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Datasheet for the decision of 27 June 2019

Case Number: T 0475/16 - 3.5.05

Application Number: 07749373.2

Publication Number: 2013797

IPC: G06F19/00

Language of the proceedings: EN

Title of invention:
AUTOGENERATION OF NEUROSTIMULATION THERAPY PROGRAM GROUPS

Applicant:
Medtronic, Inc.

Headword:
Program groups/MEDTRONIC

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (no)

Decisions cited:
T 0234/96

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 0475/16 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 27 June 2019

Appellant: (Applicant)	Medtronic, Inc. 710 Medtronic Parkway Minneapolis, MN 55432-5604 (US)
Representative:	Dehns St. Bride's House 10 Salisbury Square London EC4Y 8JD (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 5 October 2015 refusing European patent application No. 07749373.2 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair	A. Ritzka
Members:	E. Konak
	F. Blumer

Summary of Facts and Submissions

I. The appeal is against the decision of the examining division to refuse the application for lack of inventive step (Article 56 EPC) with regard to the following documents:

D1: US 2004/0181262 A1
D2: WO 2004/041352 A1

The appeal is based on the main request on which the decision under appeal was based, and on first and second auxiliary requests submitted with the statement setting out the grounds of appeal.

In a communication annexed to the summons to oral proceedings, the board raised objections under Articles 123(2), 83, 84 and 56 EPC.

By letter dated 27 May 2019, the appellant submitted a new main request, a new first auxiliary request and a new second auxiliary request. Further, a new page 8 of the description adapted to the new requests was filed.

II. Oral proceedings were held before the board.

III. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request, the first auxiliary request or the second auxiliary request, all requests as filed with the letter dated 27 May 2019.

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

"A device comprising a processor (50) configured to:

receive rating information and information describing at least one actual effect, being an actual paresthesia coverage area or a symptom resulting from delivery of neurostimulation therapy according to, and for, each of a plurality of neurostimulation programs tested on a patient;
receive target therapy information from a user for a subsequent delivery of neurostimulation therapy that describes a plurality of desired target therapy effects being target paresthesia coverage areas or symptoms, that the user desires to address in the subsequent delivery of neurostimulation;
compare the actual effects for the previously tested programs to the desired target therapy effects that the user desires to address in the subsequent delivery in response to receiving target therapy information from the user;
to automatically generate a plurality of program groups based on the rating information and the comparison, each of the program groups consisting of a subset of two or more of the plurality of neurostimulation programs tested on the patient; and
to control an implantable medical device to deliver neurostimulation therapy to the patient according to a selected one of the program groups by alternating delivery of neurostimulation therapy pulses according to different ones of the programs of the selected program group."

V. Claim 1 of the first auxiliary request differs from claim 1 of the main request in that it has the following additional feature at the end of its penultimate paragraph:

"and to store the plurality of program groups in a memory of an implantable medical device".

VI. Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request in that it has the following additional feature at the end of its second paragraph:

"the desired target therapy delivery effects corresponding to a plurality of different target paresthesia coverage areas or symptoms"

and the following additional feature before the feature recited above under point V:

"each program of a given program group related to a different target therapy effect".

Reasons for the Decision

1. Main request

1.1 D2 represents the closest prior art. This was not challenged by the appellant.

The device of claim 1 of the main request differs from D2 in that:

(i) it automatically generates a plurality of program groups, each of the program groups consisting of a subset of two or more neurostimulation programs, and

(ii) it delivers the therapy according to a selected one of the program groups by alternating delivery of neurostimulation therapy pulses according to different ones of the programs of the selected program group.

1.2 D2 is silent about "program groups". However, paragraph [0004] of the description of the present application acknowledges that program groups consisting of a plurality of programs that addresses different symptoms and alternating the delivery of pulses according to different programs of a program group were known in the field of neurostimulation therapy at the priority date. The appellant confirmed this at the oral proceedings. Accordingly, it does not argue an inventive contribution to the art by virtue of feature (ii), but by virtue of feature (i).

1.3 The appellant did not dispute that the system of D2 discloses testing of individual programs on patients and storing their ratings on a server. According to D2, paragraphs [0065] and [0067], a clinician can submit a query that includes patient information to the server and receive in response a list of one or more programs that may be effective for treatment of the patient, together with their associated ratings.

1.4 The appellant submitted that in a case where a patient has pain in different regions, e.g. the spine and a leg, the clinician using the system of D2 would have to submit separate queries for the list of programs to treat those different regions. They would then have to assemble a program group manually with programs selected from the two separate lists. This is a time-consuming and error-prone procedure, and feature (i) addresses this problem by automatically assembling program groups.

1.5 According to established case law of the boards of appeal, however, mere automation of functions previously performed by human operators is in line with the general trend in technology and cannot be

considered inventive (see "Case Law of the Boards of Appeal of the European Patent Office", 8th edition, I.D.9.18.4). The scenario presented by the appellant illustrates that feature (i) is mere automation of what a clinician using the system of D2 would perform themselves. The appellant argued that the invention lay not in mere automation but in the "idea" of automating the assembling of a program group or in that this task can be automated. It is, however, also established case law that the mere idea of automation is a normal aim of the skilled person and cannot be inventive (*ibidem*, second paragraph; see also T 234/96, point 1.2.3 of the reasons). Therefore, the appellant's arguments do not persuade the board.

1.6 Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step (Article 56 EPC).

2. First auxiliary request

2.1 Claim 1 of the first auxiliary request differs from claim 1 of the main request in that it has the additional feature of storing the automatically generated plurality of program groups in a memory of the implantable medical device.

2.2 The implantable medical device 14 in D2, however, has its own memory 38 that stores one or more programs available for its processor to select for the delivery of therapy (paragraph [0039], first two sentences). As noted above, D2 is silent about program groups, but programs groups were known in the art. Were the implantable medical device 14 of D2 to be loaded with program groups instead of individual programs, it is

obvious that the program groups would also be saved on the same memory and in the same manner as the programs.

2.3 The appellant argued that if a clinician using the system of D2 manually assembles a program group and loads it into the implantable device of the patient, they would not store a plurality of program groups, but only one program group. However, this argument is not persuasive, as it would not make sense for the clinician to assemble a plurality of program groups in the first place if they were to load one, and only one, of the program groups onto the implantable medical device.

2.4 Therefore, the subject-matter of claim 1 of the first auxiliary request does not involve an inventive step (Article 56 EPC).

3. Second auxiliary request

3.1 Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request in that it has the following additional features:

(iii) the desired target therapy delivery effects correspond to a plurality of different target paresthesia coverage areas or symptoms, and

(iv) each program of a given program group is related to a different target therapy effect.

3.2 These features turned out to be merely of clarifying nature, as the relevant terms had already been interpreted accordingly in the assessment of the main request. Thus, the appellant did not have any arguments specific to this request at the oral proceedings.

3.3 Therefore, the reasons for the lack of an inventive step in claim 1 of the higher-ranking requests apply also to claim 1 of the second auxiliary request (Article 56 EPC).

4. As there is no allowable request, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Götz-Wein A. Ritzka

Decision electronically authenticated