



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
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Case Number: D 0014/23

D E C I S I O N
of the Disciplinary Board of Appeal
of 6 May 2024

Appellant: N. N.

Decision under appeal: **Decision of the Examination Board dated
4 July 2023 concerning the European Qualifying
Examination 2023.**

Composition of the Board:

Chairman: I. Beckedorf

Members: P. Guntz

P. Walser

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Examination Board that the requirements of Article 14(1) of the Regulation on the European qualifying examination for professional representatives (REE, applicable version published in OJ EPO 2019, Supplementary publication 2, 2 ff) had not been fulfilled such that the appellant did not pass the European qualifying examination (EQE) 2023.

II. The appellant sat the main examination in the EQE 2023 consisting of all four papers A, B, C and D.

III. By letter dated 4 July 2023 from the Examination Secretariat, the Chairman of the Examination Board informed the appellant that, while the appellant's answer papers to papers B, C and D were awarded 93, 82 and 78 marks respectively, her answer paper to paper A was awarded only 41 marks and that, on the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) REE had not been fulfilled such that the appellant did not pass the EQE 2023.

Among other things, the letter contained the details of the marking of paper A as an attachment, according to which Examination Committee I agreed on 41 marks for the appellant's answer to paper A (device claim 0 out of a maximum possible 40 marks, use claim 10 out of 10 marks, dependent claims 18 out of 35 marks and description 13 out of 15 marks) and recommended the grade FAIL.

IV. By her letter dated 18 July 2023, received by the Examination Secretariat on the following day, the appellant filed notice of appeal, including her statement of grounds of appeal, to challenge the decision of the Examination Board. She

had already paid the prescribed appeal fee on 13 July 2023.

The appellant submitted that her answer to paper A had been incorrectly marked as a result of mistakes which were serious and so obvious that they could be established without re-opening the entire marking procedure. These mistakes led to her failing paper A and, as a result, the EQE in its entirety. This was therefore an infringement of the provisions of the REE and the Implementing provisions to the Regulation on the European qualifying examination (IPREE, applicable version published in OJ EPO 2019, Supplementary publication 2, 18 ff). She believed that an objective evaluation of her answers to paper A should have led to her answer paper being awarded a higher grade (at least a COMPENSABLE FAIL).

V. The Examination Board forwarded the appeal to the Disciplinary Board of Appeal of the EPO (DBA) without rectifying their decision.

VI. By letter dated 13 September 2023, the Examination Secretariat informed the appellant that her appeal had not been allowed by the Examination Board and that consequently her appeal had been forwarded to the DBA.

VII. In accordance with Article 24(4), first sentence, REE in conjunction with Article 12, second sentence, of the Regulation on discipline for professional representatives (RDR, Supplementary publication 1, OJ EPO 2022, 142 ff), the DBA consulted both the President of the EPO and the President of the Council of the Institute of Professional Representatives before the EPO (epi), neither of whom presented any comment in writing on the merits of the appeal.

VIII. The appellant's arguments can be summarised as follows.

The appellant's independent product claim was awarded 0 marks despite the fact that it was novel, inventive, clear and concise. Since the claim deviated from the model answer only with regard to the second part of feature d1) and did not contain any unnecessary limitations, the only explanation for the marking could be that the Examination Board considered her claim not novel with regard to D2.

However, although she had not expressly claimed that the generated electrical field was applied to the skin when worn on the skin, novelty was assured by the functional feature "for accelerating the healing of wounds" that implied that the field had to be capable of reaching the skin. This distinguished her device from the one in D2, which was not at all suitable for accelerating the healing of wounds, as acknowledged by the examiners' report under point 2.4.2, see page 13, last paragraph.

This distinction was also reflected in the candidate's description, which proved that she had relied on it to ensure novelty.

Since the examiners' report listed several potential equivalents for the suggested distinguishing feature d1 "and arranged so as to apply an electrical field on the skin when the device is worn on the skin" and since it was established in the case law that functional features using the language "[suitable] for" were able to limit the scope of a claim, novelty should have been acknowledged.

The claim furthermore contained all essential features listed by the examiners' report and, even if this were not the case, any lack of clarity could not have led to a deduction of 40

marks.

IX. The appellant requested that

- the decision under appeal be set aside,
- the grade "PASS" or "COMPENSABLE FAIL" be awarded for the appellant's answer to paper A of the European qualifying examination 2023,
- in combination with the marks already awarded with respect to papers B (93), C (82) and D (78), the requirements of Article 14(1) REE be declared fulfilled,
- the appeal fee be reimbursed,
- the registration for paper A of the European qualifying examination 2024 be cancelled and the fee according to Rule 8 IPREE be reimbursed.

Reasons for the Decision

Admissibility of the appeal

1. The notice of appeal and the statement of grounds of appeal were duly filed within the one-month time limit under Article 24(2) REE. The appeal fee was also paid on time. The appeal is therefore admissible.

Extent of the judicial review by the DBA

2. In accordance with Article 24(4) REE and the consistent case law of the DBA, which followed decisions D 1/92 (OJ EPO 1993, 357) and D 6/92 (OJ EPO 1993, 361), decisions of the Examination Board may, as a rule, only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the

Examination Committee and the Examination Board have some latitude of evaluation subject to only limited judicial review by the DBA. Accordingly, the Examination Board's value judgement on the number of marks that an examination paper deserves is not subject to review by the DBA.

2.1 However, the discretion granted must be exercised appropriately and without arbitrariness. In order to make the Examination Board's decision in individual cases comprehensible to the applicant, Rule 4(1) IPREE provides as an essential element of the examination procedure (see D 13/17, Reasons 3.3) that the participants are sent assessment sheets containing details of the marks awarded. The basis for awarding the individual marks for each category of an answer paper can in turn be found in the published examiners' report, which includes information on both the solutions expected from the candidates and any shortcomings that may have a negative impact on the assessment, thereby enabling consistent marking of candidates' answers within the meaning of Article 6(2)(c) of the REE.

2.2 Appropriate marks must also be awarded for answers that deviate from the model answer, but nevertheless contain justifiable and competently reasoned alternative solutions (see D 7/05, Reasons 13, D 31/22, Reasons 1.3). This appears to be lacking in the present case, as will be shown below.

Device claim - novelty

3. The device claim as drafted by the appellant contains all of the features expected by the examiners' report except the second part of feature d1, according to which the electrical field generated by the device is to be applied to the skin when the device is worn on the skin.

3.1 Since the claim does not contain any unnecessary limiting features and any clarity issues could only lead to a maximum deduction of 30 marks, the only plausible reason for a deduction of all of the 40 marks achievable is that the Examination Board considered the claim not novel with regard to D2.

3.2 However, this assessment either ignored the fact that the appellant added the further feature "for accelerating the healing of wounds" or did not take into account that such functional features may, according to the established case law under the EPC and as acknowledged by the Guidelines for Examination in the European Patent Office (see F-IV, 4.13.1 of the version applicable from March 2022 to February 2024), limit the scope of the claim with regard to the suitability of a device to achieve the indicated effect. In the present case, the added feature thus does in fact distinguish the subject-matter claimed in the appellant's answer from the device in D2, which contains a "special rubber pad" providing "a full electrical shield between the skin and the electrical parts" and therefore does not render this device suitable to allow for any healing effect of the electrical field on the skin of the person wearing the device.

3.3 The first alternative would amount to a failure of the Examination Committee to properly mark the answer paper (on the basis of its complete content) according to Article 8(1)(d) REE, which would result in a serious and obvious mistake. The same would be true for the second alternative because not only are the candidates expected to have a thorough knowledge of European patent law, including both the case law as covered in the latest edition of the Case Law of the Boards of Appeal of the European Patent Office (Article 13(1)(a) and (d) REE, Rule 2 IPREE) and the Guidelines for Examination in the European Patent Office (Rule 22(1)(m) IPREE), but even more importantly the members of the Examination Committees are

expected to base their evaluations and decisions on a legally correct premise (see D 2/14, Reasons 1). They must apply both the Guidelines and the basic case law when assessing whether alternative solutions not covered in the examiners' report are equally suitable to render a claim novel and inventive.

Device claim - clarity and conciseness

4. The claim as drafted by the appellant contains all the structural features of the device needed to create an electrical field. It also contains the healing function that the field created by the device must be able to achieve. To have any effect on wounds, the device must implicitly be able to apply the electrical field on the skin when worn.

4.1 The question of whether the claim lacks clarity could be discussed, since this is apparently an essential feature which should be expressly, not just implicitly, included in the claim.

4.2 However, according to the examiners' report, a potential clarity issue due to a single missing feature could lead to a deduction of 10 marks and, as mentioned above, even more severe issues, as well as all clarity issues together, would not lead to a deduction of more than 30 marks.

4.3 Therefore, as the claim as set out above did not contain any other shortcomings, such as unnecessary features, there is no alternative explanation for the deduction of all of the 40 marks achievable for the device claim.

Consequence for the decision under appeal

5. As a result, the appellant was able to show that the contested decision must be based on serious and obvious mistakes which the board can take into account because the

alleged mistakes are so obvious that they can be established without re-opening the entire marking procedure (see decision D 7/05, OJ EPO 2007, 378). The appeal thus appears to be well-founded and the decision is to be set aside (Article 24(4) REE).

Remittal

6. Moreover, it is clear from the guidance given in the examiners' report that, had the mistake not occurred, the result achieved in total by the appellant would have been at least 10 marks, if not 30 or 40 marks, higher than awarded.

6.1 Thus, the appellant would in any case have reached the result "PASS" according to Rule 6(3)(a) and it may remain open whether the Examination Board would have awarded 51, 71 or 81 marks.

6.2 Against this background, a remittal of the case for further examination is neither necessary nor, in view of the additional time and work involved, justified. It would amount to a mere formality. Thus, special reasons for not remitting the case arise (see D 14/17, Reasons 3.3).

Overall consequence

7. Since the appellant has passed not only paper A, but all of the examination papers, she has passed the European qualifying examination 2023 according to Article 14(1) REE.

Request for reimbursement of the appeal fee

8. With respect to the appellant's request for reimbursement of the appeal fee, reference is made to Article 24(4), third sentence, REE.

The appeal is successful, and the board considers it equitable to order the reimbursement of the appeal fee in full.

Request for reimbursement of the fee for re-sitting paper A in 2024

9. This appeal is only directed against the decision that the appellant did not pass the European qualifying examination 2023. The board is thus not competent to decide on a reimbursement of the fee regarding the European qualifying examination 2024. Such request is to be addressed to the Examination Secretariat.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The grade "PASS" is awarded for the appellant's answer to paper A of the European qualifying examination 2023.
3. The appellant is declared to have passed the European qualifying examination 2023.
4. Reimbursement of the appeal fee in full is ordered.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated