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Inventors: Singh et al.	:	
Patent No. 9,296,737	:	FINAL AGENCY DECISION ON
Issue Date: March 29, 2016	:	REQUEST FOR RECONSIDERATION
Application No. 13/670,937	:	OF PATENT TERM ADJUSTMENT
Filing Date: November 7, 2012	:	
Attorney Docket No. 2007878-0180	:	

This is a decision on the request under 37 C.F.R. § 1.705 filed June 22, 2016, which requests the United States Patent and Trademark Office ("Office") adjust the patent term adjustment ("PTA") set forth on the patent from 0 days to 141 days.

The request is **DENIED**.

This decision is the Director's decision on applicants' request for reconsideration for purposes of seeking judicial review under 35 U.S.C. § 154(b)(4).

Relevant Procedural History

The patent issued with a PTA determination of 0 days on March 29, 2016. The instant request seeking an adjustment of 141 days was timely filed with a payment for a one-month extension of time on June 22, 2016.

Decision

The PTA set forth on the patent is based on the following determinations previously made by the Office:

(1) The period of delay under 35 U.S.C. § 154(b)(1)(A) ("A Delay") is 0 days;
(2) The period of delay under 35 U.S.C. § 154(b)(1)(B) ("B Delay") is 0 days;
(3) The period of delay under 35 U.S.C. § 154(b)(1)(C) ("C Delay") is 0 days;
(4) The number of days of overlapping delay ("Overlap") between the periods of A Delay, B Delay, and C Delay is 0 days; and
(5) The period of delay under 35 U.S.C. § 154(b)(2)(C) ("Applicant Delay") is 0 days.

The PTA to be set forth on a patent is the sum of the days of A Delay, B Delay, and C Delay reduced by the number of days of Overlap and Applicant Delay. In other words, the following formula may be used to calculate the PTA:

PTA = A Delay + B Delay + C Delay – Overlap – Applicant Delay

The patent sets forth a PTA of 0 days (0 days of A Delay + 0 days of B Delay + 0 days of C Delay - 0 days of Overlap - 0 days of Applicant Delay).

The periods of A Delay, C Delay, Overlap, and Applicant Delay are not in dispute.

The request asserts the Office incorrectly calculated the period of B Delay, and as a result, incorrectly calculated the PTA set forth on the patent. The request asserts the correct period of B Delay is 141 days. The request asserts the correct PTA is 141 days.

The following facts are relevant to the calculation of the period of B Delay:

(1) The application was filed on November 7, 2012;
(2) The first request for continued examination ("RCE") filed for the application was filed on November 1, 2013;
(3) The Office issued a notice of allowance on November 9, 2015; and
(4) The patent issued on March 29, 2016.

The impact the submission of a request for continued examination ("RCE") has on the calculation of B Delay is addressed in *Novartis AG v. Lee*, 740 F.3d 593 (Fed. Cir. Jan. 15, 2014). *Novartis* indicates time consumed by continued examination does not include the time period after allowance unless examination on the merits of the application resumes.[1]

Pursuant to *Novartis* and 37 C.F.R. § 1.703(b)(1), the time consumed by continued examination in this case is 739 days, which is the number of days beginning on the date the first RCE was filed (November 1, 2013) and ending on the date the Office issued the notice of allowance (November 9, 2015).

37 C.F.R. § 1.703(b) states,

> The period of [B Delay] is the number of days, if any, in the period beginning on the day after the date that is three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an international application and ending on the date a patent was issued, but not including the sum of [the periods of time set forth in sections (1)-(4) of this paragraph].

The number of days beginning on the day after the date that was three years after the filing date (November 8, 2015) and ending on the issue date (March 29, 2016) is 143 days. The sum of the periods set forth in sections (1)-(4) of 37 C.F.R. § 1.703(b) is 739 days, which is the number of

[1] *Novartis*, 740 F.3d at 602.

days consumed by continued examination.[2] The number of days in the period beginning on the day after the date three years after the filing date and ending on the issue date is *less than* the number of days in the periods of time set forth in sections (1)-(4) of 37 C.F.R. § 1.703(b). Therefore, the period of B Delay is 0 days.

The determination that the period of B Delay is 0 days is consistent with the following "instructions" for calculating B Delay set forth in *Novartis*:

> The better reading of the language is that the patent term adjustment time [for B Delay] should be calculated by determining the length of the time between application and patent issuance, then subtracting any continued examination time (and other time identified in (i), (ii), and (iii) of (b)(1)(B)) and determining the extent to which the result exceeds three years.[3]

The length of time between application and issuance is 1,239 days, which is the number of days beginning on the filing date (November 7, 2012) and ending on the issue date (March 29, 2016). As previously stated, the time consumed by continued examination is 739 days. The number of days beginning on the filing date (November 7, 2012) and ending on the date three years after the filing date (November 7, 2015) is 1,096 days. The result of subtracting the time consumed by continued examination (739 days) from the length of time between application and issuance (1,239 days) is 500 days, which does not exceed three years (1,096 days). In other words, the period of B Delay is 0 days pursuant to the instructions for calculating the period of B Delay set forth in *Novartis*.

The request states the period of B Delay includes the period of time following the issuance of the notice of allowance. Specifically, the request states, "Because 37 C.F.R. § 1.703(b)(1) allows for the accrual of B-type delay after the date of a mailing of a notice of allowance on November 9, 2015," the period of B Delay is 141 days, which is the number of days beginning on the day after the date the Office issued the notice of allowance (November 10, 2015) and ending on the date the patent issued (March 29, 2016).

35 U.S.C. § 154(b)(1)(B) provides the Office with a three-year "allotment" to issue an application as a patent prior to the accrual of B Delay. *Novartis* states, "[T]ime spent in a continued examination does not deplete the PTO's allotment of three years for application processing before a resulting patent has its term extended[.]"[4]

As of the date the application was filed, the number of days in the Office's three-year allotment was 1,096 days, which is the number of days beginning on the filing date (November 7, 2012) and ending on the date three years after the filing date (November 7, 2015).

The Office used 359 days of the 1,096-day allotment prior to the submission of the first RCE. Specifically, the number of days beginning on the filing date (November 7, 2012) and ending on the day before the date the RCE was filed (October 31, 2013) is 359 days.

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[2] The total number of days falling under sections (2)-(4) of 37 C.F.R. § 1.703(b) is 0 days.
[3] *Novartis,* 740 F.3d at 602.
[4] *Id.* at 601.

As of the date the RCE was filed, the number of days remaining in the Office's three-year allotment was 737 (1,096 - 359) days. The Office did not "use" any of the 737 days remaining in the allotment during the time period consumed by continued examination.

The Office only used 141 days of the 737 days remaining in the allotment during the 141-day period beginning on the day after the Office issued the notice of allowance (November 10, 2015) and ending on the issue date (March 29, 2016). In other words, the *entire* time period after allowance fell within the Office's three-year allotment. Therefore, the period of B Delay does not include any of the dates falling within the 141-day period after allowance.

In view of the prior discussion, the correct period of B Delay is 0 days.

Conclusion

The correct PTA is 0 days (0 days of A Delay + 0 days of B Delay + 0 days of C Delay - 0 days of Overlap - 0 days of Applicant Delay).

Telephone inquiries specific to this decision should be directed to Attorney Advisor Steven Brantley at (571) 272-3203.

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