

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMNEAL PHARMACEUTICALS LLC, AMNEAL
PHARMACEUTICALS OF NEW YORK, LLC, and MYLAN
PHARMACEUTICALS INC.,
Petitioners,

v.

ALMIRALL, LLC,
Patent Owner.

IPR2019-00207¹
Patent 9,517,219 B2

Before SUSAN L. C. MITCHELL, CHRISTOPHER G. PAULRAJ,
and RYAN H. FLAX, *Administrative Patent Judges*.

FLAX, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71(d)

¹ Mylan Pharmaceuticals Inc., the petitioner in IPR2019-01095, has been joined in this proceeding. When referring herein to “this case” or “this proceeding” or “this *Inter Partes* Review,” or variants of these, we refer to both IPR2019-00207 and IPR2019-01095.

I. INTRODUCTION

A. STATUS OF THE PROCEEDING

Almirall, LLC (“Patent Owner”) is the owner of U.S. Patent 9,517,219 B2 (Ex. 1001, “the ’219 patent”). Amneal Pharmaceuticals LLC, and Amneal Pharmaceuticals of New York, LLC (collectively, “Amneal” or “Petitioner”) filed a Petition requesting *inter partes* review of claims 1–8 of the ’219 patent. Paper 3 (“Pet.”). We instituted trial in this matter on May 10, 2019. Paper 13 (“Institution Decision”). On November 27, 2019, IPR2019-01095 was instituted between Mylan Pharmaceuticals Inc. (“Mylan”) and Almirall, LLC over the ’219 patent and Mylan joined this proceeding. Paper 35 (“me-too” joinder). Unless otherwise stated, we include Mylan when referring to Petitioner herein.

Following institution and joinder, Patent Owner filed a Response. Paper 20 (“PO Resp.”). Petitioner filed a Reply to Patent Owner’s Response and Patent Owner filed a Sur-Reply to Petitioner’s Reply. Paper 28 (“Pet. Reply”); Paper 37 (“PO Sur-Reply”). A hearing was conducted on February 7, 2020, where the parties presented oral argument. Paper 55 (“Hr’g Tr.”).

After considering the parties’ arguments and supporting evidence, we concluded that Petitioner proved by a preponderance of the evidence that claims 1–8 of the ’219 patent are unpatentable and rendered judgment in a Final Written Decision. Paper 58 (“Final Written Decision”).

Patent Owner has now requested rehearing of our Final Written Decision. Paper 61 (“PO Req. Reh’g” or “Patent Owner’s Request for Rehearing”). We deny the request.

II. STANDARD OF REVIEW

A party requesting rehearing of a Board decision has the burden to show that the decision should be modified. Pursuant to 37 C.F.R. § 42.71(d), the rehearing request must identify, specifically, 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. When rehearing a decision on a petition, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c) (2019). An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

We review Patent Owner’s Request for Rehearing in view of these standards of law and the evidence of record.

III. DISCUSSION

Patent Owner asserts that, because in a related district court proceeding (*Almirall, LLC v. Amneal Pharmaceuticals LLC*, C.A. No. 19-658 (GJP) (Dist. Del.)) Petitioner (there the defendant) asserted that the claims of the ’219 patent found by the Board to be unpatentable are invalid or not amenable to construction as indefinite (under 35 U.S.C. § 112, second paragraph), and further because Petitioner failed to disclose this contention in this proceeding, the Board has overlooked and/or misapprehended evidence and argument that Petitioner failed to carry its burden. PO Req. Reh’g 1–5. Patent Owner further asserts that the Board could not have instituted this trial because of the challenged claims’ alleged indefiniteness. *Id.* at 7–9. Patent Owner further asserts that Petitioner could not prove that

the asserted prior art taught the claimed invention with a reasonable expectation of success because there was no way to ascertain whether the prior arts' gelling agent (Sepineo) met the claimed concentration of polymeric viscosity builder A/SA component because Petitioner has alleged the respective claim element is indefinite. *Id.* at 12. Patent Owner additionally asserts that Petitioner's indefiniteness challenge in the district court litigation undermines Petitioner's assertion in this proceeding that the gelling agent Carbopol and the gelling agent Sepineo are interchangeable. *Id.* at 14.

We are unpersuaded by Patent Owner's arguments. In our analysis of the '219 patent, the Panel did not find any claim language of the '219 patent to be indefinite nor was indefiniteness an issue raised by either party. *See, e.g.,* Final Written Decision, 20–21 (claim construction), 24–70 (analyzing the obviousness of the '219 patent's independent claims 1 and 6). Petitioner's district court litigation strategy and arguments have no impact on the Board's conclusions regarding the obviousness of the challenged claims, which we readily understood for purposes of our analysis in this proceeding. *Id.* Accordingly, Patent Owner has not identified any issues the Board misapprehended or overlooked and we find no abuse of discretion in our conclusions in the Final Written Decision.

IV. CONCLUSION

For the reasons discussed above, we deny Patent Owner's Request for Rehearing.

ORDER

Accordingly, it is hereby:

ORDERED that, Patent Owner's Request for Rehearing is *denied*.

IPR2019-00207
Patent 9,517,219 B2

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