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In re Patent of Bradley et al. :
Patent No. 9,317,843 :
Issue Date: April 19, 2016 :
Application No. 13/283,126 :
Filing Date: October 27, 2011 :
Attorney Docket No. 07451.0050-18000 :

FINAL AGENCY DECISION ON
REQUEST FOR RECONSIDERATION
OF PATENT TERM ADJUSTMENT

This is a decision on the “APPLICATION FOR PATENT TERM ADJUSTMENT – POST GRANT,” (“Request”) filed July 19, 2016, which requests the United States Patent and Trademark Office (“Office”) correct the patent term adjustment determination (“PTA”) set forth on the patent to indicate the term of the patent is extended or adjusted by two hundred ten (210) days.

The request for reconsideration is granted to the extent that the determination has been reconsidered; however, the request for reconsideration of patent term adjustment (“PTA”) is **DENIED** with respect to making any change in the patent adjustment determination under 35 U.S.C. § 154(b) of eighty (80) days.

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

Relevant Procedural History

The patent issued with a PTA determination of 80 days on April 19, 2016. A petition for a one month extension of time pursuant to 37 CFR 1.136(a) and a request seeking a PTA of 210 days were timely filed on July 19, 2016.

Decision

The PTA is based on the following determination previously made by the Office:

- (1) The period of delay under 35 U.S.C. § 154(b)(1)(A) (“A Delay”) is 318 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 238 days.

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The PTA 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:

$$\text{PTA} = \text{A Delay} + \text{B Delay} + \text{C Delay} - \text{Overlap} - \text{Applicant Delay}$$

The patent set forth a PTA of 80 days (318 days of A Delay + 0 days of B Delay + 0 days of C Delay - 0 days of Overlap - 238 days of Applicant Delay).

The Request asserts the Office incorrectly calculated the period of B Delay. The Request asserts the correct period of B Delay is 130 days. The Request argues the correct PTA is 210 days (318 days of A Delay + 130 days of B Delay + 0 days of C Delay - 0 days of Overlap - 238 days of Applicant Delay).

As will be discussed, the period of B Delay is 0 days. Therefore, the correct PTA is 80 days (318 days of A Delay + 0 days of B Delay + 0 days of C Delay - 0 days of Overlap - 238 days of Applicant Delay).

A Delay

The Request does not dispute the Office's prior determination the period of A Delay is 318 days. The Office has recalculated the period of A Delay as part of the Office's redetermination of the PTA and confirmed the period of A Delay is 318 days.

B Delay

The Request disputes the Office's prior determination the period of B Delay is 0 days. The Office has recalculated the period of B Delay as part of the Office's redetermination of the PTA and confirmed the period of B Delay is 0 days.

Pursuant to the *Novartis AG v. Lee*, 740 F.3d 593 (Fed. Cir. Jan. 15, 2014) decision, the Office has determined patentee is entitled to 0 days of "B" delay. In this case, applicant filed the application on October 27, 2011, and the patent issued on April 19, 2016. Thus, the application was pending for 1637 days. During this time, applicant filed a RCE on February 14, 2014. The Office mailed a Notice of Allowance on December 11, 2015. Under 35 U.S.C. § 154(b)(1)(B)(i), the time period consumed by continued examination ("RCE period") began on February 14, 2014, and ended on December 11, 2015, or 666 days. Subtracting the RCE period from the total number of days the application was pending results in 971 (1637 - 666) days. Thus, for purposes of "B" delay, the application was pending for zero (0) days beyond the three-year anniversary of the filing date.

In other words, applicant filed a RCE on February 14, 2014, prior to October 27, 2014, the three-year date. As of the day before the date applicant filed the RCE, the application was only

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pending 841 days. However, before “B” delay could begin to accrue, this application had to be pending an additional 256 days ($841 + 256 = 1097$) after the end of the period consumed by continued examination (i.e. the date of mailing of the Notice of Allowance on December 11, 2015). Accordingly, the period for calculating “B” delay would begin on August 23, 2016 (the day after the date that is 256 days from the mail date the Notice of Allowance). As August 23, 2016, is after the date the patent issued on April 19, 2016, no “B” delay was accrued.

C Delay

The Request does not dispute the Office’s prior determination the period of C Delay is 0 days. The Office has recalculated the period of C Delay as part of the Office’s redetermination of the PTA and confirmed the period of C Delay is 0 days.

Overlap

The Request does not dispute the Office’s prior determination the number of days of Overlap is 0 days. The Office has recalculated the number of days of Overlap as part of the Office’s redetermination of the PTA and confirmed the number of days of Overlap is 0 days.

Applicant Delay

The Request does not dispute the Office’s prior determination the number of days of Applicant Delay is 238 days. The Office has recalculated the number of days of Applicant Delay as part of the Office’s redetermination of the PTA and confirmed the number of days of Applicant Delay is 238 days.

Conclusion

The Request argues the correct PTA is 210 days (318 days of A Delay + 130 days of B Delay + 0 days of C Delay - 0 days of Overlap - 238 days of Applicant Delay).

As previously discussed, the correct period of B Delay is 0 days. Therefore, the correct PTA is 80 days (318 days of A Delay + 0 days of B Delay + 0 days of C Delay - 0 days of Overlap - 238 days of Applicant Delay).

Telephone inquiries specific to this decision should be directed to Attorney Advisor Shirene Willis Brantley at (571) 272-3230.

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