

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen

D E C I S I O N
of 10 February 2001

Case Number: T 1112/97 - 3.2.2

Application Number: 94901404.7

Publication Number: 0668747

IPC: A61B 17/00

Language of the proceedings: EN

Title of invention:
CARDIAC PROTECTION DEVICE

Applicant:
ALLEYNE, Neville

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 54, 56, 84, 111(1)
EPC R. 27, 29

Keyword:
"Amended claims for appeal (allowable)"

Decisions cited:
-

Catchword:
-



Case Number: T 1112/97 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 10 February 2001

Appellant: ALLEYNE, Neville
9687 Claiborne Square
La Jolla
CA 92037 (US)

Representative: Van Malderen, Joelle
Office Van Malderen
Place Reine Fabiola 6/1
BE-1083 Bruxelles (BE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 1 July 1997
refusing European patent application
No. 94 901 404.7 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. D. Weiß
Members: M. G. Noël
R. T. Menapace

Summary of Facts and Submissions

I. European application No. 94 901 404.7 (publication No. WO 94/10913) was refused by decision of the Examining Division issued on 1 July 1997 on the grounds that the claims did not meet the requirements of Article 123(2) EPC (omission of features resulting in the extension of the subject-matter of the application as filed) and of Rule 29(1) EPC (incorrect delimitation over the closest prior art document). In addition, observations were made against novelty and inventive step of the claimed subject-matter vis-à-vis the disclosure of the closest prior art document:

D1: US-A-4 013 078.

II. The appellant (applicant) lodged an appeal on 20 August 1997 against this decision and paid the prescribed fee. A statement of grounds was filed on 30 October 1997 along with new sets of claims according to a main and two auxiliary requests, respectively. Oral proceedings were also requested.

III. In a communication of the Board dated 10 November 2000, sent following a summons to attend oral proceedings, the appellant was informed that claims 1 to 12 according to the main request seemed to be acceptable provided that the introductory part of the description be adapted correspondingly and that other deficiencies listed in the communication be removed from the application documents.

IV. In its reply the appellant submitted amended pages of the application, which were received on 29 November 2000 by the EPO. As some of the above-mentioned

deficiencies were still present in the new set of documents, the Board notified it in a second notification sent on 5 December 2000.

The appellant's reply, received on 14 December 2000, was satisfactory, so that the Board cancelled the oral proceedings.

V. The appellant finally requested that a patent be granted on the basis of the lastly submitted application documents, received on 14 December 2000 by the EPO.

VI. Claim 1 reads as follows:

"A biocompatible protection device to minimise the postoperative formation of adhesions and having a first face and an opposite face to said first face, said device comprising :

- a shield body (10) in the shape of an arch, extending in a longitudinal length direction and transverse width direction such that the length of the shield is greater than the width, and

- means (14, 18, 20 and 50) for attaching said shield to bones, cartilage, ligaments or muscle, characterised in that said attaching means (14, 18, 20 and 50) are positioned along the periphery of the shield (10) and extend in both longitudinally extending sides (12, 54) of said shield, thereby allowing securement of said longitudinal extending sides (12, 54) of said shield (10) so that both longitudinal sides and the arch of the shield (10) are supported away from the spinal dura and the surrounding neural tissues when the attaching means (14, 18, 20 and 50) on both sides of the shield (10) are secured to bones, cartilage,

ligaments or muscle."

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments*

All formal objections raised by the first instance have been overcome by the amended set of claims according to the main request. In particular, claim 1 has been correctly delimited with respect to the features known from the closest prior art document D1, the omitted features have been reintroduced in claim 1 and this latter implemented by additional features drawn up from the application as filed.

Also independent claims 2 to 12 are clear and fairly supported by the application as filed.

The description has been amended to meet the requirements of the EPC. To this end, the introductory part setting out the invention was put in conformity with the new main claim and the paragraphs related to methods for treatment of the human body such as for minimizing cardiac adhesions or for accessing the heart of a patient were deleted. Recasting errors due to the insertion of replacement pages were also removed, with the exception of two remaining clerical errors presumably omitted by oversight, which the Board rectifies on its own motion:

- page 10: line 1 to be deleted,

- page 24: to be replaced by page 24 received on
29 November 2000.

To sum up, all above amendments now meet the requirements of Articles 84, 123(2) and Rules 27 and 29 EPC.

3. *Patentability*

Though the reasons for the refusal were restricted to formal issues, the Board makes use of its power conferred by Article 111(1) EPC to proceed further with the case on substantive issues.

3.1 Novelty

Document D1 represents the closest prior art document. It discloses all the features recited in the precharacterising portion of claim 1, in particular a biocompatible protection device to minimise the postoperative formation of adhesions, comprising a shield body 13 in the shape of an arch, extending in length and width directions such that the length of the shield is greater than the width (see Figures 1, 12, 18, 21) and means for attaching said shield to bones (see 17 (Figures 4, 13); 319, 321 (Figures 18, 19); 415, (Figure 22)).

However, said attaching means do not extend along the periphery, in both longitudinally extending sides of the shield, and the shield is not supported away from the spinal dura when the attaching means are secured to bones.

With respect to the disclosure of document D1 the

subject-matter of claim 1 distinguishes by its characterising features. It is, therefore, new within the meaning of Article 54 EPC.

3.2 Inventive step

The solution according to claim 1 solves the problem addressed in the application (page 2, lines 10 to 14 and page 8, lines 2 to 6) of providing a protection device able to prevent the formation of postoperative adhesions and scar tissue between the underside of the device and the spinal dura, in particular to protect the dura and to facilitate future revision surgeries.

Document D1, which is already acknowledged in the application as originally filed, addresses the same problem. However, the device proposed therein is said "invasive" in that it is accommodated within the spinal canal and anchored directly to the dura 53 by means of sutures 56 (see e.g. Figures 4 and 5 and column 6). Therefore, the purpose of the arch-shaped shield is not, like in the present application (cf. page 13, lines 8 to 11) to provide a protection distance ("h") between the shield and the dura but, on the contrary, to conform to the dura in order to be secured thereto. Therefore, the shield disclosed in document D1 comes into contact with the dura, which the invention just aims at avoiding.

In another alternative embodiment disclosed in document D1, the shield may be secured to the vertebrae by sutures 321 passed through apertures 319 (see Figure 18 and column 9) and provided in a curved portion 25 extending away from the shield body. In this embodiment, as can be seen in Figure 19, the shield is

no longer in direct contact with the dura but is placed at a slight distance therefrom. This alternative embodiment, however, does not appropriately suggest the invention since the shield is secured to the vertebrae by the curved intermediate portion at only one side so that, in use, the shield can be readily deformed to come in contact with the dura and, again fails to protect it. It results therefrom that the combination of the subject-matter of claim 1 is neither disclosed nor suggested by the teaching of document D1.

Since no other prior art document comes closer to the invention than document D1, the subject-matter of claim 1 is inventive within the meaning of Article 56 EPC.

4. Dependent claims 2 to 12 which relate to further embodiments of the protection device according to claim 1 are, therefore, also allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to grant a patent on the basis of the following application documents:

Claims: 1 to 12 received on 14 December 2000.

Description: pages 1, 1A, 2 to 4, 4bis, 4ter, 6 to 9, 10 (with the correction noted in section 2 above), 11 to 21, 21A, 22 to 23, 25 to 26, received on 14 December 2000.
page 24, received on 29 November 2000.

Drawings: sheets 1/6 to 6/6 received on 14 December 2000.

The Registrar:

The Chairman:

V. Commare

W. D. Weiß