

Internal distribution code:

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

**Datasheet for the decision
of 13 June 2016**

Case Number: T 1632/11 - 3.4.01

Application Number: 09176675.8

Publication Number: 2198915

IPC: A61N1/36

Language of the proceedings: EN

Title of invention:
Facial stimulation apparatus

Applicant:
Bio-Medical Research Limited

Headword:

Relevant legal provisions:
EPC Art. 84

Keyword:
Claims - clarity (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1632/11 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 13 June 2016

Appellant: Bio-Medical Research Limited
(Applicant) BMR House
Parkmore Park West
Galway (IE)

Representative: Syrtsova, Ekaterina
Murgitroyd & Company
Scotland House
165-169 Scotland Street
Glasgow, Strathclyde G5 8PL (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 25 February
2011 refusing European patent application No.
09176675.8 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman G. Assi
Members: T. Zinke
J. Geschwind

Summary of Facts and Submissions

- I. The appeal filed on 26 April 2011 lies from the decision of the examining division, posted on 25 February 2011, refusing European patent application No. 09 176 675.8, published with publication No. 2 198 915. The appeal fee was paid on the same date. The statement setting out the grounds of appeal was filed on 24 June 2011.
- II. In its decision, the examining division refused the application according to then pending main request and auxiliary request, because respective claims 1 were considered as lacking clarity (Article 84 EPC).
- III. With the notice of appeal, the appellant (applicant) requested that the decision under appeal be set aside and a patent be granted. As an auxiliary request, the appellant requested oral proceedings.
- IV. With the statement setting out the grounds of appeal, the appellant requested that a patent be granted on the basis of amended sets of claims according to a main request or one of first to fifth auxiliary requests, respectively, all filed with the statement of grounds.

In the section discussing the main request in the statement setting out the grounds of appeal (cf. point 2.3.2), the appellant further noted *"However, should the Board consider the term "two dimensional" to be unclear and superfluous in view of the above comments, the Applicant requests, as a further Auxiliary Request, the opportunity to delete the term "two dimensional" from the independent claims."*

Further, the appellant provided arguments with regard to Article 123(2) EPC, Article 84 EPC and Articles 54 and 56 EPC.

- V. By summons of 25 February 2016, the appellant was summonsed to oral proceedings due to take place on 13 June 2016.
- VI. With a letter dated 26 April 2016, the representative informed the Board that *"the applicant will not attend Oral Proceedings"*, that *"The applicant's request for oral proceedings is ... withdrawn"* and that *"A decision according to the state of the file is ... requested"*.
- VII. With a communication under Article 15(1) RPBA dated 9 May 2016, the Board informed the appellant that the oral proceedings would take place as scheduled, since the Board considered them to be expedient. The Board further reminded the appellant of the provisions according to Rule 115(2) EPC and Article 15(3) RPBA.

In addition, the Board provided its preliminary opinion with regard to the issues to be discussed during oral proceedings in order to give the appellant an opportunity to present its comments according to Article 113(1) EPC. In particular, the Board raised objections under Articles 84, 83 and 56 EPC for all requests, discussed the admissibility of the third and fifth auxiliary requests under Article 12(4) RPBA and referred to a possible double patenting issue with regard to claims of the granted patent EP-B-2 455 130, which is based on a divisional application of the present application.

- VIII. The appellant did not provide any comments to the Board's communication.

IX. The oral proceedings took place as scheduled in the absence of the appellant.

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

"1. Facial stimulation apparatus for applying an electrical current to the human facial nerves, the apparatus comprising:

- (i) a C-shaped headband (22);*
- (ii) two electrode carriers (20) connected to the headband (22);*
- (iii) a stimulating electrode (16a, 16b) provided on each electrode carrier (20);*
- (iv) a stimulation device connectable to each electrode (16a, 16b) for providing a stimulating current thereto; and*
- (v) a location feature for anatomical referencing of the apparatus with respect to an anatomical feature of each ear (14);*

characterised in that the headband (22) is non-adjustable in length and resilient; each electrode carrier (20) is provided with a pair of stimulating electrodes (16a, 16b); and the electrode carriers (20) are connected to respective opposing distal ends of the headband (22) such that, in use, each electrode pair (16a, 16b) is presentable against the skin overlapping facial nerve branches (1, 2, 3, 4, 5) just anteriorly of each ear (14); and wherein a two-dimensional vector displacement in terms of the distance and direction between any given point on each location feature and a given point on the corresponding electrode pair (16a, 16b) is fixed and non-adjustable, thus ensuring inevitable positioning of each electrode pair (16a, 16b) over facial nerve branches just anteriorly of each ear (14), with respect to said anatomical feature."

Independent claim 8 is a correspondingly formulated claim for a cosmetic method.

XI. Claim 1 of the first auxiliary request reads as follows:

"1. Facial stimulation apparatus for applying an electrical current to the human facial nerves, the apparatus comprising:

- (i) a C-shaped headband (22);*
- (ii) two electrode carriers (20) connected to the headband (22);*
- (iii) a stimulating electrode (16a, 16b) provided on each electrode carrier (20);*
- (iv) a stimulation device connectable to each electrode (16a, 16b) for providing a stimulating current thereto; and*
- (v) a location feature for anatomical referencing of the apparatus with respect to an anatomical feature of each ear (14);*

characterised in that the headband (22) is non-adjustable in length and resilient; each electrode carrier (20) is provided with a pair of stimulating electrodes (16a, 16b); and the electrode carriers (20) are connected to respective opposing distal ends of the headband (22) such that, in use, each electrode pair (16a, 16b) is presentable against the skin overlapping facial nerve branches (1, 2, 3, 4, 5) just anteriorly of each ear (14); and wherein a two-dimensional vector displacement in terms of the distance and direction between any given point on each location feature and a given point on the corresponding electrode pair (16a, 16b) is fixed and non-adjustable."

Independent claim 8 is a correspondingly formulated claim for a cosmetic method.

XII. Claim 1 of the second auxiliary request reads as follows:

"1. Facial stimulation apparatus for applying an electrical current to the human facial nerves, the apparatus comprising:

- (i) a C-shaped headband (22);*
- (ii) two electrode carriers (20) connected to the headband (22);*
- (iii) a stimulating electrode (16a, 16b) provided on each electrode carrier (20);*
- (iv) a stimulation device connectable to each electrode (16a, 16b) for providing a stimulating current thereto; and*
- (v) two location features for anatomical referencing of the apparatus with respect to an anatomical feature of each ear (14);*

characterised in that the headband (22) is non-adjustable in length and resilient, and is shaped and dimensioned for positioning above or below the ears; each electrode carrier (20) is provided with a pair of stimulating electrodes (16a, 16b); each electrode carrier (20) is non-adjustably connected to one of the respective opposing distal ends of the headband (22) by a non-adjustable bend (24) for anatomical referencing with an upper or lower peripheral feature of the ear (14); and wherein each bend (24) defines one of said two location features and extends out of the general plane within which the remainder of C-shaped headband (22) lies."

Independent claim 3 is a correspondingly formulated claim for a cosmetic method.

XIII. Claim 1 of the third auxiliary request reads as follows:

"1. Facial stimulation apparatus for applying an electrical current to the human facial nerves, the apparatus comprising:

- (i) a C-shaped headband (22);*
- (ii) two electrode carriers (20) connected to the headband (22);*
- (iii) a stimulating electrode (16a, 16b) provided on each electrode carrier (20);*
- (iv) a stimulation device connectable to each electrode (16a, 16b) for providing a stimulating current thereto; and*
- (v) a location feature for anatomical referencing of the apparatus with respect to an anatomical feature of each ear (14);*

characterised in that the headband (22) is non-adjustable in length and resilient; each electrode carrier (20) is provided with a pair of stimulating electrodes (16a, 16b) and comprises a paddle of flexible rubber material (21) connectable thereto by means of a snap fit into a receptacle which carries conductive contacts which are crimped or soldered onto wiring within each electrode carrier (20); and the electrode carriers (20) are connected to respective opposing distal ends of the headband (22) such that, in use, each electrode pair (16a, 16b) is presentable against the skin overlapping facial nerve branches (1, 2, 3, 4, 5) just anteriorly of each ear (14); and wherein a two-dimensional vector displacement in terms of the distance and direction between any given point on each location feature and a given point on the corresponding electrode pair (16a, 16b) is fixed and non-adjustable."

Independent claim 8 is a correspondingly formulated claim for a cosmetic method.

XIV. The claim set for the fourth auxiliary request is identical to the claim set for the first auxiliary request. In the fourth auxiliary request the description has been amended as compared to the first auxiliary request.

XV. Claim 1 of the fifth auxiliary request reads as follows:

"1. A cosmetic method of applying an electrical current to the human facial nerve comprising the steps of:

(i) providing apparatus comprising a resilient C-shaped headband (22) which is non-adjustable in length;

(ii) providing two electrode carriers (20) connected to respective opposing distal ends of the headband (22) wherein each electrode carrier (20) comprises a paddle of flexible rubber material (21) connectable thereto by means of a snap fit into a receptacle which carries conductive contacts which are crimped or soldered onto wiring within each electrode carrier (20);

(iii) providing a pair of stimulating electrodes (16a, 16b) on each electrode carrier (20);

(iv) providing a stimulation device connectable to the electrode pair (16a, 16b) for providing a stimulating current thereto;

(v) providing two location features on the apparatus wherein a two-dimensional vector displacement in terms of the distance and direction between any given point on each location feature and a given point on the corresponding electrode pair (16a, 16b) is fixed and non-adjustable once

the apparatus is positioned on the face whilst accommodating only natural movement of the face;
(vi) positioning the headband (22) on the human head; and
(vii) referencing each location feature with a peripheral feature on each ear (14)."

Reasons for the Decision

1. The appeal is admissible.
2. Admissibility of the requests
 - 2.1 Notwithstanding the issue raised in the Board's communication of 9 May 2016 as to whether the third and fifth auxiliary requests should be admissible in view of Article 12(4) RPBA, the Board considers the amended claims and description pages according to the main request and first to fifth auxiliary requests, submitted with the grounds of appeal, as a response to the examining division's objections in the decision. Hence, these requests are considered to be in the appeal proceedings according to Article 12(1) (a) RPBA.
 - 2.2 With regard to the "*further auxiliary request*", as cited in the statement setting out the grounds of appeal, to have "*the opportunity to delete the term "two dimensional" from the independent claims*", the Board holds that this reflects an appellant's intention rather than a request.
3. Main request - Article 84 EPC
 - 3.1 The Board shares the examining division's concerns with regard to clarity (Article 84 EPC) as mentioned in the contested decision.

3.2 The independent claims mention the feature "*two-dimensional vector displacement*", which relies inter alia on undefined terms like "*location feature*" and "*given point*". Such a feature does not have a clearly recognizable meaning.

The fact that it does not have to be a "*tangible*" feature of the claimed apparatus (see for instance claim 2 of the main request, paragraph [0057] and Figures 9a to 9c of the application as published) renders the claimed subject-matter even more unclear.

Should such a location feature be understood as defining the claimed facial stimulation apparatus in relation to the anatomy of the human face, a further lack of clarity arises in that the anatomy varies depending on the person (see paragraph [0003] of the application as published).

Moreover, the feature "*two-dimensional vector displacement*" is defined "*in terms of the distance and direction ...*". However, the distance and direction are not defined in absolute terms.

3.3 Furthermore, the expression "*anatomical referencing with*" in the phrase "*for anatomical referencing of the apparatus with respect to an anatomical feature of each ear*" in claim 1 is vague and thus does not provide a clear definition of the relationship between the apparatus and the ear.

3.4 Hence, the independent claims of the main request lack clarity (Article 84 EPC).

For this reason, the main request is not allowable.

4. Auxiliary requests - Article 84 EPC

4.1 The independent claims of the first, third and fourth auxiliary requests include the same formulations "*two-dimensional vector displacement*", "*location feature*", "*given point*", "*in terms of the distance and direction ...*" and "*anatomical referencing with*" as the independent claims of the main request. Hence, the same objections mentioned above apply.

4.2 Claim 1 of the second auxiliary request includes the formulation "*anatomical referencing*" in the phrase "*by a non-adjustable bend (24) for anatomical referencing with an upper or lower peripheral feature of the ear (14)*". There is no further specification in this expression that would help in understanding the meaning of "*anatomical referencing*". Hence, the clarity objection as expressed above with regard to this feature also applies.

4.3 Claim 1 of the fifth auxiliary request also mentions the features "*location feature*", "*given point*" and "*in terms of the distance and direction ...*". Hence, the clarity objections as expressed above also apply.

4.4 Therefore, the independent claims of the auxiliary requests also lack clarity (Article 84 EPC).

For this reason, the auxiliary requests are not allowable.

5. The reasons for the present decision are all mentioned in the Board's communication of 9 May 2016. The appellant, however, failed to make any submissions in reply. The Board has no reason to take another view.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated