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SUGHRUE MION, PLLC 2000 PENNSYLVANIA AVENUE, N.W. SUITE 900 WASHINGTON, DC 20006			EASON, MATTHEW A	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID WELNER and OLE ERIK TOFT

Appeal 2018-004208
Application 12/101,185
Technology Center 2600

Before KALYAN K. DESHPANDE, CHARLES J. BOUDREAU,
and SHARON FENICK, *Administrative Patent Judges*.

FENICK, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

This is a decision on Appellant's¹ Request for Rehearing ("Reh'g Req.") of our Decision on Appeal issued July 22, 2019 ("Dec."). In that Decision, we affirmed the Examiner's decision rejecting claims 23–25 under 35 U.S.C. § 103(a) as unpatentable over Killion, Motegi, and Boucher; reversed the Examiner's decision rejecting claim 26 under 35 U.S.C. § 103(a) as unpatentable over Killion, Motegi, and Boucher; and reversed the Examiner's decision rejecting claims 27 and 28 under 35 U.S.C. § 103(a) as unpatentable over Killion, Motegi, and Dix.

¹ We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42.

Appellant requests rehearing of our Decision with respect to claims 23–25. Requests for rehearing are limited to matters misapprehended or overlooked by the Board in rendering the original decision. 37 C.F.R. § 41.52(a)(1). We have reviewed our Decision regarding claims 23–25 in light of Appellant’s comments in the Request for Rehearing and are not persuaded that we misapprehended or overlooked any arguments or evidence. Accordingly, we DENY the request to modify our Decision.

ANALYSIS

Appellant “believes the Panel has failed to appreciate the argument for patentability of claims 23–25” and “seeks to clarify a point earlier made.” Reh’g Req. 1. Specifically, Appellant disagrees with the Board’s finding that Boucher’s teaching of inhibiting an alarm for a warm-up time period following power-on to avoid false alarms is reasonably pertinent to the problem faced by the inventors. *Id.* at 2–4; *see* Dec. 4. According to Appellant,

The Board has correctly stated . . . that the problem addressed by the inventors here is a problem of “a temporary drop in the cell voltage” triggering the battery alarm too early and “giving the user a false impression of the remaining time until a hearing aid will actually stop functioning properly.” But then the Board seemingly applies a different test, where the problem is simply inhibiting any false alarms during a warm-up period.

Reh’g Req. 3. Appellant argues that Boucher does not address the same problem faced by the inventors of “false ‘low battery’ alarms due to supply voltage instability during a short time after turn-on of the hearing aid.” *Id.* at 3. Accordingly, Appellant argues that Boucher is not reasonably pertinent to the problem faced by the inventors, and not analogous art to the claimed invention. *Id.* at 2–4.

We determined that Boucher’s solution for false alarms during turn-on is reasonably pertinent to Appellant’s problem of false alarms during turn-on. *See* Dec. 3, 5. To the extent that Appellant argues that we have misapprehended whether Boucher must teach the same exact problem faced by the inventors, i.e., to the degree of particularity stated by Appellant, in order to be reasonably pertinent to the problem faced by the inventors and, thus, qualify as analogous art, we disagree that the Decision contains such a misapprehension. “A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor’s endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor’s attention in considering his problem.” *In re Clay*, 966 F.2d 656, 659 (Fed. Cir. 1992). We are instructed “to construe the scope of analogous art broadly,” and that ““familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle.”” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010) (emphasis omitted) (quoting *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 402 (2007)). Accordingly, Appellant’s argument is directed to a mere disagreement with our analysis, which is not a proper basis for a rehearing request, and does not persuade us that we misapprehended or overlooked any aspects of Boucher or previous arguments made by Appellant.

Appellant further argues that, even if Boucher is analogous art, it would not have been obvious to a person of ordinary skill in the art to temporarily inhibit the alarm after turn-on, as taught by Boucher, in the battery alarm of a hearing aid taught by Killion and Motegi. *Reh’g Req.* 4–6. Specifically, Appellant argues that there is “no apparent reason to adopt the Boucher solution in a hearing aid” because “[n]either Killion nor Motegi

mention anything about false alarms” and “Boucher presents a solution to a problem that does not exist in hearing aids, i.e., false gas sensor readings that happen because a semiconductor gas sensor has not warmed up to its proper operating temperature.” *Id.* at 4–5.

We considered this argument in our Decision, noting the Examiner’s provided motivation of “preventing false alarm[s]” for combining Boucher with Killion and Motegi, and we determined that the Examiner did not err in concluding that it would have been obvious to one of ordinary skill in the art to combine Boucher’s inhibition of alarms during warm-up with Killion and Motegi’s battery alarm of a hearing aid in order to avoid false alarms. Dec. 4–5 (citing Appeal Br. 7–9; Reply Br. 8; Final Act. 4). While the specific cause of the false alarms in Boucher differs from that facing the inventors, “[o]ne of ordinary skill in the art need not see the identical problem addressed in a prior art reference to be motivated to apply its teachings,” and Appellant does not persuade us that we misapprehended or overlooked evidence or arguments relating to the combination. *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1323 (Fed. Cir. 2005); Dec. 5.

We have reviewed and considered the arguments in Appellant’s Request for Rehearing and conclude that Appellant has not demonstrated that the Board misapprehended or overlooked any matters in the Decision.

CONCLUSION

In view of the foregoing discussion, we DENY Appellant's Request for Rehearing.

DECISION SUMMARY

Outcome of Decision on Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Denied	Granted
23–25	103	Killion, Motegi, Boucher	23–25	

Final Outcome of Appeal after Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Affirmed	Reversed
23–25	103	Killion, Motegi, Boucher	23–25	
26	103	Killion, Motegi, Boucher		26
27, 28	103	Killion, Motegi, Dix		27, 28
Overall Outcome			23–25	26–28

TIME PERIOD FOR RESPONSE

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

DENIED