



Mitchell Swartz
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Weston MA 02493

In re Application of	:	
Mitchell Swartz	:	
Application No. 13/544,381	:	DECISION ON PETITION
Filed: July 9, 2012	:	
For: MACHINE AND PROCESS TO	:	
PRELOAD, ACTIVATE, REJUVENATE,	:	
AND EVALUATE ENERGY PRODUCTION	:	
FROM A NANOSTRUCTURED MATERIAL	:	

This is a decision on the petition under 37 CFR 1.181 filed June 23, 2016, which is being treated as a petition requesting that the Director exercise her supervisory authority and overturn the decisions¹ of a Technology Center 3600 Director (Technology Center Director), and specifically to “correct” statements by the examiner in the Office actions issued in the above-identified application and recuse the examiner from the above-identified application.

The petition under 37 CFR 1.181 to “correct” statements by the examiner in the Office actions issued in the above-identified application and recuse the examiner from the above-identified application is **DENIED**.

BACKGROUND

The above-identified application was filed on July 9, 2012 by petitioner as a *pro se* applicant via the United States Patent and Trademark Office (USPTO) electronic filing system (EFS). The above-identified application was accompanied by, *inter alia*, an information disclosure statement listing nineteen (19) documents, and among the documents listed on the information disclosure statement were: (1) Swartz, M., “*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*”, Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006)

¹ This decision reviews the Technology Center Director decisions of February 19, 2016, May 23, 2016, and August 9, 2016.

(document number 15); and (2) Swartz, M., G. Verner, “*Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux*”, Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010) (document number 19).

A non-final Office action was mailed on May 13, 2015. The non-final Office action of May 13, 2015 included, *inter alia*: (1) an objection to the specification under 35 U.S.C. § 112 (for failing to provide an adequate written description of the invention and for failing to adequately teach how to make and/or use the invention); (2) a rejection of claims 13 through 19 under pre-AIA² 35 U.S.C. § 112, first paragraph (for failing to comply with the enablement requirement); (3) a rejection of claims 13 through 19 under 35 U.S.C. § 112, second paragraph (indefiniteness); (4) a rejection of claims 13 through 19 under 35 U.S.C. § 101 for lack of utility; (5) a rejection of claims 13, 15, 17, 18, and 19 under 35 U.S.C. § 103 as unpatentable over Arrathoon (U.S. Patent No. 4,054,496) and Frentrop (U.S. Patent No. 3,546,496); and (6) a rejection of claims 14 and 16 under 35 U.S.C. § 103 as unpatentable over Arrathoon, Frentrop, and McCorkle (U.S. Patent No. 4,759,894). The non-final Office action of May 13, 2015 also indicated that: (1) claims 1 through 12 and 20 through 25 were withdrawn from further consideration as being drawn to a nonelected invention (37 CFR 1.142(b)); and (2) the information disclosure statement filed with the above-identified application did not comply with 37 CFR 1.98(a)(2) as lacking a legible copy of each document. The copy of the information disclosure statement listing included with the non-final Office action of May 13, 2015 was annotated to indicate that two (2) documents (Swartz, M., “*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*”, Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006), and Swartz, M., G. Verner, “*Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux*”, Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010)) (“two documents in question”) were not considered.

A reply to the non-final Office action of May 13, 2015 was filed on August 11, 2015, and a petition under 37 CFR 1.181 was filed on August 13, 2015. The reply of August 11, 2015 and petition under 37 CFR 1.181 of August 13, 2015 asserted that the two documents in question were filed with the information disclosure statement of July 9, 2012. The petition under 37 CFR 1.181 of August 13, 2015 was dismissed by the Technology Center Director in a decision mailed on February 19, 2016.

² 35 U.S.C. § 112 was amended in the Leahy Smith America Invents Act (AIA) to designate its first through sixth paragraphs as subsections (a) through (f), with no substantive changes. *See* Pub. L. 112-29, § 4(c), 125 Stat. 284, 296 (2011). Since the pre-AIA version of 35 U.S.C. § 112 is applicable to the above-identified application, this decision refers to 35 U.S.C. § 112, first paragraph, and 35 U.S.C. § 112, second paragraph, rather than 35 U.S.C. § 112(a) and 35 U.S.C. § 112(b).

A non-final Office action was mailed on October 15, 2015. The non-final Office action of October 15, 2015 included, *inter alia*: (1) an objection to the specification under 35 U.S.C. § 112 (for failing to provide an adequate written description of the invention and for failing to adequately teach how to make and/or use the invention); (2) a rejection of claims 1 through 19 under 35 U.S.C. § 112, first paragraph (for failing to comply with the enablement requirement); (3) a rejection of claims 1 through 19 under 35 U.S.C. § 112, second paragraph (indefiniteness); (4) a rejection of claims 1 through 19 under 35 U.S.C. § 101 for lack of utility; (5) a rejection of claims 1, 3 through 13, 15, 17, 18, and 19 under 35 U.S.C. § 103 as unpatentable over Arrathoon and Frentrop; and (6) a rejection of claims 2, 14, and 16 under 35 U.S.C. § 103 as unpatentable over Arrathoon, Frentrop, and McCorkle. The non-final Office action of October 15, 2015 also indicated that: (1) the restriction requirement is withdrawn as to claims 1 through 19; (2) claims 20 through 25 remain withdrawn from further consideration as being drawn to a nonelected invention (37 CFR 1.142(b)); (3) the two documents in question that were listed on the information disclosure statement of July 9, 2012 are not present in the above-identified application; and (4) petitioner may rectify the situation by resubmitting the two documents in question.

A reply to the non-final Office action of October 15, 2015 and another petition under 37 CFR 1.181 were filed on January 15, 2016. The reply and petition under 37 CFR 1.181 of January 15, 2016 again asserted that the two documents in question were filed with the information disclosure statement of July 9, 2012.

A final Office action was mailed on April 15, 2016. The final Office action of April 15, 2016 included, *inter alia*: (1) an objection to the specification under 35 U.S.C. § 112 (for failing to provide an adequate written description of the invention and for failing to adequately teach how to make and/or use the invention); (2) a rejection of claims 1 through 19 under 35 U.S.C. § 112, first paragraph (for failing to comply with the enablement requirement); (3) a rejection of claims 1 through 19 under 35 U.S.C. § 112, second paragraph (indefiniteness); (4) a rejection of claims 1 through 19 under 35 U.S.C. § 101 for lack of utility; (5) a rejection of claims 1, 3 through 13, 15, 17, 18, and 19 under 35 U.S.C. § 103 as unpatentable over Arrathoon and Frentrop; and (6) a rejection of claims 2, 14, and 16 under 35 U.S.C. § 103 as unpatentable over Arrathoon, Frentrop, and McCorkle. The final Office action of April 15, 2016 also indicated that: (1) claims 20 through 25 remain withdrawn from further consideration as being drawn to a nonelected invention (37 CFR 1.142(b)); (2) the two documents in question that were listed on the information disclosure statement of July 9, 2012 are not present in the above-identified application; and (3) petitioner may rectify the situation by resubmitting the two documents in question.

The petition under 37 CFR 1.181 of January 15, 2016 was dismissed by the Technology Center Director in a decision mailed on May 23, 2016.

A petition under 37 CFR 1.181 was filed on May 11, 2016 and another petition under 37 CFR 1.181 was filed on May 16, 2016, yet again asserting that the two documents in question were filed with the information disclosure statement of July 9, 2012. The petition under 37 CFR 1.181 of May 16, was dismissed by the Technology Center Director in a decision mailed on August 9, 2016.

An after-final submission under 37 CFR 1.116 was filed on May 12, 2016, and an advisory action in response to the after-final submission under 37 CFR 1.116 of May 12, 2016 was mailed on May 25, 2016.

After-final submissions under 37 CFR 1.116 were filed on June 7, 2016, June 13, 2016, and June 16, 2016, and an advisory action in response to the after-final submissions under 37 CFR 1.116 of June 7, 2016, June 13, 2016, and June 16, 2016 was mailed on July 8, 2016.

A notice of appeal under 35 U.S.C. § 134 to the Patent Trial and Appeal Board was filed on July 11, 2016.

STATUTE AND REGULATION

35 U.S.C. § 131 provides that:

The Director shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefor.

35 U.S.C. § 132 provides that:

(a) Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

(b) The Director shall prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant. The Director may establish appropriate fees for such continued examination and shall provide a 50 percent reduction in such fees for small entities that qualify for reduced fees under section 41(h)(1).

35 U.S.C. § 134 provides that:

(a) PATENT APPLICANT.— An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

(b) PATENT OWNER.— A patent owner in a reexamination may appeal from the final rejection of any claim by the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

37 CFR 1.98 provides that:

(a) Any information disclosure statement filed under § 1.97 shall include the items listed in paragraphs (a)(1), (a)(2) and (a)(3) of this section.

(1) A list of all patents, publications, applications, or other information submitted for consideration by the Office. U.S. patents and U.S. patent application publications must be listed in a section separately from citations of other documents. Each page of the list must include:

(i) The application number of the application in which the information disclosure statement is being submitted;

(ii) A column that provides a space, next to each document to be considered, for the examiner's initials; and

(iii) A heading that clearly indicates that the list is an information disclosure statement.

(2) A legible copy of:

(i) Each foreign patent;

(ii) Each publication or that portion which caused it to be listed, other than U.S. patents and U.S. patent application publications unless required by the Office;

(iii) For each cited pending unpublished U.S. application, the application specification including the claims, and any drawing of the application, or that portion of the application which caused it to be listed including any claims directed to that portion; and

(iv) All other information or that portion which caused it to be listed.

(3)(i) A concise explanation of the relevance, as it is presently understood by the individual designated in § 1.56(c) most knowledgeable about the content of the information, of each patent, publication, or other information listed that is not in the English language. The concise explanation may be either separate from applicant's specification or incorporated therein.

(ii) A copy of the translation if a written English-language translation of a non-English-language document, or portion thereof, is within the possession,

custody, or control of, or is readily available to any individual designated in § 1.56(c).

(b)(1) Each U.S. patent listed in an information disclosure statement must be identified by inventor, patent number, and issue date.

(2) Each U.S. patent application publication listed in an information disclosure statement shall be identified by applicant, patent application publication number, and publication date.

(3) Each U.S. application listed in an information disclosure statement must be identified by the inventor, application number, and filing date.

(4) Each foreign patent or published foreign patent application listed in an information disclosure statement must be identified by the country or patent office which issued the patent or published the application, an appropriate document number, and the publication date indicated on the patent or published application.

(5) Each publication listed in an information disclosure statement must be identified by publisher, author (if any), title, relevant pages of the publication, date, and place of publication.

(c) When the disclosures of two or more patents or publications listed in an information disclosure statement are substantively cumulative, a copy of one of the patents or publications as specified in paragraph (a) of this section may be submitted without copies of the other patents or publications, provided that it is stated that these other patents or publications are cumulative.

(d) A copy of any patent, publication, pending U.S. application or other information, as specified in paragraph (a) of this section, listed in an information disclosure statement is required to be provided, even if the patent, publication, pending U.S. application or other information was previously submitted to, or cited by, the Office in an earlier application, unless:

(1) The earlier application is properly identified in the information disclosure statement and is relied on for an earlier effective filing date under 35 U.S.C. 120; and

(2) The information disclosure statement submitted in the earlier application complies with paragraphs (a) through (c) of this section.

37 CFR 1.181(a) provides that:

Petition may be taken to the Director:

(1) From any action or requirement of any examiner in the *ex parte* prosecution of an application, or in *ex parte* or *inter partes* prosecution of a reexamination proceeding which is not subject to appeal to the Patent Trial and Appeal Board or to the court;

(2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Director; and

(3) To invoke the supervisory authority of the Director in appropriate circumstances. For petitions involving action of the Patent Trial and Appeal Board, see § 41.3 of this title.

OPINION

Petitioner maintains that multiple copies of the two documents in question (Swartz, M., “*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*”, Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006), and Swartz, M., G. Verner, “*Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux*”, Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010)) were timely submitted and that these documents are persuasive evidence of patentability. Petitioner alleges that the USPTO is improperly stating that the documents have not been received (and/or stating that the documents were illegible), and generally alleges corruption of the USPTO and the examiner in the removal/destruction and/or blacking out of documents. Petitioner submits several declarations (declarations by Dr. Mitchell Swartz (petitioner), Gayle Verner (journalist and educator) and Dr. Richard Goldblum (board certified psychiatrist)). Petitioner requests review of the Technology Center Director’s decisions in the above-identified application, and specifically requests that the Director “correct” statements by the examiner in the Office actions issued in the above-identified application and recuse the examiner from the above-identified application.

The record of the above-identified application, including the petitions and declarations submitted by petitioner, has been thoroughly reviewed. A result of this review reveals no basis for directing the Technology Center to “correct” statements by the examiner in the Office actions issued in the above-identified application or recuse the examiner from the above-identified application.

The above-identified application was filed on July 9, 2012 via the USPTO’s electronic filing system (EFS), which automatically generates an electronic filing receipt (Electronic Acknowledgement Receipt) when patent documents are received via EFS. As discussed in section 502 of the Manual of Patent Examining Procedure (MPEP):

The Electronic Acknowledgement Receipt establishes the date of receipt by the USPTO of documents submitted via EFS-Web. The electronic documents are itemized in the Electronic Acknowledgement Receipt, which will contain a full listing of the documents submitted to the USPTO as described by the user during the submission process, including the count of pages and/or byte sizes for each document. Thus, the Electronic Acknowledgement Receipt is the electronic equivalent of the postcard receipt described in MPEP 503.

See MPEP § 502.

In addition, MPEP § 502 further cautions applicants that: “the Electronic Acknowledgement Receipt only indicates that the USPTO received what was actually sent, as opposed to what may have been intended to be transmitted.” *See id.*

As discussed with respect to postcard receipts in MPEP § 503: “[a] postcard receipt which itemizes and properly identifies the items which are being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.” *See* MPEP § 503. MPEP § 503 further cautions that:

The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard “a complete application” or “patent application” will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee) or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portion of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard. Furthermore, merely incorporating by reference in the postcard receipt, the items listed in a transmittal letter will not serve as *prima facie* evidence of receipt of those items.

See MPEP § 503.

Since June of 2003, the USPTO’s official patent application and patent records have been retained in the USPTO image file wrapper (IFW) system. *See Changes to Implement Electronic Maintenance of Official Patent Application Records*, 68 *Fed. Reg.* 38611 (June 30, 2003) (final rule); *see also* MPEP § 502. The two documents in question (Swartz, M., “*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*”, Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006), and Swartz, M., G. Verner, “*Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux*”, Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010)) are not present in the USPTO’s IFW records for the above-identified application.

The Electronic Acknowledgement Receipt contains no indication that the two documents in question were submitted with the above-identified application on July 9, 2012. The Electronic Acknowledgement Receipt for the above-identified application and accompanying documents submitted via EFS have been compared against the documents that are present in the IFW records for the above-identified application, and the application parts and accompanying documents indicated on the Electronic Acknowledgement Receipt as having been submitted on July 9, 2012 for the above-identified application are present in the IFW records for the above-identified application. Therefore, the Electronic Acknowledgement Receipt for the above-

identified application indicates that the two documents in question were not among the documents submitted for the above-identified application on July 9, 2012.

As to the contention that multiple copies of the documents in question were resubmitted, the copies of the postcard receipts integrated into the petition have been reviewed. The two documents are not itemized on the postcard. At best, the postcard receipt generally refers to “2nd copy of Refs.” Such a general itemization of the documents being submitted does not serve as *prima facie* evidence that the two documents in question (or any particular documents) were among the papers being filed in the above-identified application. *See* MPEP § 503 (The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard).

Petitioner submits a plethora of arguments and declarations (Swartz and Verner declarations) to support the position that the two documents in question were submitted with the above-identified application on July 9, 2012 or resubmitted thereafter. These arguments and affidavits have been considered; however, the most probative evidence of what documents were actually submitted to and received by the USPTO via EFS is the Electronic Acknowledgement Receipt that is automatically generated when a document is received in the USPTO via EFS, and the most probative evidence of what follow-on documents were filed by mail or hand-delivery and received by the USPTO is a properly itemized return postcard receipt. *See Honigsbaum v. Lehman*, 903 F. Supp. 8, 9-10 (D.D.C. 1995) (document showing receipt by United States Postal Service (USPS) of papers allegedly filed with the USPTO via the USPS more probative of what documents were filed in the USPTO than affidavits, declarations, and copies of records from the petitioner). Therefore, there is no error in the Technology Center Director’s conclusion that the two documents in question were not present in the information disclosure statement submitted on July 9, 2012. Consequently, there is no basis for disturbing the Technology Center Director’s decision that the information disclosure statement submitted on July 9, 2012 was not in compliance with 37 CFR 1.98 with respect to the documents in question. *See* 37 CFR 1.98(a)(2)(requires a legible copy of each publication or that portion which caused it to be listed, other than U.S. patents and U.S. patent application publications).

Petitioner, in virtually every document filed in the above-identified application, asserts that as a *pro se* applicant he should not be held to the same standards as a represented applicant, citing *Haines v. Kerner*, 404 U.S. 519 (1972), in support of this position. The USPTO does give *pro se* applicants considerable latitude in the prosecution of their applications, but an applicant’s *pro se* status is not a license to act in a patently unreasonable manner. *See 1997 Changes to Patent Practice and Procedure*, 62 *Fed. Reg.* 53131, 53177 (Oct. 10, 1997) (final rule) (comment 107 and response). A typical applicant (whether represented or *pro se*) would respond to a notice that documents were not received by simply resubmitting the documents so that they could be considered, rather than file petition after petition insisting that the documents were filed in the above-identified application and accuse an examiner of improper and criminal conduct.

To facilitate resolution of this issue, the Technology Center has obtained a copy of each of the two documents in question (Swartz, M., “*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*”, Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006), and Swartz, M., G. Verner, “*Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux*”, Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010)) from the USPTO’s Scientific and Technical Information Center (STIC). The two documents in question will be made of record and considered in the next Office action (which may be an examiner’s answer).³ This concludes the USPTO’s consideration of petitioner’s contentions concerning the two documents in question.

Petitioner’s allegations of misconduct (improper and/or criminal conduct) on the part of the examiner or Technology Center are without basis. As discussed previously, the USPTO’s official patent application and patent records are retained in the USPTO’s IFW system. The USPTO’s IFW system is a secure system for maintaining the USPTO’s official record of patent application documents with controls to ensure the integrity of these patent application documents. *See Notification of United States Patent and Trademark Office Patent Application Records being Stored and Processed in Electronic Form*, 1271 *Off. Gaz. Pat. Office* 100 (June 17, 2003). Stated simply, patent examiners are neither permitted nor even capable of either removing or altering the documents that have been placed in the USPTO’s IFW system (*e.g.*, an examiner does not annotate an originally filed information disclosure statement listing to consideration or non-receipt of a document, but rather a copy of the information disclosure statement is annotated and entered into the record as an attachment to the Office action it accompanies). Therefore, petitioner’s allegations that (1) the examiner removed or altered documents submitted with the above-identified application, and (2) the examiner’s treatment of the information disclosure statement filed on July 9, 2012 was improper, are without basis.

To remove or recuse an examiner on the basis of bias or improper conduct, an applicant must demonstrate improper conduct, including bias or the appearance of bias, on the part of the examiner, and not simply that the applicant perceives improper conduct or a bias on the part of an examiner. *See In re Ovshinsky*, 24 USPQ2d 1241, 1251-52 (Comm’r Pats. 1992). The record of the above-identified application simply does not indicate improper conduct, including bias or the appearance of bias, on the part of the examiner.

³ The document at page 458 of the Proceedings of the 14th International Conference on Condensed Matter Nuclear International Science, Editors David J. Nagel and Michael E. Melich (International Standard Book Number (ISBN) 978-0-578-06694-3) is entitled *The Phusor®-type LANR Cathode is a Metamaterial Creating Deuteron Flux for Excess Power Gain* rather than *Metamaterial Function of Cathodes Producing Hydrogen Energy and Deuteron Flux* as cited by petitioner.

In the Office actions issued during the examination of the above-identified application (the Office actions of May 13, 2015, October 15, 2015, and April 15, 2016), the examiner thoroughly explained the basis for the decision to object to the specification under 35 U.S.C. § 112 (for failing to provide an adequate written description of the invention and for failing to adequately teach how to make and/or use the invention), and reject claims 1 through 19 under 35 U.S.C. §§ 101, 103, and 112, first and second paragraphs. A close review of the Office actions of May 13, 2015, October 15, 2015, and April 15, 2016 reveals nothing more than the explanations that are typically provided to an applicant when the examiner has reached the decision that the applicant's claims are not patentable. The Office actions of May 13, 2015, October 15, 2015, and April 15, 2016 do not reveal any evidence of bias, appearance of bias, or any other improper conduct. A difference of opinion between the examiner and the applicant as to the patentability of one or more claims does not evidence bias, abuse, or any other improper conduct on the part of the examiner, much less that the examiner's replacement is justified. The decision to find a claim patentable or unpatentable is ultimately a judgment call over which reasonable people can disagree. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (U.S.1969).

Finally, with respect to petitioner's contentions concerning the propriety of the rejections in the above-identified application, and the probative value of the documents submitted by petitioner in support of patentability, review of the propriety of a rejection *per se* (and its underlying reasoning) is by way of an appeal as provided by 35 U.S.C. § 134, and not by way of petition. *See Boundy v. U.S. Patent & Trademark Office*, 73 USPQ2d 1468, 1472 (E.D. Va. 2004). Accordingly, an applicant dissatisfied with an examiner's decision in the second or subsequent rejection may appeal to the Patent Trial and Appeal Board (formerly the Board of Patent Appeals and Interferences). *See* 37 CFR 43.31(a)(1). It is well settled that the Director will not, on petition, usurp the functions or impinge upon the jurisdiction of the Patent Trial and Appeal Board. *See In re Dickerson*, 299 F.2d 954, 958, 133 USPQ 39, 43 (CCPA 1962); *see also* MPEP § 1201 ("The line of demarcation between appealable matters for the Board and petitionable matters for the Director of the U.S. Patent and Trademark Office (Director) should be carefully observed. The Board will not ordinarily hear a question that should be decided by the Director on petition, and the Director will not ordinarily entertain a petition where the question presented is a matter appealable to the Board."). Therefore, a rejection set forth in an Office action is **not** a matter that is properly reviewable via petition.

DECISION

The instant petition is granted to the extent that the action of the Technology Center Director has been reviewed, but is **denied** with respect to disturbing the Technology Center Director's decisions or requiring the Technology Center Director to "correct" statements by the examiner in the Office actions issued in the above-identified application or recuse the examiner from the above-identified application. No further reconsideration of this decision on petition will be entertained.

This decision becomes a final agency action upon entry of a final decision by the Patent Trial and Appeal Board. See MPEP § 1002.02.

Telephone inquiries concerning this decision may be directed to Nancy Johnson, Attorney Advisor at 571.272.3219.



Robert W. Bahr
Deputy Commissioner for
Patent Examination Policy

Attachments:

- (1) Swartz, M., "*Can a Pd/D2O/Pt. Device be Made Portable to Demonstrate the Optimal Operating Point?*", Proc ICCF-10, ISBN 981-256-564-6, 29-44; 45-54 (2006)
- (2) Swartz, M., G. Verner, "*The Phusor®-type LANR Cathode is a Metamaterial Creating Deuteron Flux for Excess Power Gain*", Proc. ICCF14, 10-15 August 2008, Washington, D.C. Editors: David J. Nagel and Michael E. Melich, ISBN: 978-0-578-06694-3, 458, (2010)