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D E C I S I O N
of 24 September 2002

Case Number: T 0732/00 - 3.2.2

Application Number: 93420182.3

Publication Number: 0569308

IPC: A61H 23/04

Language of the proceedings: EN

Title of invention:

A high efficiency external counter pulsation apparatus and method for controlling same

Applicant:

Vasomedical, Inc.

Opponent:

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Headword:

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Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Claims adequately supported, after amendments"
"Broadening of a claim allowable at the examining stage"

Decisions cited:

T 0133/85

Catchword:

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Case Number: T 0732/00 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 24 September 2002

Appellant: Vasomedical, Inc.
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Representative: Luckhurst, Anthony Henry William
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 21 February 2000
refusing European patent application
No. 93 420 182.3 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. D. Weiß
Members: M. G. Noël
J. C. M. De Preter

Summary of Facts and Submissions

- I. In its decision, the Examining Division refused all requests concerning European patent application No. 93 420 182.3, in particular the third auxiliary request, on the ground that some features regarded as essential had been deleted from the main claim, which resulted in an unallowable broadening of its subject-matter, in contravention to Article 123(2) EPC.
- II. The appellant (applicant) lodged an appeal against this decision and filed a statement of grounds along with new sets of claims according to a main and two auxiliary requests.
- III. In a communication dated 27 June 2002, the Board suggested a revised set of claims based on one of the said requests, which would probably meet the requirements of Article 123(2) EPC. On this basis, the prospect of remittal of the case to the first instance for further prosecution was held out.
- IV. In its reply the appellant agreed with the Board's proposals and requested remittal of the case back to the first instance for further prosecution on the basis of the amended set of claims 1 to 9 annexed to the said communication of the Board dated 27 June 2002 and posted on 28 June 2002.
- V. Claim 1 reads as follows:

"An external counterpulsation apparatus,
comprising:

a gas source including a gas compressor (20) and
gas pipes,

gas reservoir means (22) for storing compressed gas from the gas source to provide gas flow of stable pressure;

a gas distribution means including a plurality of valves;

a plurality of balloon devices, each of them comprising at least a balloon (25) and a balloon cuff body (13, 44), and

fixing elements (41, 42, 43) for securing the balloon cuff body (44) to the upper or lower limbs or the buttocks of a patient,

the balloons being connected by pipes to corresponding valves (24, 35) in the gas distribution means;

a control means (10) including,

(i) a plurality of detectors (1, 12, 16) to be positioned at predetermined parts of the body of the patient

(ii) filtering means for detector output signals, and

(iii) a computer system consisting of a micro-computer and an A/D converter (6), the computer system obtaining data for controlling the inflation and deflation time of the balloons, and generating corresponding inflation and deflation signals; and

(iv) a drive circuit (8) responsive to said inflation and deflation signals to open and close said plurality of valves to automatically inflate and deflate the balloons."

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments*
 - 2.1 The first auxiliary request filed with the grounds of appeal is based on the third auxiliary request refused by the Examining Division. The amendments suggested by the Board in its communication were made for the sake of clarity and for avoiding objections under Article 52(4) EPC (features related to steps of a method for treatment by therapy or surgery).
 - 2.2 The current version of the claims 1 to 9 is supported as follows:

Claims 1, 3, 4, 5, 6, 8 are based, respectively, on claims 1, 2, 3, 4, 5, 11 according to the application as filed.

Claim 2 is supported by the original description, in particular on page 14, lines 8 and 22.

Claim 7 is supported by claim 10 as originally filed, supplemented by features drawn up from the description, page 14, second paragraph and page 15, first paragraph.

Claim 9 is supported by original claim 12 and by the description, page 9, second paragraph and page 22, first paragraph.

2.3 The reason given by the first instance for supporting its objection under Article 123(2) EPC, was that the deletion from the main claim, of features such as "solenoid" (valves) and "high frequency constant current source" which were regarded as essential in the specification, led to an unallowable broadening of that claim.

The Board concurs with the decision under appeal, see page 5, last paragraph, that it is clear for a person skilled in the art that the ability of the valves to open and close is of utmost importance and that the skilled person must select a valve accordingly. But it disagrees with the finding that only "solenoid valves are suitable to cope with this requirement", since the solenoid is the specific device for actuating the valve. The skilled person knows that there are quick and sluggish types of solenoid valves on the market, he just has to select the right one for his specific purpose, that is, with respect to its response time and not to its kind of actuation. Consequently, a limitation of claim 1 to a "solenoid valve" is not necessary. As to the "high frequency constant current source", this feature is actually only relevant when using electrodes 1 to detect impedance changes and is not required when using other detectors such as the finger pulse transducer 16 or the pressure transducer 12. Consequently, the restriction of the subject-matter of claim 1 to this source of current is neither necessary nor appropriate.

Further, the Board observes that during the examination proceedings the broadening of a claim is allowable, provided that the subject-matter which results from the modification was already disclosed within the content

of the original application as filed (see T 133/85, OJ EPO 1988, 441, sections 4 and 5). Therefore, features originally present in a claim may be validly deleted if they turn out to be not essential to the solution in its most general definition. This is the case here since the deleted features are of no relevance with respect to the problems which the application as filed aims at solving (cf. page 4, lines 9 to 11). As a matter of fact, the invention resides principally in the operating of the computer system for automatically optimizing the timing of inflation and deflation of the balloons in accordance with feature (iii) (cf. paragraph bridging pages 8 and 9 and page 28, lines 10 to 14).

2.4 Therefore, the requirements of Article 123(2) EPC are met.

3. *Remittal*

Since the refusal by the Examining Division was exclusively based on formal objections under Article 123(2) EPC, now removed, the Board considers it appropriate to remit the case to the first instance for further prosecution on the substantive issues as also requested by the appellant.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for further prosecution on the basis of the set of claims 1 to 9 annexed to the communication of the Board of 27 June 2002, posted on 28 June 2002.

The Registrar:

The Chairman:

V. Commare

W. D. Weiß