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D E C I S I O N
of 18 January 2005

Case Number: T 0328/03 - 3.2.2

Application Number: 96943282.2

Publication Number: 0873105

IPC: A61H 23/02

Language of the proceedings: EN

Title of invention:
Method and device to modify the excitability of the neural networks

Applicant:
Deli, Roberto, et al

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 84

Keyword:
"Clarity (yes, after amendment)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0328/03 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 18 January 2005

Appellant: Deli, Roberto, et al
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Representative: Iannone, Carlo Luigi
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 5 December 2002 refusing European application No. 96943282.2 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: T. K. H. Kriner
Members: S. S. Chowdhury
A. Pignatelli

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division dated 5 December 2002 to refuse European patent application No. 96 943 282.2.

The ground of refusal was that claim 1, the solitary independent claim, did not meet the clarity requirement of Article 84 EPC.

II. On 10 January 2003 the appellant (applicant) lodged an appeal against the decision and paid the prescribed fee on the same date. On 18 February 2003 a statement of grounds of appeal was filed.

III. The appellant requests that the decision under appeal be set aside and that the examination of the case be carried out on the basis of claim 1 filed by telefax dated 17 January 2005.

IV. Claim 1 reads as follows:

"An apparatus for modifying the excitability of the neuronal networks, comprising a feeder (1), an amplifier (3), a mechanical transducer (4), and means (6) for generating vibrations with frequencies within the range of 1 and 300 Hz and an amplitude at an element (9) for applying the vibrations to the body within the range from 1 micron and 0.3 x L_0, where L_0 is the average length of the muscle fibres at the body portion to which the vibrations are to be applied, and means for coupling said vibration generation means (6) and said applying element to the body portion at any desired orientation."

V. The appellant argued as follows:

Upon application of Article 69 EPC the meaning of claim 1 became clear. Moreover, it was noted that no clarity objection was made in the IPER.

Reasons for the Decision

1. The appeal is admissible.

2. *Article 123(2) EPC*

Apart from clarifying amendments the main amendment to claim 1 is the replacement of the feature "amplitude so dimensioned to be within the range from 1μ and the maximum physiological amplitude of the muscle" by the term "0.3 x L_0, where L_0 is the average length of the muscle fibres at the body portion to which the vibrations are to be applied". The description defines this value as the upper limit of amplitude at several places, for example in the penultimate paragraph on page 3 and paragraph 3) on page 8. The claim meets the requirements of Article 123(2) EPC, accordingly.

3. *Clarity*

The application relates to apparatus for applying mechanical vibrations to muscles in order to modify the excitability of neuronal networks, as set out in claim 1.

The original claims read in poor technical English and the examining division had consequently objected to the

use of the expressions "amplitude so dimensioned to be within the range from 1μ and the maximum physiological amplitude of the muscle", and "specific body portion" and "any body portion" in claim 1.

The upper limit of the first expression was said to be unclear, and has now been replaced by the term "0.3 x L_0, where L_0 is the average length of the muscle fibres at the body portion to which the vibrations are to be applied". The Board considers this term to be clear despite the fact that it defines the upper limit by reference to the human body, since the person skilled in the art knows what the average length of the muscle fibres is at the body portion to which the vibrations are to be applied. This means that the upper limit could be very large and if a prior art apparatus has the other features of claim 1 and also the large amplitude, then it would fall under the scope of claim 1.

The other clarity objections of the examining division have been overcome by the new wording of claim 1 and no confusion arises regarding the body portion to which the vibrations are to be applied. Also, new claim 1 makes it clear that the means for coupling the vibration generation means and the applying element to the body portion couple these to the body at any desired orientation.

4. Since the examining division had made only a tentative attack against the claims under Article 52(1) EPC based on a broad interpretation of the claims, the Board sees fit to remit the case for a complete examination of the application.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance with the order to resume the examination procedure on the basis of claim 1 filed by telefax dated 17 January 2005.

The Registrar: The Chairman

V. Commare T. K. H. Kriner