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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
17/937,947	10/04/2022	Ava Naeini	558064435np	5609

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EXAMINER	
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ART UNIT	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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In re Application of Ava Naeini	:	
Application No. 17/937,947	:	
Filed: 4 Oct 2022	:	DECISION ON PETITION
For: MONITORING AND ALERTING	:	
SYSTEM BACKED BY A MACHINE	:	
LEARNING ENGINE	:	

This is a decision on the petition filed on October 28, 2024,[1] which is being treated as a petition filed under 37 CFR 1.181, invoking the supervisory authority of the Director to review the decision of October 22, 2024, issued by the Director of Technology Center 2100 (Technology Center Director), dismissing petitioner's request to have the instant application reassigned to a different examiner.

The petition is **DENIED**.

RELEVANT BACKGROUND

Petitioner filed the instant application on October 4, 2022.

A non-final Office action (referred hereinafter as "the Office action") was mailed on May 7, 2024, which included, *inter alia*: (1) a rejection of claims 1 through 20 under 35 U.S.C. § 101, stating that the claimed invention is directed to an abstract idea without significantly more; (2) a statement that certain claim limitations are being interpreted to invoke 35 U.S.C. § 112(f); (3) a rejection of claim 20 under 35 U.S.C. § 112(a) for failing to comply with the written description requirement; (4) a rejection of claims 10, 12, 14, 16, and 20 under 35 U.S.C. § 112(b), as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor regards as the invention; and (5) objections to claims 1, 5, 7, 8, 19, and 20 for informalities.

An examiner interview was conducted on August 7, 2024, between the applicant and the examiner, the substance of which is recorded in an applicant-initiated interview summary issued on September 19, 2024.

[1] A duplicate petition was received by mail on October 30, 2024.

Additional interviews were conducted between the applicant and the examiner's supervisory patent examiner on August 8, 2024, and September 13, 2024, the substance of which is recorded in an applicant-initiated interview summary issued on October 3, 2024.

A petition under 37 CFR 1.181 was filed on September 1, 2024,[2] requesting to change the examiner and potentially transfer the application to a more appropriate art unit.

The petition of September 1, 2024, was dismissed by the Technology Center Director in a decision issued on October 22, 2024.

The instant petition, filed on October 28, 2024, and being treated under 37 CFR 1.181, requests reconsideration of the Technology Center Director's decision of October 22, 2024.

Petitioner filed a response to the outstanding Office action on November 4, 2024, accompanied by a three month extension of time, which included, *inter alia*: (1) amendments to the claims; and (2) remarks.

STATUTES AND REGULATIONS

35 U.S.C. § 131 provides that:

> The Director shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefore.

35 U.S.C. § 132 provides that:

> (a) Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.
>
> (b) The Director shall prescribe regulations to provide for the continued examination of applications for patent at the request of the applicant. The Director may establish appropriate fees for such continued examination and shall provide a 50 percent reduction in such fees for small entities that qualify for reduced fees under section 41(h)(1).

[2] A duplicate petition was received by facsimile on September 3, 2024.

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 1.181 provides in part that:

> (a) 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.
>
> ****
>
> (c) When a petition is taken from an action or requirement of an examiner in the ex parte prosecution of an application, or in the ex parte or inter partes prosecution of a reexamination proceeding, it may be required that there have been a proper request for reconsideration (§ 1.111) and a repeated action by the examiner. The examiner may be directed by the Director to furnish a written statement, within a specified time, setting forth the reasons for his or her decision upon the matters averred in the petition, supplying a copy to the petitioner.
>
> ****
>
> (f) The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

37 CFR 1.75(d)(1) provides that:

> The claim or claims must conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description. (See § 1.58(a).)

OPINION

Petitioner has failed to demonstrate improper conduct amounting to bias or the appearance of bias on the part of the examiner.

The instant petition alleges that the decision by the Technology Center Director, issued on October 22, 2024, was made without proper review of evidence, and requests: (1) removing and replacing the examiner currently assigned to the instant application; (2) providing proper due diligence and administrative processing in a professional and timely manner; and (3) eliminating acts of prejudice/bias or appearance of bias/entitlement, jealousy or tort action from the process.

A petitioner is not entitled to choose his or her examiner, supervisory patent examiner, or other deciding official. *See In re Arnott,* 19 USPQ2d 1049, 1052 (Comm'r Pat. 1991). A Technology Center Director and supervisory patent examiner have considerable latitude as part of their day-to-day management of a Technology Center or Group Art Unit, respectively, in deciding the assignment of applications to examiners and the transfer of applications between examiners.

A petitioner seeking to invoke the Director's supervisory authority to overrule the Technology Center Director and direct the Technology Center to assign an application to a new examiner must demonstrate improper conduct amounting to bias or the appearance of bias on the part of the examiner. *See In re Ovshinsky,* 24 USPQ2d 1241, 1251-52 (Comm'r Pat. 1992). The record of the instant application has been carefully reviewed and there is no indication of improper conduct amounting to bias or the appearance of bias on the part of the examiner so as to warrant directing the Technology Center Director to remove and replace the examiner.

In the petition of September 1, 2024, petitioner alleged concerns that the examiner: (1) was unreachable and negligent; (2) subjected petitioner to harassment and improper conduct amounting to bias or the appearance of bias; (3) made communications that were not coherent; (4) was incompetent, disinterested and dishonest; (5) asked questions that revealed a lack of knowledge and unfamiliarity with the technology related to the subject matter of the instant application; (6) had ineffective communication; (7) acted with bad faith and malicious intent; and (8) wrote an Office action that was repetitive. Based on these concerns, petitioner requested that the instant application not be further reviewed by the examiner and instead, be reassigned to another more qualified examiner that is more familiar with the subject matter of the application, has a demonstrated ability to conduct examination in good faith and free from prejudice and bias or the appearance of bias, and is willing to assist petitioner with protecting intellectual property.

In support of the above-stated allegations, petitioner appended four exhibits to the petition of September 1, 2024, including petitioner's resume (Exhibit 1), petitioner's claim against another individual and order to go to small claims court (Exhibit 2), an excerpt of the rejection of claims 1 through 20 under 35 U.S.C. § 101 from the Office action (Exhibit 3), and an excerpt of the objections to claims 1, 5, 7, 8, 19, and 20 from the Office action (Exhibit 4).

In the decision of October 22, 2024, the Technology Center Director considered and addressed each alleged concern made in the petition of September 1, 2024, and considered all four exhibits.

With respect to petitioner's concern that the examiner was unreachable and negligent, the Technology Center Director responded by recognizing that the examiner arranged for an interview and held an interview with petitioner to discuss the merits of the application, as evidenced by the interview summary recorded on September 19, 2024.

With respect to petitioner's concerns of harassment and bias, the Technology Center Director considered petitioner's accusation of awkward silences and giggling, and evidence of a lawsuit filed in small claims court (Exhibit 2) but concluded that there was no evidence of specific actions that could be construed as harassment or bias.

With respect to petitioner's concerns of examiner communications that were not coherent, the Technology Center Director considered Exhibit 3 and noted that this portion of the Office action is a rejection of the claims under 35 U.S.C. § 101 which merely recites language taken directly from the claims. Thus, the Technology Center Director concluded that there was no evidence of record that the examiner's communications were not coherent. See the *Manual of Patent Examining Procedure* (MPEP) § 2106 for further information on the steps of the subject matter eligibility analysis for products and processes that are to be used during examination for evaluating whether a claim is drawn to patent-eligible subject matter under 35 U.S.C. § 101.

With respect to petitioner's concerns of incompetence, disinterest, and dishonesty, the Technology Center Director considered petitioner's allegations and noted that all examiners have at least a basic understanding of the technology in their assigned areas. MPEP § 909.01 further explains that nonprovisional utility applications are assigned directly to individual examiners by an automated routing system that uses classification symbols on an application to determine the best available examiner to work on that individual application. The Technology Center Director also considered Exhibit 4 with respect to the objections to claims 1, 5, 7, 8, 19, and 20 for informalities and responded to petitioner's arguments by explaining that this portion of the Office action was merely requiring petitioner to recite features consistently throughout the specification and the claims. The rules of the USPTO require that application claims must "conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description." 37 CFR 1.75(d)(1).

The Technology Center Director also considered petitioner's allegations that the examiner asked questions that revealed a lack of knowledge and unfamiliarity with the technology related to the subject matter of the instant application, had ineffective communication, and wrote an Office

action that was repetitive. In response, the Technology Center Director explained that what petitioner interpreted as the examiner's incompetence was merely the examiner's attempt to clarify the scope of protection covered by the particular claim language. During prosecution, the Office construes claims by giving them their broadest reasonable interpretation consistent with the specification in an effort to establish a clear record of what the applicant intends to claim. Applicant has the ability to amend the claims during prosecution to ensure that the meaning of the language is clear and definite prior to issuance or provide a persuasive explanation (with evidence as necessary) that a person of ordinary skill in the art would not consider the claim language unclear. *In re Buszard,* 504 F.3d 1364, 1366, 84 USPQ2d 1749, 1750 (Fed. Cir. 2007) (claims are given their broadest reasonable interpretation during prosecution "to facilitate sharpening and clarifying the claims at the application stage").

Lastly, the Technology Center Director also considered petitioner's allegations that the examiner engaged in acts of theft and bad faith, but found no evidence to support these general allegations.

Accordingly, for the reasons set forth above, petitioner's argument that the Technology Center Director issued the decision of October 22, 2024, without proper review of evidence, has been considered but is not persuasive.

In addition to renewing the allegations made in the petition of September 1, 2024, the petition of October 28, 2024, further alleges that: (1) the examiner acted with malice intent; and (2) the examiner and the deciding official of the decision issued on October 22, 2024, have made statements against established science and common sense and have demonstrated a lack of familiarity with the technology that relates to the instant application.

Petitioner argues that the examiner acted with malice intent by characterizing the claimed invention as merely a mental process when analyzing the claims under 35 U.S.C. § 101. Petitioner relies upon the excerpt of the rejection of claims under 35 U.S.C. § 101 taken from Exhibit 3 and a description of the invention taken from Exhibit 2 to attempt to establish that the examiner's characterization of the invention as a mental process is misleading. These arguments amount to a difference of opinion between petitioner and the examiner concerning the rejections made under 35 U.S.C. § 101 and, more specifically, whether the subject matter of the invention *as claimed* is patent eligible.

A difference of opinion as to the patentability of one or more claims does not evidence bias, abuse, or any other improper conduct on the part of the examiner, much less that the examiner's replacement is justified. The decision to find a claim patentable or unpatentable is ultimately a judgment call over which reasonable people can disagree. *See Lear, Inc. v. Adkins,* 305 U.S. 653, 670 (1969). Each application is examined on its own merits for compliance with pertinent statutory requirements. *In re Gyurik,* 596 F 2d 1012, 1018-19 n.15 (C.C.P.A. 1979) ("Each case is determined on its own merits. In reviewing specific rejections of specific claims, this court does not consider allowed claims in other applications or patents."); *In re Wertheim,* 541 F.2d 257,264 (C.C.P.A. 1976) ("It is immaterial in *ex parte* prosecution whether the same or similar clams have been allowed to others."). The review of the propriety of a rejection *per se* (and its underlying reasoning) is by way of an appeal as provided by 33 U.S.C. § 134 and 37 CFR 40.31

and not by way of petition under 37 CFR 1.181 , even if the petitioner frames the issues as concerning procedure versus the merits, *See Boundy v. US Patent & Trademark Office,* 73 USPQ2d 1468, 1472 (E.D. Va. 2004). As stated by the Court of Customs and Patent Appeals (a predecessor of the U.S. Court of Appeals for the Federal Circuit), the adverse decisions of examiners, which are reviewable by the Board, are those which relate, at least indirectly, to matters involving the rejection of claims. *See In re Henge hold,* 440 F.2d 1395, 1404 (C.C.P.A. 1971). That an applicant casts the argument as directed to a procedural requirement (rather than the merits of the rejection) does not untether the review of the *prima facie* case from the review of the merits of the rejection. *See In re Jung,* 637 F.3d 1356, 1363 (Fed. Cir. 2011) (applicant's procedural arguments concerning the *prima facie* case requirement are the same arguments that would have been made on the merits). It is well settled that the Director will not, on petition, usurp the functions or impinge upon the jurisdiction of the Patent Trial and Appeal Board. *See In re Dickinson,* 299 F.2d 954, 958 (C.C.P A. 1962) (The Board will not ordinarily hear a question that should be decided by the Director on petition, and the Director will not ordinarily entertain a petition where the question presented is a matter appealable to the Board).

With respect to petitioner's allegations that the examiner and Technology Center Director have made statements against established science and common sense, petitioner makes general allegations that the examiner, during the telephone interview of August 7, 2024, was not interested in learning more about the invention. This general allegation is not sufficient to warrant replacement of the examiner. Additionally, petitioner takes issue with a statement made in the decision by the Technology Center Director that "software can certainly exist separately from hardware." The arguments presented by petitioner amount to a difference of opinion between petitioner and the examiner and Technology Center Director concerning potential claim interpretations. This difference of opinion is not a basis to grant petitioner's request to have the instant application reassigned to a different examiner.

In view of the above, petitioner has not demonstrated improper actions by the examiner amounting to bias or the appearance of bias on the part of the examiner that would warrant overturning the Technology Center Director's decision of October 22, 2024.

DECISION

For the above-stated reasons, the petition to overturn the Technology Center Director's decision of October 22, 2024, and direct the Technology Center Director to: (1) remove and replace the patent examiner assigned to the instant application; (2) provide proper due diligence and administrative processing in a professional and timely manner; and (3) eliminate acts of prejudice and bias or appearance of bias, 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 2100 for consideration of the reply to the Office action filed on November 4, 2024.

/Charles Kim/
Deputy Commissioner for
Patents