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In re Application of	:	
Michael VASQUEZ	:	
Application No. 12/957,257	:	ON PETITION
Filed: November 30, 2010	:	
Attorney Docket No.: 8997.3002	:	

This is a decision on the petition filed August 18, 2015 and resubmitted August 19, 2015, under 37 CFR 1.181(a)(3) requesting that the Director exercise her supervisory authority and overturn the decisions of the Director, Technology Center 3700 (Technology Center Director), dated August 15, 2015, which refused to vacate the Office action of June 23, 2015.

The petitions to overturn the decisions of the Technology Center Director dated August 18, 2015 and August 19, 2015 are **DENIED**.

RELEVANT BACKGROUND

On January 16, 2015, a final Office action was mailed.

A response to the final Office action was filed February 12, 2015.

A Notice of Appeal was filed March 12, 2015.

On March 16, 2015, an Advisory Action was mailed.

On June 23, 2015, a non-final Office action was mailed.

On June 24, 2015, a petition to the TC Director was filed.

On August 15, 2015, the TC Director mailed a petition decision which dismissed the previously filed petition.

On August 18, 2015 and August 19, 2015, petitions were filed requesting supervisory review of the petition decision of the TC Director.

STATUTE, REGULATION, AND EXAMINING PROCEDURE

35 U.S.C. 131 states:

> 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 states:

> (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) of this title.

MPEP 1201 states:

> The United States Patent and Trademark Office (Office) in administering the Patent Laws makes many decisions of a substantive nature which the applicant may feel deny him or her the patent protection to which he or she is entitled. The differences of opinion on such matters can be justly resolved only by prescribing and following judicial procedures. Where the differences of opinion concern the denial of patent claims because of prior art or other patentability issues, the questions thereby raised are said to relate to the merits, and appeal procedure within the Office and to the courts has long been provided by statute (35 U.S.C. 134) .
>
> The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (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. However, since 37 CFR 1.181(f) states that any petition not filed within 2 months from the action

complained of may be dismissed as untimely and since 37 CFR 1.144 states that petitions from restriction requirements must be filed no later than appeal, petitionable matters will rarely be present in a case by the time it is before the Board for a decision. In re Watkinson, 900 F.2d 230, 14 USPQ2d 1407 (Fed. Cir. 1990).

OPINION

Petitioner seeks reversal of the Technology Center Director's decision of August 15, 2015, on the grounds that the non-final Office action of June 23, 2015 improperly rejected the claims over the prior art. Accordingly, petitioner further contends that the June 23, 2015 Office action should be vacated.

Petitioner has only presented arguments directed to the propriety of the examiner's rejections under 35 U.S.C. 103 and 112. Specifically, petitioner argues: (1) the examiner's rejections are vertically and horizontally redundant combinations of the references; (2) the two lead references, Bahrett and Ludwig, have been in this case since January 2013 and the two new references, Jane and Gravlin, are outside Applicant's field and are horizontally and vertically redundant to prior combinations of art; and (3) an appeal is wholly unsatisfactory remedy to *ultra virus* conduct by an Examiner and the interest of justice can only be served by invoking supervisory authority in addressing the issue raised by this petition; namely, the of setting patent policy regarding repetitive office actions with vertically and horizontally redundant combination of references.

A rejection, or the continuation of a rejection, of a claim(s) cannot be reviewed on petition; rather, as explained in MPEP 1201, the mechanism for having the propriety of a given rejection reviewed is by way of appeal before the Patent Trial and Appeal Board (PTAB) under 35 U.S.C. § 134 and 37 CFR 41.31. The issues of whether, *e.g.*, the examiner properly analyzed the claims in light of the specification disclosure before making the rejection(s), or whether the rejections over prior art were properly maintained relate to the merits of those rejections and such can only be considered on appeal and will not be considered on petition. See 37 CFR 1.181(a); see also Boundy v. U.S. Patent & Trademark Office, 73 USPQ2d 1468 (DC Eva 2004), appeal dismissed, 2004 U.S. App. LEXIS 26384 (Fed. Cir. 2004). It is well settled that the Director will not, on petition, usurp the functions or impinge upon the jurisdiction of the PTAB. See In re Dickerson, 299 F.2d 954, 958, 133 USPQ 39, 43 (CCPA 1962); Bayley's Restaurant v. Bailey's of Boston, Inc., 170 USPQ 43, 44 (Comm'r Pat. 1971).

As noted in In re Ovshinsky, 24 USPQ2d 1241, 1251-2 (Comm'r Pats.1992), the issue is not whether the perceptions of an applicant regarding alleged bias are reasonable; rather the issue is: whether an applicant has demonstrated improper conduct, including bias or the appearance of bias, on the part of the Technology Center Director. A full investigation of the facts set forth in the petition, as well as a full consideration of the entire record of this application fails to reveal bias or improper conduct on the part of

the Group Director or the examiner, and as such, there is no reversible error in the Technology Center Director's decision.

The gravamen of applicant's complaint seems to be that the examiner continues to reject claims on various statutory grounds, and applicant obviously disagrees with the rejections contained in the Office action. It should be noted that reasonable men can disagree as to whether a given claim is patentable and on what basis. See Lear, Inc. v. Adkins, 395 U.S. 653, 670, 162 USPQ 1, 8 (1969). A mere difference of opinion between the examiner and the applicant as to the patentability of one or more claims does not evidence bias, a lack of understanding, or improper conduct on the part of the examiner. Rather, such a difference of opinion is properly addressed via an appeal to the PTAB under 35 U.S.C. 134 and 37 CFR 41.31. Indeed, the Technology Center Director correctly observed that the examiner withdrew the 112(pre-AIA), first paragraph, rejections. This does not evidence bias on the part of the examiner; rather the examiner is merely attempting to clarify the record.

For the reasons set forth above, the Technology Center Director's decision to refuse petitioners' request to vacate the Office action of June 23, 2015 is not shown to be in clear error.

DECISION

A review of the record indicates that the Technology Center Director did not abuse his discretion or act in an arbitrary and capricious manner in the petition decisions of August 15, 2015. The record establishes that the Technology Center Director had a reasonable basis to support his findings and conclusion.

For the reasons given above, petitioner has failed to adequately demonstrate bias or the appearance of bias towards applicant by the Technology Center Director, or the examiner. The petition is granted to the extent that the decision of the Technology Center Director dated August 15, 2015, has been reviewed, but is **denied** as to the request that the aforementioned decision be overturned. The Office action of June 23, 2015, will not be disturbed.

This constitutes a final decision on this petition. No further requests for reconsideration will be entertained. Judicial review of this petition decision may be available if the USPTO issues a final agency action adverse to the petitioner in the underlying proceeding or examination to which it relates, or, if this decision does not relate to any ongoing proceeding or examination, if it otherwise constitutes final agency action under 5 U.S.C. 704.

This application is being referred to Technology Center 3700 for further processing.

Telephone inquiries concerning this decision should be directed to Petitions Examiner David Bucci at (571) 272-7099.

Robert W. Bahr
Acting Deputy Commissioner for
Patent Examination Policy/
Petitions Officer