



Case Number: D 0008/15

D E C I S I O N
of the Disciplinary Board of Appeal
of 17 June 2016

Appellant: N.N.

Decision under appeal: Decision dated 14 July 2015 of the Examination Board of the European Qualifying Examination.

Composition of the Board:

Chairman: E. Dufrasne
Members: L. Bühler
H. G. Hallybone

Summary of Facts and Submissions

- I. With letter of 14 July 2015, the appellant was notified that the Examination Board, based on the marks obtained by the appellant at the European qualifying examination 2015 for papers C and D, had decided that the requirements of Article 14(1) of the Regulation on the European qualifying examination for professional representatives (REE; OJ EPO Supplementary publication 2/2014, 2) had not been fulfilled and that the appellant having failed papers C and D had not passed the European qualifying examination.
- II. With letters dated 6 and 12 August 2015, respectively, the appellant filed two separate appeal briefs to challenge the decision to give his answers to paper C the mark of 46 and to give his answers to paper D the mark of 42. He paid the appeal fee twice.
- III. The appeal briefs were considered to constitute a single appeal against the decision of the Examination Board dated 14 July 2015. With letter of 8 October 2015, the Examination Board remitted the appeal to the Appeal Board without rectifying its decision. The Examination Board also reimbursed one of the appeal fees.
- IV. On 4 March 2016, the Appeal Board sent a communication conveying its preliminary opinion. With letter dated 5 April 2016, the appellant replied to the Appeal Board's communication and provided additional arguments. The appellant withdrew its request that the marking of his answers to paper D be re-evaluated and paper D be awarded a pass or a compensable fail.

V. The appellant's arguments, as far as relevant for the present decision, may be summarised as follows:

The appellant submitted that Article 24(1) REE had been infringed. He argued that his answers with respect to inventive step in paper C had not been correctly marked and concluded that for each of these answers he should have been awarded more marks than were actually given.

To support his objections, the appellant established a hypothetical marking schedule in which the maximum marks obtainable for a particular aspect of paper C were further broken down into marks for each element of such aspect by dividing the maximum marks for each aspect by the number of elements of answers identified in the examiners' reports on each paper.

In detail, the appellant contended that the only difference in the assessment of inventive step of claim 3 between his answer and the official answer was the reason given for selecting the closest prior art. The justification for the choice of the closest prior art in the official answer was based on a technically false premise which would have led to a different assessment of inventive step. The marks awarded to the appellant's answer were thus based on an error. With respect to claim 4b, the additional objection under Article 100(a) EPC should have led to a different marking considering that this additional ground of opposition was justified in order to provide a comprehensive reasoning and complete attack of this claim. The appellant's assessment of inventive step for claim 5 differed from the proposed solution in the formulation of a different objective technical problem. In view of the concordant

conclusions on inventive step, the different formulations of the objective problem had to be seen as equivalent. The marking was thus not justified. Likewise, the difference as to the effect and problem formulated with respect to the difference between the closest prior art and the subject-matter of claim 6 were purely linguistic and did not justify the deduction of marks.

- VI. The appellant's final requests were that
- (a) the marking of his answers to paper C be re-evaluated and paper C be awarded a pass, and
 - (b) the fee for appeal be refunded.

Reasons for the Decision

1. The appeal is admissible.
2. In accordance with Article 24(1) REE and the Appeal Board's consistent jurisprudence (following D 1/92, OJ EPO 1993, 357, and D 6/92, OJ EPO 1993, 361), decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application, or higher-ranking law. It is not the function of the Appeal Board to reconsider the entire examination procedure on the merits. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Appeal Board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure, for instance where the two examiners differ so widely in their marking that

the difference in marks alone suggests an infringement of the principle of uniform marking, or where a question is inconsistently or incomprehensibly formulated, or where the examiners based their marking on a technically or legally false premise on which the contested decision is based. The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Appeal Board; nor are the examining bodies' criteria for determining the weighting of the expected answers to the examination questions (D 7/05, OJ EPO 2007, 378, point 20 of the reasons).

3. The reasons given by the appellant in the present case do not provide any indication that the marking of the appellant's answers in paper C would have to be regarded as having been influenced by an obvious mistake made by one or both of the examiners.

3.1 The Appeal Board cannot identify the alleged obvious mistake in the inventive step assessment of the subject-matter of claim 3 in the examiners' report for paper C. Rather, the appellant confuses in his argumentation considerations with respect to the purpose or objective of the claimed invention (here: "enabling bidirectional use" of a claimed freestyle snowboard) in the determination of the closest prior art document (Annex 2), the establishment of the objective technical problem (here: "improving reliability of the damper") in view of the technical effect(s) of the difference(s) between the subject-matter claimed and the determined closest prior art (Annex 2), and considerations for combining the closest prior art document with further documents of the state

of the art (here: "damping using piezoelectric material" disclosed in Annex 6). The appellant's reference to the disclosure of Annex 6 in the discussion of the reasons for the choice of Annex 2 as closest prior art is therefore of no relevance unless he argues that Annex 6 should be considered the closest prior art. This is however not the answer he has given in his examination paper.

3.2 The appellant's objections to the solutions in the examiners' report concerning claims 5 and 6 likewise fail to reveal serious and obvious mistakes. Again, the appellant's reasoning is flawed. With respect to claim 5 the appellant's formulation includes a pointer to the solution, and the differences in the definition of the objective technical problem in the context of claim 6 ("saving time" proposed in the examiners' report vs. "finding position by trial and error") are not merely linguistic differences. The appellant's submissions do not allow establishing a mistake without reviewing the examination procedure on the merits.

3.3 With respect to the appellant's contention regarding claim 4b, the appellant's attention is drawn to the fact that Rule 25(5) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE; OJ EPO Supplementary publication 2/2014, 18) provides that the "notice of opposition shall contain all those grounds (and no others) ... which candidates consider in this particular case to be prejudicial to the maintenance of the patent" (emphasis by the Appeal Board). Therefore, additional grounds for opposition do not necessarily lead to the awarding of additional

marks and might even justify a deduction of marks (D 11/14 of 10 February 2015, point 2.4 of the reasons).

4. The appellant's line of argument based on the hypothetical marking schedule established by him is also bound to fail for the following reasons:
 - 4.1 First, elements ("features") of an answer to an individual aspect of paper C do not necessarily have equal weight. For example, contrary to the proposed repartition of marks in the appellant's "feature" tables for paper C, there is no objective justification for always attributing one mark to the mention of the correct number of the closest prior art document and an additional mark to the statement that this document represents the closest prior art. In fact, the identification of the closest prior art document is just the starting point in the assessment of inventive step in accordance with the problem-solution approach. Naming the closest prior art has possibly less weight than the substantiated motivation of the choice which moreover can vary in difficulty for the various inventive step attacks expected.
 - 4.2 Second, elements of an answer do not constitute a comprehensive reasoning or a complete analysis. Their value has to be assessed in the overall context of the paper. The purpose of paper C is to assess candidates' ability to draft a notice of opposition to a European patent (Rule 25(1) IPREE). Such ability is not demonstrated by giving 50 out of 100 expected "features" of an opposition brief.

- 4.3 Third, the evaluation of the merits of a candidate's answer to an examination paper and the repartition of points for elements of the answer is part of the actual marking which is within the responsibility of each of the two examiners and not subject to review by the Appeal Board. The Appeal Board notes in this respect that the marking sheet for paper C shows that the examiners arrived independently from one another with an almost identical number of overall marks at the result that the appellant did not merit a number of marks sufficient for a "pass".
5. In view of the above considerations, the Appeal Board considers that the grounds of appeal thus merely show that the appellant's opinion and that of the examiners as to the merit of the appellant's answers differ and that the appellant is of the opinion that his answers should have been awarded more marks than were actually given by the examiners. Since the actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Appeal Board, the appellant's appeal is to be dismissed.
6. According to Article 24(4), third sentence, REE, reimbursement (in full or in part) of the fee for appeal is ordered in the event that the Appeal Board allows the appeal or that the appeal is withdrawn. Since the appeal cannot be allowed, the request for reimbursement of the appeal fee is to be refused.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

P. Martorana

E. Dufrasne