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Paper 21
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS (ADROCA) LLC,
Petitioner,

v.

ACORDA THERAPEUTICS, INC.,
Patent Owner.

Case IPR2015-00720
Patent 8,663,685 B2

Before MICHAEL P. TIERNEY, LORA M. GREEN, and JACQUELINE WRIGHT BONILLA, *Administrative Patent Judges.*

BONILLA, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Coalition For Affordable Drugs (ADROCA) LLC ("Petitioner") filed a Request for Rehearing of our Decision (Paper 15, "Decision" or "Dec.") denying *inter partes* review of claims 1–8 of U.S. Patent No. 8,663,685 B2 (Ex. 1001, "the '685 patent"). Paper 18 ("Req. Reh'g.").

In our Decision, we denied institution based on three obviousness grounds in the Petition (Paper 1, "Pet.") relying upon two posters asserted as prior art, i.e., the Goodman poster (Ex. 1008)[1] and the Hayes poster (Ex. 1009).[2] Dec. 2. We were not persuaded that Petitioner had made a threshold showing that either poster was sufficiently publicly accessible to qualify as "printed publication" prior art under § 102(b) to the '685 patent. *Id*. at 5.

Under 37 C.F.R. § 42.71(c), "[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion." An abuse of discretion occurs when a "decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment." *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565,

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[1] Goodman et al., poster titled "*Placebo-Controlled Double-Blinded Dose Ranging Study of Fampridine-SR in Multiple Sclerosis*" (7th Annual Meeting of the Americas Committee for Treatment and Research in Multiple Sclerosis and 18th Congress of the European Committee for Treatment and Research in Multiple Sclerosis (ACTRIMS/ECTRIMS), Baltimore, MD, September 18–21, 2002) ("the Goodman poster") (Ex. 1008). *See also* Ex. 2033, 3 ("C416").

[2] Hayes et al., poster titled "*Open-Label, Multiple-Dose Study to Determine the Pharmacokinetics and Safety of Fampridine-SR (Sustained-Release 4-Aminopyridine) in Patients with Chronic Spinal Cord Injury*" (American Neurological Association, Chicago, IL, September 30–October 3, 2001) ("the Hayes poster") (Ex. 1009). *See also* Ex. 2031, 12 ("C148").

1567 (Fed. Cir. 1988) (citations omitted). A request for rehearing "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed." 37 C.F.R. § 42.71(d).

II. ANALYSIS

Petitioner argues that we improperly applied the "reasonable likelihood" standard under 35 U.S.C. § 314(a) by requiring Petitioner "to ***persuade*** the Board that its references ***constitute*** prior art" before instituting a trial. Req. Reh'g. 3–4. Petitioner contends that it met the "proper standard" regarding institution by showing there was at least a 50/50 chance that Petitioner would establish during a trial that the posters were prior art printed publications. *Id*. at 4–5.

In our Decision, we stated that we were "not persuaded that Petitioner has made *a threshold showing* that the posters were sufficiently publicly accessible to qualify as a 'printed publication' under § 102(b)." Dec. 5 (emphasis added). We also stated that Petitioner had "not demonstrated *adequately*" that either poster constituted prior art to the '685 patent. *Id*. (emphasis added). In other words, when considering the Petition and information before us, Petitioner did not demonstrate sufficiently that either poster constituted prior art, and consequently, Petitioner did not establish that there was a reasonable likelihood that it would prevail with respect to at least one of the claims challenged in the Petition, as required under § 314(a). Petitioner's assertions regarding the "proper standard" do not persuade us that we made a legal error in denying the Petition on that basis.

Petitioner also argues that we misapprehended its argument regarding "admissions" by Patent Owner in Information Disclosure Statements

("IDSs") of record. Req. Reh'g 5–9. As noted in our Decision (Dec. 3), Petitioner asserted in its Petition that the Goodman poster was prior art "because it was published at least as early as September 18–21, 2002 (a fact admitted by the '685 patent applicants in an October 1, 2012 IDS, *see* Ex. 1043, at Reference No. C416)." Pet. 18. As also noted in our Decision (Dec. 3), the Petitioner similarly argued that the Hayes poster was prior art "because it was published on Sept. 30—October 3, 2001, more than one year prior to December 11, 2003 (a fact admitted by the '685 patent applicants in an October 31, 2011 IDS, *see* Ex. 1033, at Reference No. C148)." Pet. 19.

The above-quoted assertions correspond to arguments, in their entirety, made by Petitioner regarding "admissions" by Patent Owner in relation to the posters. In its Request for Rehearing now, Petitioner essentially reargues, or attempts to bolster with new arguments, the same assertions, citing the same IDSs, that we already considered and expressly addressed in our Decision. Req. Reh'g. 1–2, 5–9; Pet. 7–9, 18–20 (citing Ex. 1043, C416; Ex. 1033, C148); Dec. 3–4. As explained in our Decision, the cited statements in the IDSs, by themselves, did not provide sufficient evidence of an "admission" by Patent Owner as to exactly when, where, and to whom the Goodman and Hayes posters were presented at scientific meetings. Dec. 3–5.

Petitioner further argues that we applied the "wrong law" regarding the alleged admissions by Patent Owner in those IDSs, for example, by misapprehending *In re Klopfenstein* and other case law. Req. Reh'g. 7–9. As explained by the Federal Circuit, a "determination of whether a reference is a 'printed publication' under 35 U.S.C. § 102(b) involves a case-by-case inquiry into the facts and circumstances surrounding the reference's

disclosure to members of the public." *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). We engaged in exactly that inquiry, consistent with other binding case law, and determined that information presented in the Petition did not make a threshold showing in relation to the prior art status of the posters. Dec. 3–5. Mere disagreement with the Board's analysis or determination in this regard is not a proper basis for rehearing.

Petitioner also contends that our Decision is based on "clearly erroneous findings of fact" in relation to *Klopfenstein* factors, including "duration of display," "expertise of target audience," "existence of reasonable expectations of copying," and "simplicity or ease of copying." Req. Reh'g. 9–15. Petitioner further contents that we made "clear errors of law and judgment" in weighing those factors. *Id*. In this regard, Petitioner again relies on its argument that our Decision "misapprehends or overlooks [Patent Owner's] admissions of fact regarding publication of the posters." *Id*. at 9–10, and 9–15 generally.

Once again, Petitioner essentially reargues, and attempts to bolster with new arguments now, the same contentions that we already considered and expressly addressed in our Decision. Dec. 3–5. As noted above, mere disagreement with the Board's analysis or determination is not a proper basis for rehearing. Moreover, we will not consider new arguments made for the first time in a Request for Rehearing, especially when an opportunity to present arguments and information regarding the posters clearly existed at the time Petitioner filed its Petition. *See, e.g.*, *Berk-Tek LLC v. Belden Tech. Inc.*, Case IPR2013-00057, slip op. at 3 (PTAB May 15, 2013) (Paper 21) ("A request for rehearing is not an opportunity to submit new analysis, after

the Decision has noted the deficiencies in the petitioner's original analysis.").

For the reasons given, Petitioner has not demonstrated that we abused our discretion in denying institution, nor that we misapprehended or overlooked matters raised in the Petition in our Decision.

III. ORDER

Accordingly, it is

ORDERED that Petitioner's Request for Rehearing is *denied*.

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