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**Datasheet for the decision
of 24 November 2016**

Case Number: T 1148/12 - 3.2.02

Application Number: 05721407.4

Publication Number: 1731090

IPC: A61B5/04, A61B5/08

Language of the proceedings: EN

Title of invention:

Garment for Bioinformation Measurement Having Electrode,
Bioinformation Measurement System and Bioinformation
Measurement Device, and Device Control Method

Applicant:

Nihon Kohden Corporation

Headword:

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Added subject-matter - all requests (yes)

Decisions cited:

T 0169/83, T 0748/91

Catchword:



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Case Number: T 1148/12 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 24 November 2016

Appellant: Nihon Kohden Corporation
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Representative: Arth, Hans-Lothar
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 21 December
2011 refusing European patent application No.
05721407.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman E. Dufrasne
Members: M. Stern
D. Ceccarelli

Summary of Facts and Submissions

- I. The applicant lodged an appeal against the decision of the Examining Division, dispatched on 21 December 2011, refusing European application No. 05 721 407.4. The application was refused on the grounds that the different versions of claim 1 then on file did not comply with, *inter alia*, Article 123(2) EPC.

- II. Notice of appeal was filed on 20 February 2012 and the fee for appeal was paid the same day. A statement setting out the grounds of appeal dated 20 April 2012 was received on 23 April 2012.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or one of auxiliary requests I and II, all filed with the statement of grounds of appeal dated 20 April 2012.

- III. The appellant was summoned on 28 July 2016 to attend oral proceedings. In a communication annexed to the summons the Board presented its provisional opinion concerning, *inter alia*, added subject-matter and clarity (Articles 123(2) and 84 EPC).

- IV. In a letter dated 13 October 2016, the appellant announced that it would not be attending the oral proceedings.

- V. Oral proceedings took place on 24 November 2016 in the absence of the appellant (in accordance with Rule 115(2) EPC and Article 15(3) RPBA).

- VI. Claim 1 of the main request reads as follows:

"A garment (300) for measuring biological information formed of a nonconductive material having elasticity, the garment (300) being characterized in comprising chest lead electrodes (353, 354, 355, 356, 357, 358), formed of a conductive material capable of acquiring a heart potential at vicinity of chest part when an examinee wears the garment,

wherein each of the chest lead electrodes is constructed to contact to skin of the examinee and has a length of more than 5 cm and less than 30 cm in longitudinal [sic] direction, and

wherein the chest lead electrodes are arranged in substantially parallel from each other and arranged in row from vicinity of the front center of the garment (300) to vicinity of the left side of the garment (300)."

Claim 1 of auxiliary request I reads as follows:

"A garment (300) for measuring biological information formed of a nonconductive material having elasticity, the garment (300) being characterized in comprising limb electrodes (351, 352, 361, 362) and longitudinally formed strip shaped chest lead electrodes (353, 354, 355, 356, 357, 358), formed of a conductive material capable of acquiring a heart potential at vicinity of chest part when an examinee wears the garment,

wherein each of the chest lead electrodes is constructed to electrically contact to skin of the examinee and has a length of more than 5 cm and less than 30 cm in longitudinal direction, the chest lead electrodes having substantially same length, and

wherein the chest lead electrodes are arranged in substantially parallel from each other and arranged in row from vicinity of the front center of the

garment (300) to vicinity of the left side of the garment (300)."

Claim 1 of auxiliary request II reads as follows:

"A garment (300) for measuring biological information formed of a nonconductive material having elasticity, wherein the garment (300) is a shirt worn on the upper body of the examinee, the garment (300) being characterized in comprising longitudinally formed strip shaped chest lead electrodes (353, 354, 355, 356, 357, 358), formed of a conductive material capable of acquiring a heart potential at vicinity of chest part when an examinee wears the garment, and four limb electrodes (351, 352, 361, 362) having dimensions so as to at least cover one of the body surface of near collar bones of the examinee and the body surface of near pelvis of the examinee and capable of acquiring an electric potential and capable of delivering the potential to the cardiogram analysis device (100), wherein each of the chest lead electrodes is constructed to electrically contact to skin of the examinee and has a length of more than 5 cm and less than 30 cm in longitudinal direction, and wherein the chest lead electrodes are arranged in substantially parallel from each other and arranged in row from vicinity of the front center of the garment (300) to vicinity of the left side of the garment (300)."

VII. The arguments presented by the appellant which are relevant for the present decision are summarised as follows:

Contrary to the decision by the Examining Division concerning the requirements of Article 123(2) EPC, the

features of a "parallel" and "in row" arrangement could be derived from the original description in combination with the figures, for example, from paragraph [0066] which referred to Figures 4 and 5. Figure 4A showed that the electrodes were arranged in parallel and "in row". From paragraph [0078] in combination with Figure 5A of the original application the skilled artisan would have concluded that the parallel arrangement in a row is a technical feature of the invention. The skilled artisan would have concluded that the advantages of the invention had to be seen in the arrangement of the electrodes shown in Figure 4 (paragraph [0093]). This also applied to other embodiments, such as the second embodiment described in paragraph [0105] in combination with Figure 9. Decision T 748/91 also applied to the present case.

Reasons for the Decision

1. The appeal is admissible.
2. The application concerns an elastic non-conductive garment, such as a shirt, with chest electrodes for measuring heart potentials.
3. Claim 1 of all requests defines that "the chest lead electrodes are arranged **in substantially parallel** from each other [sic] and arranged in row [sic]" [emphasis added by the Board].
 - 3.1 The appellant indicated that the features of a "parallel" and "in row" arrangement of the electrodes could be derived from the original description in combination with the figures, for example, paragraphs

[0066], [0078] and [0093] referring to Figures 4 and 5, or paragraph [0105] in combination with Figure 9.

- 3.2 The Board agrees with the Examining Division's view in the decision under appeal that the text of the application as filed is entirely silent regarding the arrangement of the electrodes in "parallel".

Moreover, according to established case law following decision T 169/83 (as cited in Case Law of the Boards of Appeal, 8th edition 2016, II.E.1.12.1), features may be extracted from drawings provided that their structure and function are clearly, unmistakably and fully derivable from the drawings by the skilled person.

In the present case, Figures 4A, 5A and 9 schematically depict a shirt with a number of strip-shaped chest electrodes placed side by side. However, the schematic nature of these figures does not allow the skilled person to clearly and unmistakably derive that the arrangement of the electrodes is necessarily parallel. Nor does the description of the original application (particularly paragraphs [0066], [0078], [0093] and [0105] cited by the appellant) allow him to clearly and unmistakably derive anything related to the function of the purported parallel arrangement. Less than that, the skilled person would certainly not be able to recognise any meaningful technical purpose or function in the alleged parallel placement of the electrodes on the described elastic shirt, knowing that in use such parallel arrangement would invariably be lost when the elastic shirt was irregularly stretched over a rounded, bulging or busty chest of the user. Thus, these aspects distinguish the present case from that underlying decision T 748/91, cited by the appellant, in which the

disclosure of the original application as a whole was held by the deciding Board to provide the skilled person with a discernible and reproducible technical teaching to extract a size ratio from the schematic drawings.

- 3.3 For the reasons given above, the subject-matter of claim 1 of all requests extends beyond the content of the application as filed, contrary to Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated