

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC.,
Petitioner

v.

BOEHRINGER INGELHEIM INTERNATIONAL GMBH,
Patent Owner.

Case IPR2016-01565
Patent 8,853,156

PETITIONER MYLAN PHARMACEUTICALS INC.'S MOTION FOR
REHEARING UNDER 37 C.F.R. § 42.71

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Petitioner Mylan Pharmaceuticals Inc. respectfully requests rehearing of the Board’s February 9, 2017 decision denying *inter partes* review of claims 1, 2, 4–8, 10–18, and 23–25 (the “Challenged Claims”) of U.S. Patent No. 8,853,156 (the “’156 patent”) as obvious based on Petitioner’s Ground 2.¹ (Paper 17 at 22).

I. INTRODUCTION

The Board erred by imposing a greater evidentiary burden than required to establish that a reference is a printed publication at the institution stage. As a consequence of this legal error, the Board improperly found that Petitioner did not sufficiently establish that the Januvia Label (Ex. 1006) and Huettner (Ex. 1004) were printed publications for purposes of institution. While the Board acknowledged that Petitioner need only make a “threshold showing” of public accessibility at the institution stage, the Board actually required more evidence—an amount similar to that required at the close of evidence and the conclusion of trial. This is not the proper standard. At this stage of the proceeding, Petitioner’s evidence should be assessed while recognizing that this assessment is being done without the benefit of a fully developed record. For that reason, Petitioner need only make a “threshold” showing at institution. That is, Petitioner need only come forward with sufficient credible evidence establishing a reasonable likelihood that Petitioner will fully meet

¹ The Board instituted *inter partes* review on claims 1, 2, 4, 5 and 23 based on Ground 1. (Paper 17 at 16–20).

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