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D E C I S I O N
of 29 January 2003

Case Number: T 0838/02 - 3.3.7

Application Number: 94901465.8

Publication Number: 0668793

IPC: B01D 61/32

Language of the proceedings: EN

Title of invention:
Apparatus for kidney dialysis

Patentee:
ALTHIN MEDICAL, INC.

Opponent:
1. B. Braun Melsungen AG
2. Fresenius Medical Care Deutschland GmbH

Headword:
Opposition Division/ALTHIN MEDICAL

Relevant legal provisions:
EPC Art. 19(2), 111(2), 113

Keyword:
"Chairman of Opposition Division excluded by participation in
grant proceedings"
"Remittal (yes) - Reimbursement of appeal fee (yes)"

Decisions cited:
G 0005/91; T 0251/88; T 0939/91; T 0071/99;

Catchword:
If the composition of the Opposition Division is contrary to
Article 19(2) EPC , the parties should be given the
opportunity to comment, before the Board decides on the
remittal of the case.



Case Number: T 0838/02 - 3.3.7

D E C I S I O N
of the Technical Board of Appeal 3.3.7
of 29 January 2003

Appellant:
(Proprietor of the patent)

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Respondents:
(Opponent 01)

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Representative:

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(Opponent 02)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 24 June 2002
revoking European patent No. 0 668 793 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: R. E. Teschemacher
Members: B. L. ter Laan
B. J. M. Struif

Summary of Facts and Submissions

- I. European patent No. 0 668 793 was granted in response to European patent application No. 94 901 465.8. The mention of the grant of the patent was published on 5 April 2000.
- II. Two notices of opposition were filed on 3 January 2001 and 5 January 2001, respectively.
- III. In a decision dated 24 June 2002, the Opposition Division revoked the patent.
- IV. On 1 August 2002, the Proprietor filed a notice of appeal, the prescribed fee was paid on 2 August 2002. A statement of grounds of appeal was filed on 21 October 2002.
- V. In a communication dated 13 November 2002, the Board informed the parties that the Chairman of the Opposition Division had signed Form 2035 in the examining procedure. Therefore, he was excluded from being the Chairman of the Opposition Division pursuant to Article 19(2), second sentence, EPC. For this reason, the contested decision was formally defective and could be set aside for this reason alone. The parties were invited to comment. In particular they were asked to indicate whether they wished the case to be remitted to the Opposition Division or whether they wished the case to be decided in substance by the Board.

VI. In reply, the Appellant (Proprietor) and the Respondent 02 (Opponent 02) requested that the case be remitted to the Opposition Division. In addition, the Appellant requested that an entirely new Opposition Division be appointed and that the appeal fee be refunded. Respondent 01 (Opponent 01) declared that he would accept a decision of the Board as well as a remittal of the case.

Reasons for the Decision

1. The appeal is admissible.
2. Pursuant to Article 19(2) EPC, the Opposition Division shall consist of three technical examiners, at least two of whom shall not have taken part in the proceedings for grant of the patent to which the opposition relates. An examiner who has taken part in grant proceedings shall not be the Chairman of the Opposition Division.
3. In the present case, the Chairman of the Opposition Division had taken part as second examiner in the grant proceedings when signing Form 2035 which established the text in which the patent was to be granted and ordered the dispatch of the communication under Rule 51(4) EPC. Therefore, the composition of the Opposition Division was contrary to Article 19(2), second sentence, EPC.

There is good reason to assume that the Chairman of the Opposition Division was not aware of his participation in grant proceedings. He signed Form 2035 deputizing for the second member originally foreseen whose pre-printed name on the form was replaced by a stamp. Apparently, it had been overlooked to enter the change

of the composition of the Examining Division into the EPO's data base because the form of the decision to grant still contains the name of the original second member who had been replaced. For the requirements of Article 19(2) EPC, however, it makes no difference whether the relevant facts were or were not known to the Opposition Division.

4. In such a situation, previous decisions of the Boards of Appeal have set aside the contested decision immediately, as in T 939/91, dated 5 December 1994 (cited in Case Law of the Boards of Appeal of the EPO, 4th ed. 2001, VI.L.3, page 377f. of the English version). In case T 251/88 (decision dated 14 November 1989, not published in OJ EPO), however, the Board asked the Applicant/Appellant whether he invoked the procedural violation before deciding on the remittal of the case.
5. This Board prefers the latter approach. It may be in the legitimate interest of the parties in an individual case to proceed and to come to a final decision as quickly as possible. A remittal implies a substantial delay, even if the case is treated with priority by the department of first instance. Therefore, the Board considered it appropriate to give the parties an opportunity to comment before deciding on the question of remittal.
6. It is the Appellant who is adversely affected by the contested decision which has been taken in breach of Article 19(2) EPC. Since he has requested remittal and since the respondents have not objected to this course of action, the Board concludes that remittal has to be ordered in the absence of any special reasons for doing otherwise (Article 10 of the Rules of Procedure of the Boards of Appeal).

7. The remittal is the consequence of a substantial procedural violation. Thus, the requested reimbursement of the appeal fee under Rule 67 EPC appears equitable.

8. For his request that an entirely new Opposition Division be appointed, the Appellant has given the reason that he does not wish to be placed at a possible disadvantage by the involvement of the other members of the initially appointed Division. He has not, however, indicated any specific reason why he suspects partiality, which would justify an objection to those members on the basis of the general principle of law whereby nobody should decide a case in respect of which a party may have good reasons to assume partiality (G 5/91, OJ EPO 1992, 617, Reasons, point 3). The Board sees no reason to go into further detail in this respect, since the appointment of the members of a Division in the individual case is part of the allocation of duties within the departments of first instance and, therefore, an administrative function which is the primary competence of the responsible director (see T 71/99, dated 20 June 2001, not published in OJ EPO, Reasons, point 4), subject to review by the Boards of Appeal as to whether the requirement of impartiality has been fulfilled (G 5/91, *supra*, Reasons, point 5).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. Reimbursement of the appeal fee is ordered.

The Registrar

The Chairman:

C. Eickhoff

R. Teschemacher