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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JASON PALMER,
BART-JAN ZWART, CHRISTOPHER JOHN HUFF, and
JACOB BRINKERT

Appeal 2018-008172
Application 14/388,273
Technology Center 3700

Before MICHAEL L. HOELTER, ANNETTE R. REIMERS, and
LISA M. GUIJT, *Administrative Patent Judges*.

GUIJT, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant's¹ Request for Rehearing² pursuant to 37 C.F.R. § 41.52
seeks review of our Decision³ affirming the Examiner's rejections of claims
1, 2, 5, 6, 8, 10, 11, and 13–15.

¹ Koninklijke Philips N.V. (“Appellant”) is the applicant as provided under
37 C.F.R. § 1.46 and is identified as the real party in interest. Appeal Br. 3.

² Dated July 7, 2019 (“Req.”).

³ Dated May 5, 2019 (“Decision” or “Dec.”).

DISCUSSION

A request for rehearing is limited to matters overlooked or misapprehended by the Board in rendering the original decision. *See* 37 C.F.R. § 41.52; *see also Ex parte Quist*, 95 USPQ2d 1140, 1141 (BPAI 2010) (precedential) (quoting Manual of Patent Examining Procedure (MPEP) § 1214.03). The request may not rehash arguments originally made in the appeal brief, neither is it an opportunity to merely express disagreement with a decision; further, the request may not raise new arguments or present new evidence except as permitted by paragraphs (a)(2) through (a)(4). *See* 37 C.F.R. § 41.52.

First, Appellant argues that the Board misapprehended the teachings of *Tesini*, *Rees*, *Tashiro*, *Horan*, and *Kesselring*, which are “directed to addressing a collapsed state of a resilient teat wall, and are not directed to addressing a depressed state of a resilient teat wall.” Req. 11. Specifically, Appellant submits,

even if the Board believes *Tesini*, *Rees*, *Tashiro*, *Horan* and [*Kesselring*] teach a rotationally asymmetric wall thickness distribution of a resilient teat, such teachings if true only apply to opposing wall portions of teat 10 . . . that would come into contact during a teat collapse whereby the rotationally symmetric wall thickness distribution of ribs that are arranged on an inner surface of the non-fold portion of teat 10 during a depressed state of the teat 10 would prevent a collapse of the teat.

Id. (citing Spec. FIG. 3B). Appellant concludes,

Tesini, *Rees*, *Tashiro*, *Horan* and [*Kesselring*] . . . may not be characterized as teaching a fold region during a depressed state of a teat wherein the fold region has a rotationally asymmetric wall thickness distribution for effecting an elastic transformation by the resilient wall of the teat from the depressed state to the distended state [because] the rib embodiments of [these prior art

references] *are located in a non-fold region* during a depressed state of a teat . . . for effecting a flow of liquid through the teat in case of collapse of the teat wall.

Id. at 11–12 (emphasis added). Appellant submits that this argument “clearly set[s] forth in the Appeal Brief and the Reply Brief that the teachings of *Tesini, Rees, Horan and [Kesselring]* are directed to addressing a collapsed state of a resilient teat wall, and are not directed to addressing a depressed state of the resilient teat wall.” *Id.* at 9.

Reproduced below is the sole argument presented in the Appeal Brief for the patentability of *all* claims on appeal:

a careful review of an entirety of *Tesini, . . . Rees, Tashiro, [and] Horan*, reveals these references individually describe a rotational symmetric wall thickness distribution *in a fold region* of a resilient wall of the teat, *particularly via ribs*, and fail to describe, teach or suggest, individually or in combination, a rotational asymmetric wall thickness in a fold region of a resilient wall of the teat as encompassed by the aforementioned limitations of independent claims 1 and 15.

Appeal Br. 16, Section 7.A (italicized for emphasis); *see also id.* 17–19, 28, 29, 32, 33, 37, 42, 45–47, 51, 52, 54, 56, 57, 61, 62, 64 (relying on arguments “as previously set forth in Section 7.A.” for each rejection); Dec. 7 (noting that merely restating a claim is not considered a presentation of an argument for the patentability of the claim). In other words, Appellant acknowledges that these references disclose *a fold region*, as claimed, but Appellant submits the references disclose a rotationally *symmetric* wall thickness distribution in their respective fold regions, particularly because the ribs fail to impart an asymmetric wall thickness in the fold region, as required by the claims. This same argument from Section 7.A of the Appeal Brief is reproduced in the Reply Brief in the rejection of all claims. *See*

Reply Br. 18, 25, 26, 30, 31, 32, 34–38, 41–44, 46, 49, 50–54 (relying on arguments “as previously set forth in Section 7.A of the Appeal Brief”); Dec. 7 (noting that merely restating a claim is not considered a presentation of an argument for the patentability of the claim).

Notably, the Reply Brief additionally explains why the ribs disclosed in each prior art reference fail to provide the rotational *asymmetric* wall thickness required by the claims. *See* Reply Br. 18–19 (arguing that “*Tesini* is not teaching the ribs may have differing thickness from the interior wall but instead saying the identical varying thickness of ribs 312-314 varies between $2\text{mm} \pm 1\text{mm}$ ”); *id.* at 19–21 (arguing that Rees’s ribs 8, 9, 18, 19, 36, 42, and 43 are either equidistantly spaced-apart and identical, or not equidistantly space[d] apart but not identical); *cf.* Appeal Br. 68 (claim 1, requiring, in relevant part, “equidistantly spaced-apart ribs . . . wherein at least one of the ribs has a different length and/or width and/or thickness than the other ribs”); Reply Br. 21–22 (arguing that Tashiro only discloses “a rotational symmetric wall thickness” and further, that ribs 706 are identical and not equidistantly spaced apart); *id.* at 22–23 (arguing that Horan is merely cumulative and does not teach “incorporat[ing] a mechanical property of a wall thick distribution of ribs/elastic material for preventing both a teat collapse and a teat depression ,” as claimed).

In view of the record before us, we determine that Appellant’s current argument that the ribs disclosed in *Tesini*, Rees, Tashiro, Horan, and Kesselring are on a *non*-folded portion of the teat, such that the ribs cannot at least partially effect the rotationally asymmetric wall thickness distribution in a *fold* region, as claimed, is a new argument presented for the first time in this Request for Rehearing, which is not permitted as set forth

supra. In particular, with reference to the Examiner's Rejections III–V, we cannot find in either the Appeal Brief or the Reply Brief an argument that Rees's ribs, for example, as depicted in embodiments 12A and 12B, and modified to include varying wall thicknesses as taught in Rees, are in a *non*-fold region of the nipple. *See* Dec. 7 (noting that merely restating a claim is not considered a presentation of an argument for the patentability of the claim).

Further, Appellant's new argument is not applicable to our affirmances of the Examiner's Rejections I and II involving Tesini, which were based on Appellant's failure to address the Examiner's finding that Tesini's valve 100 at least partially effects the rotationally asymmetric wall thickness distribution in the fold region. Dec. 5–6. Clearly, Appellant failed to argue in either the Appeal Brief or the Reply Brief that Tesini's valve 100 is in a *non*-fold region, rather than in a fold region, as claimed (and now, as presently argued), because Appellant fails to even address the Examiner's reliance on Tesini's valve 100. *See* Dec. 7 (noting that merely restating a claim is not considered a presentation of an argument for the patentability of the claim). Nor do we have, on the record before us, any response from the Examiner addressing any argument presented by Appellant as to whether the ribs and/or valves, as disclosed in the prior art references, are in a fold region verses a non-fold region of the teats. *See* Ans. 13–15.

Similarly, Appellant's new argument is also not applicable to our affirmances of the Examiner's Rejections III–V involving Tashiro, which were based on Appellant's failure to address the Examiner's finding that Tashiro's valve in Figure 9 at least partially effects the rotationally asymmetric wall thickness distribution in the fold region. Dec. 16. Again,

clearly, Appellant failed to argue in either the Appeal Brief or the Reply Brief that Tashiro's valve in Figure 9 is in a *non*-fold region, rather than in a fold region, as claimed (and now, as presently argued), because Appellant failed to even address the Examiner's reliance on Tashiro's valve in Figure 9. *See* Dec. 7 (noting that merely restating a claim is not considered a presentation of an argument for the patentability of the claim). Nor do we have, on the record before us, any response from the Examiner addressing any argument presented by Appellant as to whether the ribs and/or valves, as disclosed in the prior art references, are in a fold region verses a non-fold region of the teats. *See* Ans. 13–15.

Second, Appellant argues that “the Board incorrectly cites *Tesini*” as teaching that the rotationally asymmetric wall thickness distribution is at least partially effected through the use of rotationally asymmetric distribution of at least two materials having a mutually different modules of elasticity, as claimed. Req. 12. In support, Appellant submits that *Tesini*'s valve is not the wall. *Id.* (citing *Tesini* ¶¶ 28, 29). However, the Board did not make this finding; rather, *the Examiner* found that *Tesini*'s valve 100 meets this claim limitation. Dec. 4–5 (citing Final Act. 4, Ans. 5 (wherein the Examiner finds “the presence of the valve in the areola would render the areola region rotationally asymmetric”)). Thus, again, Appellant, in the Request, is raising a new argument, which could have been presented earlier in the Appeal Brief, in response to the Examiner's findings.

Appellant also argues that “the Board incorrectly cites *Tashiro*” as teaching that the rotationally asymmetric wall thickness distribution is at least partially effected through the use of rotationally asymmetric distribution of at least two materials having a mutually different modules of

elasticity, as claimed. Req. 12. In support, Appellant submits that Tashiro teaches “a non-fold region of a nipple body 130 during a depressed state of the teat having a different modulus of elasticity of a fold region of a nipple body 120 of a resilient wall during a depressed state of the teat.” *Id.* 13. However, the Board did not make this finding; rather, *the Examiner* found that Tashiro’s “valve in [Figure 9] also renders the teat rotationally asymmetric.” Dec. 14 (quoting Ans. 14), 16. Thus, again, Appellant, in the Request, is raising a new argument, which could have been presented earlier in the Appeal Brief and/or the Reply Brief, in response to the Examiner’s findings.

Finally, we wish to clarify for the parties that the claims presented in the Appendix of the Appeal Brief, and which have been subjected to examination, recite subject matter that may not have the scope intended by Appellant. The Specification discloses that a fold region has a rotationally asymmetric *stiffness* distribution, which is distinct from the claimed rotationally asymmetric *wall thickness* distribution. *See, e.g.*, Spec. 9 (“the rotationally asymmetric *stiffness* distribution in the fold region 30 may be at least partially effected through a rotationally asymmetric *wall thickens* distribution in said region” (emphasis added)). The Specification relates *ribs* as partially affecting the *wall thickness* distribution (*see, e.g.*, Spec. 4 (disclosing that “[t]he fold region may, for instance, include a rotationally asymmetric arrangement of wall thickness-defined structures, e.g.,] protrusions or recesses”), 7 (“inner surface 12a of the teat wall 12 features a rotationally *a*-symmetric arrangement of ribs 40a, 40b”); claim 1 (clause (i))). In comparison, the Specification relates the use of *at least two materials having a mutually different modulus of elasticity* as partially

affecting the *stiffness* distribution (*see, e.g.*, Spec. 11 (disclosing that “rotationally asymmetrically distributed ‘inlays,’ portions or patches of a second constituent material having a modulus of elasticity that differs from that of the first” may be used to at least partially effect “stiffness distribution”); claim 1 (clause (ii)). The Preliminary Amendment filed September 26, 2014 amended claim 1 to recite that “the rotationally asymmetric *stiffness* distribution in the fold region” is: [at least partially effected by (i) or (ii)].” (Emphasis added). However, the next amendment, the Amendment after Non-Final Rejection filed on November 21, 2016, presents claim 1 as reciting that “the rotationally asymmetric *wall* thickness distribution in the fold region is: [at least partially effected by (i) or (ii)].” We call this change to Appellant’s attention in the event the current, narrower scope of the claims is unintended.

DECISION AND ORDER

We grant the Request to the extent that we have considered the arguments pertaining to matters allegedly overlooked or misapprehended, but otherwise deny the Request.

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

DENIED