

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ONE WORLD TECHNOLOGIES, INC.,
d/b/a TECHTRONIC INDUSTRIES POWER EQUIPMENT,
Petitioner,

v.

CHERVON (HK) LIMITED,
Patent Owner.

PGR2020-00061
Patent 10,524,420 B2

Before LINDA E. HORNER, JAMES J. MAYBERRY, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request on Rehearing of Decision Denying Institution
of Post-Grant Review
37 C.F.R. § 42.71(d)

I. INTRODUCTION

One World Technologies, Inc., d/b/a Techtronic Industries Power Equipment (“Petitioner”) filed a Petition requesting a post-grant review of claims 1–15 of U.S. Patent No. 10,524,420 B2 (“the ’420 patent”). Paper 1 (“Pet.”). Chervon (HK) Limited (“Patent Owner”) filed a Preliminary Response. Paper 11 (“Prelim. Resp.”).

On December 7, 2020, we denied institution (Paper 16, “Dec.”) because Petitioner failed to show that the ’420 patent is eligible for post-grant review. Dec. 2, 10–18.

Petitioner filed a Request for Rehearing (Paper 17, “Req. Reh’g”) seeking reconsideration of our eligibility analysis and of our decision to deny institution. Petitioner also filed Exhibit 1025 with the Request for Rehearing. For the reasons stated below, we *deny* the Request for Rehearing and expunge Exhibit 1025.

II. NEW EVIDENCE

Petitioner filed Exhibit 1025 with its Request for Rehearing. Req. Reh’g 15 n.4. This exhibit was not of record at the time the Decision Denying Institution was entered. *See id.* (Petitioner acknowledging that “Exhibit 1025 is being added to the record of this proceeding concurrently with this Request for Rehearing; Ex. 1025 was originally ‘Reserved.’”). Petitioner did not request a conference call with the Board prior to submitting Exhibit 1025, nor did Petitioner explain in the Request for Rehearing why this exhibit should be admitted. Thus, Petitioner has not established good cause to admit Exhibit 1025. *See Huawei Device Co. v. Optis Cellular Tech., LLC.*, IPR2018-00816, Paper 19 at 3–4 (PTAB Jan. 8, 2019) (expunging exhibits filed with a request for rehearing when the

petitioner failed to establish good cause for admitting the exhibits)¹; *see also* Consolidated Trial Practice Guide 90 (Nov. 2019)² (“Absent a showing of ‘good cause’ prior to filing the request for rehearing or in the request for rehearing itself, new evidence will not be admitted.”).

Because Petitioner has not established good cause to admit Exhibit 1025, we expunge the exhibit from the record.

III. ANALYSIS

When reconsidering a decision on institution, we review the decision for an abuse of discretion. *See* 37 C.F.R. § 42.71(c) (2019). An abuse of discretion occurs if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *See Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). The party requesting rehearing has the burden of showing the decision should be modified, which includes specifically identifying all matters the party believes were misapprehended or overlooked. *See* 37 C.F.R. § 42.71(d).

In our Decision Denying Institution, we found that Petitioner failed to meet its burden to show that the ’420 patent is eligible for post-grant review. *See* AIA § 3(n)(1)(B) (making the AIA applicable to a patent that claims priority under 35 U.S.C. § 120, 121, or 365(c) to any patent or application

¹ The Office designated *Huawei* precedential on April 5, 2019, well over a year before our Decision and Petitioner’s Request for Rehearing in this case. Petitioner should have been aware of this Board precedent and addressed it if it wished to submit new evidence.

² Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

that contains or contained at any time a claim having an effective filing date on or after March 16, 2013); 37 C.F.R. § 42.204(a) (requiring a petitioner to certify that the patent for which review is sought is available for post-grant review); *Mylan Pharms. Inc. v. Yeda Res. & Dev. Co.*, PGR2016-00010, Paper 9 at 10 (PTAB Aug. 15, 2016) (holding that the ultimate burden of persuasion remains with a petitioner to demonstrate that the challenged patent is eligible for post-grant review).

Petitioner’s basis for arguing in the Petition that the ’420 patent is eligible for post-grant review was that the ’627 patent³, to which the ’420 patent claims priority, allegedly contains at least one claim having an effective filing date on or after March 16, 2013. Pet. 10–11. Specifically, Petitioner asserts that the parent ’627 patent claims subject matter, i.e., a “gripping member” and a “handle,” disclosed only in the later CN040 priority application⁴ filed after March 16, 2013. *Id.* at 11 (citing Ex. 1023, claim 1). Petitioner asserts that the earlier CN914 priority application⁵ does not disclose this claimed subject matter. *Id.* at 13. Petitioner bore the burden on this issue.

We found, “Petitioner’s evidence in support of its assertion that “[t]he earlier [CN914] application does not disclose a “gripping member” and “handle”” is inadequate.” Dec. 16. Specifically, we faulted Petitioner’s logic in attempting to show that the earlier CN914 application does not disclose these claimed features by showing that the later CN040 application

³ U.S. Pat. 9,888,627 B2 (Ex. 1023, “the ’627 patent”).

⁴ Chinese priority application CN 2012 20602040U (“CN040”), filed May 3, 2013.

⁵ Chinese priority application CN 2012 10387914 (“CN914”), filed October 14, 2012.

PGR2020-00061
Patent 10,524,420 B2

does disclose them. *Id.* at 16–17 (“[T]he depiction of what appears to be a substantially cylindrical gripping member and an elongated handle in the later CN040 application does not exclude these features also from being disclosed in the earlier CN914 application.”). We also noted that Patent Owner demonstrated the earlier CN914 application “appears to show similar-looking features as the substantially cylindrical gripping member and the elongated handle identified by Petitioner in the figures of the later CN040 application.” *Id.* at 17. We faulted Petitioner for failing “to address the drawings presented in the earlier CN914 application or establish sufficiently that the claim features of the parent ’627 patent are not disclosed therein.” *Id.*

Petitioner argues that the Board’s Decision “seemingly admonishes Petitioner for not submitting affirmative evidence to prove a negative – that the CN914 application fails to disclose what is claimed in claims 1-5 and 6-10 of the ’627 patent.” Req. Reh’g 6. Petitioner argues, “The Decision does not explain what additional evidence this Board expected, but Petitioner concedes it ‘d[id] not refer to any specific support’ in the earlier CN914 application because that is the point – the CN914 application does not disclose what is claimed.” *Id.*

Petitioner’s objection to being expected to prove a negative is unpersuasive. Petitioner provides substantive analysis of the figures in the CN914 application in this Request for Rehearing and points out alleged “material differences” between the figures in the CN914 and CN040 applications. Req. Reh’g 12–15 (emphasis omitted). This is exactly the type of analysis and argument that could have been supportive of Petitioner’s

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