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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* PREBEN KIDMOSE and SOREN ERIK WESTERMANN

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Appeal 2019-001666  
Application 13/335,896  
Technology Center 3700

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Before MICHAEL J. FITZPATRICK, LISA M. GUIJT, and  
LEE L. STEPINA, *Administrative Patent Judges*.

FITZPATRICK, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) requests partial rehearing under 37 C.F.R. § 41.52 of our Decision of December 4, 2019 (“Decision”), wherein we affirmed the Examiner’s rejection of claims 1–7, 9–20, and 26–32. *See* Request for Rehearing filed February 4, 2020 (“Request”). Appellant’s Request seeks rehearing only with respect to claims 28–30. Request 1.

The Request is denied.

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<sup>1</sup> Appellant is the “applicant” under 37 C.F.R. § 1.42(a) and identifies assignee Widex A/S as the sole real party in interest. Appeal Br. 2.

## DISCUSSION

A “request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board.” 37 C.F.R. § 41.52(a)(1). With few exceptions, none of which apply here, “[a]rguments not raised, and evidence not previously relied upon . . . are not permitted in the request for rehearing.” *Id.*<sup>2</sup>

### *Claim 28*

Claim 28 recites:

The apparatus according to claim 1, wherein said presented spoken voice message relates to an identified or predicted predetermined biological incident, and wherein said apparatus further comprises an element operable by said user to trigger at least one further voice message relating to said identified or predicted predetermined biological incident.

Appeal Br. 16.

The Request seeks rehearing on claim 28 because “neither” of two passages cited in the Final Action in relation to claim 28 “says anything about the user operating some element to trigger at least one further voice message relating to the biological incident.” Request 1. The Request does not identify where this argument was previously raised. *Id.* at 1–2. Indeed, it was not. *See generally* Appeal Br.; Reply Br. In fact, Appellant appealed the rejection of claim 28 solely on the basis of its dependency from claim 1. *See* Appeal Br. 7–11. The Request is denied as to claim 28.

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<sup>2</sup> The exceptions relate to new case law and new grounds of rejection. 37 C.F.R. § 41.52(a)(2)–(4).

*Claims 29 and 30*

Claim 29 recites:

29. A portable EEG monitoring apparatus, said apparatus comprising:

an EEG pick-up component configured to measure at least one EEG signal from a *person* carrying the apparatus,

a signal processor configured to analyze said at least one EEG signal and to identify or predict predetermined biological incidents in *said person* based on said analysis,

a decision component configured to decide when information is to be presented to *said person*, a message selector configured to select a voice message providing *said person* with information, and

an acoustic transducer for presenting the selected voice message to *the person*, where said apparatus is adapted to present the voice message in the ear of *the person*,

said apparatus further comprising an acknowledgement component whereby *the person* carrying the apparatus can acknowledge the presented spoken voice message, the spoken voice message being repeated and the volume thereof increased with each repetition until it is acknowledged; and

*a user input* by which *said person* can adjust multiple criteria for presenting information to *said person*.

Appeal Br. 16–17 (emphasis added). Claim 30 depends from claim 29. *Id.* at 17.

The Request asserts that “[w]hat is overlooked . . . in the Board Decision is that claim 29 requires that the adjustments can be made by the same person whose EEG is being monitored and to whom the information about his own condition will be provided.” Request 2; *see also* Appeal Br. 9 (“So when claim 29 refers to a user input ‘by which *said person* can adjust multiple criteria for presenting information to *said person*,’ it is necessarily the case that the person adjusting the multiple criteria is the same person

whose EEG signal is being measured, whose biological incident is being predicted and into whose ear the spoken voice message is presented.”).

Appellant is correct that each recitation of “person” in claim 29 refers to the same person and that the “user input” is operable by that same person.

However, Appellant is incorrect that the Board overlooked such an argument. We explicitly addressed Appellant’s argument, as follows:

Appellant . . . argues that Fischell’s device is not “programmable by the *user*.” [Appeal Br. 8.] Appellant argues that, per the claim language, the “user” refers to the person whose EEG signals are measured by the EEG device, i.e., a patient. Appeal Br. 9. We agree with Appellant on that point. However, we disagree with Appellant’s conclusion that the user cannot be a physician. *See id.* (“This is not and cannot be the physician making adjustments in Fischell.”). Rather, we agree with the Examiner that the claim does “not recite or require the user/person to be a non-medical professional.” Final Act. 10. “When the portable EEG monitoring apparatus is used by the physician, the physician is the user.” *Id.*

Decision 7.

The Request argues: “Whether the user is a physician or not does not change the fact that Fischell never suggests having a person able to adjust their own alarm criteria.” Request 2. This argument is not persuasive, as claim 29 is directed to an apparatus that comprises, among other things, “a user input by which said person can adjust multiple criteria for presenting information to said person.” The Examiner has shown that Fischell teaches such an input. *See* Decision 7; Final Act. 3, 10 (both pages citing Fischell 4:66–5:25). That Fischell does not explicitly teach that a physician could use the input to adjust criteria when the device is implanted in himself is not probative of nonobviousness.

The Request does not assert anything else was overlooked or misapprehended in the Decision. *See generally* Request. Nonetheless, the Request does present two additional arguments that arguably imply something was overlooked or misapprehended.<sup>3</sup>

The first such argument is that “there is no disclosure in Fischell of adjusting multiple *criteria for presenting*, as opposed to multiple *formats for presenting*.” Request 3. This is a claim construction argument, a version of which was presented in the Appeal Brief as follows:

In Paragraph 13 of the final Office action, the examiner responds that Fischell explicitly teaches programmable parameters related to how information is presented to a user (amplitude, frequency, and time duration of an acoustic, visual, or other sensory input applied to the person).

First, it is noted that the values the examiner has identified are values describing *how* information is presented, but not criteria for presenting the information. . . . It is clear that the criteria are criteria for deciding when information is to be presented to the person.

Appeal Br. 9. In the Answer, the Examiner rejected the Appellant’s claim construction argument, stating:

[G]iven its broadest reasonable interpretation, ‘criteria’ simply refers to a characterizing mark or trait. The manner in which a message is presented to the user (amplitude, frequency, time duration) is a characterizing mark or trait of the presented message.

Ans. 4.

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<sup>3</sup> “The request for rehearing *must state with particularity* the points believed to have been misapprehended or overlooked by the Board.” 37 C.F.R. § 41.52(a)(1) (emphasis added). Thus, it is insufficient to present arguments that merely imply something was overlooked or misapprehended.

The Examiner has the better position. Appellant previously directed us to the paragraph bridging pages 12 and 13 of its Specification as providing support for the limitation. *See* “Summary of Claimed Subject Matter” 2 (filed June 11, 2018).<sup>4</sup> There, the Specification states, in relevant part: “[The interface] may provide access to the settings of the EEG monitoring apparatus 2, e.g. allowing the user to change alarm threshold, warning intervals, volume settings etc.” Spec. 12–13 (citing Fig. 1, ref. 11). Neither this paragraph, which does not even mention “criteria” (or “criterion”), nor any other portion of the Specification supports Appellant’s narrow construction of “criteria.”

The second such argument is that claim 29 is directed to a “*portable* EEG monitoring apparatus,” whereas “lines 21–23 of col. 15 [of Fischell<sup>5</sup>] describe the parameters being programmed by a physician *at a workstation*.” Request 3. The Request does not identify where this argument was previously raised. *Id.* at 3. Indeed, it was not. *See* Appeal Br. 8–9; Reply Br. 8–9.

For the foregoing reasons, the Request is denied as to claims 29 and 30.

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<sup>4</sup> The “Summary of Claimed Subject Matter” was filed after the Appeal Brief in response to a Notice of Defective Appeal Brief.

<sup>5</sup> The Examiner cited this portion of Fischell as teaching that “that the programmable parameters recited in col. 4, line 66 – col. 5, line 25 are programmed by a physician.” Final Action 10; Ans. 3.

SUMMARY

Outcome of Decision Rehearing:

Claims Rejected	35 U.S.C.	References	Denied	Granted
28, 29	§ 103(a)	Fischell, Randlov	28, 29	
30	§ 103(a)	Fischell, Randlov, Chittum	30	

Final Outcome of Appeal after Rehearing:

Claims Rejected	35 U.S.C.	References	Affirmed	Reversed
1-4, 9-13, 16-18, 28, 29, 31, 32	§ 103(a)	Fischell, Randlov	1-4, 9-13, 16-18, 28, 29	31, 32
5, 14	§ 103(a)	Fischell, Randlov, Heintzman	5, 14	
6, 15	§ 103(a)	Fischell, Randlov, Shuttleworth	6, 15	
7	§ 103(a)	Fischell, Randlov, Hood	7	
19, 20	§ 103(a)	Fischell, Randlov, Beck-Nielsen, Dilorenzo	19, 20	
26, 27	§ 103(a)	Fischell, Randlov, Luria or Bowers	26, 27	
30	§ 103(a)	Fischell, Randlov, Chittum	30	
<b>Overall Outcome</b>			1-7, 9-20, 26-30	31, 32

DENIED