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Aktenzeichen / Case Number / N° du recours : T 166/84

Anmeldenummer / Filing No / N° de la demande : 81 301 663.1

Publikations-Nr. / Publication No / N° de la publication : 38674

Bezeichnung der Erfindung:

Title of invention:

Titre de l'invention :

ENTSCHEIDUNG / DECISION

vom / of / du 22 August 1984

Anmelder/Patentinhaber:

Applicant/Proprietor of the patent: Takeda Chemical Industries Ltd.

Demandeur/Titulaire du brevet :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Art.52(4) EPC

"Use claim for therapy", "Decision pending before Enlarged Board of Appeal", "Suspension of Examination"

Leitsatz / Headnote / Sommaire

"Whenever a decision of the Examining Division depends entirely on the outcome of proceedings before the Enlarged Board of Appeal on a legal question or point of law raised according to Article 112 EPC - and this is known to the Examining Division - the further examination of the application must be suspended until the matter is decided by the EBA."

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number: T 166 / 84

DECISION
of the Technical Board of Appeal 3.3.1
of 22 August 1984

Appellant: Takeda Chemical Industries Ltd.
27, Doshomachi 2-chome, Higashi-ku
OSAKA 541
Japan

Representative: Lewin, John Harvey
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Decision under appeal: Decision of Examining Division 002 of the European Patent
Office dated 19 January 1984 refusing European patent
application No 81 301 663.1 pursuant to Article 97(1)
EPC

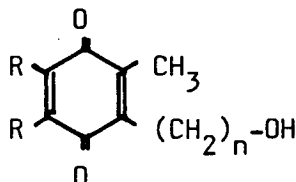
Composition of the Board:

Chairman: D. Cadman
Member: G. Szabo
Member: O. Bossung

Summary of Facts and Submissions

- I. European patent application 81 301 663.1 filed on 15 April 1981 and published on 28 October 1981 with publication number 38 674 claiming the priority of the prior application of 21 April 1980 (JP-53127/80), was refused by the decision of the Examining Division 002 of the European Patent Office dated 19 January 1984. The decision was based on claims 1 to 13 filed on 19 November 1983. The main claim was worded as follows:

"1. Use of a compound of the formula:



wherein R is methyl or methoxy, or two R's taken together represent $-\text{CH}=\text{CH}-\text{CH}=\text{CH}-$; and \underline{n} is an integer of 4 to 22, for the treatment of a mammal suffering from allergic disease due to slow reacting substance of anaphylaxis."

- II. The reason given for the refusal was that claims 1 to 9 relate to a method of treatment of a mammal, and as such these claims are not susceptible to industrial application under Article 52(4) EPC and therefore not patentable. The decision also referred to the "Nimodipin/BAYER" case (T 17/81, OJ 7/1983, 266-267), wherein the matter of the use of chemical substance for therapeutic purposes had been submitted to the Enlarged Board of Appeal.

III. On 13 March 1984 the applicant lodged an appeal against the decision of the 19 January 1984 and submitted the Statement of Grounds within the prescribed time. It is requested by the applicant that the consideration of the allowability of use claims should be postponed until a decision has been given by the Enlarged Board of Appeal in the Nimodipin case.

Reasons for the Decision


1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. The matter of use claims in therapy had already been under consideration by the Enlarged Board of Appeal (EBA) when the decision of the Examining Division refusing the application fell in the case of the present application. It is the opinion of the Board that, whenever a decision of the Examining Division depends entirely on the outcome of proceedings before the EBA on a legal question or point of law raised according to Article 112 EPC - and this is known to the Examining Division - the further examination of the application must be suspended until the matter is decided by the EBA. The refusal of the application was therefore inappropriate and the appeal fee must be refunded in view of a substantial procedural violation according to Rule 67 EPC.

Order

It is decided that:

1. The Decision of the Examining Division of the European Patent Office dated 19 January 1984 is set aside..
2. The application is remitted to the Examining Division in order to await the decision of the Enlarged Board of Appeal in the question of use claims in therapy and then to continue the substantive examination accordingly.
3. The appeal fee is reimbursed.

Registrar:


22/8/84
T30

Chairman:

