	Mark J. Levine	127506-00702	2911
141216	7590	12/19/2019	EXAMINER	
McCarter & English, LLP / Albany International Worldwide Plaza, 825 Eighth Ave., 31st Floor New York, NY 10019			PIZIALI, ANDREW T	
			ART UNIT	PAPER NUMBER
			1789	
			NOTIFICATION DATE	DELIVERY MODE
			12/19/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARK J. LEVINE and CHRISTIAN B. WIDEN

Appeal 2018-002097
Application 10/730,459
Technology Center 1700

Before WESLEY B. DERRICK, JEFFREY W. ABRAHAM, and
BRIAN D. RANGE, *Administrative Patent Judges*.

DERRICK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant¹ filed an appeal under 35 U.S.C. § 134(a) from an Examiner’s decision finally rejecting claims 1, 2, 4, 6–8, 13, 23, 25–27, 31, and 32. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Albany International Corp. Appeal Brief dated September 1, 2017 (“Appeal Br.”), 4.

CLAIMED SUBJECT MATTER

The subject matter of the claims on appeal relates to “[a] fabric incorporating flattened filaments for use as a support fabric in producing a nonwoven product by a hydroentangling process.” Specification filed December 8, 2003 (“Spec.”), Abstract. Claims 1 and 23—reproduced below—are the sole independent claims on appeal.

1. A hydroentangling apparatus for the production of a hydroentangled nonwoven product, the improvement comprising:

a hydroentangling support fabric formed into a continuous belt and having the mechanical properties and structural strength to reflect liquid jetted from the hydroentangling apparatus at sufficient energy to entangle a nonwoven web and comprising flat filaments having a flat cross-sectional shape, wherein said filaments flat filaments comprise polymeric resin material.

23. An improved hydroentangling support fabric in a hydroentangling apparatus for production of a hydroentangled nonwoven product, the improvement comprising:

said hydroentangling support fabric formed into a continuous belt and in the hydroentangling apparatus having the mechanical properties and structural strength to reflect liquid jetted from the hydroentangling apparatus at sufficient energy to entangle a nonwoven web and comprising flat filaments having a flat cross-sectional shape, wherein said filaments flat filaments comprise polymeric resin material.

Appeal Br. 35–36.

REJECTIONS ON APPEAL

The Examiner maintains the following rejections:

Claims 23, 25–27, 31, and 32 stand rejected as anticipated by, or in the alternative rendered unpatentable for obviousness over, Gaisser,² with Ngai³ as evidence to establish inherency;

Claims 1, 2, 4, 6–8, 13, 23, 25–27, 31, and 32 stand rejected as anticipated by, or rendered unpatentable for obviousness over, Chen⁴;

Claims 23, 25–27, 31, and 32 stand rejected as anticipated by, or rendered unpatentable for obviousness over, Chiu,⁵ with Chen as evidence to establish inherency;

Claims 1, 2, 4, 6–8, and 13 stands rejected as unpatentable for obviousness over Chiu in view of Chen;

Claim 13 stands rejected as unpatentable for obviousness over Chen in further view of Wedel⁶; and

Claim 13 stands rejected as unpatentable for obviousness over Chiu in view of Chen, in further view of Wedel.

DISCUSSION⁷

We address the rejection of claims 1, 2, 4, 6–8, 13, 23, 25–27, 31, and 32 as anticipated by, or rendered unpatentable for obviousness over, Chen

² Gaisser, US 5,857,497, issued January 12, 1999.

³ Ngai, US 6,314,627 B1, issued November 13, 2001.

⁴ Chen et al., US 5,990,377, issued November 23, 1999.

⁵ Chiu et al., US 5,429,686, issued July 4, 1995.

⁶ Wedel et al., US 5,921,000, issued July 13, 1999.

⁷ We refer to the Specification, the Non-Final Office Action dated September 1, 2016 (“Non-Final Act.”), the Appeal Brief, the Examiner’s Answer dated October 20, 2017 (“Ans.”), and the Reply Brief filed December 20, 2017 (“Reply Br.”).

because this rejection covers all claims on appeal. On this record, we are not persuaded of reversible error in the Examiner's decision. We add the following.

For any ground of rejection, “the examiner bears the initial burden . . . of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). We consider the record to determine whether Appellant has identified reversible error in the Examiner's rejection. *See In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board's practice to require an applicant to identify the alleged error in the examiner's rejections,” *citing Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential)).

As discussed by both the Examiner and Appellant, the Board reversed an earlier rejection under § 102(b) or, in the alternative, § 103(a) over Gaisser alone. Ans. 14; Appeal Br. 11; Board Decision dated June 26, 2015 (“2015 Decision”), 9–10. As we explained in the 2015 Decision, the Examiner had not shown a sound basis for the fabric in Gaisser having the same or similar structure, but had rather conflated Gaisser's drying fabric for a papermaking machine with the hydroentangling support fabric claimed. 2015 Decision, 10. Accordingly, the Examiner had not met his burden for a *prima facie* case and the Board reversed the rejection. *Id.*

Appellant contends that the Board decided that “Appellants have persuasively shown that a dryer fabric is different from a hydroentangling fabric.” Reply Br. 2 (citing 2015 Decision *generally*). Appellant contends, for example, that “the Board has concurred” with its repeated explanations that “a dryer fabric and hydroentangling fabric differ.” *Id.*

Appellant further contends throughout its briefs that a dryer fabric differs from a hydroentangling support fabric, e.g.: “[a] dryer fabric would not be understood by a person of ordinary skill in the art as capable of or adaptable to possessing [sic] the mechanical properties and structural strength to reflect liquid jetted from a hydroentangling apparatus” (Reply Br. 5 (emphasis omitted)); “a dryer fabric is different from a hydroentangling fabric” (Appeal Br. 12); “a dryer fabric for a papermaking machine has a different structure than a hydroentangling fabric” (*id.* at 13); and “dryer fabrics do not necessarily and inherently have the same structure as hydroentangling fabrics . . . as dryer fabrics must be highly permeable, they are necessarily different in structure” (*id.* at 15).

Appellant overstates its case with respect to the 2015 Decision. A fair reading of the decision does not support the proposition that a dryer fabric necessarily cannot function as a hydroentangling support fabric, or vice versa. Rather, as explained in the decision, the Examiner failed to meet his burden to support the rejections. *See generally* 2015 Decision. We likewise discern no particular definition for “hydroentangling support fabric” in the Specification that excludes a fabric simply because it is denoted as a dryer fabric. *See generally* Spec.

Appellant attempts to incorporate prior argument and evidence by reference, “including but not limited to, demonstration that a dryer fabric and hydroentangling fabric are different.” Appeal Br. 11, fn.1. Such incorporation by reference does not meet our requirement that the brief includes arguments that explain why the examiner erred. *See* 37 C.F.R. § 41.37(c)(iii). *Cf. Gross v. Town of Cicero, III*, 619 F.3d 697, 702 (7th Cir. 2010) (“Judges are not like pigs, hunting for truffles buried in the record.”)

(quotation and alteration omitted). We properly limit our consideration, accordingly, to the arguments actually made in the Appeal Brief and the Reply Brief. Further, we decline to reach the arguments raised for the first time in the Reply Brief as to “the fallacy of the Examiner’s argument that alleges a dryer fabric is, or can be, a hydroentangling fabric.” Reply Br. 4; *see also id.* at 3–5. Appellant provides no good reason why these arguments could not have been raised in the Appeal Brief. *See generally* Reply Br. We deem them waived, therefore, for purposes of the present appeal. 37 C.F.R. § 41.41(b)(2).

We now turn specifically to the rejection of the claims as anticipated by or, in the alternative, as unpatentably obvious over Chen. Chen discloses absorbent articles, as well as machines and methods for their manufacture. *See generally* Chen. These absorbent articles include, for example, those having a contoured base sheet 1 and an underlying fibrous layer 5. Chen, Figs. 1–2. Chen also discloses a paper machine suitable for producing the contoured basesheet depicted in Figure 1. Chen, 26:42–44, 29:64–30:50, Fig. 4. Chen also discloses that “[s]uitable basesheets can be prepared . . . with known papermaking techniques” and goes on to identify “[t]hrough-drying fabrics” from Chiu as being well-suited, while discussing various methods by which the basesheet may be formed. *Id.* at 3:25–55. Chiu discloses the use of flat filaments in its through-drying fabrics. Chiu, 1:45–53, 3:34–36, 8:42–52, 9:4–24, Figs. 1, 14–16. It is not manifest that Chen forms the basesheet using hydroentanglement, although it discloses “hydroentangling to impart apertures by rearrangement of the fibers . . . as [the fibrous web] resides on a patterned, textured or three-dimensional substrate that imparts a pattern to the web.” Chen, 5:14–18.

Chen elsewhere, however, also discloses methods for providing apertures in a nonwoven web apparently corresponding to the underlying fibrous layer 5, in a pattern corresponding to a basesheet, which “involves hydroentangling . . . [which], as is known in the art, can be used to impart apertures to a nonwoven web” (Chen, 6:2–15), such that “[w]hen the apertured nonwoven material is then attached to the through-dried basesheet, the apertures can be aligned with the depressed regions of the basesheet” (*id.* at 6:37–39). In particular, Chen discloses the alignment can be achieved by using “the same kind of throughdrying fabric that was used to mold a three-dimensional through-dried sheet,” that is, the throughdrying fabric used to form the basesheet. *Id.* at 6:21–27.

The Examiner relies on Chen as disclosing “a hydroentangling support fabric formed into a continuous belt and inherently having the mechanical properties and structural strength to reflect liquid jetted from the hydroentangling apparatus at sufficient energy to entangle a nonwoven web and comprising flat filaments having a flat cross-sectional shape, wherein said filaments . . . comprise polymeric resin material.” Ans. 6 (citing Chen 5:6–25, 5:64–6:48, 29:64–30:50, 40:26–44). The Examiner further cites Chen for its incorporation of Chiu (*id.* at 3:37–41), and Chiu for its disclosure of belts including flat filaments (Chiu, 1:45–53, 3:28–42, 8:42–52, 9:4–24, Figs. 1, 14–16).

Appellant contends that Chen is “inapplicable art” and that “Chen does not disclose, teach, or suggest the claimed invention.” Appeal Br. 17. Appellant argues independent claims 1 and 23 together, adding additional argument for some dependent claims. *Id.* at 17–28, 32–33.

As to being “inapplicable art,” Appellant argues that “a person of ordinary skill in the art would not be motivated or have any desire to refer to Chen” because “[t]he disclosure and invention in Chen does not relate to a hydroentangling apparatus or fabric.” Appeal Br. 17–18. Appellant argues that because Chen’s emphasis is on “improved absorbency but increased comfort for a product user,” an artisan of ordinary skill “seeking to develop the instantly claimed invention . . . would have no motivation, reason, or desire to look to Chen.” *Id.* at 18–19. Appellant also highlights the types of nonwoven products that can be produced by use of its hydroentangling support fabric, as well as some of its properties. *Id.* at 19 (citing 2:26–29, 4:10–14, 14:1–7). As to Chiu, incorporated by reference into Chen, Appellant argues that “Chen does not rely on Chiu for teaching or disclosing any elements of hydroentangling.” Reply Br. 18.

Appellant’s argument that Chen is inapplicable is not persuasive of reversible error. As to the rejection under § 102, there is simply no requirement that the art is from the same field of endeavor. *See In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997) (“[T]he question whether a reference is analogous art is irrelevant to whether that reference anticipates.”). As to the rejection under § 103, we assess whether Chen is in the same field of endeavor or is reasonably pertinent to the problem addressed by the inventor. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). Chen relates to absorbent products, including household wipes and disposable hygiene materials, and explicitly refers to applying a hydroentangling process to a nonwoven web, which is then included in an absorbent product. Chen, 1:8–14. Similarly, the Specification sets forth that “the present invention provides . . . a support fabric [for use] in producing a

nonwoven product by a hydroentangling process.” Spec. 6:9–12. Chen is, therefore, in the same field of endeavor.

As to Chen disclosing, teaching, or suggesting the claimed invention, Appellant focuses on the recited “hydroentangling support fabric formed into a continuous belt . . . having the mechanical properties and structural strength to reflect liquid jetted from the hydroentangling apparatus at sufficient energy to entangle a nonwoven web . . . comprising flat filaments having a flat cross-sectional shape.” Appeal Br. 19–28. Appellant also argues separately for certain dependent claims, specifically that no cited prior art, including Chiu, discloses or renders obvious forming the flat filaments through calendaring (claims 25–27) or incorporating the flat filaments into the support fabric (claim 31). *Id.* at 32–33.

Appellant’s general arguments are grounded on the Examiner erring in determining that Chen connects a dryer fabric with hydroentangling because the cited process is for forming apertures in a nonwoven web rather than entangling a nonwoven web. Appeal Br. 19–28. As to Chen’s disclosure at column 5, line 54, to column 6, line 48, Appellant argues specifically that Chen merely provides that hydroentangling can be used to produce apertures in an already formed nonwoven web and that these can be aligned with a basesheet that was formed on a through-air-drying fabric. *Id.* at 22–23. Appellant contends that “creating apertures in an already formed nonwoven web is different altogether from generating and entangling a nonwoven web” and that, accordingly, “a person of ordinary skill in the art would appreciate that Chen’s disclosure does not disclose, teach, or suggest an apparatus or fabric for the actual entanglement of a nonwoven web per the pending claims.” *Id.* at 23. Appellant further argues that while it “do[es]

not dispute that Chen discloses a web that can be formed through hydroentangling,” “the purpose of any disclosure of hydroentangling in Chen is not to disclose [the] flat, polymeric filaments of the instantly claimed invention (or the hydroentangling fabric itself), but rather the use of hydroentangling—generally—to impart apertures and make a web.” Reply Br. 14–15 (citing Chen, 6:7–21). Similarly, Appellant argues that “Chen does not reference Chiu in the context of making a web through hydroentangling, and, what’s more Chiu does not disclose flat filaments for a hydroentangling fabric.” *Id.* at 17–18.

As to Chen’s disclosure at column 40, lines 26 to 44, Appellant again contends that it merely “concerns forming apertures using hydroentangling on an already formed web.” Appeal Br. 26–27. Appellant also argues it is different, and thus does not support the hydroentangling support fabric being the same as that claimed because “this passage refers to the process as a **modified form of hydroentangling**,” that is, that “an already formed web could be placed on a [through-air-drying] fabric that was used for forming the basesheet.” *Id.* at 27.

Relying on its contentions that Chen is limited to forming apertures and does not disclose hydroentangling a nonwoven product per the claimed invention, Appellant argues that the Examiner erred in relying on Chiu because “Chen cites Chiu for something other than hydroentangling, *i.e.*, as a [through-air-drying] fabric.” Appeal Br. 28; *see also* Reply Br. 20 (“that Chiu may disclose flat filaments for a dryer fabric . . . does not render the claims anticipated by Chiu or obvious in view of Chen”). On this basis, Appellant argues that regardless of what types of filaments Chiu discloses, “neither Chen nor Chiu disclose a ‘hydroentangling support fabric . . .

having the mechanical properties and structural strength to reflect liquid jetted from the hydroentangling apparatus . . . to entangle a nonwoven web.”
Appeal Br. 28.

On this record, we are not persuaded that the Examiner erred reversibly in determining that Chen discloses the apparatus of claim 1 and the hydroentangling support fabric of claim 23. Appellant’s arguments focus on a dryer fabric being distinct from a hydroentangling support fabric and the hydroentanglement process in Chen differing from that accomplished using a hydroentangling support fabric according to the claims. Both general issues are, in effect, addressed in discussing what Chen discloses.

Chen, as discussed above with regard to Appellant’s argument that it is “inapplicable art,” discloses a process to form apertures in a nonwoven web that involves hydroentangling, which it identifies as “involving the use of high pressure water jets to modify a fibrous surface.” Chen, 6:7–10. Chen, therefore, as determined by the Examiner, reasonably discloses application of high pressure water jets to impinge on the nonwoven web in the relied-on process in which apertures are formed in the nonwoven web. Ans. 22–23. Such application of high pressure water jets to a nonwoven fiber web supported by a fabric appears to be substantially the same as that cited by Appellant for the meaning of “hydroentangling apparatus.” See Appeal Br. 7–8 (citing Spec. 3:25–4:6, 5:31–6:2, 7:19–25); *id.* at 9 (quoting November 2012 Brief, Exhibit A).

Also as highlighted by the Examiner, Chen specifically identifies the process used to form the apertures as hydroentangling, which the Examiner determines is sufficient to reasonably establish that “the dryer fabric of Chiu

possesses the mechanical properties and structural strength to reflect liquid jetted from a hydroentangling apparatus at sufficient energy to entangle a nonwoven web.” Ans. 23 (emphasis omitted). While Appellant argues that forming an aperture is somehow different (*see, e.g.*, Appeal Br. 22–23, 28), or that the apertures are not formed using Chiu’s fabric (*see, e.g.*, Reply Br. 16, 17–18, 20–21), Appellant does not squarely contest with sufficient evidence the Examiner’s determination that use of the term hydroentangling reasonably indicates a process in which liquid jetted from the hydroentangling apparatus is reflected at sufficient energy to entangle a nonwoven web (*see generally* Appeal Br.; Reply Br.). Nor does Appellant address evidence of record that appears inconsistent with its view. The Reply Brief, for example, reproduces an excerpt from a publication that discloses “Spunlacing (Hydroentanglement),” describing it as a process in which:

the finished product is produced by entangling fibers in a preformed web, . . . using high pressure, columnar water jets (Figure 2.198). As the jets penetrate the web and deflect from the forming fabric, some of the fluids splash back into the web with considerable force. Fiber segments are carried by the turbulent fluid and become entangled on a semimicron scale.

Reply Br. 10 (citing S. Adanur, *Paper Machine Clothing: Key to the Paper Making Process*, Technonic Publishing (1997), 139).

There is also a sufficient basis on this record for the Examiner’s determination that there is rearrangement of fibers within the nonwoven web when apertures are formed by hydroentanglement such that they are considered entangled to some degree. Ans. 22–24. On this record, particularly, we do not discern a particular level of entanglement to be required by the claims. Thus, where it is apparent that there is some

entanglement, the nascent argument that the relied on hydroentanglement process disclosed in Chen to form apertures in a nonwoven web does not suffice because there is not enough entanglement is not persuasive. *In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (such “arguments fail from the outset because . . . they are not based on limitations appearing in the claims”). In this respect, Appellant no longer squarely contests that Chen discloses that a web can be formed through hydroentangling or that apertures can be formed. Reply Br. 14 (citing Chen, 6:7–21). Rather, Appellant argues that the “disclosure of hydroentangling in Chen is not to disclose . . . the hydroentangling fabric itself” and, particularly, “not to disclose flat, polymeric filaments of the instantly claimed invention.” *Id.* at 14–15.

Appellant’s arguments as to the purpose of Chen’s disclosure of hydroentangling are not persuasive of reversible error because they fail to squarely address that Chen teaches the use of Chiu’s “[t]hrough-drying fabrics well suited for formation of three-dimensional webs” to form a basesheet, and then the use of the same through-drying fabric in hydroentangling a nonwoven web to form apertures that align with the features of the basesheet. Chen, 3:25–26, 3:37–41, 6:2–40. Nor are we otherwise apprised of any deficiency as to the fabrics, as Chen explicitly teaches the use of through-drying fabrics comprising flat filaments in that it incorporates Chiu explicitly for its through-drying fabrics, and Chiu discloses through-drying fabrics with flat filaments, as well as that they are preferred. *See, e.g.*, Ans. 6. Moreover, Appellant does not squarely contest that Chen teaches the use of Chiu’s through-drying fabrics with flat filaments, or that Chiu teaches those including flat filaments are preferred for through-drying fabrics. *See generally* Appeal Br. 17–28; Reply Br. 14–

21. In sum, we find Chen (incorporating Chiu) reasonably discloses throughdrying fabrics comprising flat filaments, use of these for forming a basesheet, and a hydroentangling process using the same throughdrying fabric as used for forming a basesheet that appears at least substantially similar to the hydroentangling process reflected in the claims' recitations.

Thus, on this record, we determine the Examiner has sufficiently established a basis for the throughdrying fabric of Chen (incorporating Chiu) to be the same or substantially the same as the hydroentangling support fabric according to the claims, such that the burden was properly shifted to Appellant to establish that it lacks the claimed "mechanical properties and structural strength to reflect liquid jetted from [a] hydroentangling apparatus at sufficient energy to entangle a nonwoven web."

While claim 1 is directed to a hydroentangling apparatus, Appellant argued the claim together with claim 23 on the basis of the hydroentangling support fabric, which was unpersuasive of reversible error. Accordingly, we are apprised of no reversible error in the Examiner's rejection for either independent claim 1 or claim 23. Further, where we find the cited portions of column 6 of Chen to disclose hydroentangling, Appellant provides no cogent argument for Chen's disclosure relating to that hydroentangling process falling short of disclosing a hydroentangling apparatus.

As to claims 25–27, reciting flat filaments formed by calendaring to form the flat filaments, the Examiner relies on Chiu disclosing flat filaments that are identical to or only slightly different from the claimed article. Ans. 9 (citing Chiu, 1:45–53). The Examiner treats these claims as product-by-process and, thereby, unpatentable even if made by a different process. *Id.*

Appellant argues the three claims together on the basis that “it would not have been understood . . . to use calendaring as claimed in claims 25–27 to produce flat filaments” and that the product is not a dryer fabric. Appeal Br. 32.

On this record, we are apprised of no reversible error in the Examiner’s rejection because we are directed to no difference in the product on the basis it was made by a different process or, as discussed above, in that it is referred to as a dryer fabric.

As to claim 31, reciting that flat filaments are incorporated during production of the fabric, the Examiner similarly relies on the flat filaments disclosed in Chiu, column 1, lines 45 to 53, and on the claim as product-by-process. Ans. 7, 21.

Appellant similarly argues, as for claims 25–27, that the Examiner fails to provide disclosure in the art and the product is not a dryer fabric. Appeal Br. 33; *see also id.* at 32. Likewise, we are not apprised of reversible error.

Accordingly, on this record, Appellant has failed to identify reversible error in the rejection of the claims as anticipated by or, in the alternative, rendered obvious over Chen, and we sustain the rejection of claims 1, 2, 4, 6–8, 13, 23, 25–27, 31, and 32.

Because our affirmance of the rejection over Chen disposes of all claims on appeal, we decline to reach the Examiner’s further rejections under 35 U.S.C. § 102 and/or § 103.⁸

⁸ Appellant’s argument as to the rejection of claim 13 in further view of Wedel, similar to arguments discussed above, relies on Chen disclosing a dryer fabric, not a hydroentangling fabric, and this deficiency not being remedied by Wedel. Appeal Br. 23.

CONCLUSION

The Examiner's decision is affirmed.

Claims Rejected	35 U.S.C. §	Rejection(s)/Basis	Affirmed	Reversed
23, 25–27, 31, 32	102	Gaisser		
23, 25–27, 31, 32	103	Gaisser, Ngai		
1, 2, 4, 6–8, 13, 23, 25–27, 31, 32	102/103	Chen	1, 2, 4, 6–8, 13, 23, 25–27, 31, 32	
23, 25–27, 31, 32	102	Chiu		
23, 25–27, 31, 32	103	Chiu, Chen		
1, 2, 4, 6–8, 13	103	Chiu, Chen		
13	103	Chen, Wedel		
13	103	Chiu, Chen, Wedel		
Overall Outcome			1, 2, 4, 6–8, 13, 23, 25–27, 31, 32	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED