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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOSEPH BERNSTEIN

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Appeal 2018-008543  
Application 13/554,323  
Technology Center 3600

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Before ANTON W. FETTING, NINA L. MEDLOCK, and  
BRADLEY B. BAYAT, *Administrative Patent Judges*.

FETTING, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE<sup>1</sup>

Joseph Bernstein (Appellant<sup>2</sup>) seeks review under 35 U.S.C. § 134 of a final rejection of claims 15–21, the only claims pending in the application

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<sup>1</sup> Our decision will make reference to the Appellant’s Appeal Brief (“Appeal Br.,” filed January 25, 2018) and Reply Brief (“Reply Br.,” filed August 28, 2018), and the Examiner’s Answer (“Ans.,” mailed July 10, 2018), and Final Action (“Final Act.,” mailed August 25, 2017).

on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

The Appellant invented “an improved authorization process for high intensity medical interventions.” Spec. 4:26–27.

An understanding of the invention can be derived from a reading of exemplary claim 15, which is reproduced below (bracketed matter and some paragraphing added).

15. A process for gaining third party payment authorization for a prescribed mode of diagnostic testing or therapeutic medical care for a patient, the process including a dialogue between a user and a computer, the process comprising the steps of:

[1] the user’s entry into the computer of

medical information about the patient

and

an authorization request for a specific mode of diagnostic testing or therapeutic medical care for the patient;

[2] the computer’s retrieval of one or more questions from a database in non-transient memory responsive to the information and authorization request,

directed to refining an assessment of whether the specific mode of diagnostic testing or therapeutic medical care is indicated;

[3] the user’s entry into the computer of one or more answers responsive to the one or more questions;

[4] the computer’s retrieval from the database of at least one further question based on one of the one or more answers entered into the computer;

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<sup>2</sup> 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 Joseph Bernstein (Appeal Br. 2).

[5] the user's entry into the computer of at least one further answer to said at least one further question;

and

[6] the computer's generation of feedback responsive to the one or more answers and the at least one further answer,

the feedback instructing the user as to whether or not the specific mode of diagnostic testing or therapeutic medical care is indicated,

wherein the computer permits the user to withdraw the authorization request throughout the process but ultimately grants the authorization request if the user does not withdraw the authorization request, irrespective of whether or not the computer instructs the user that the specific mode of diagnostic testing or therapeutic medical care is indicated,

the computer maintaining a record of the user's decision to withdraw or persist with the authorization request,

the record factoring into a performance metric that reflects the user's medical decision-making prowess,

wherein a granting of the authorization request obligates a third party payer to pay at least a portion of costs associated with the prescribed mode of diagnostic testing or therapeutic medical care.

Claims 15–21 stand rejected under 35 U.S.C. § 101 as directed to a judicial exception without significantly more.

### ISSUES

The issues of eligible subject matter turn primarily on whether the claims recite more than abstract conceptual advice of results desired.

## ANALYSIS

### STEP 1<sup>3</sup>

Claim 15, as a method claim, nominally recites one of the enumerated categories of eligible subject matter in 35 U.S.C. § 101. The issue before us is whether it is directed to a judicial exception without significantly more.

### STEP 2

The Supreme Court

set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, . . . determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, “[w]hat else is there in the claims before us? To answer that question, . . . consider the elements of each claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. [The Court] described step two of this analysis as a search for an “‘inventive concept’”—*i.e.*, an element or combination of elements that is “sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.”

*Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 217–18 (2014) (citations omitted) (citing *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66 (2012)). To perform this test, we must first determine what the claims are directed to. This begins by determining whether the claims recite one of the judicial exceptions (a law of nature, a natural phenomenon, or an abstract idea). Then, if the claims recite a judicial exception, determining

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<sup>3</sup> For continuity of analysis, we adopt the steps nomenclature from 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (“Revised Guidance”).

whether the claims at issue are directed to the recited judicial exception, or whether the recited judicial exception is integrated into a practical application of that exception, i.e., that the claims “apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception.” Revised Guidance, 84 Fed. Reg. at 54. If the claims are directed to a judicial exception, then finally determining whether the claims provide an inventive concept because the additional elements recited in the claims provide significantly more than the recited judicial exception.

#### STEP 2A Prong 1

At a high level, and for our preliminary analysis, we note that method claim 15 recites entering, retrieving, and generating data for display. Retrieving data is a combination of rudimentary analysis followed by receiving data. Entering data is generating data. Thus, claim 15 recites generating, receiving, analyzing, and displaying data. None of the limitations recites technological implementation details for any of these steps, but instead recite only results desired by any and all possible means.

From this we see that claim 15 does not recite the judicial exceptions of either natural phenomena or laws of nature.

Under Supreme Court precedent, claims directed purely to an abstract idea are patent ineligible. As set forth in the Revised Guidance, which extracts and synthesizes key concepts identified by the courts, abstract ideas include (1) mathematical concepts,<sup>4</sup> (2) certain methods of organizing

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<sup>4</sup> See, e.g., *Gottschalk v. Benson*, 409 U.S. 63, 71–72 (1972); *Bilski v. Kappos*, 561 U.S. 593, 611 (2010); *Mackay Radio & Telegraph Co. v. Radio*

human activity,<sup>5</sup> and (3) mental processes.<sup>6</sup> Among those certain methods of organizing human activity listed in the Revised Guidance are managing personal behavior or relationships or interactions between people. Like those concepts, claim 15 recites the concept of medical management. Specifically, claim 15 recites operations that would ordinarily take place in advising to inform one about medical procedures after repeated queries. The advice to inform one about medical procedures after repeated queries in this context involves instructing the user as to whether or not the specific mode of diagnostic testing or therapeutic medical care is indicated, which is a medical management act, and gaining third party payment authorization for a prescribed mode of diagnostic testing or therapeutic medical care for a patient, which is an act ordinarily performed in the stream of medical management. For example, claim 15 recites “instructing the user as to whether or not the specific mode of diagnostic testing or therapeutic medical care is indicated,” which is an activity that would take place whenever one is managing medical processes. Similarly, claim 15 recites “gaining third party payment authorization for a prescribed mode of diagnostic testing or therapeutic medical care for a patient,” which is also characteristic of medical management.

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*Corp. of Am.*, 306 U.S. 86, 94 (1939); *SAP Am., Inc. v. InvestPic, LLC*, 898 F.3d 1161, 1163 (Fed. Cir. 2018).

<sup>5</sup> See, e.g., *Bilski*, 561 U.S. at 628; *Alice*, 573 U.S. at 219–20; *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014); *Smart Sys. Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364, 1383 (Fed. Cir. 2017); *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1160–61 (Fed. Cir. 2018).

<sup>6</sup> See, e.g., *Benson*, 409 U.S. at 67; *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1371–72 (Fed. Cir. 2011); *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1318 (Fed. Cir. 2016).

The Examiner determines the claims to be directed to maintaining a record of a user's decision making skills before a third party payer obligates to paying for a patient's diagnostic testing or therapeutic medical care. Final Act. 2. The preamble to claim 15 recites that it is a process for gaining third party payment authorization for a prescribed mode of diagnostic testing or therapeutic medical care for a patient. The steps in claim 15 result in informing one about medical practices based on iterative queries absent any technological mechanism other than a conventional computer for doing so.

As to the specific limitations, limitations 1, 3, and 5 recite entering data. Limitations 2, 4, and 6 recite generic and conventional analyzing and displaying of medical data, which advise one to apply generic functions to get to these results. The limitations thus recite advice for informing one about medical practices based on iterative queries. To advocate informing one about medical practices based on iterative queries is conceptual advice for results desired and not technological operations.

The Specification at 4:26–27 describes the invention as relating to an improved authorization process for high intensity medical interventions. Thus, all this intrinsic evidence shows that claim 15 recites medical management. This is consistent with the Examiner's determination.

This in turn is an example of managing personal behavior or relationships or interactions between people as a certain method of organizing human activity because medical management is the managing of interactions between people for the benefit of a patient. The concept of medical management by informing one about medical practices based on iterative queries is one idea for gathering information for such interactions.

The steps recited in claim 15 are part of how this might conceptually be premised.

Our reviewing court has found claims to be directed to abstract ideas when they recited similar subject matter. *Trading Techs. Int'l, Inc. v. IBG LLC*, 921 F.3d 1378, 1384 (Fed. Cir. 2019) (display to help users process information more quickly); *Affinity Labs of Tex., LLC v. Amazon.com Inc.*, 838 F.3d 1266, 1271 (2016) (customizing user interface and tailoring content).

Alternately, this is an example of concepts performed in the human mind as mental processes because the steps of generating, receiving, analyzing, and displaying data mimic human thought processes of observation, evaluation, judgment, and opinion, perhaps with paper and pencil, where the data interpretation is perceptible only in the human mind. *See In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 611 (Fed. Cir. 2016); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1093–94 (Fed. Cir. 2016). Claim 15, unlike the claims found non-abstract in prior cases, uses generic computer technology to perform data reception, analysis, and display and does not recite an improvement to a particular computer technology. *See, e.g., McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1314–15 (Fed. Cir. 2016) (finding claims not abstract because they “focused on a specific asserted improvement in computer animation”). As such, claim 15 recites generating, receiving, analyzing, and displaying data, and not a technological implementation or application of that idea.

From this we conclude that at least to this degree, claim 15 recites a medical management process by informing one about medical practices based on iterative queries, which is managing personal behavior or

relationships or interactions between people, which is one of certain methods of organizing human activity identified in the Revised Guidance, and, thus, an abstract idea.

STEP 2A Prong 2

The next issue is whether claim 15 not only recites, but is more precisely directed to this concept itself or whether it is instead directed to some technological implementation or application of, or improvement to, this concept i.e., integrated into a practical application.<sup>7</sup>

At the same time, we tread carefully in construing this exclusionary principle lest it swallow all of patent law. At some level, “all inventions ... embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” Thus, an invention is not rendered ineligible for patent simply because it involves an abstract concept. “[A]pplication[s]” of such concepts “ ‘to a new and useful end,’ ” we have said, remain eligible for patent protection.

Accordingly, in applying the § 101 exception, we must distinguish between patents that claim the “ ‘buildin[g] block[s]’ ” of human ingenuity and those that integrate the building blocks into something more.

*Alice*, 573 U.S. at 217 (citations omitted).

Taking the claim elements separately, the operation performed by the computer at each step of the process is expressed purely in terms of results, devoid of implementation details. Steps 1, 3, and 5 are pure data gathering steps. Limitations describing the nature of the data do not alter this. Steps 2, 4, and 6 recite generic computer processing expressed in terms of results desired by any and all possible means and so present no more than

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<sup>7</sup> See, e.g., *Alice*, 573 U.S. at 223, discussing *Diamond v. Diehr*, 450 U.S. 175 (1981).

conceptual advice. All purported inventive aspects reside in how the data are interpreted and the results desired, and not in how the process physically enforces such a data interpretation or in how the processing technologically achieves those results.

Viewed as a whole, Appellant's claim 15 simply recites the concept of medical management by informing one about medical practices based on iterative queries as performed by a generic computer. This is no more than conceptual advice on the parameters for this concept and the generic computer processes necessary to process those parameters, and does not recite any particular implementation.

Claim 15 does not, for example, purport to improve the functioning of the computer itself. Nor does it effect an improvement in any other technology or technical field. The 11+ pages of Specification do not bulge with disclosure, but only spell out different generic equipment<sup>8</sup> and parameters that might be applied using this concept and the particular steps such conventional processing would entail based on the concept of medical management by informing one about medical practices based on iterative queries under different scenarios. They do not describe any particular improvement in the manner a computer functions. Instead, claim 15 at issue amounts to nothing significantly more than an instruction to apply medical management by informing one about medical practices based on iterative queries using some unspecified, generic computer. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice*, 573 U.S. at 225–26.

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<sup>8</sup> The Specification describes a computer containing an algorithm. Spec. 7:29–31.

None of the limitations reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field, applies or uses a judicial exception to effect a particular treatment or prophylaxis for a disease or medical condition, implements a judicial exception with, or uses a judicial exception in conjunction with, a particular machine or manufacture that is integral to the claim, effects a transformation or reduction of a particular article to a different state or thing, or applies or uses the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment, such that the claim as a whole is more than a drafting effort designed to monopolize the exception.

We conclude that claim 15 is directed to achieving the result of medical management by advising one to inform one about medical procedures after repeated queries, as distinguished from a technological improvement for achieving or applying that result. This amounts to managing personal behavior or relationships or interactions between people, which fall within certain methods of organizing human activity that constitute abstract ideas. The claim does not integrate the judicial exception into a practical application.

#### STEP 2B

The next issue is whether claim 15 provides an inventive concept because the additional elements recited in the claim provide significantly more than the recited judicial exception.

The introduction of a computer into the claims does not generally alter the analysis at *Mayo* step two,

the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.

Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implement[t]” an abstract idea “on . . . a computer,” that addition cannot impart patent eligibility. This conclusion accords with the preemption concern that undergirds our § 101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of “additional feature[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.”

*Alice*, 573 U.S. at 223–24 (citations omitted).

“[T]he relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea . . . on a generic computer.” *Alice*, 573 U.S. at 225. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is purely conventional. Using a computer for generating, receiving, analyzing, and displaying data amounts to electronic data query and retrieval—one of the most basic functions of a computer. All of these computer functions are generic, routine, conventional computer activities that are performed only for their conventional uses. *See Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353 (Fed. Cir. 2016). *See also In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011) (“Absent a possible narrower construction of the terms ‘processing,’ ‘receiving,’ and ‘storing,’ . . . those functions can be achieved by any general purpose computer without special programming”). None of these activities is used in some unconventional

manner nor does any produce some unexpected result. Appellant does not contend it invented any of these activities. In short, each step does no more than require a generic computer to perform generic computer functions. As to the data operated upon, “even if a process of collecting and analyzing information is ‘limited to particular content’ or a particular ‘source,’ that limitation does not make the collection and analysis other than abstract.” *SAP Am.*, 898 F.3d at 1168.

Considered as an ordered combination, the computer components of Appellant’s claim 15 add nothing that is not already present when the steps are considered separately. The sequence of data generation-reception-analysis-display is equally generic and conventional. *See Ultramercial*, 772 F.3d at 715 (sequence of receiving, selecting, offering for exchange, display, allowing access, and receiving payment recited an abstraction), *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372, 1378 (Fed. Cir. 2017) (sequence of data retrieval, analysis, modification, generation, display, and transmission), *Two-Way Media Ltd. v. Comcast Cable Commc’ns, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (sequence of processing, routing, controlling, and monitoring). The ordering of the steps is therefore ordinary and conventional.

We conclude that claim 15 does not provide an inventive concept because the additional elements recited in the claim do not provide significantly more than the recited judicial exception.

#### REMAINING CLAIMS

Claim 15 is representative. The remaining method claims merely describe process parameters. We conclude that the method claims at issue are directed to a patent-ineligible concept itself, and not to the practical

application of that concept. There are no structural claims. As a corollary, the claims are not directed to any particular machine.

#### LEGAL CONCLUSION

From these determinations we further determine that the claims do not recite an improvement to the functioning of the computer itself or to any other technology or technical field, a particular machine, a particular transformation, or other meaningful limitations. From this we conclude the claims are directed to the judicial exception of the abstract idea of certain methods of organizing human activity as exemplified by the managing personal behavior or relationships or interactions between people of medical management by advising one to inform one about medical procedures after repeated queries, without significantly more.

#### APPELLANT'S ARGUMENTS

As to Appellant's Appeal Brief arguments, we adopt the Examiner's determinations and analysis from Final Action 2–5 and Answer 3–5 and reach similar legal conclusions. We now turn to the Reply Brief.

We are not persuaded by Appellant's argument that "on pages 4 and 5 of the Appeal Brief, an explanation is provided regarding how the present invention improves computer functionality." Reply Br. 2. Appellant refers to

while the invention includes the step of supplying questions that are answered in order to determine whether certain medical interventions are necessary, the identification is not a simple linear process. In other words, for a particular medical intervention, not all appropriate questions are identified prior to evaluating the medical procedure. Rather, certain initial questions are identified, and other questions are not identified until answers to the initial questions have been obtained. As a result, certain technical advantages over the prior art are

obtained. First, it should be understood that not all questions that will be posed are initially identified. As a result, the identification of questions that will not be posed may be eliminated, resulting in faster identification of questions to pose, decreases searching of memory to obtain questions to be posed, and fewer memory access because fewer questions are initially retrieved. Then, as initial questions are answered, additional questions may be retrieved from memory based on the answers to the initial questions. Again, this results in more efficient access to memory as retrieval of questions that will not be posed may be avoided.

Appeal Br. 4–5. Appellant argues that interview and search techniques are patent eligible. Such techniques are literally performable without even paper and pencil, requiring no more than oral communication in a non-computer context. This is the epitome of mental concept. Computer context cannot confer eligibility. “The Supreme Court and [the Federal Circuit] have repeatedly made clear that merely limiting the field of use of the abstract idea to a particular existing technological environment does not render the claims any less abstract.” *Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1259 (Fed. Cir. 2016). Appellant goes on to contend that such techniques improve computer memory performance in efficiency. But this is not a technological improvement. It does not improve the manner in which a computer operates. It only states the obvious that a computer uses as much capacity as its inputs and programs require and efficiencies in gathering data for entry reduce follow on computer usage.

We are not persuaded by Appellant’s argument that “[i]n paragraph 8 of the Final Rejection, first sentence, the PTO acknowledges that a computer is improved as a result of the claimed invention. While the sentence refers to ‘abstract idea,’ the acknowledgement of a technical improvement is noteworthy.” Appeal Br. 5. Appellant refers to “[t]here is no evidence

showing improvement to the structural or functional properties of the computer itself, outside of improving the computer specifically for implementing the abstract idea.” Final Act. 7. The Examiner is simply referring to the same input tracking improvement we describe in the previous argument response.

Appellant cites *Berkheimer* for the proposition that evidence of something being conventional is necessary. *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018). Reply Br. 2–4. Support for this finding is provided under Step 2B *supra*.

We are not persuaded by Appellant’s argument that

while the invention includes the step of supplying questions that are answered in order to determine whether certain medical interventions are necessary, the identification is not a simple linear process. In other words, for a particular medical intervention, not all appropriate questions are identified prior to evaluating the medical procedure. Rather, certain initial questions are identified, and other questions are not identified until answers to the initial questions have been obtained. As a result, certain technical advantages over the prior art are obtained.

Appeal Br. 4. This argument refers to the concept of improving data acquisition sequencing, without reciting any technological implementations for doing so. As we determined *supra*, even if a process of collecting and analyzing information is limited to particular content or a particular source, that limitation does not make the collection and analysis eligible. *See SAP Am. supra*.

We are not persuaded by Appellant’s argument that claim 15 “recites an order of accessing memory to obtain questions, with the result of increased processor and memory retrieval efficiency.” Appeal Br. 5. This is

another form of the first argument *supra*, and any improvement is an information improvement, not a processor improvement. “The claims are focused on providing information to traders in a way that helps them process information more quickly, not on improving computers or technology.” *Trading Techs.*, 921 F.3d at 1384 (internal citations omitted). The same argument would erroneously support the conclusions that this sequence results in brain efficiency when performed manually with paper and pencil.

We are not persuaded by Appellant’s argument that the claimed invention addresses the challenge of requiring a medical provider to assess the need to perform a test (or procedure) by answering specific questions from non-transient memory, permitting a medical provider to withdraw a request for a test (or procedure), and the compilation and retrieval of the results of the interaction with the non-transient memory. These are meaningful limitations that add more than generally linking the use of abstract ideas because they solve a problem with a claimed solution that is necessarily rooted in computer technology.

Appeal Br. 6–7 (emphasis omitted). Again, this is an information improvement, not a technological improvement. Contrary to the argument, the claimed solution is only situated in a technological context, not rooted in computer technology. No technological implementation details are recited. “The purely functional nature of the claim confirms that it is directed to an abstract idea, not to a concrete embodiment of that idea.” *Affinity Labs*, 838 F.3d at 1269.

#### CONCLUSIONS OF LAW

The rejection of claims 15–21 under 35 U.S.C. § 101 as directed to a judicial exception without significantly more is proper.

CONCLUSION

The rejection of claims 15–21 is affirmed.

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
15–21	101	Eligibility	15–21	

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) (2011).

AFFIRMED