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In re Application of :
Zhengxu He :
Application No. 16/517,705 : DECISION ON PETITION
Filed: July 22, 2019 :
For: AUTOMATIC KITCHEN SYSTEM :

This is a decision on the petition filed on October 7, 2022, filed under 37 CFR 1.181, requesting that the Director exercise supervisory authority and review the decision of October 6, 2022, by the Director of Technology Center 3700 (Technology Center Director) which decision refused to enter the amendment filed on August 19, 2022.

The petition to enter the amendment filed on August 19, 2022, is **DENIED**.

RELEVANT BACKGROUND

The above-identified application was filed on July 22, 2019.

A requirement for restriction was issued on April 30, 2021, requiring a restriction under 35 U.S.C. § 121 among: Invention I (claims 1 through 15) drawn to a loading apparatus, classified in A47J37/043; Invention II (claims 16 through 19) drawn to a cap opening apparatus, classified in B67B7/00; and Invention III (claim 20) drawn to a cooking system, classified in A47J36/165.

A reply to the requirement for restriction of April 30, 2021, was filed on June 19, 2021, in which petitioner elected, with traverse, Invention I (claims 1 through 15). The reply included an amendment to claims 1, 3 through 10, 14, 16 through 18, and 20.

A non-final Office action was issued on August 11, 2021, which included, *inter alia*, several objections to the drawings, specification, and claims; a provisional non-statutory double patenting rejection of claims 1 and 14 as being unpatentable over claims 1, 17 through 19, and 21 of copending application number 16/180,051; a rejection of claims 1 through 15 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement; a rejection of claims 1 through 15 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement; a rejection of claims 1 through 15 under 35 U.S.C. § 112(b) as being indefinite; a rejection of claims 1, 2, 4 through 8, and 10 through 15 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al.; a rejection of claim 3 under 35 U.S.C. § 103 as being unpatentable over WO

2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of Published U.S. Patent Application No. 2011/0307098 to Ennis; and a rejection of claim 9 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of U.S. Patent No. 1,482,925 to High.

A petition under 37 CFR 1.181 was filed on August 30, 2021, requesting withdrawal of the restriction requirement issued on April 30, 2021.

A decision by the Technology Center Director was issued on September 22, 2021, granting the petition to withdraw the restriction requirement issued on April 30, 2021, and stating that the application would be forwarded to the examiner once a response to the non-final Office action of August 11, 2021, is filed.

A reply to the non-final Office action issued on August 11, 2021, was filed on October 28, 2021, the reply including an amendment to claims 1 through 20, the specification, and the drawings.

A non-final Office action was issued on January 13, 2022, which included, *inter alia*, several objections to the drawings, specification, and claims; a provisional non-statutory double patenting rejection of claims 1, 14, and 16 through 20 as being unpatentable over claims 1, 17 through 19, and 21 of copending application number 16/180,051; a rejection of claims 1 through 20 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement; a rejection of claims 5, 9, 10, 13, and 16 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement; a rejection of claims 1 through 20 under 35 U.S.C. § 112(b) as being indefinite; a rejection of claims 1, 2, 4 through 8, 10 through 16, and 20 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al.; a rejection of claim 3 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of Published U.S. Patent Application No. 2011/0307098 to Ennis; and a rejection of claim 9 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of U.S. Patent No. 1,482,925 to High; and a rejection of claims 17 through 19 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of Published U.S. Patent Application No. 2017/0348854 to Oleynik.

A petition was filed on March 28, 2022, requesting replacement of the supervisory examiner and the examiner.

A reply to the non-final Office action issued on January 13, 2022, was filed on April 5, 2022, the reply including an amendment to claims 1, 3 through 7, and 9 through 20 and the specification.

A decision by the Technology Center Director was issued on April 22, 2022, which decision dismissed the petition filed on March 28, 2022.

A petition was filed on May 18, 2022, requesting reconsideration of the decision issued on April 22, 2022, dismissing the petition filed on March 28, 2022.

A final Office action was issued on May 24, 2022, which included, *inter alia*, several objections to the drawings, specification, and claims; a provisional non-statutory double patenting rejection of claims 1, 14, and 16 through 20 as being unpatentable over claims 1, 17 through 19, and 21 of copending application number 16/180,051; a rejection of claims 1 through 20 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement; a rejection of claims 5, 9, 10, 13, and 16 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement; a rejection of claims 1 through 19 under 35 U.S.C. § 112(b) as being indefinite; a rejection of claims 1, 2, 4 through 8, 10 through 16, and 20 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al.; a rejection of claim 3 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of Published U.S. Patent Application No. 2011/0307098 to Ennis; and a rejection of claim 9 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of U.S. Patent No. 1,482,925 to High; and a rejection of claims 17 through 19 under 35 U.S.C. § 103 as being unpatentable over WO 2015/117156 to Chen et al. in view of Published U.S. Patent Application No. 2005/0193901 to Buehler et al. and further in view of Published U.S. Patent Application No. 2017/0348854 to Oleynik.

A decision by the Technology Center Director was issued on June 14, 2022, which decision denied the petition filed on May 18, 2022.

A reply and amendment under 37 CFR 1.116 were filed on July 4, 2022, in response to the final Office action issued on May 24, 2022. An advisory action issued on July 19, 2022, indicating that the amendment filed on July 4, 2022, would not be entered because the proposed claim amendment would raise new issues that would require further consideration or search.

A petition was filed on July 13, 2022, requesting that the drawing, specification, and claim objections raised by the examiner in the final Office action issued on May 24, 2022, be overturned.

A petition was filed on July 14, 2022, requesting a review of the decision by the Technology Center Director issued on June 14, 2022, denying the petition filed on May 18, 2022.

A Notice of Appeal and Appeal Brief were filed on July 14, 2022.

A petition was filed under 37 CFR 1.191 [sic] on July 20, 2022, requesting that the amendment filed on July 4, 2022, be entered.

A decision by the Technology Center Director was issued on August 18, 2022, which decision granted-in-part the petition filed on July 13, 2022, and denied the petition filed on July 20, 2022.

An amendment under 37 CFR 1.116 was filed on August 19, 2022, including an amendment to claims 1, 9 through 11, 15, 16, and 20.

An amended Appeal Brief was filed on August 22, 2022, to include the claim amendments filed on August 19, 2022, in the claims appendix to the appeal brief.

An advisory action was issued on September 12, 2022, indicating that the amendment filed on August 19, 2022, would not be entered because it was filed after the date of filing an appeal brief (the original appeal brief being filed on July 14, 2022) and was not limited to cancelling claims or rewriting dependent claims into independent claims.

A Notice of Defective Appeal Brief was issued on September 12, 2022, noting that the claims appendix filed with the appeal brief filed on August 22, 2022, was non-compliant in that the claims did not match the last entered claim set filed on April 5, 2022.

A petition was filed on September 15, 2022, requesting that the amendment filed on August 19, 2022, be entered since only grammatical errors were being corrected and entry of the amendment would make the appeal brief filed on August 22, 2022, compliant.

A decision by the Technology Center Director was issued on October 6, 2022, the decision denied the petition filed on September 15, 2022.

The present petition was filed on October 7, 2022, requesting that the amendment filed on August 19, 2022, be entered.

STATUTES AND REGULATIONS

35 U.S.C. § 134 provides that:

- (a) PATENT APPLICANT ----- An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

(b) PATENT OWNER — A patent owner in a reexamination may appeal from the final rejection of any claim by the primary examiner to the Patent Trial and Appeal Board, having once paid the fee for such appeal.

37 CFR § 1.113 provides that:

(a) On the second or any subsequent examination or consideration by the examiner the rejection or other action may be made final, whereupon applicant's, or for *ex parte* reexaminations filed under §1.510, patent owner's reply is limited to appeal in the case of rejection of any claim (§41.31 of this title), or to amendment as specified in §1.114 or §1.116. Petition may be taken to the Director in the case of objections or requirements not involved in the rejection of any claim (§1.181). Reply to a final rejection or action must comply with §1.114 or paragraph (c) of this section. For final actions in an *inter partes* reexamination filed under §1.913, see §1.953.

(b) In making such final rejection, the examiner shall repeat or state all grounds of rejection then considered applicable to the claims in the application, clearly stating the reasons in support thereof.

(c) Reply to a final rejection or action must include cancellation of, or appeal from the rejection of, each rejected claim. If any claim stands allowed, the reply to a final rejection or action must comply with any requirements or objections as to form.

37 CFR 1.181(a) provides that:

Petition may be taken to the Director:

(1) From any action or requirement of any examiner in the *ex parte* prosecution of an application, or in *ex parte* or *inter partes* prosecution of a reexamination proceeding which is not subject to appeal to the Patent Trial and Appeal Board or to the court;

(2) In cases in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Director; and

(3) To invoke the supervisory authority of the Director in appropriate circumstances. For petitions involving action of the Patent Trial and Appeal Board, see § 41.3 of this title.

37 CFR 41.33 provides that:

(a) Amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date a brief is filed pursuant to § 41.37 may be admitted as provided in § 1.116 of this title.

(b) Amendments filed on or after the date of filing a brief pursuant to § 41.37 may be admitted:

(1) To cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or

(2) To rewrite dependent claims into independent form.

(c) All other amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), and 41.50(b)(1).

(d)

(1) An affidavit or other Evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date of filing a brief pursuant to § 41.37 may be admitted if the examiner determines that the affidavit or other Evidence overcomes all rejections under appeal and that a showing of good and sufficient reasons why the affidavit or other Evidence is necessary and was not earlier presented has been made.

(2) All other affidavits or other Evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), and 41.50(b)(1).

37 CFR 41.37 provides that:

(a) *Timing.* Appellant must file a brief under this section within two months from the date of filing the notice of appeal under § 41.31. The appeal brief fee in an application or *ex parte* reexamination proceeding is \$0.00, but if the appeal results in an examiner's answer, the appeal forwarding fee set forth in § 41.20(b)(4) must be paid within the time period specified in § 41.45 to avoid dismissal of an appeal.

(b) *Failure to file a brief.* On failure to file the brief within the period specified in paragraph (a) of this section, the appeal will stand dismissed.

(c) *Content of appeal brief.*

(1) Except as otherwise provided in this paragraph, the brief shall contain the following items under appropriate headings and in the order indicated in paragraphs (c)(1)(i) through (v) of this section, except that a brief filed by an appellant who is not represented by a registered practitioner need only substantially comply with paragraphs (c)(1)(i), (c)(1)(ii), (c)(1)(iv), and (c)(1)(v) of this section:

(i) *Real party in interest.* A statement identifying by name the real party in interest at the time the appeal brief is filed, except that such statement is not required if the named inventor or inventors are themselves the real party in interest. If an appeal brief does not contain a statement of the real party in interest, the Office may assume that the named inventor or inventors are the real party in interest.

(ii) *Related appeals, interferences, and trials.* A statement identifying by application, patent, appeal, interference, or trial number all other prior and pending appeals, interferences, trials before the Board, or judicial proceedings (collectively, "related cases") which satisfy all of the following conditions: involve an application or patent owned by the appellant or assignee, are known to appellant, the appellant's legal representative, or assignee, and may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal, except that such statement is not required if there are no such related cases. If an appeal brief does not contain a statement of related cases, the Office may assume that there are no such related cases.

(iii) *Summary of claimed subject matter.* A concise explanation of the subject matter defined in each of the rejected independent claims, which shall refer to the specification in the Record by page and line number or by paragraph number, and to the drawing, if any, by reference characters. For each rejected independent claim, and for each dependent claim argued separately under the provisions of paragraph (c)(1)(iv) of this section, if the claim contains a means plus function or step plus function recitation as permitted by 35 U.S.C. 112(f), then the concise explanation must identify the structure, material, or acts described in the specification in the Record as corresponding to each claimed function with reference to the specification in the Record by page and line number or by paragraph number, and to the drawing, if any, by reference characters. Reference to the patent application publication does not satisfy the requirements of this paragraph.

(iv) *Argument.* The arguments of appellant with respect to each ground of rejection, and the basis therefor, with citations of the statutes, regulations, authorities, and parts of the Record relied on. The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant. Except as provided for in §§ 41.41, 41.47 and 41.52, any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal. Each ground of rejection contested by appellant must be argued under a separate heading, and each heading shall reasonably identify the ground of rejection being contested (*e.g.*, by claim number, statutory basis, and applied reference, if any). For each ground of rejection applying to two or more claims, the claims may be argued separately (claims are considered by appellant as separately patentable), as a group (all claims subject to the ground of rejection stand or fall together), or as a subgroup (a subset of the claims subject to the ground

of rejection stand or fall together). When multiple claims subject to the same ground of rejection are argued as a group or subgroup by appellant, the Board may select a single claim from the group or subgroup and may decide the appeal as to the ground of rejection with respect to the group or subgroup on the basis of the selected claim alone. Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately. Under each heading identifying the ground of rejection being contested, any claim(s) argued separately or as a subgroup shall be argued under a separate subheading that identifies the claim(s) by number. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

(v) *Claims appendix.* An appendix containing a copy of the claims involved in the appeal.

(2) A brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other Evidence. *See* § 1.116 of this title for treatment of amendments, affidavits or other evidence filed after final action but before or on the same date of filing an appeal and § 41.33 for treatment of amendments, affidavits or other Evidence filed after the date of filing the appeal. Review of an examiner's refusal to admit an amendment or Evidence is by petition to the Director. *See* § 1.181 of this title.

(d) *Notice of non-compliance.* If a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a time period within which to file an amended brief. If appellant does not, within the set time period, file an amended brief that overcomes all the reasons for non-compliance stated in the notification, the appeal will stand dismissed. Review of a determination of non-compliance is by petition to the Chief Administrative Patent Judge. *See* § 41.3.

(e) *Extensions of time.* The time periods set forth in this section are extendable under the provisions of § 1.136 of this title for patent applications and § 1.550(c) of this title for ex parte reexamination proceedings.

OPINION

Petitioner asserts that the amendment filed on August 19, 2022, be entered since only grammatical errors were being corrected and entry of the amendment would make the appeal brief filed on August 22, 2022, compliant. Petitioner also argues that because the claims appendix filed with the July 14, 2022, appeal brief included the claim amendments filed on July 4, 2022, this appeal brief was defective and that a defective appeal brief should not be considered a valid appeal brief, therefore 37 CFR 41.33 would not be applicable.

The *Manual of Patent Examining Procedure* (MPEP) § 1206 provides that:

Entry of a new amendment in an application on appeal is not a matter of right.

Amendments filed **on or after** the date of filing a brief pursuant to 37 CFR 41.37 and within the time period set forth in 37 CFR 90.3 may be admitted only to:

(A) cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding; or

(B) rewrite dependent claims into independent form.

In the present application, a reply and an amendment under 37 CFR 1.116, were filed on July 4, 2022, in response to the final Office action issued on May 24, 2022. The reply and amendment to the claims filed on July 4, 2022, to the final Office action issued on May 24, 2022, were not entered for the reasons set forth in the advisory action of July 19, 2022. An appeal brief was filed on July 14, 2022. An amendment to the claims was also filed on August 19, 2022, and an amended appeal brief was filed on August 22, 2022. An advisory action issued on September 12, 2022, indicated that the amendment filed on August 19, 2022, would not be entered pursuant to 37 CFR 41.33(b) and (c). A Notice of Defective Brief issued on September 12, 2022, noting that the claims appendix filed with the amended appeal brief filed on August 22, 2022, was non-compliant in that the claims did not match the last entered claim set filed on April 5, 2022, as neither the amendment to the claims filed on July 4, 2022, nor the amendment to the claims filed on August 19, 2022, was entered. The Notice of Defective Brief of September 12, 2022, also provided a time period within which petitioner could file an amended brief in order to avoid dismissal of the appeal.

Petitioner argues that while the claims appendix of the appeal brief filed on July 14, 2022, included that amendments to the claims filed on July 4, 2022, and that the appeal brief may have been defective for that reason, a defective appeal brief should not be considered a valid appeal brief and therefore, 37 CFR 41.33 would not be applicable.

Petitioner's argument has been considered but it is not persuasive. The entry of an amendment submitted in an application on or after the filing of an appeal brief pursuant to 37 CFR 41.37 is governed by 37 CFR 41.33. Pursuant to 37 CFR 41.37(c)(2), a brief shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other Evidence. Furthermore, 37 CFR 41.37(d) states that if a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and given a time period within which to file an amended brief. In the present application, an appeal brief was filed on July 14, 2022, and an amendment to the claims was filed on August 19, 2022.

An *amended* brief was filed on August 22, 2022. As such, 37 CFR 41.33 is applicable and the amendment filed on August 19, 2022, was filed after the appeal brief filed on July 14, 2022. Furthermore, the advisory action issued on September 12, 2022, properly indicated that, and in accordance with 37 CFR 41.33, the amendment of August 19, 2022, would not be entered since the amendment filed on August 19, 2022, was filed after the date of filing the appeal brief, and was not limited to cancelling claims or rewriting dependent claims into independent claims.

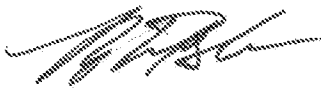
Petitioner also argues that since the amendment filed on August 19, 2022, only corrects grammatical errors in the claims, the amendment should be entered. However, 37 CFR 41.33 is applicable in the present case, as discussed above, and limits entry of amendments to either cancel claims or rewrite dependent claims into independent claims, neither of which is present in the amendment of August 19, 2022. Therefore, the amendment filed on August 19, 2022, was properly refused entry and the Technology Center Director did not err in upholding the refusal to enter the amendment filed on August 19, 2022.

DECISION

For the previously stated reasons, the petition requesting that the Director exercise supervisory authority and overturn the decision of October 6, 2022, by the Director of Technology Center 3700 which decision refused to enter the amendment filed on August 19, 2022, is DENIED.

This constitutes a final decision on the petition. No further requests for reconsideration will be entertained. Judicial review of this decision may be available upon entry of a final agency action adverse to the petitioner in the instant application (*e.g.*, a final decision by the Patent Trial and Appeal Board). See MPEP § 1002.02.

This application is being referred to Technology Center 3700 for treatment of the amended appeal brief filed on October 8, 2022.



Robert W. Bahr
Deputy Commissioner
for Patents