

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIPRO CORPORATION,
Petitioner,

v.

NXSTAGE MEDICAL, INC.,
Patent Owner.

Case IPR2016-00744
Patent 8,092,414 B2

REQUEST FOR REHEARING UNDER 37 C.F.R. § 42.71(D)

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I. INTRODUCTION

Nipro Corporation (“Petitioner”) hereby requests rehearing of the Board’s Decision (Paper No. 11, entered July 28, 2016; “Dec.”). The Board reviews a request for rehearing for abuse of discretion, which “occurs when a court misunderstands or misapplies the relevant law or makes clearly erroneous findings of fact.” *Renda Marine, Inc. v. U.S.*, 509 F.3d 1372, 1379 (Fed. Cir. 2007). As set forth below, that standard is met.

According to the Decision, the distinguishing feature of the ‘414 claims over Minami is an “integral” connection between a pressure tube and a pressure pod—a term not found in the ‘414 specification, but which was first introduced by Patent Owner during prosecution. Ex. 1010. The Decision disagreed with Petitioner’s proposed construction of the term “integral.” Rather than adopt the plain meaning—which would require only that the pressure tube be formed “as a unit” with the pressure pod (see Pet., 16)—the Board construed “integral” to require a “seal” limitation based upon the ‘414 specification, finding that the claims require that the pressure tube be formed “as a sealed unit” with the pressure pod. Dec., 12.

The Decision overlooked arguments in the Petition establishing that Minami (Ex. 1012, translation at Ex. 1013), to be operative for its intended purpose, necessarily discloses that its pressure tubing is attached to its pressure pod or air chamber as a sealed unit. As the Board commented in IPR2015-01454, where it

found that a prior art reference’s disclosure of a “computing device” necessarily included a computer processor and memory even though not explicitly recited therein, “a reference can anticipate a claim even if it does not expressly spell out all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would at once envisage the claimed arrangement or combination.” Paper No. 15 at p. 11 (internal quotation marks omitted) (citing *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015)). The same is true here, where Minami’s disclosure of a pressure sensor to measure pressure in a remote pressure pod via a pressure tube necessarily includes a sealed connection that one of ordinary skill in the art would “at once envisage” between the tube and pressure pod.

While the Decision stated that the Petition does not “show sufficiently” a “sealed” connection in Minami because Petitioner focused on a different claim construction only requiring direct attachment (Dec., 14), the Board overlooked that a sealed connection would necessarily be required by the Petition’s arguments about *the pressure measurement mechanism of Minami*. Even if the Board adopts an initial claim construction that differs from the Petition, the Board must still consider all of the Petition’s arguments in relation to a particular claim limitation, examining those arguments in the light of what would be “at once envisaged” by one of ordinary skill in the art as to the newly adopted construction.

II. THE DECISION ERRED IN FINDING THAT THE PETITION DOES NOT ESTABLISH THAT MINAMI TEACHES A DEVICE THAT INCLUDES PRESSURE TUBING ATTACHED TO A PRESSURE POD OR AIR CHAMBER “AS A SEALED UNIT.”

A. The Decision overlooked the Petition’s arguments about Minami’s pressure measurement mechanism, which necessarily requires a sealed connection between the pressure tube and the pressure sensing/transmitting pod.

In construing the term “integral” as requiring attachment “as a sealed unit,” the Decision relies on several sections of the ‘414 patent describing the mechanism by which pressure sensing occurs in the ‘414 device, including the following:

Movement of the diaphragm between the first and second positions is restricted by the fact that, in the pressure sensing process, a sealed, fixed volume of air exists between the diaphragm and a pressure sensing transducer, with the branch line pressure tubing extending therebetween. Thus, movement of the diaphragm toward one position or another position will reflect a change of the level of compression of the air or other compressible fluid in the fluid flow path between the diaphragm and the pressure sensing transducer, thus transmitting the pressure of the blood to the transducer.

Ex. 1001, 5:14-23. The sealed attachment between the various parts of the ‘414 device is for ensuring an existence of “fixed volume of air,” which in turn is for transmitting the blood pressure to the transducer. A change of the blood pressure in the pressure pod causes movement of a diaphragm, which causes a change of the level of compression of air in the path between the diaphragm and the transducer, which transmit the blood pressure to the

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