

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AKER BIOMARINE AS
Petitioner

v.

NEPTUNE TECHNOLOGIES AND BIORESSOURCES INC.
Patent Owner

Case IPR2014-00003
Patent 8,278,351 B2

Before LORA M. GREEN, JACQUELINE WRIGHT BONILLA, and
SHERIDAN K. SNEDDEN, *Administrative Patent Judges*.

BONILLA, *Administrative Patent Judge*.

DECISION
Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Aker Biomarine AS (“Aker”) filed a Petition to institute an *inter partes* review of claims 1-94 of U.S. Patent No. 8,278,351 B2 (Ex. 1001; “the ’351 patent”). Paper 6 (“Pet.”). Neptune Technologies and Bioresources, Inc. (“Neptune”) filed a Patent Owner Preliminary Response. Paper 16. Thereafter, the Parties filed a Joint Motion to Limit Petition, requesting that the Board limit the Petition to claims 1-6, 9, 12-13, 19-29, 32, 35-36, and 42-46 of the ’351 patent. Paper 18. We granted the Joint Motion, thereby limiting this proceeding to the aforementioned claims. Paper 21.

On March 23, 2014, we instituted a trial based on Petitioner’s challenges to: (1) claims 1, 3-6, 9, 12, 13, 19-24, 26-29, 32, 35, 36, and 42-46, but not claims 2 and 25, as anticipated by WO 00/23546 (Ex. 1002, “Beaudoin I”), and (2) all challenged claims as obvious over the combination of Fricke (Ex. 1006), Bergelson (Ex. 1017), Yasawa (Ex. 1015), Itano (Ex. 1009), and the WHO Bulletin (Ex. 1018). Paper 22 (“Decision”). We denied all remaining grounds of unpatentability as redundant to the above grounds, except that we denied all anticipation grounds asserted in the Petition regarding claims 2 and 25. *Id.* at 27-28, 16-20. In its Request for Rehearing, Aker asks that the Board reconsider its denial to institute a review of claims 2 and 25 as anticipated by Beaudoin I. Paper 26 (“Rehearing Req.”) 1-3.

II. ANALYSIS

When rehearing a decision on petition, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be determined 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. *Star Fruits S.N.C. v. United States*, 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, and “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” 37 C.F.R. § 42.71(d).

Claims 2 and 25

Dependent claims 2 and 25 each recite the krill extract of claim 1 or 24, respectively, having “a total phospholipid concentration in an amount of about 40% w/w, wherein about represents $\pm 10\%$.” Ex. 1001, 28:65-67, 31:36-38. We denied Aker’s ground that Beaudoin I anticipates claims 2 and 25. Decision 17.

In its Request for Rehearing, Aker contends two points. Rehearing Req. 2. First, Aker asserts that the Board incorrectly applied the standard of inherent anticipation, and overlooked that “Beaudoin I *explicitly discloses* a phospholipid concentration within the claimed range.” *Id.* at 2, 5-6. We note that we addressed both express and inherent anticipation in our Decision when stating that “Aker fails to explain adequately how the range disclosed by Beaudoin I fell within a range defined as about 40% w/w, wherein about represents $\pm 10\%$, i.e., from 30% to 50%.” Decision 17. That said, we grant the Request for Rehearing to explain more fully why we denied Aker’s ground of anticipation of claims 2 and 25 by Beaudoin I, whether it be express or inherent anticipation.

As Aker correctly notes in its Petition, “Beaudoin I discloses 54.1 \pm 6.1% *phospholipids and polar material w/w* in Fraction I extracts.” Pet. 20 (citing Ex. 1002, 23, Table 14) (emphasis added). Thus, Beaudoin I’s description of

concentration percentages of “[p]hospholipids or other polar material” in Table 14 does not disclose explicitly a total phospholipid concentration as recited in challenged claims 2 and 25. Ex. 1002, Table 14. Rather, Table 14 in Beaudoin I describes percentages, in krill oil Fractions I and II, of material having phospholipids (at some undisclosed concentration) plus “other polar material” (at some undisclosed concentration). Thus, Aker does not explain sufficiently in its Petition, or in its Request for Rehearing, how one can ascertain the total phospholipid concentration of Fraction I by looking at Table 14 or elsewhere in Beaudoin I.

It is *possible* that Fraction I contains the recited total phospholipid concentration (*see* Decision 17), but Table I does not describe expressly that it does. Table 14 of Beaudoin I indicates that the total phospholipid concentration in Fraction I depends on the amount of “other polar material,” as well as the final concentration of “[p]hospholipids or other polar material,” existing in that fraction. Ex. 1002, Table 14. Aker fails to establish adequately, with argument or evidence, that “Beaudoin I expressly discloses phospholipid concentrations within the ranges claimed by claims 2 and 25.” Rehearing Req. 6-7. Thus, Aker does not establish a reasonable likelihood that it would prevail on the ground that Beaudoin I expressly anticipates challenged claims 2 and 25.¹

¹ In its Request for Rehearing, Aker also contends that Beaudoin I alone renders claims 2 and 25 *prima facie* obvious. *See, e.g.*, Rehearing Req. 9-10, 14. A rehearing request “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion” 37 C.F.R. § 42.71(d). Aker fails to show where it asserted this obviousness ground in its Petition. *See, e.g.*, Pet. i-ii, Table of Contents. Consistently, the “error” asserted by Aker in its Request for Rehearing relates to the ground of anticipation by Beaudoin I.

In its second point, Aker further contends that the “Board adopted Aker’s argument that because ‘the processes described in the ’351 patent and . . . the prior art [Beaudoin I] are virtually indistinguishable,’ as a result so, too, ‘would be the resulting extracts.’” Rehearing Req. 2-3, 11 (citing Pet. 12;² Decision 13). Thus, according to Aker, it established a *prima facie* case of anticipation, and under *In re Best* and “its progeny,” the burden shifted to Neptune to produce evidence as to why the resulting compositions would be different, which Aker contends Neptune failed to do. *Id.* at 3, 10-13 (citing *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977); *In re Spada*, 911 F.3d 705, 708 (Fed. Cir. 1990)).

Contrary to Aker’s assertion, we did not “adopt” Aker’s contention that the processes of the ’351 patent and Beaudoin I are virtually indistinguishable. Rehearing Req. 2-3, 11. Aker cites our Decision at page 13, which discusses the asserted ground of anticipation of claims 1 and 24 by Beaudoin I. While we discuss some of Aker’s contentions, the Decision concludes that “evidence presented by Aker tends to demonstrate that the *E. pacifica* krill extract disclosed in Beaudoin I comprised at least one phospholipid” recited in claim 1 “under the principles of inherency as explained by Aker,” citing page 12 of Aker’s Petition. Decision 13 (citing Pet. 12). On page 12 of its Petition, Aker asserts that Neptune “identif[ies] phospholipid molecules that naturally occur in krill and all prior krill extracts,” i.e., an inherency position. Pet. 12.

In support of its inherency position regarding claims 1 and 24, Aker cited declaration evidence, including the van Breeman Declaration (Ex. 1040). Pet. 14. Specifically, as noted in our Decision, the “van Breeman Declaration, in particular,

² The Request for Rehearing cites Paper 4 at 12. *See* Rehearing Req. 2-3. Paper 4 is a Certificate of Service. We assume that Aker intends to refer to its Petition (Paper 6) at 12.

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