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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KURT A. BURKHART SR. and RONALD E. BURKHART SR.

Appeal 2019-000884
Application 15/236,843
Technology Center 3600

Before MICHAEL L. HOELTER, JILL D. HILL, and
LEE L. STEPINA, *Administrative Patent Judges*.

STEPINA, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant filed a Request for Rehearing (“Req. Reh’g” or “Request”) dated February 18, 2020, of the Decision on Appeal mailed December 18, 2019 (“Decision”). This Decision affirmed in part the Examiner’s rejections of claims 1–3 and 5–17. *See* Decision 13. Appellant “believes the Board overlooked portions of Appellant’s reply brief and misapprehended Appellant’s arguments.” Req. Reh’g 1.

Upon consideration of Appellant’s Request, we do not modify our opinion.

A REQUEST FOR REHEARING

A request for rehearing “must state with particularity the points believed to have been misapprehended or overlooked by the [Patent Trial and Appeal Board, hereinafter “Board”].” *See* 37 C.F.R. § 41.52(a)(1). This section also states that arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs “are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) through (a)(4) of this section.” In addition, a request for rehearing is not an opportunity to express disagreement with a decision without setting forth points believed to have been misapprehended or overlooked by the Board in rendering its 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. *See* 35 U.S.C. §§ 141, 145.

ANALYSIS

Appellant quotes the following text from the Decision. “Appellant does not contest the Examiner’s finding that adding flow obstructers would enhance dimensional stability.” Req. Reh’g 1 (quoting Decision 9). Appellant then states, “Appellant respectfully believes the Board overlooked portions of Appellant’s reply brief and misapprehended Appellant’s arguments.” *Id.* Appellant’s quote from page 9 of the Decision omits certain key language. The following is a quotation of the entire sentence of the Decision from which Appellant takes this quotation. “Appellant does not contest the Examiner’s finding that adding flow obstructers would enhance dimensional stability, and *this finding is not premised on a finding*

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that Graf '975 discloses interior modules, much less flow obstructers in interior modules.” Decision 9 (emphasis added).

Appellant then quotes portions of pages 3 and 4 of the Reply Brief that discuss what each of Graf '975 and Burkhart '473 discloses. *Id.* at 1–2. Appellant further quotes a portion of page 5 of the Reply Brief setting forth Appellant’s interpretation of a previous, related Board decision (Appeal No. 2013-007366). *Id.* at 2. Appellant then concludes “[t]hus, Appellant *did in fact address* the ‘added structural capacity’ and use of the structural braces to provide this ‘structural capacity’ adding structural capacity is the same as ‘dimensional stability’ and Appellant did in fact contest the use of those ‘braces’ in Burkhart in interior modules.” *Id.* (emphasis added).

We disagree with Appellant on this point because none of the portions of the Reply Brief quoted by Appellant contest the finding that adding flow obstructers would enhance dimensional stability. Rather, these portions assert that (i) Graf '975 discloses only exterior modules, (ii) the Examiner proposes to add structure “in locations where neither Burkhart '473 nor Graf '975 explicitly disclose benefits or desirability to add flow obstructers,” and (iii) with respect to Appeal No. 2013-007366, Appellant’s understanding is that the Board found Burkhart does not teach or suggest use of flow obstructers on interior modules. Req. Reh’g 1–2.

The discussion in the Request does not identify any argument contesting that adding flow obstructers would enhance dimensional stability. Instead, Appellant argued something different, namely, that Graf '975 discloses only *exterior* modules (not interior modules), Graf '975 and Burkhart '473 do not “*explicitly disclose* benefits or desirability to add flow obstructers,” and the only modules with structural braces in Burkhart are *exterior* modules. Req. Reh’g 1–2 (emphasis added).

Appellant next notes the Decision’s discussion of paragraph 33 of Graf ’975 and states, “this is where the Board has misapprehended Appellant’s arguments.” Req. Reh’g 2 (citing Decision 6). Appellant argues that the disclosure in paragraph 33 of Graf ’975’s that some or all of the internal arcuate apertures 11 could be provided with filler plates 20 “if deemed desirable” “only extends to the *exterior* modules in Graf because Graf does not disclose interior modules in the first place.” *Id.* Appellant goes on to reiterate that “Graf does not disclose *interior* modules, Graf necessarily cannot disclose filler plates in interior modules since those interior modules are absent in the first place.” *Id.*

Appellant’s discussion on this point does not identify any portion of the Decision that misapprehends or overlooks an Appellant argument. Rather, as explained on page 9 of the Decision, the Examiners finding that adding flow obstructers would enhance dimensional stability “is not premised on a finding that Graf ’975 discloses interior modules, much less flow obstructers in interior modules.”¹

On pages 3 through 9 of the Request, Appellant asserts that Graf ’975 and Burkhart ’473 do not disclose or suggest flow obstructers on interior modules and that, in Appeal No. 2013-007366, “the Board previously agreed with Appellant that Burkhart did not suggest the structural braces being located in *interior modules*.” Appellant states that, in Appeal No. 2013-007366, “the examiner was reversed for providing a rejection which lacked

¹ As discussed *supra*, the Request quotes a portion of this sentence from the Decision, but Appellant’s partial quotation omits this part of the sentence explaining that the rejection does not require a finding that Graf ’975 discloses interior modules or flow obstructers on interior modules. *See* Req. Reh’g 1; Decision 9.

rational underpinning as to why one of skill in the art would want to put those structural braces in the interior modules.” Req. Reh’g 3.

These repeated assertions do not identify any argument misapprehended or overlooked by the Board. The Examiner’s reasoning and the underpinnings for it are discussed on page 6 of the Decision. Further, as stated in the Decision, “Appellant does not contest the Examiner’s finding that adding flow obstructers would enhance dimensional stability, and *this finding is not premised on a finding that Graf ’975 discloses interior modules, much less flow obstructers in interior modules.*” Decision 9. Arguing, as Appellant does, that a reference does not disclose or suggest flow obstructers on interior modules is not the same as contesting an Examiner’s finding that adding flow obstructers would increase dimensional stability.

Additionally, Appellant’s characterization of the reason for a reversal of the rejection of independent claim 14 in Appeal No. 2013-007366 is incorrect. In Appeal No. 2013-007366, the Board did not find that Burkhart ’473 “does not suggest or disclose use of braces or any type of flow obstructer in interior modules,” as asserted by Appellant. Req. Reh’g 3; *see also id.* at 4–5. Rather, in Appeal No. 2013-007366, the Board merely disagreed with the Examiner’s finding that placement of a module containing a brace in the *perimeter* of an assembly of modules met the requirements of claim 14, which required “each of said rows and columns of said plurality of interior modules containing at least one flow obstructer.” Appeal No. 2013-007366, Decision 10. In other words, the rejection of claim 14 in Appeal No. 2013-007366 was reversed because the Examiner’s proposed combination of references did not meet all the requirements of the claim, not because of a lack of any suggestion by Burkhart ’473.

Pages 6–9 of the Request also discuss *In re Kotzab*, 217 F.3d 1365 (Fed. Cir. 2000), and assert that the Decision relies on abstract teachings in affirming the Examiner’s rejection. For example, the Request states, “[t]he Board, by stating [E]xaminer’s finding was not premised on the existence of interior modules in Graf (Decision at 9), shows the error of logic. For Graf to suggest flow obstructers in interior modules, Graf must first disclose interior modules, which Graf fails to do.” Req. Reh’g 8. This discussion points out Appellant’s disagreement with the Decision, and in particular, the discussion of the Examiner’s reasoning on page 6 of the Decision, but does not identify misapprehended or overlooked arguments.

Accordingly, we deny Appellant’s Request for Rehearing.

CONCLUSION

Outcome of Decision on Rehearing:

Claims Rejected	35 U.S.C. §	Basis	Denied	Granted
1–3, 5–17	103(a)	Burkhart ’473, Graf ’975	1–3, 5–10, 13–17	
Overall Outcome			1–3, 5–10, 13–17	

Final Outcome on Appeal after Rehearing:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1–3, 5–17	103(a)	Burkhart ’473, Graf ’975	1–3, 5–10, 13–17	11, 12
1–3, 5–17	103(a)	Burkhart ’473, Nicholas ’780		1–3, 5–17
1–3, 5–17	103(a)	Burkhart ’473, Nicholson ’319		1–3, 5–17

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Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
Overall Outcome			1-3, 5-10, 13-17	11, 12

DENIED