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**Datasheet for the decision
of 19 June 2013**

Case Number: T 1970/09 - 3.4.01
Application Number: 96921716.5
Publication Number: 777510
IPC: A61N 1/08, A61N 1/18, A61N 7/00
Language of the proceedings: EN

Title of invention:
Physical therapy apparatus having an interactive interface

Patent Proprietor:
Encore Medical Asset Corporation

Opponent:
Gymna uniphy

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)
RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):
EPC Art. 84

Keyword:
"Admissibility (yes: main request, no: auxiliary requests 1
and 2)"
"Clarity (no: main request)"

Decisions cited:
-

Catchword:
-



Case Number: T 1970/09 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 19 June 2013

Appellant: Gymna uniphy
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
31 July 2009 concerning maintenance of the
European patent No. 777510 in amended form.

Composition of the Board:

Chairman: G. Assi
Members: H. Wolfrum
A. Pignatelli

Summary of Facts and Submissions

- I. The appeal of the opponent lies from the interlocutory decision of the opposition division dispatched on 31 July 2009 maintaining European patent No. 0 777 510 in amended form.

The notice of appeal was received on 30 September 2009 and the prescribed fee was paid on the same day. On 30 November 2009 a statement of grounds of appeal was filed. The appellant (opponent) submitted further documents as evidence for the prior art and raised objections under Articles 83 and 84 EPC 1973 as well as under Articles 52(1), 54(1) and (2) and 56 EPC.

In its response by letter of 9 April 2010, the respondent (patentee) requested to consider if the patent could be maintained in further amended form with an annexed amended claim 1 and page 4a of the description and also requested to reject the opponent's appeal.

- II. According to corresponding requests, the parties were summoned to oral proceedings by a notification dated 13 March 2013.

In an accompanying communication the Board of Appeal asked the respondent to clarify its requests. With respect to the issues that required attention, the Board pointed *inter alia* to added subject-matter in claim 1 filed by letter of 9 April 2010.

- III. By letter of 18 May 2013, the respondent filed amended patent documents including new versions of claim 1

according to a main request and seven auxiliary requests.

IV. Oral proceedings were held on 19 June 2013.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the versions of claim 1 according to the main request or auxiliary request 1, both filed with the letter of 18 May 2013, or according to auxiliary request 2 filed at the oral proceedings before the Board.

V. Claim 1 of the respondent's **main request** reads as follows:

"1. Interactive ailment protocol selection interface for responsively configuring an associated physical therapy apparatus (10), the ailment-protocol selection interface comprising:

ailment storage means storing identification data representative of a plurality of predetermined physical ailments for each of a plurality of predetermined human body parts and a corresponding set of predetermined transducer operational parameters associated with each predetermined physical ailment and each predetermined body part so as to define a respective clinical protocol (24);

a screen display (36) responsive to said ailment storage means for displaying identification data representative of a plurality of physical ailments for a

predetermined human body part;
ailment selecting means, operatively connected in preferably electrical communication with said ailment storage means and responsive to operator selection of one of the physical ailments for which representative identification data is displayed, for obtaining the set of predetermined transducer operational parameters associated with the selected physical ailment such that the associated physical therapy apparatus (10) is automatically reconfigured based upon the set of transducer operational parameters obtained by said ailment selecting means to provide therapeutic treatment to the identified body part according to the set of transducer operational parameters,
ailment sorting means for forming a subset from the identification data representative of the plurality of the physical ailments based upon a predetermined criterion defined as one of said plurality of predetermined body parts such that the identification data included within the subset is representative of various ailments for the one of said plurality of predetermined body parts, and
wherein the interactive ailment protocol selection interface is adapted such that identification data displayed by the screen display (36) is selected from the subset."

Claim 1 of the respondent's **auxiliary request 1** reads as follows:

"1. *Interactive ailment protocol selection interface for responsively configuring an associated physical therapy apparatus (10), the ailment-protocol selection interface comprising:*

ailment storage means storing identification data representative of a plurality of predetermined physical ailments for each of a plurality of predetermined human body parts and a corresponding set of predetermined transducer operational parameters associated with each predetermined physical ailment and each predetermined body part so as to define a respective clinical protocol (24);

a screen display (36) responsive to said ailment storage means for displaying identification data representative of at least one physical ailment for at least one of the predetermined human body parts characterised by:

the screen display (36) being further responsive to an ailment sorting means and displaying a subset of the identification data;

ailment selecting means, operatively connected in preferably electrical communication with said ailment storage means and responsive to operator selection of one of the physical ailments for which representative identification data for the subset is displayed, for obtaining the set of predetermined transducer operational parameters associated with the selected physical ailment such that the associated physical therapy apparatus (10) is automatically reconfigured based upon the set of transducer operational parameters obtained by said ailment selecting means to provide therapeutic treatment to the identified body part according to the set of transducer operational parameters; and

the ailment sorting means for forming the subset from the identification data representative of the plurality of the physical ailments based upon a predetermined criterion defined as one of said plurality of

predetermined body parts such that the identification data included within the subset is representative of various ailments for the one of said plurality of predetermined body parts."

Claim 1 of the respondent's **auxiliary request 2** differs from claim 1 of the main request in that the last feature reads :

"the identification data displayed by the screen display (36) is the subset."

Reasons for the Decision

1. In the following reference is made to the provisions of the EPC 2000, which entered into force as of 13 December 2007, unless the former provisions of the EPC 1973 still apply.
2. The appeal complies with the requirements of Articles 106 to 108 EPC and Rule 99 EPC and is, therefore, admissible.
3. Respondent's main request and auxiliary request 1
 - 3.1 Admissibility (Article 13(1) RPBA)
 - 3.1.1 The appellant objected to the admission of all of the requests filed by the respondent with its letter of 18 May 2013, for the reason of late filing.
 - 3.1.2 In response, the respondent maintained the main request and auxiliary request 1 of the requests filed on 18 May 2013. It was submitted that the two requests

constituted alternative attempts to address problems discussed for the first time in the Board's communication of 13 March 2013 annexed to the summons to the oral proceedings. The requests could not come as a surprise to the appellant/opponent since they were based on requests which had already been proposed in the opposition proceedings and to which only relatively minor amendments were made.

3.1.3 According to Article 13(1) RPBA "Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion....."

3.1.4 In the present case, the issue of added subject-matter with regard to claim 1 filed on 9 April 2010 was indeed brought to the respondent's attention for the first time in the appeal proceedings by the Board's communication of 13 March 2013. In such a situation, the right to be heard and procedural fairness demand that the respondent be given an opportunity to react to this situation and to overcome the deficiency by corresponding amendment.

This purpose is served by the appellant's main request, filed by letter of 18 May 2013 in response to the Board's communication.

Therefore, the Board admitted this request into the appeal proceedings.

3.1.5 Although it was filed with the same letter of 18 May 2013, the situation is different for auxiliary request 1.

The procedural right to file amendments in reaction to a fresh objection does not oblige the Board to consent to the filing of plural requests, in particular not at an advanced stage of the appeal proceedings and certainly not when the further requests would give rise to new objections and/or would require a new examination.

Although claim 1 of auxiliary request 1 includes further details of the screen display by specifying that the screen display is further responsive to the ailment sorting means, it does not include anymore the last feature of claim 1 of the main request. Thus, auxiliary request 1 is not convergent with the main request, in the sense that claim 1 of auxiliary request 1 does not build on the wording of claim 1 of the main request, but in fact covers any ailment-protocol selection interface. An examination of claim 1 of auxiliary request 1 would, in this respect, be different in substance from that of claim 1 of the main request. Moreover, judged on a *prima facie* basis, serious doubts exist as to whether the amendments made have a proper basis of disclosure and would therefore comply with the requirement of Article 123(2) EPC. As a matter of fact, there is no literal basis of disclosure for the specification that the screen display is further responsive to an ailment sorting means, nor may such a feature be considered to be directly and unambiguously implied by the information provided by the description of the application as filed.

For the above reasons, the Board did not admit auxiliary request 1 into the proceedings.

3.2 Clarity (Article 84 EPC 1973) - main request

3.2.1 The last feature of claim 1 of the main request reads "wherein the interactive ailment protocol selection interface is adapted such that identification data displayed by the screen display (36) is selected from the subset".

This definition is ambiguous and misleading.

First of all the question arises as to which element or part of the ailment protocol selection interface would be "adapted" to perform the claimed function. In particular, it is not apparent whether or not this wording would imply the presence of any means in addition to those specified by the preceding features of claim 1, and what such means would be.

Moreover, the feature in question could be interpreted so as to mean that it is an adapting interface which effects (somehow autonomously) the selection of identification data from the subset for display. However, such a function does not find support in the description of the patent, which consistently indicates that it is an operator who makes any selection.

Finally, the claim wording is inconsistent in itself when it comes to the definitions concerning the screen display. The last feature of claim 1 as cited above implies that the displayed identification data is representative of a certain ailment which happens to have been selected. However, according to a preceding definition in claim 1 of the screen display, the screen

display is "*for displaying identification data representative of a plurality of physical ailments for a predetermined human body part*", ie for displaying identification data representative of several ailments at a time.

- 3.2.2 The respondent argued that the last feature of claim 1 was not intended to define a separate functionality of the interface but merely served as a tying phrase which underlined that the function of the screen display was connected to that of the ailment sorting means, which formed a subset from the whole of the identification data representative of ailments of a predetermined body part, thus emphasizing the role of the sorting means.

The claim had to be read in the light of the description, which provided the proper context on the basis of which the claim definitions had to be understood and from which it was abundantly clear to a skilled reader that the actual function of the ailment sorting means was to sort the identification data and not to perform any kind of selection.

- 3.2.3 These arguments are not convincing in view of the fact that in case of amendments to patent claims ambiguities in a claim definition cannot be resolved by pointing to supplementary information which might be provided by the description since Article 84 EPC (1973) requires a claim to be clear in itself. Thus, the respondent's arguments cannot change the fact that the claim definitions are unclear in the aforementioned respects, regardless of what they are intended to define.

For the above reasons, the Board has come to the conclusion that claim 1 of the main request does not comply with the requirements of Article 84 EPC 1973.

Thus, the main request is not allowable.

4. Respondent's auxiliary request 2 - admissibility

4.1 Auxiliary request 2 was filed at an advanced stage of the oral proceedings, at a which time the Board had already deliberated on all of the requests on file.

The respondent defended the late filing of auxiliary request 2 as an attempt to overcome by amendment the clarity problems identified in the preceding discussion of the main request. Moreover, the amendments were not extensive in substance but merely constituted a rephrasing of the last feature of claim 1 by deleting part of the wording which had been objected to.

4.2 In order to be admissible at such a late stage of the proceedings, a new request has not only to clearly solve the clarity problems but also to overcome all of the remaining objections that were raised. This would not be the case, if, judged on at least a *prima facie* basis, problems still persist or new problems arise.

4.3 In the case of auxiliary request 2, after further amendment, the last feature of claim 1 reads "*the identification data displayed by the screen display (36) is the subset*".

The respondent conceded that this phrase does not find a literal basis in the application documents as

originally filed. In the respondent's view, however, the fact that the screen display displayed the subset from the identification data became apparent for a skilled reader from the description on page 23, line 24 to page 24, line 20, in conjunction with the passage on page 21, lines 29 to 32.

The appellant raised objections under Article 84 EPC 1973 and Article 123(2) EPC.

In order to comply with the requirements of Article 84 EPC 1973 and Article 123(2) EPC, an amendment to a claim has to have an unambiguous basis of disclosure in the application documents and has to be supported by the description. This, however, is not the case for the features of claim 1 under consideration which pertain to the screen display.

As far as the passages referred to by the respondent mention the screen display and what it displays, it is stated on page 24, lines 2 to 14 : *"Further, in one advantageous embodiment, the screen display 36 can display a human body and prompt the operator 16 to select the body part, such as by touch the touch screen 38 which defines the criteria according to which the identification data will be sorted. ... Thus, in this embodiment, the operator 16 can create a subset of identification data based on a predetermined criteria prior to displaying the identification data. Consequently, the identification data thereafter displayed can be selected from the subset of identification data."*

It becomes immediately apparent from the cited passages that the screen display displays quite different pieces of information at different stages of operator interaction with the interface, namely first "a human body" and thereafter, once the operator has created a subset of identification data based on a predetermined criterion, "*the identification data ... selected from the subset of identification data.*" However, there is no unambiguous reference to the display of the whole subset of identification data, as is specified by the last feature of claim 1 under consideration.

This observation holds true also for the further cited passage on page 21, lines 29 to 32, which reads: "*Accordingly, the operator can sequentially page through the identification data representative of the plurality of physical ailments for each of the plurality of human body parts.*" This piece of information forms part of a larger paragraph of the description starting on page 21, line 15, which does not concern the display of identification data arranged in a subset but instead refers to the page by page display of a listing of all of the identification data stored.

For the sake of completeness it is added that, by picking out the display of the "subset", whereas it is apparent from the description that in fact different pieces of information are displayed at different stages of interaction with the interface, the introduction of the claimed feature (even if it were somehow implicitly disclosed) into claim 1 could at best be considered as the result of an arbitrary selection from a pool of information without preserving a meaningful functional

and temporal context for the operation and interaction of the various elements of the interface.

- 4.4 For these reasons, claim 1 of auxiliary request 2 is not supported by the description and contains technical information which has no direct and unambiguous basis of disclosure in the application documents as filed, contrary to the requirements of Article 84 EPC 1973 and Article 123(2) EPC

Therefore, the Board did not admit auxiliary request 2 into the proceedings.

5. In conclusion it is found that there is no allowable request made by the respondent on file.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar

The Chairman

R. Schumacher

G. Assi