Internal distribution code:
(A) [ ] Publication in OJ
(B) [ ] To Chairmen and Members
(C) [ ] To Chairmen
(D) [X] No distribution

Datasheet for the decision
of 5 June 2012

Case Number: T 0933/09 - 3.2.02

Application Number: 01991976.0

Publication Number: 1349583

IPC: A61M 1/00

Language of the proceedings: EN

Title of invention:
System and method for closed loop controlled inspired oxygen
concentration

Applicant:
University of Miami

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 108, 109, 110
EPC R. 99(2), 101(1)
RPBA Art. 12(2)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Admissibility of appeal: no"

Decisions cited:
T 0934/02

Catchword:
-

C7955.D
EPA Form 3030   This datasheet is not part of the Decision.
                       It can be changed at any time and without notice.

Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Beschwerdekammern   Boards of Appeal   Chambres de recours

Case Number: T 0933/09 **-** 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 5 June 2012

Appellant: (Applicant)	University of Miami P.O. Box 016960 Miami FL 33101 (US)
Representative:	Gervasi, Gemma Notarbartolo & Gervasi GmbH Bavariaring 21 D-80336 München (DE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted 29 October 2008 refusing European patent application No. 01991976.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: E. Dufrasne
Members: M. Stern
                  C. Körber

C7955.D

Summary of Facts and Submissions

I.   The applicant lodged an appeal against the decision of
        the Examining Division, dispatched on 29 October 2008,
        refusing European application No. 01 991 976.0.

II.   The application had been refused by the Examining
        Division on the grounds that claim 1 did not fulfil the
        requirements of Article 123(2) EPC. The Examining
        Division had objected, inter alia, that no basis for
        the "initial algorithm" and "subsequent algorithm"
        defined in the characterising portion of feature e)iii)
        of claim 1 of the main request could be established,
        particularly since the features of these algorithms
        seemed to be cherry-picked from the description,
        leading to an intermediate generalisation which went
        beyond the content of the original application
        (points 4.1 and 4.2 of the Reasons of the impugned
        decision).

III.   The notice of appeal was received on 18 December 2008
        and the appeal fee was paid on the same day. With the
        statement setting out the grounds of appeal, received
        on 19 February 2009, an amended set of claims
        comprising a reworded claim 1 was filed. This claim no
        longer includes the features of section e)iii) objected
        to in the impugned decision, but, according to the
        appellant's statement, *"includes all the steps
        necessary to carry out the algorithm described in the
        flow diagram 106 (figure 6) and consequently further
        comprises all the steps needed to perform the
        processing of blocks 204 and 206; support of this
        features can be easily found in the description from
        page 8 line 6 to page 34 line 13."*

IV.   Claim 1 reads as follows (underlinings and
        strikethrough text added by the Board to indicate,
        respectively, features added to and deleted from
        claim 1 of the main request on which the impugned
        decision was based):

        "A computer readable medium having an executable
        component for adjusting fractionally inspired oxygen
        delivery (FiO2) for a patient in response to receiving
        an arterial hemoglobin oxygen saturation (SpO2) signal,
        wherein the executable component contains ~~computer
        executable instruction for:~~
        computer-executable instruction for increasing a
        hypoxemia, hyperoxemia, or normoxemia adjust interval
        counter and computer-executable instruction for:
        a) specifying a plurality of hemoglobin oxygen
        saturation levels ~~and~~ being a normoxemic, a hyperoxemic
        and a hypoxemic target range;
        b) reading the arterial hemoglobin oxygen saturation
        signal;
        c) determining if the arterial hemoglobin oxygen
        saturation signal is a valid signal;
        d) if the hemoglobin oxygen saturation signal is a
        [sic] not a valid signal, determining a value for the
        fractionally inspired oxygen delivery to the patient
        based on backup value;
        e) if the hemoglobin oxygen saturation signal is a
        valid signal,
        i) determining the hemoglobin oxygen saturation level
        based on the arterial hemoglobin oxygen saturation
        signal ~~as being in one of the normoxemic, the
        hyperoxemic and the hypoxemic ranges~~;

ii) determining a trend by calculating a slope using a
plurality of recent hemoglobin oxygen saturation
signals;

iii) if a closed loop mode is enabled, ~~determining the
fractionally inspired oxygen to deliver to the patient
based on the hemoglobin oxygen saturation level and the
trend indicated by the slope;~~

1) Reading the SpO2 signal and storing it as SpO2READ

2) Checking if SpO2READ is within the acceptable SpO2
range

3) If SpO2 is not within the acceptable SpO2 range
then

• Alerting the user

• performing the SpO2 signal OUT processing by setting
FiO2 Set is the FiO2 backup level,

4) If SpO2 is within the acceptable SpO2 range then
performing the SpO2 signal OK processing and:

• classifying and confirming the actual SpO2 level
using counters of time continuously updated

• performing appropriate timing processing based on
SpO2READ and

o if SpO2 READ is in the target range for normoxemia
then performing normoxemia timing

o if SpO2 READ is greater than the target range then
performing hyperoxemia timing

o if SpO2 READ is less than the target range then
performing hypoxemia timing

• performing SpO2 slope calculation

• determining the FiO2 max and min timing

• checking if closed loop control is enabled and
if so performing FiO2Set determination
if not setting FiO2Set to FiO2Backup

• determining if FiO2 Base Calc is enabled and
performing FiO2Base Determination

• performing FiO2Set checking

• performing FiO2Base/backup checking

• passing the updated FiO2Set value to the output
routine that control the air-oxygen mixer

5) monitoring if user settings have been changed and if
so updating the variables according and starting again
from iii;

iv) if the closed loop mode is not enabled, determining
the fractionally inspired oxygen to deliver to the
patient based on the backup value; and

f) delivering the fractionally inspired oxygen to the
patient~~,~~

~~characterized in that in step iii)~~

~~o an initial algorithm calculates a respectively~~
~~initial increase/decrease of the fractionally inspired~~
~~oxygen as a function of the calculated~~
~~negative/positive trend of the hemoglobin oxygen~~
~~saturation level, and~~

~~o a subsequent algorithm determines adjusting of the~~
~~fractionally inspired oxygen proportional to the slope~~
~~of the hemoglobin oxygen saturation level~~."

V.   In an annex to the summons to oral proceedings under
         Article 15(1) RPBA dated 12 March 2012, the Board
         informed the appellant of its provisional view that the
         appeal did not seem to comply with Rule 99(2) EPC and
         was therefore likely to be rejected as inadmissible
         pursuant to Rule 101(1) EPC.

VI.   Oral proceedings took place on 5 June 2012.

         The appellant requested that the decision under appeal
         be set aside and that the case be remitted to the
         department of first instance for further prosecution.

VII. The arguments of the appellant are summarised as
      follows:

      With its statement of grounds of appeal, the appellant
      had removed from claim 1 the wording objected to by the
      Examining Division. Thus, in the light of decision
      T 934/02, the present appeal should be considered
      sufficiently substantiated within the meaning of
      Article 108, third sentence, EPC, since amended claims
      had been filed which deprived the contested decision of
      its basis, even though it did not state any specific
      reasons why the contested decision was wrong. Claim 1
      attached to the statement of grounds of appeal no
      longer contained the wording objected to in the
      decision. Instead, the appellant had introduced all the
      technical features of the embodiment of Figure 6,
      supplemented by those features of Figures 7 and 8
      explicitly referred to in Figure 6. The arguments
      provided in the statement of grounds of appeal relating
      to the fulfilment of the requirements of Article 123(2)
      EPC were indeed quite concise, and the reference to the
      description was indeed quite broadly worded. The
      additional arguments presented in response to the
      communication from the Board should be considered as a
      clarification of the quite concise arguments in the
      statement of grounds of appeal.

      The appellant also explained that when the statement of
      grounds of appeal was filed it had been fully convinced
      that, based on the amended set of claims, the Examining
      Division would have rectified its decision under
      Article 109 EPC and full examination would have
      continued based on the amended set of claims.

Reasons for the Decision

1.   Article 108 EPC in conjunction with Rule 99(2) EPC
        requires that a statement setting out the grounds of
        appeal be filed which indicates the reasons for setting
        aside the decision impugned, or the extent to which it
        is to be amended, and the facts and evidence on which
        the appeal is based.

2.   This requirement is reflected in Article 12(2) RPBA
        which states: "The statement of grounds of appeal and
        the reply shall contain a party's complete case. They
        shall set out **clearly** and concisely the reasons why it
        is requested that the decision under appeal be reversed,
        amended or upheld, and should specify **expressly** all the
        facts, arguments and evidence relied on" [emphasis
        added].

3.   In the present case the appellant filed with the
        statement of grounds of appeal an extensively reworded
        claim 1. In particular, this claim contains a full page
        of newly formulated features in section e)iii), mainly
        replacing those features in claim 1 of the main request
        which had been objected to in the impugned decision.
        Beyond the general information given by the appellant
        in its statement of grounds of appeal that these newly
        formulated features included all the steps necessary to
        carry out the algorithm of the flow diagram of Figure 6,
        the only indication of any reasons why these new
        features might fulfil the requirements of Article 123(2)
        EPC is the appellant's statement:

"support of this [sic] *features can be easily found
in the description from page 8, line 6 to page 34
line 13"* (that is, amongst 26 pages).

4.   This statement merely conveys the information that the
        contents of 26 pages of the originally filed
        description (comprising a total of 34 pages) had been
        condensed into the newly formulated features in
        section e)iii). It does not enable the Board to
        immediately understand, without first having to make
        investigations of its own, if - and if so, where -
        there is a direct and unambiguous basis for each of the
        amendments made (in terms of both additions of features
        as well as omissions of other features belonging to the
        same context). Thus, the statement of grounds of appeal
        is not sufficient to allow to recognise the relevance
        of the amendments for remedying the raised objections
        of added subject-matter.

5.   The lack of self-evidence for such basis for more than
        a dozen added method steps becomes particularly
        apparent from inspection of the large list of citations
        of numerous passages scattered throughout the mentioned
        26 description pages which the appellant filed before
        the oral proceedings in an attempt to provide a
        purported basis for the added features. However,
        contrary to the appellant's view, additional arguments
        filed after the time limit fixed in Article 108 EPC
        cannot be taken into consideration for assessing the
        admissibility of the appeal.

6.   Consequently, the aforementioned statement cannot be
        considered to set out **clearly** the reasons for reversing
        the impugned decision and to specify **expressly** all the

C7955.D

arguments relied on for establishing the appellant's
complete case as prescribed by Article 12(2) RPBA.

7.   It is not denied that in some cases an appeal may be
        found to be substantiated as a result of filing amended
        claims which self-evidently deprive the contested
        decision of its basis. In the case underlying decision
        T 934/02 cited by the appellant, the statement of
        grounds of appeal did in fact give detailed reasons why
        the subject-matter of the amended claims satisfied the
        requirements of novelty and inventive step vis-à-vis
        the documents cited in the impugned decision (point 2
        of the Reasons), whereas in the present case the
        appellant has remained effectively silent as to why the
        amendments introduced into claim 1 now meet the
        requirements of Article 123(2) EPC.

        Thus, in the present case, contrary to the appellant's
        view, the Board considers that the mere filing of
        amended claims does not exonerate the appellant from
        the task of expressly specifying in the statement of
        grounds of appeal the relevance of the amendments for
        overcoming the objections on which the decision under
        appeal was based.

8.   In view of the circumstances explained above, the Board
        also considers that the appellant's acknowledged
        expectation of obtaining a continuation of the
        examination procedure before the Examining Division by
        means of interlocutory revision under Article 109 EPC
        is irrelevant, since the Examining Division did not
        rectify its decision and remitted the appeal to the
        Board.

9.   For the aforementioned reasons, the Board finds that
        the appeal does not comply with the requirements of
        Rule 99(2) EPC and is therefore to be rejected as
        inadmissible under Rule 101(1) EPC.

        In consequence, the allowability of the appellant's
        request that the decision under appeal be set aside and
        that the case be remitted to the department of first
        instance for further prosecution is not examined
        (Article 110 EPC).

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar: The Chairman:

D. Hampe   E. Dufrasne