

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS, LLC,
Petitioner,

v.

CEDAR LANE TECHNOLOGIES INC.,
Patent Owner.

IPR2020-00006
Patent 7,173,177 B1

Before CHRISTOPHER M. KAISER, NORMAN H. BEAMER, and
SCOTT B. HOWARD, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

JUDGMENT

Denying Petitioner's Request on Rehearing of
Final Written Decision Determining Some Claims Unpatentable
37 C.F.R. § 42.71(d)(2)

INTRODUCTION

Unified Patents, LLC¹ (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 1–26 of U.S. Patent No. 7,173,177 B1 (Ex. 1001, “the ’177 patent”). Cedar Lane Technologies Inc. (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). We instituted review of all challenged claims on each of the grounds asserted in the Petition. Paper 8 (“Dec. Inst.”).

Following institution, Patent Owner filed a Response (Paper 10, “PO Resp.”), and Petitioner filed a Reply (Paper 12, “Reply”). We held a hearing on December 16, 2020, the transcript of which has been entered into the record. Paper 19 (“Tr.”).

On February 12, 2021, we entered a Final Written Decision determining that Petitioner had shown by a preponderance of the evidence that claims 1–15 and 23 were unpatentable but had not shown by a preponderance of the evidence that claims 16–22 or 24–26 were unpatentable. Paper 20 (“Dec.”). Petitioner filed a timely Rehearing Request with respect to our conclusion on claims 16–22. Paper 22 (“Req. Reh’g”). We have considered Petitioner’s Request for Rehearing and, for the reasons set forth below, we deny the requested relief.

STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that a decision should be modified. 37 C.F.R. § 42.71(d). The party must identify all matters it believes the Board misapprehended or overlooked, and the

¹ After filing the Petition, Petitioner changed its name from Unified Patents Inc. to Unified Patents, LLC. Paper 7, 1.

place where each matter was addressed previously in a motion, an opposition, or a reply. *Id.* When rehearing a decision on petition, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted).

DISCUSSION

Petitioner requests rehearing of our Final Written Decision with respect to claims 16–22, arguing that we abused our discretion in two respects. Req. Reh’g 1–11. We consider each of Petitioner’s arguments below.

A. Alleged Error by Overlooking Dr. Myler’s Testimony

In the Final Written Decision, we determined that, under Petitioner’s proposed construction of the term “window region,” Petitioner had directed us to no evidence in support of its position that Looney taught or suggested the window regions of claim 16. Dec. 22. Petitioner argues that this determination was an abuse of discretion because it overlooked Petitioner’s citation to the testimony of Harley Myler, Ph.D., P.E. Req. Reh’g 3–6 (citing Ex. 1012 ¶¶ 8–10). Petitioner correctly notes that it cited this testimony in its Reply. *Id.* (citing Reply 13–15). Nevertheless, we are not persuaded by this argument that we abused our discretion.

Petitioner argued that “‘first window region’ and ‘second window region’ should have their plain meaning, which would be regions or areas of the same *window* (and not ‘screen,’ as [Patent Owner] attempts to insert)” and that, “[u]nder this interpretation, Looney’s control screens are window

regions.” Reply 13–14. We first found a lack of cited evidence for Petitioner’s proposed interpretation of the term “window region.” Dec. 21. We also found a lack of evidence for Looney teaching window regions even under Petitioner’s interpretation. *Id.* at 22. It is in this second finding that Petitioner now argues we abused our discretion by overlooking three paragraphs’ worth of testimony from Dr. Myler. We are not persuaded, however, that any of Dr. Myler’s testimony is sufficiently supported or explained to support Petitioner’s position that Looney teaches Petitioner’s version of window regions.

First, Dr. Myler testified that “Looney’s Screen2 and Screen4 are regions of the same window that are navigable using tabs” because “a user may quickly switch between the two screens of the same application windows by clicking on the S2 and S4 tabs.” Ex. 1012 ¶ 8 (citing Ex. 1004, 8:25–41, Figs. 15, 24). Dr. Myler is correct that Looney teaches multiple screens, with each screen containing buttons that can be used to reach the other screens. Ex. 1004, 8:32–37. What is less clear from Looney’s disclosure is whether each screen is a different window, or whether the multiple screens are separate areas within a single window. Dr. Myler’s statement that the screens “are regions of the same window that are navigable using tabs” because “a user may quickly switch between the two screens of the same application windows by clicking on the S2 and S4 tabs,” Ex. 1012 ¶ 8, amounts to an argument that the screens are regions of the same window because the screens are regions of the same window. This tautology is unhelpful in determining whether the evidence supports Petitioner’s argument.

Second, Dr. Myler testified that Looney’s screens “are parts or regions of the same window,” despite “[t]he fact that Looney calls [them] ‘screens.’” *Id.* ¶ 9. Dr. Myler does not cite to any evidence to support this statement. *Id.* If Rule 42.65(a) means anything at all, it is that unsupported *ipse dixit* pronouncements by an expert are insufficient to prove a fact. *See* 37 C.F.R. § 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”); *TQ Delta, LLC v. CISCO Systems, Inc.*, 942 F.3d 1352, 1361–63 (Fed. Cir. 2019) (where expert declaration is “[u]ntethered to any supporting evidence,” Board may not base factual determinations on it).

Third, Dr. Myler testified that, even though “only one tab or ‘Screen’ is active, or displayed, at a given time,” a person of ordinary skill in the art “would still have understood different tabs to be regions of the same window.” Ex. 1012 ¶ 9. This opinion is supported by evidence: Dr. Myler cites to Exhibit 1014 as support for programmers having known “that tabs represent areas ‘within the same window.’” *Id.* (quoting Ex. 1014, 141). But the testimony only shows that, if Looney’s screens had been considered to be navigable using tabs, a person of ordinary skill in the art would have considered them to be regions of the same window. Missing is any reason to find that a person of ordinary skill in the art actually would have considered Looney to disclose a window with tab controls rather than multiple separate windows accessed by buttons. *Id.* As we noted in the Final Written Decision, Dec. 22, Looney merely discloses “various screens” that “are denoted respectively by buttons” that “appear on the bottom of all display screens.” Ex. 1004, 8:32–37. As discussed above, to the extent that Dr. Myler’s testimony attempts to support a finding that a person of ordinary

skill in the art would have considered that disclosure to teach tab navigation, it is conclusory and unsupported. *See* Ex. 1012 ¶¶ 8–9.

Finally, Dr. Myler testified that “[w]indow tabs were, and still are, a very common user interface tool for organizing and allowing users to navigate to different areas of a program window” and that “tabs allowed a user to focus on what they need[ed] and allowed for the immediate switching between window regions.” Ex. 1012 ¶ 10. This testimony was supported: Dr. Myler cites Exhibit 1015 as support for Microsoft Excel having been “a well-known example” of a single window “that allowed users to navigate between different ‘sheets’ using tabs near the bottom of each workbook.” *Id.* (citing Ex. 1015) (footnote omitted). But again, this testimony only supports a finding that, if Looney had disclosed tab controls, those would be considered to switch between different regions of a single window, not a finding that Looney actually disclosed such controls.

Thus, although our discussion of Dr. Myler’s testimony in the Final Written Decision cited only paragraph 9 expressly, we did not overlook any portion of the testimony that supported a finding in favor of Petitioner. Accordingly, we did not abuse our discretion by overlooking any testimony of Dr. Myler in determining that Petitioner had not shown by a preponderance of the evidence that Looney taught the window regions of claim 16 under Petitioner’s proposed construction of “window region.”

B. Alleged Error by Failing to Adopt Petitioner’s Proposed Claim Construction

In the Final Written Decision, we determined that, although Patent Owner’s proposed construction of “window region” was incorrect, Petitioner “offer[ed] no support at all for its proposed construction,” depriving us of

“sufficient evidence of record to establish how a person of ordinary skill in the art would have interpreted the phrase ‘window region.’” Dec. 21. We found Petitioner’s failure to carry its burden on claim construction “improper.” *Id.* In its Rehearing Request, Petitioner argues that we abused our discretion by refusing to adopt Petitioner’s proposed construction. Req. Reh’g 6–11. For several reasons, we are not persuaded by this argument that we abused our discretion.

First, even assuming our failure to adopt Petitioner’s proposed construction was in error, that error did not lead us to an incorrect determination as to the unpatentability of claims 16–22. As we noted above, we determined in the Final Written Decision that, under Petitioner’s proposed construction of the term “window region,” Petitioner had directed us to no evidence in support of its position that Looney taught or suggested the window regions of claim 16. Dec. 22. And, as further noted above, Petitioner has not persuaded us that we abused our discretion in that analysis. Thus, we already have applied Petitioner’s proposed construction of “window region” and found the record not to support the asserted unpatentability of claims 16–22.

Moreover, none of Petitioner’s arguments for the impropriety of our failing to adopt its claim construction persuades us that we abused our discretion. We discuss each argument below.

1. Petitioner’s Argument that it Properly Identified its Proposed Construction of “Window Region”

In the Final Written Decision, we determined that Petitioner’s failure to offer any “support at all for its proposed construction” of “window region” was “improper” because Rule 42.104(b)(3) required Petitioner to

“identify . . . [h]ow the challenged claim is to be construed.” Dec. 21 (quoting 37 C.F.R. § 42.104(b)(3)). Petitioner argues that we misapprehended Rule 42.104(b)(3) because that rule merely “requires the party to identify how the challenged claim is to be construed,” and Petitioner offered a construction by arguing that “claim 16 [should be construed] according to its plain meaning.” Req. Reh’g 9.

We are not persuaded by this argument that we abused our discretion. It is true, as Petitioner argues, that, “[i]n some cases, the ordinary meaning of claim language may be readily apparent and claim construction will involve little more than the application of the widely accepted meaning of commonly understood words.” *Id.* (quoting *Homeland Housewheres, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1375 (Fed. Cir. 2017)). This is not such a case. The parties each proposed a different meaning for the phrase “window region.” Under Petitioner’s view, the first and second window regions are “regions or areas of the same window.” Reply 13–14 (emphasis removed). Under Patent Owner’s view, the first and second window regions are “separate windows or similar regions displayed on the same screen.” PO Resp. 19. In the absence of any evidence tending to suggest one interpretation over the other, both parties propose reasonable interpretations of the phrase “window regions.” Petitioner’s view is similar to the ordinary reading of “window panes”: smaller entities that, taken as a group, make up a larger object called a window. Patent Owner’s view is similar to the ordinary reading of “coastal regions”: separate areas, each characterized by the physical characteristic specified in the first word of the phrase. Thus, contrary to *Homeland Housewheres*, the ordinary meaning of the claim language here is far from “readily apparent.”

Petitioner needed to identify in its Petition what interpretation of “window region” should be used. 37 C.F.R. § 42.104(b)(3) (“*the petition* must set forth . . . [h]ow the challenged claim is to be construed” (emphasis added)). In light of the multiple plausible ordinary and customary meanings of the phrase, Petitioner’s proposed construction in the Petition was insufficient. *See* Pet. 13 (stating only that a person of ordinary skill in the art “would apply the ordinary and customary meaning to all the claim elements in the Challenged Claims,” without specifying which of the at least two plausible meanings was the “ordinary and customary” one); Req. Reh’g 9 (directing us only to page 13 of the Petition for the identification of Petitioner’s allegedly Rule-42.104(b)(3)-compliant claim construction). Not until the Reply did Petitioner explain which construction we should adopt, and even that identification was accompanied by no evidence in favor of adopting Petitioner’s construction rather than Patent Owner’s. Reply 13–14.

Petitioner suggests that, because the Board characterized its proposed construction of “window region” as “a ‘very good’ reading of the claim language,” Petitioner must have carried any burden it had under Rule 42.104(b)(3). Req. Reh’g 9 (quoting Tr. 72). Not so. Although one member of the panel did say during the hearing in this proceeding that “window regions means regions of a window is a very good reading of the phrase,” they immediately proceeded to ask about support in the record for a different reading, “regions that are windows.” Tr. 72. The discussion during the hearing made clear that the panel was struggling with—as it continues to struggle with—the lack of evidence in the record to choose either of the proposed meanings of “window region” over the other. Moreover, even if the panel’s question could be seen as evidence that they

understood Petitioner’s proposed construction by the time of the hearing, this does not necessarily mean that the Petition itself complied with Rule 42.104(b)(3), as the Rule requires.

2. *Petitioner’s Argument that it Responded to the Claim-Construction Dispute at its Earliest Opportunity*

Next, Petitioner argues that it should not be faulted for its effort on claim construction because it responded to the dispute over claim construction “at its first opportunity” after Patent Owner raised the issue. Req. Reh’g 9–10. We are not persuaded by this argument that we abused our discretion.

We agree, first, that Petitioner did identify its claim construction in the Reply. Reply 13 (“‘first window region’ and ‘second window region’ should have their plain meaning, which would be regions or areas of the same window (and not ‘screen,’ as Cedar attempts to insert)” (emphasis omitted)). This was a proper use of the Reply, because it was responsive to Patent Owner’s raising of a proposed construction of “window region” in the Response. *See* PO Resp. 19 (arguing that “window region” should be interpreted as “separate windows or similar regions displayed on the same screen”). The problem with the argument in the Reply is not that Petitioner failed to identify its proposed construction of “window region.” Instead, the problem is that Petitioner did not support that proposed construction by directing us to sufficient evidence of record to choose its construction over Patent Owner’s construction. The unsupported statement that Petitioner’s proposed construction is “the plain meaning” is not sufficient to prove that we should adopt that construction, at least when Patent Owner also has

proposed a construction that is a plausible plain reading of the phrase in question, as happened here.

3. *Petitioner’s Argument that the Board Should Have Resolved the Obviousness Question for Claims 16–22*

Petitioner argues that we abused our discretion by failing to construe “window region” ourselves and then analyzing Petitioner’s obviousness case under that construction. Req. Reh’g 10–11. Specifically, Petitioner argues that we erred by failing to “find that any proper construction would exclude Looney’s Screen2 and Screen4” as window regions. *Id.* at 11. We are not persuaded by this argument that we abused our discretion.

First, as discussed in detail above, we analyzed Petitioner’s arguments for the obviousness of claims 16–22 in the Final Written Decision, using Petitioner’s proposed construction of “window region” and the evidence of record. Dec. 22. We determined that, although Petitioner argued that Looney taught this limitation, Petitioner did not prove this teaching by a preponderance of the evidence. *Id.* We accepted Petitioner’s argument that a person of ordinary skill in the art would have considered tab-controlled displays “to be regions of the same window” and therefore that tab-controlled displays lay within the scope of Petitioner’s proposed construction of “window region.” *Id.* Nevertheless, we determined that Petitioner failed to prove by a preponderance of the evidence that Looney’s screens constituted a tab-controlled display, because Petitioner provided only conclusory statements to that effect. *Id.* Petitioner’s statement in the Rehearing Request that “the abstraction[s] that Looney refers to as ‘screens’ are regions of the same window” is likewise unsupported and conclusory. Req. Reh’g 11. Accordingly, it is not sufficient to persuade us that we

abused our discretion in finding that, even under Petitioner's proposed construction of "window region," Petitioner failed to prove by a preponderance of the evidence that Looney's screens constituted window regions.

Moreover, Petitioner's argument that we were required to "find that any proper construction would exclude Looney's Screen2 and Screen4" as window regions, Req. Reh'g 11, ignores 35 U.S.C. § 316(e), which places the burden of proof on Petitioner. To find the challenged claims unpatentable as obvious, we would have needed to determine that Petitioner had proven by a preponderance of the evidence that the claims would have been obvious. Petitioner turns that burden on its head by arguing that it was the Board's burden to prove that the asserted prior art fell outside the scope of the challenged claims, rather than Petitioner's burden to show that the asserted prior art fell within that scope. Accordingly, we do not find this argument persuasive of any abuse of discretion.

CONCLUSION

For the foregoing reasons, Petitioner has not demonstrated that we abused our discretion in determining that Petitioner had failed to show by a preponderance of the evidence that claims 16–22 were unpatentable.

In summary:

Outcome of Decision on Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Denied	Granted
16	103(a)	Looney, DeMartin, Cluts	16	
17–19, 21, 22	103(a)	Looney, DeMartin, Cluts, Wiser	17–19, 21, 22	
20	103(a)	Looney, DeMartin, Cluts, Wiser, Burke	20	
Overall Outcome			16–22	

Final Outcome of Final Written Decision after Rehearing:

Claims	35 U.S.C. §	Reference(s)/Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1, 10, 12, 13, 15, 16	103(a)	Looney, DeMartin, Cluts	1, 10, 12, 13, 15	16
2–7, 9, 11, 17–19, 21, 22, 24, 25	103(a)	Looney, DeMartin, Cluts, Wiser	2–7, 9, 11	17–19, 21, 22, 24, 25
8, 14, 20, 26	103(a)	Looney, DeMartin, Cluts, Wiser, Burke	8, 14	20, 26
23	103(a)	Looney, DeMartin, Cluts, Morioka	23	
Overall Outcome				

ORDER

It is hereby

ORDERED that the Request for Rehearing is denied.

IPR2020-00006
Patent 7,173,177 B1

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