

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte CAROL FRAUWIRTH

Appeal No. 2002-1809
Application No. 09/798,050

ON BRIEF

Before COHEN, FRANKFORT, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This is in response to the appellant's request for rehearing¹ of our decision mailed July 31, 2002, wherein we affirmed the examiner's rejection of claim 3 under 35 U.S.C. § 103 as being unpatentable over the acknowledged prior art set forth on pages 1, 2 and 6 of the specification (hereafter, APA) in view of Wier².

¹ Filed August 12, 2002.

² Wier, Adventure Travel Photography, 26 (New York, Watson-Guption Publications, 1992).

The argument (p. 2) raised by the appellant is that this panel of the Board of Patent Appeals and Interferences overlooked the fact that

the Wier prior art was withdrawn and deemed in the EXAMINER'S ANSWER at page 5 in the last paragraph as "art rejections of non-final Office Action of June 26, 2001 [that] are no longer applied to the appealed claim."

We have carefully considered the argument raised by the appellant in the request for rehearing, however, the argument therein does not persuade us that our decision was in error in any respect. In fact, the argument does not set forth any error in our determination that claim 3 was unpatentable under 35 U.S.C. § 103 over the combined teachings of APA and Wier.

We do not agree with the appellant's apparent argument that Wier was withdrawn as prior art being applied against claim 3 for the following reasons: (1) Weir was cited and applied against claim 3 in the final rejection (Paper No. 5, mailed October 9, 2001); (2) Weir was cited and applied against claim 3 in the examiner's answer (Paper No. 8, mailed March 21, 2002); and (3) on page 2 of the answer, the examiner stated that "[t]he appellant's statement of the issues in the brief is correct" and the sole issue set forth on page 3 of the appellant's brief (Paper No. 6, filed January 18, 2002) was whether claim 3 on appeal is unpatentable under 35 U.S.C. § 103 over the APA in view of Wier. While the examiner did state on page 5 of the answer that "[i]n response to arguments of lines 17

and 18 of page 6, the art rejections of non-final Office Action of June 26, 2001 are no longer applied to the appealed claim," we cannot speculate as to what the examiner meant. However, it is clear to us that the examiner did not mean by that statement to withdraw Wier as a reference being applied in the final rejection of claim 3 that was being appealed.

In light of the foregoing, the appellant's request for rehearing is granted to the extent of reconsidering our decision, but is denied with respect to making any change thereto.

No period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

REQUEST FOR REHEARING - DENIED

IRWIN CHARLES COHEN
Administrative Patent Judge

CHARLES E. FRANKFORT
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

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