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Datasheet for the decision of 8 February 2007

Case Number: T 0847/05 - 3.2.02

Application Number: 97949578.5

Publication Number: 0957954

IPC: A61M 5/142

Language of the proceedings: EN

Title of invention:
Apparatus for pumping fluid at a steady flow rate

Patentee:
THERAKOS, INC.

Opponent:
Fresenius Medical Care Deutschland GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 104(1), 114(2)

Keyword:
"Late-filed document (admitted)"
"Inventive step (no)"
"Award of costs (rejected)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0847/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 8 February 2007

Appellant: (Opponent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 17 May 2005 rejecting the opposition filed against European patent No. 0957954 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: T. Kriner
Members: M. Noël
M. Vogel

Summary of Facts and Submissions

I. Following an opposition filed by the appellant (opponent) against European patent No. 0957954, the opposition division decided on 17 May 2005 to reject the opposition and to maintain the patent as granted.

The opposition division held that the grounds of opposition (lack of novelty and inventive step) did not prejudice the maintenance of the patent as granted.

II. The appellant lodged an appeal, by notice received at the EPO on 6 July 2005, and paid the appeal fee on the same day. A statement setting out the grounds of appeal was filed on 27 September 2005.

Together with this statement the appellant filed the following new documents:

D5: US-A-4 468 222
D6: US-A-5 002 471
D7: US-A-5 476 368
D8: US-A-4 322 201

Furthermore, with the letter dated 15 December 2006, he filed the new document:

D1': WO-A1-86/01115.

III. Oral proceedings were held on 8 February 2007.

As announced in the letter dated 23 January 2007 the respondent was not represented at the oral proceedings.

IV. At the end of the proceedings the appellant requested that the decision under appeal be set aside, that the European patent No. 0957954 be revoked and that the respondent's request to an award of costs be rejected.

V. The respondent requested in the written proceedings that the appeal be dismissed (main request) or in the alternative that the patent be maintained on the basis of claims 1 to 16 according to a first auxiliary request or claims 1 to 14 according to a second auxiliary request, both filed with the letter dated 14 February 2006, that the late-filed documents D5 to D8 be excluded from the appeal proceedings, and that an award of costs be made if document D1' was admitted into the proceedings.

VI. The independent claims of the various requests read as follows:

Main request:

"1. An apparatus (100) for pumping fluid at a steady rate comprising:

(A) a first drive chamber (102) having a movable outer surface (102a);

(B) a second drive chamber (104) having a movable outer surface (104a);

(C) a block (110) having a plurality of internal passages including a first passage (112) for receiving said fluid into said block (110) and a second passage (114) for discharging said fluid from said block (110)

at said steady rate, said block (110) having first and second internal chambers (120, 130) in fluid connection with said first and second passages (112, 114), said first internal chamber (120) having a first flexible surface (120a) for mating with said movable outer surface (102a) of said first drive chamber (102), said second internal chamber (130) having a second flexible surface (130a) for mating with said movable outer surface (104a) of said second drive chamber (104);

(D) at least one actuator for applying positive pressure to said first flexible surface (120a) while simultaneously applying negative pressure to said second flexible surface (130a) and for applying negative pressure to said first flexible surface (120a) while simultaneously applying positive pressure to said second flexible surface (130a), said at least one actuator being respectively coupled to said first and second flexible surfaces (120a, 130a) by said first and second drive chambers (102, 104)."

First auxiliary request:

The content of claim 1 of the main request and the following additional feature at the end of the claim:

"wherein said block (110) is adapted to be disposed of after use of said apparatus with said patient, and said first and second drive chambers (102, 104) and said at least one actuator are adapted to be reused with subsequent patients."

Second auxiliary request:

The content of claim 1 of the main request and the following additional last features at the end of the claim:

"wherein said at least one actuator is in fluid communication with said first and second drive chambers (102, 104), and with said movable outer surfaces (102a, l04a) thereof said first and second drive chambers (102, 104), and

wherein said at least one actuator is coupled to said movable outer surface (102a) of said first drive chamber (102) by a first fixed volume of drive fluid, and said at least one actuator is coupled to said movable outer surface (104a) of said second drive chamber (104) by a second fixed volume of drive fluid."

VII. At the oral proceedings the appellant submitted the following arguments:

Late-filed documents D5 to D8 were submitted with the statement setting out the grounds of appeal in order to refute the arguments presented in the contested decision. Therefore these documents should be admitted into the proceedings.

D1' was related to D1 which was cited in the international search report. Although D1' was filed lately, this document was found by chance as reaction to the requests filed by the respondent and in preparation for the oral proceedings. Having regards to the high relevance of this document, it should be

admitted into the proceedings, the more since its submission was made within the prescribed time-limit set out in the Board's communication of 13 December 2006.

D1' disclosed all the features recited in claim 1 of the various requests, with the exception of the feature according to which internal passages were arranged within the block for conducting the pumping fluid into and out of said block. However, such minor modifications fell within the scope of the normal design procedure followed by persons skilled in the art and did not require an inventive activity.

An apportionment of costs different from that provided in Article 104(1) EPC was not justified. Despite all due care, D1' was found only at a late stage but without the intention to unduly continue the proceedings. Moreover, this document was cited in the search report and equally available to both parties.

VIII. In its written submissions the respondent argued as follows:

Documents D5 to D8 were filed without explanation for their late citation. Therefore, they should be excluded from the present appeal proceedings.

Although D1' was *prima facie* highly relevant, this document was nevertheless filed very late and without convincing justification. Since the oral proceedings could have been avoided if the appellant had filed the document D1' at the very beginning of the opposition proceedings, the respondent requested that an award of

costs be made in its favour in application of Article 11a(2) of the Rules of Procedure of the Boards of Appeal, should D1' be admitted into the proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. *Admittance of the late filed documents*

The question whether or not the late-filed documents D5 to D8 should be introduced into the appeal proceedings can be left open, since these documents are not relevant for the present decision.

D1' was submitted less than two months before the date of oral proceedings, however before the prescribed time-limit of one month set out in the Board's communication of 13 December 2006. Taking into consideration that this document is highly relevant, which has also been recognized by the respondent itself, and that the respondent had enough time for studying it before the oral proceedings, the Board, using its discretion conferred by Article 114(2) EPC, has decided to admit D1' into the appeal proceedings.

3. *Novelty (Claim 1, main request)*

D1' discloses (see Fig. 2) an apparatus for pumping fluid at a steady rate (see page 8, lines 22-27 and page 12, No. 5) comprising two pumping elements operating in pairs and in opposite directions, to establish a continuous flow of fluid (see page 6,

lines 20-24). Each pumping element comprises an internal chamber 213 and a drive chamber 201 having a movable outer surface 202 in the form of a flexible wall (see page 6, lines 26-31).

The apparatus comprises further a block 207 for housing two internal chambers, each of them being in fluid connection with internal passages 208, 209 within the block for receiving and discharging said fluid through said internal passages, respectively (see page 7, lines 5-6).

Each internal chamber 213 has a flexible surface 206 for mating with the movable outer surface 202 of the corresponding drive chamber 201 (see page 7, lines 8-14 and claim 1).

Moreover, the apparatus comprises at least one actuator in the form of fluid pressure means, respectively coupled to the flexible surfaces of the internal chambers by said drive chambers, for alternately applying positive pressure to the flexible surface of one internal chamber, while simultaneously applying negative pressure to the flexible surface of the other internal chamber of the pair of pumping elements (see from page 2, line 32 to page 3, line 7 and page 6, lines 15-24).

Therefore, D1' discloses all the features of claim 1 of the main request with the exception of that feature according to which the plurality of internal passages includes "a first passage for receiving the fluid into said block" and "a second passage for discharging the fluid from said block".

In other words, in the present patent both internal chambers are in fluid connection with a common fluid receiving passage 112 (inlet) and a common fluid discharging passage 114 (outlet), all provided in said block, whereas in D1' the fluid connections between the receiving and the discharging passages of the internal chambers are realized outside of the block 207.

It results therefrom that the subject-matter of claim 1 according to the main request is novel over the disclosure of D1'.

4. *Inventive step (claim 1, main request)*

The provision of the fluid inlet and outlet passages within the block merely represents an alternative design of the known pumping apparatus. Such a design is regarded as a matter of normal practice within the skill of an ordinary engineer.

For this reason the subject-matter of claim 1 to the main request lacks an inventive step vis-à-vis the disclosure of D1'.

5. *Auxiliary requests*

D1' discloses a block 207 disposable after use (see page 7, lines 6-14). Since the mating and flexible surfaces or membranes 202, 206 assure the tightness of the corresponding chambers, the drive chambers and associated actuator means can be reused after separation of the block from the remaining components.

Therefore, the additional feature of claim 1 according to the first auxiliary request is also known from D1'.

Moreover, D1' discloses that the drive chambers are filled with a liquid medium. Therefore, it can be said that the actuator means are in fluid communication with the corresponding drive chambers and are also coupled to the corresponding flexible and movable outer surfaces by a fixed volume of drive fluid (see page 2, lines 32-34; page 6, lines 33-35 and claim 10).

Therefore, the additional features of claim 1 according to the second auxiliary request are also known from D1'.

It results therefrom that the subject-matter of claim 1 according to the auxiliary requests does not involve an inventive step, either.

6. *Award of costs*

In principle, each party to opposition proceedings meets its own costs. However, under Article 104(1) EPC the opposition division or board of appeal can, for reasons of equity, order a different apportionment of costs incurred during taking of evidence or in oral proceedings.

In the present case, D1' was easily and equally available to each party, since it has been cited as a family member of D1 (DE-A-3 428 828) in the International Search Report.

The fact that an additional search was made by the appellant at a late stage of the proceedings was justified by the not less late-filing of new sets of claims on behalf of the respondent and in an ultimate reaction to the Board's communication sent before oral proceedings. It does not appear, therefore, that the reasons for the late citing of document D1' points towards negligence or other circumstances that would amount to an abuse of procedure or an irresponsible or malicious conduct on behalf of the appellant, so that there is no reason of equity which would justify an apportionment of costs in favour of the respondent. As a consequence, an award of costs is not accepted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

3. The request to an award of costs is rejected.

The Registrar: The Chairman:

V. Commare T. Kriner