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Datasheet for the decision of 30 January 2007

Case Number: T 0771/05 - 3.2.02

Application Number: 01114354.2

Publication Number: 1163924

IPC: A61M 16/06

Language of the proceedings: EN

Title of invention:
A nasal mask

Applicant:
Fisher & Paykel Healthcare Limited

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Novelty, inventive step - (yes, after amendments) - third auxiliary request"

Decisions cited:
-

Catchword:
-

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Case Number: T 0771/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 30 January 2007

Appellant: Fisher & Paykel Healthcare Limited
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Representative: Hoarton, Lloyd Douglas Charles
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 3 February 2005 refusing European application No. 01114354.2 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: T. Kriner
Members: D. Valle
E. Dufrasne

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal on 8 April 2005 against the decision of the examining division posted on 3 February 2005 to reject the European patent application 01114354.2. The fee for the appeal was paid on the same day and the statement setting out the grounds for appeal was received on 9 June 2005.

II. The examining division held that the requests submitted by the applicant did not meet the requirements of Article 54 EPC, since the subject-matter of claim 1 was not novel having regard to the document:

D2 = US - A - 5 832 918.

In addition to D2 the following further document is also relevant for the present decision:

D1 = US - A - 5 662 101.

III. Upon request of the appellant, oral proceedings have been held on 30 January 2007.

At the end of the oral proceedings the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main or of one of the auxiliary requests 1 to 4, all filed during the oral proceedings.

IV. Claim 1 of the main request reads as follows:

"A device for delivering a supply of gases to a user (1) comprising or including: a patient interface (2)

having a hollow body (102), the interface being adapted to be in fluid communication with said supply of gases (15), headgear (108) adapted to attach to or around the head of said user (1), where said patient interface (2) is adapted to substantially seal with respect to at least a portion of a face and/or respiratory system of said user (1) in at least a correct orientation and position on said user (1) and where there is a sliding connection (120, 200) between said headgear (108) and said patient interface (2), when said patient interface (2) is engaged with a user (1), characterized in that the sliding connection (120, 200) is constrained by at least one guide (126, 128, 130, 131, 202) but is allowed to slide in and out, so that the headgear (108) can move laterally, independently of the hollow body (102) and applies an even direct force on both sides of the patient interface (2) to the user's face and that the sliding connection (120, 200) is a strap constrained by the at least one guide (126, 128, 130, 131, 202) such that, in use, the sliding connection (120, 200) only moves laterally."

Claim 1 of the first auxiliary request reads as follows:

"A device for delivering a supply of gases to a user (1) comprising or including: a patient interface (2) having a hollow body (102), the interface being adapted to be in fluid communication with said supply of gases (15), headgear (108) adapted to attach to or around the head of said user (1), where said patient interface (2) is adapted to substantially seal with respect to at least a portion of a face and/or respiratory system of said user (1) in at least a correct orientation and

position on said user (1) and where there is a sliding connection (120, 200) between said headgear (108) and said patient interface (2), when said patient interface (2) is engaged with a user (1), characterized in that the sliding connection (120, 200) is constrained by two guides (126, 128, 130, 131, 202) but is allowed to slide in and out, so that the headgear (108) can move laterally, independently of the hollow body (102) and applies an even direct force on both sides of the patient interface (2) to the user's face and that the sliding connection (120, 200) is a strap constrained by the two guides (126, 128, 130, 131, 202) such that, in use, the sliding connection (120, 200) only moves laterally."

Claim 1 of the second auxiliary request reads as follows:

"A device for delivering a supply of gases to a user (1) comprising or including: a patient interface (2) having a hollow body (102), the interface being adapted to be in fluid communication with said supply of gases (15), headgear (108) adapted to attach to or around the head of said user (1), where said patient interface (2) is adapted to substantially seal with respect to at least a portion of a face and/or respiratory system of said user (1) in at least a correct orientation and position on said user (1) and where there is a sliding connection (120, 200) between said headgear (108) and said patient interface (2), when said patient interface (2) is engaged with a user (1), characterized in that the sliding connection (120, 200) is constrained by at least one guide of a number of guides (126, 128, 129, 130, 131, 202) but is allowed to slide in and out, so

that the headgear (108) can move laterally, independently of the hollow body (102) and that the sliding connection (120, 200) is a strap constrained by the at least one guide (126, 128, 129, 130, 131, 202) such that, in use, the sliding connection (120, 200) only moves laterally."

Claim 1 of the third auxiliary request reads as follows:

"A device for delivering a supply of gases to a user (1) comprising or including: a patient interface (2) having a hollow body (102), the interface being adapted to be in fluid communication with said supply of gases (15), headgear (108) adapted to attach to or around the head of said user (1), where said patient interface (2) is adapted to substantially seal with respect to at least a portion of a face and/or respiratory system of said user (1) in at least a correct orientation and position on said user (1) and where there is a sliding connection (120, 200) between said headgear (108) and said patient interface (2), when said patient interface (2) is engaged with a user (1), wherein the sliding connection (120, 200) is constrained by a pair of clips (202) or guides (126, 128, 129, 130, 131) of a number of pairs of clips (202) or guides (126, 128, 129, 130, 131) but is allowed to slide in and out, so that the headgear (108) can move laterally, independently of the hollow body (102) and that the sliding connection (120, 200) is a strap constrained by the pair of clips (202) or guides (126, 128, 129, 130, 131) to move laterally."

Auxiliary request 4 is not relevant for the present decision.

V. In support of his requests the appellant brought forward essentially the following arguments.

D2 did not disclose the subject-matter of claim 1 of the main request. The embodiment of Figure 6c did not show a sliding connection between the headgear and a patient interface. The strap (60) was forced into the peg-like connection (53) and constrained into a transversely semi-circular form which prevented the strap from sliding with respect to said connection, in particular when the interface was engaged with a user. Anyway D2 did not unequivocally disclose a slidable connection between the strap and the peg-like member. With respect to the case-law of the boards of appeal, it should therefore be decided that the claimed subject-matter was novel over the disclosure of D2.

Since D2 did not disclose the problem of the invention it could not be regarded as representing the closest prior art. The inventive step of the subject-matter of claim 1 should therefore be assessed starting from D1.

Since none of the characterising features of claim 1 of all present requests (which were all disclosed in the originally filed documents) was suggested by the cited state of the art, the subject-matter of these requests was novel and involved an inventive step.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request*

D2, see in particular Figure 6c, discloses a device for delivering a supply of gases to a user comprising or including: a patient interface, having a hollow body (20), the interface being adapted to be in fluid communication (via elements 110 and 130) with said supply of gases, headgear (60, 70, 90, 100) adapted to attach to or around the head of said user, where said patient interface is adapted to substantially seal with respect to at least a portion of a face and/or respiratory system of said user in at least a correct orientation and position on said user (see column 6, lines 55 to 62) and where there is a sliding connection (53, see also column 8, lines 43 to 45) between said headgear and said patient interface, when said patient interface is engaged with a user, whereby the sliding connection (53) is constrained by at least one guide (inner surface of 53) but is allowed to slide in and out, so that the headgear can move laterally, independently of the hollow body, and thereby inevitably applies an even direct force on both sides of the patient interface to the user's face and whereby the sliding connection is a strap (60) constrained by the at least one guide such that, in use, the sliding connection only moves laterally.

The appellant's argument that D2 did not disclose a sliding connection is not convincing. The document positively states in column 8, line 45 related to Figure 6c that the strap passes freely upon the peg. Certainly, the deformed strap presses laterally on the inside surface of the peg thereby increasing the resistance to sliding. However, this does not mean that

the strap cannot slide on the peg. A sliding connection is always subjected to a certain degree of friction resistance which depends on the extent of the contact surfaces, on the surface pressure and on the roughness of the surfaces involved. Hence there is no reason to doubt that the strap can slide on the peg, even when the interface is engaged with a user. The qualitative requirement of the claim that the connection should slide leaves the level of friction resistance completely open and is considered equivalent to the general disclosure contained in D2.

Accordingly, the subject-matter of claim 1 is not novel having regard to the disclosure of D2.

3. *First auxiliary request*

Claim 1 of the first auxiliary request differs from that of the main request in that the claimed device comprises two guides instead of at least one guide.

Due to this difference the subject-matter of the claim is novel against D2. However the provision of two guides instead of one represents a mere design option which may be provided by the skilled person without the exercise of inventive step.

The argument put forward by the appellant that the inventive step should be assessed starting from D1 and not from D2 is not convincing.

In accordance with the Case Law of the Boards of Appeal of the European Patent Office (see 4th edition 2001, English version, I.D. 3.1 and 3.2) the closest prior

art for assessing inventive step is normally that which corresponds to a similar use requiring the minimum of structural and functional modifications. The aim underlying this criterion is that the assessment of inventive step should start from a situation as close to reality to that encountered by the inventor. If it is not clear from this criterion what the closest prior art is, the problem solution approach has to be repeated taking possible alternative starting points.

In the present case D1 and D2, like the application, both refer to a device for delivering a supply of gases to a user. Hence D1 and D2 correspond not only to a similar, but to the same use as the application. However, since D2 has more structural and functional features in common with the subject-matter of claim 1 of the first auxiliary request than D1, D2 has to be regarded as the most relevant state of the art.

Moreover, if there is a doubt which of D1 and D2 represents the closest state of the art, the board has to assess the inventive step starting from D1 and D2. Consequently D2 would anyhow be considered as representing a relevant state of the art, with the above-mentioned conclusion of lack of inventive step of the subject-matter of claim 1 of the first auxiliary request.

4. *Second auxiliary request*

Claim 1 of the second auxiliary request differs from the main request essentially by the feature according to which the sliding connection is constrained by at least one guide of a number of guides.

The claims and description mention as guides the elements 126, 128, 129, 130, 131 of the figures. There is no mention in the originally filed documents of an arrangement where the sliding connection is constrained by only one guide, and Figures 5 to 7 exclusively show embodiments where the sliding connection is constrained by two guides. Therefore claim 1 of the second auxiliary request does not comply with Article 123(2) EPC.

5. *Third auxiliary request*

5.1 Amendments

Claim 1 is based on the original claim 1 and on the figures; claims 2 to 7 are based on the original corresponding claims 2 to 7; claims 8 and 9 are based on page 6 of the original description, from line 4 to page 7, line 1 and on the figures. The description has been adapted to the new filed claims.

Accordingly, the amendments comply with Article 123(2) EPC.

5.2 Novelty and inventive step

Claim 1 of the third auxiliary request differs from the main request by the feature according to which the sliding connection is constrained by a pair of clips or guides of a number of pairs of clips or guides.

Since this feature is not disclosed in D2, the subject-matter of claim 1 is novel.

The problem to be solved may be seen in providing a sliding connection which is more stable than those known from the prior art and more flexible with regard to the point of application of pressure against the hollow body.

The available prior art does not give any hint which could lead to the invention in an obvious way. Accordingly the subject-matter of claim 1 of the third auxiliary request involves an inventive step.

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 grant a patent on the basis of the auxiliary request 3, consisting of:

   – Claims: 1 to 9 filed during the oral proceedings;

   – Description: pages 1 to 7 filed during the oral proceedings;

   – Drawings: Figures 1 to 8 as published.

The Registrar: The Chairman:

V. Commare T. Kriner