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Datasheet for the decision of 10 May 2007

Case Number: T 1022/05 - 3.2.02

Application Number: 98101296.6

Publication Number: 0846452

IPC: A61F 2/06

Language of the proceedings: EN

Title of invention:
A flexible expandable stent

Patentee:
MEDINOL LIMITED

Opponents:
Edward Tomlinson
Cordis Medizinische Apparate GmbH
JANSSEN PHARMACEUTICA N.V.

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)
Rule 71(2)

Keyword:
"Extended subject-matter - yes"

Decisions cited:
T 0201/83, T 0194/84

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1022/05 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 10 May 2007

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 27 June 2005 revoking European patent No. 0846452 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: T. Kriner
Members: M. Noël
E. Dufrasne

Summary of Facts and Submissions

I. European patent No. 0846452 was revoked by decision of the opposition division dated 3 May 2005 and posted 27 June 2005 on the basis of Article 123(2) EPC.

The reason was that the disclaimers contained in claim 1 of the various requests were not allowable under Article 123(2) EPC having regard to the criteria given in decision G 1/03.

II. The appellant (patentee) lodged an appeal against this decision by notice received on 4 August 2005 and paid the appeal fee on the same day. A statement setting out the grounds of appeal was filed on 7 November 2005.

III. Respondent 3 (opponent 3) withdrew its opposition by letter dated 10 October 2005. Therefore, it is not a party to the present appeal proceedings any more.

IV. Oral proceedings were held on 24 April 2007 in the presence of the appellant and respondent 1 (opponent 1). Although duly summoned, respondents 2 and 4 (opponents 2 and 4) both informed the Board by letters dated 23 April 2007 that they would not be represented at the oral proceedings.

V. At the end of the oral proceedings, the request of the parties were as follows:

The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or, in the alternative, of

the auxiliary request, both filed at the oral proceedings.

The respondent 1 requested that the appeal be dismissed.

After deliberation the Board announced that the decision would be given in writing.

VI. Claim 1 according to the main request and the single auxiliary request read as follows:

Main request

"A stent in the form of a tube (30) made from flat metal, consisting of in a non-expanded and in an expanded form a patterned shape, the patterned shape consisting of loop containing first meander patterns (11) having axes extending in a first, i.e., the circumferential direction of the stent and loop containing second meander patterns (12) having axes extending in a second direction, orthogonal to the first direction, the second meander patterns (12) being intertwined with the first meander patterns (11), and said first meander patterns (11) being arranged individually with a spacing in-between, and connected to said second meander patterns (12) so as to leave one loop (18, 20) of each second meander pattern (12) between each pair of successive individual first meander patterns (11), wherein during insertion of the stent through curved blood vessels the loops of the second meander pattern (12) change shape in order to compensate for the differences in length between the inside and outside curves as the stent bends so that

loops (18i, 20i) near the inside of the curve will be closer together than loops (18o, 20o) on the outside of the curve, which expand, and said first meander patterns (11) comprise loops in the expanded form of the stent."

Auxiliary request

"A stent in the form of a tube (30) made from flat metal, consisting of in a non-expanded and in an expanded form a patterned shape, the patterned shape consisting of first meander patterns (11) having axes extending in a first i.e., the circumferential direction of the stent and second meander patterns (12) having axes extending in a second direction, orthogonal to the first direction, the second meander patterns (12) being intertwined with the first meander patterns (11), said first and said second meander patterns (11, 12) comprising loops (14, 16; 18, 20), wherein said first meander patterns (11) are connected to said second meander patterns (12) so as to leave one loop (18, 20) of said second meander patterns (12) between each pair of successive individual first meander patterns (11), and wherein said second meander patterns (12) are connected to said first meander patterns (11) so as to leave one, two or three loops (14, 16) of said first meander patterns (11) between each pair of successive individual second meander patterns (12), wherein during insertion of the stent through curved blood vessels the loops of the second meander pattern (12) change shape in order to compensate for the differences in length between the inside and outside curves as the stent bends so that loops (18i, 20i) near the inside of the curve will be closer together than

loops (18o, 20o) on the outside of the curve, which expand, and wherein said first meander patterns (11) comprise loops in the expanded form of the stent."

VII. At the oral proceedings the parties presented the following arguments:

The respondents submitted that concerning the features of claim 1 of both requests relating to the change of shape of the loops during insertion of the stent through curved blood vessels, in order to compensate for the differences in length between the inside and outside curves as the stent bends, only the loops of the second meander pattern(s) were addressed. Claim 1 was silent about the change of shape of the loops of the first meander patterns. Moreover, contrary to the features as claimed, near the inside of the curve only the loops of the first meander patterns were compressed (closer together) whereas on the outside of the curve only the loops of the second meander patterns were expanded (more open). Therefore, the amendments made to claim 1 according to the main and the auxiliary request added subject-matter going beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

The appellant submitted that only the change of shape of the second meander patterns played a role and facilitated the bending of the stent during insertion into curved vessels. Therefore, it was not necessary to further limit the scope of the claim 1 by introducing features related to the first meander patterns in order to achieve compensation in length.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC.It is therefore admissible.

2. *Rule 71(2) EPC*

As announced in their letters dated 23 April 2007, the respondents 2 and 4 (opponents 2 and 4) were not represented at the oral proceedings. The respondents 2 and 4 having been duly summoned, the Board decided to hold the oral proceedings in their absence, according to Rule 71(2) EPC and Article 11(3) of the Rules of Procedure of the boards of appeal.

3. *Article 123(2) EPC*

With respect to claim 1 as granted, claim 1 according to both present requests was *inter alia* amended by the addition of the following features:

"wherein during insertion of the stent through curved blood vessels the loops of the second meander pattern (12) change shape in order to compensate for the differences in length between the inside and outside curves as the stent bends so that loops (18i, 20i) near the inside of the curve will be closer together than loops (18o, 20o) on the outside of the curve, which expand".

These functional features express the flexibility of the stent during insertion, in a non-expanded state, into curved blood vessels (see application as

originally filed, page 5, lines 19 to 23 and page 7, lines 13 to 16). Referring further to the application as filed (see Figure 3 and page 5, line 24 to page 6, line 4) the following details are given about the compensation between the differences in length as the stent bends: "during bending, the loops 14-20 to the right of the point A change shape in order to compensate for the differences in length between the inside and outside curves. For example, loops 18i and 20i near the inside of the curve are closer together than loops 18o and 20o on the outside of the curve, which expand. Loops 14i and 16i near the inside I are compressed while the loops 14o and 16o closer to the outside O of the curve are expanded. As can be seen, both meander patterns 11 and 12 are involved in the bending".

Thus, the solution as claimed is incomplete in that it is restricted to the loops (e.g. 18, 20) of the second meander pattern (12) whereas the description clearly takes into account also the change of shape of the loops (e.g. 14, 16) of the first meander pattern (11). The omission of a part of features involved in the bending results in a novel subject-matter, i.e. a novel combination of features not supported by the content of the application as filed. In other words, the object resulting from the modification cannot be, as such, directly and unambiguously identified as a combination of features envisaged by the application as filed. Hence, the subject-matter of claim 1 of the main request and of the auxiliary request is not contained in the application as filed, contrary to the requirements of Article 123(2) EPC. (see T 201/83, OJ 1984, 48, points 2 and 3 and T 194/84, OJ 1990, 59).

Therefore, the subject-matter of claim 1 of both requests is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

V. Commare T. Kriner