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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MATTHIAS E. SCHUELE

Appeal 2019-002738
Application 14/566,800
Technology Center 3700

Before DANIELS. SONG, STEFAN STAICOVICI, and
MICHAEL L. HOELTER, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

Appellant¹ filed a Request for Rehearing (“Req. Reh’g”) dated January 14, 2020 of the Decision on Appeal mailed November 14, 2019 (“Decision”). This Decision affirmed in part the Examiner’s rejections of claims 1, 4–12, 14–18, 21, and 22.² *See* Decision 10. Appellant “submits that this Request for Rehearing should be granted as the [] Decision is in-part based on certain misapprehended or overlooked aspects by the Board.” 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

¹ 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 “pro med instruments GmbH.” Appeal Br. 2.

² The rejection of claims 1, 4–8, 17, 18, and 21 was affirmed. The rejections of claims 9–12, 14–16, and 22 were reversed. *See* Decision 10.

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 initially focuses on the claim language “a second rod, comprising an elongated curved shape.” Req. Reh’g 1. Appellant contends that the Board treated the phrase “elongated curved shape” as “including coordinate adjectives when that is not the case” as per The Chicago Manual of Style³ (hereinafter “Chicago Style”). Req. Reh’g 1, 2. Appellant explains that coordinate adjectives are adjectives that “are either separated by a comma or the conjunction ‘and’.” Req. Reh’g 2 (referencing Chicago Style, Chapter 5 Grammar and Usage, Section 5.91 Coordinate Adjectives). Appellant provides an example, i.e., “‘the smart, funny comedian’ uses coordinate adjectives and expresses that the comedian is smart and that the comedian is funny.” Req. Reh’g 2. However, the above claim language lacks a comma and the conjunction “and,” and thus the claimed phrase does not include coordinate adjectives. Instead, according to Appellant, the claimed phrase employs adjectives that “are considered cumulative such that one adjective [describes] the combination of the other adjective plus the noun.” Req. Reh’g 2. An example of such is provided in the Chicago Style, i.e., “the phrase ‘the lethargic soccer player’ that describes a soccer player that is lethargic.” Req. Reh’g 2.

“Appellant notes the purposeful lack of any comma or conjunction ‘and’ within [the] claimed phrase” “an elongated curved shape.” Req. Reh’g 2. This is because the “claimed phrase describes a second rod that has a

³ THE CHICAGO MANUAL OF STYLE, 17th ed., available at <https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec091.html>.

curved shape but that curved shape is elongated.” Req. Reh’g 2. Appellant contrasts that interpretation with how the Board treated this claimed phrase, i.e., “an elongated and curved shape.” Req. Reh’g 3. In other words, Appellant argues the Board misapprehended or overlooked the scope of claim 1 by basing its decision “on Olsen by pointing to a rod that is elongated but straight [i.e., item 12], and then modifying that rod by affixing a non-elongated angled joint member [i.e., item 540].” Req. Reh’g 3.

However, Appellant’s statement above regarding “non-elongated angled joint member” 540 of Olsen is not a correct characterization of that member. For clarity, Olsen’s joint members 540 and 570 are replicated below.

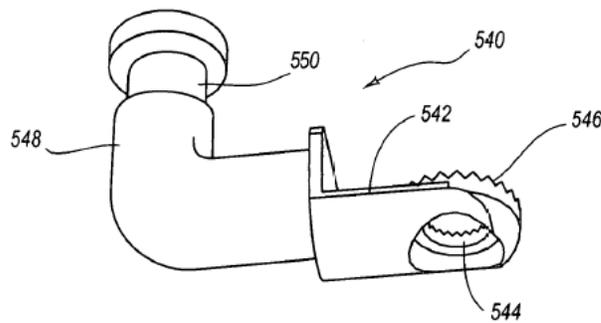


Fig. 20

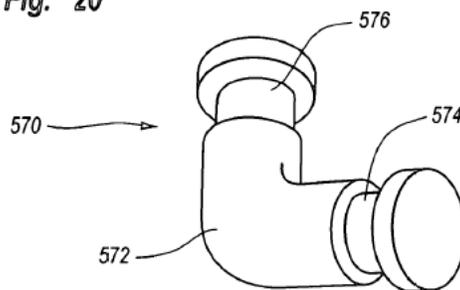


Fig. 22

The above Figures 20 and 22 of Olsen illustrate angled joint members 540 and 570 respectively which can be interchanged with each other depending on the desired end terminus. See Olsen ¶¶ 40, 42, 121, 123.

We have been instructed by our reviewing court that “[d]escription for purposes of anticipation can be by drawings alone as well as by words.” *In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972). On the one hand, we have been instructed that “patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” *Hockerson-Halberstadt, Inc. v. Avia Group Int’l, Inc.*, 222 F.3d 956 (Fed. Cir. 2000). On the other hand, we have also been instructed that our reviewing court “did not mean that things patent drawings show clearly are to be *disregarded*.” *Mraz*, 455 F.2d at 1072. In the record before us, we understand that Olsen is silent as to the issue of “precise proportions of the elements,” but also that the depiction of angled joint member 540 above clearly illustrates this item as having a length, width, and depth. Hence, because there is length between the two terminus points, there appears to be no basis for Appellant’s above assertion that angled member 540 is “non-elongated.”⁴

In further support of the elongated nature of angled joint member 540, comparable member 570 is described as comprising “an elongate cylindrical body” and “wherein the elongate member is bent between the grooves” 574, 576. Olsen ¶ 123. Referenced joint member 540 is depicted in the above figures as having a similar construction, and thus may likewise be reasonably said to comprise “an elongate cylindrical body” that is bent between its opposite ends. Moreover, as noted in the Decision, “the claim limitation at issue recites ‘a second rod, *comprising* an elongated curved

⁴ Appellant’s Specification employs the term “elongated” in its ordinary and customary sense, and does not provide a definition contrary to such usage. For example, a support rest “having a shape that is elongated with a curve” and “a curved elongated member having an egg shaped profile.” Spec. ¶ 43.

shape,’ and does not require the second rod to be curved in its entirety.”
Decision 4.

Thus, even if the limitation in question is interpreted to mean the recited curved shape is elongated, as advocated by the Appellant (*see* Req. Reh’g 2), this does not undermine or weaken the teachings of Olsen. Nor does such interpretation compromise the Examiner’s finding that Olsen discloses the limitation, “a second rod, comprising an elongated curved shape.” *See* Final Act. 3.

Accordingly, and based on the above, we do not modify our decision on this point.

Appellant also presented a second instance of where the Board is believed to have misapprehended or overlooked an argument in rendering its Decision. *See* Req. Reh’g 5. Here, Appellant addresses the claim language “wherein the first rod is rotatably adjustable about the first axis of rotation and the second axis of rotation.” Req. Reh’g 5. Appellant contends the Board failed to note that rotation is about both axes (“and”), not just one or the other. *See* Req. Reh’g 6.

We disagree. During the discussion of this rotation matter, the Decision specifically recited a passage from Paragraph 45 of Olsen. *See* Decision 7. This passage reads as follows: “**FIG. 1** shows an adjustable splint **10** that is adjustable in more than one plane or axis, as illustrated by the arrows therein.” The Decision also referenced Olsen Paragraph 51 and Figure 8, neither of which Appellant addresses in the current Request.⁵

⁵ Paragraph 51 of Olsen (addressing Figure 1) states, “(v) main body **14** can be twisted along one axis with respect to main body **12** (see arrows **44**, **46**); and (vi) main body **14** can be twisted, along another axis with respect to main body **12** (see arrows **47**, **48**).”

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Accordingly, Appellant's contention regarding a lack of any rotation about multiple axes, or that the Board misapprehended or overlooked this argument when rendering its Decision, is not persuasive. We do not modify our decision on this point.

DECISION

Appellant's Request for Rehearing has been granted to the extent that the Board reconsidered its Decision in light of the statements made in this Request, but is denied with respect to the Board making any modification to the Decision.

DENIED