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File Number: T 557/90 - 3.4.1

Application No.: 87 310 869.0

Publication No.: 0 271 340

Title of invention: A61B 5/00

Classification: Oximeter apparatus and method for measuring arterial blood constituents

D E C I S I O N  
of 13 January 1993

Applicant: Yelderman, Mark

Opponent:

Headword: Remittal

EPC Article 111

Keyword:



**Europäisches  
Patentamt**

**European  
Patent Office**

**Office européen  
des brevets**

Beschwerdekammern

Boards of Appeal

Chambres de recours

**Case Number : T 557/90 - 3.4.1**

**D E C I S I O N**  
**of the Technical Board of Appeal 3.4.1**  
**of 13 January 1993**

**Appellant :** Yelderman, Mark  
736 LaMesa  
Menlo Park  
California (US)

**Representative :** Madgwick, Paul  
c/o Ladas & Parry  
Altheimer Eck 2  
W-8000 München 2 (DE)

**Decision under appeal :** **Decision of the Examining Division of the  
European Patent Office dated 8 February 1990  
refusing European patent application  
No. 87 310 869.0 pursuant to Article 97(1) EPC.**

**Composition of the Board :**

**Chairman :** G.D. Paterson  
**Members :** U.G.O.M. Himmler  
H.J. Reich

**Summary of facts and submissions**

I. During proceedings before the Examining Division, in response to a communication the applicant filed a new set of claims, but the Examining Division held in its Decision dated 8 February 1990 that none of these claims involved an inventive step having regard to the disclosure in the cited document:

(D1) Medical and Biological Engineering, Volume 10,  
January 1972, pages 9-22.

II. With the statement of grounds of appeal, the Appellant filed amended independent Claims 1 and 8, and contended in such statement that such claims were patentable over document (D1). In a communication dated 9 November 1992 pursuant to Article 11(2) RPBA, the Board indicated its provisional view that such amended claims were not allowable under Articles 52(1) and 56 EPC.

III. By fax dated 23 December 1992, the Appellant filed further amended independent Claims 1 and 8, which were intended to meet the objections raised in the Board's communication.

IV. At oral proceedings held on 13 January 1993, the Appellant's representative filed a further amended Claim 1, having subject-matter said to be substantially similar to the subject-matter of Claim 1 as filed on 23 December 1992. The Appellant's representative also filed a copy of US Patent No. 4 167 331 (D2), which was said to have been recently cited in corresponding proceedings in the United States of America. The Appellant's representative agreed with the Board that having regard to the additional subject-matter included for the first time in the amended claims filed on 23 December 1992, the case should be remitted to the

Examining Division for further prosecution, and the oral proceedings were concluded by announcing the Board's Decision to that effect.

### Reasons for the Decision

1. The further amended Claim 1 which was filed during oral proceedings on 13 January 1993 as the basis for the Appellant's main and sole request contains a technical feature which was not present in any of the claims which were considered by the Examining Division so far, namely

"a driver (106, 118, 144, 148, 152, 158) having means (116, 124) for defining a first and a second clock state (Phi 1, Phi 2) and for causing the light source to produce light of one of the wavelengths during the first clock state (Phi 1) and to switch to producing light of the other wavelength during the second clock state (Phi 2), the first and second clock states (Phi 1, Phi 2) alternating periodically with one another at a given switching frequency".

2. Following the established practice of the Boards of Appeal (see eg. Decision T 63/86, OJ EPO 1988, 224), since the current main request is based upon a main claim which has been substantially amended in comparison with the claims which have been examined by the Examining Division, and since at least one further document (D2) will have to be considered in relation to such main request, the Board has decided under Article 111(1) EPC to remit the case for further examination of the admissibility and allowability of such main request.

Order

For these reasons it is decided that:

1. The decision of the Examining Division is set aside.
2. The case is remitted to the first instance for further prosecution.

Registrar



M. Beer

Chairman



G.D. Paterson

