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**Datasheet for the decision  
of 13 February 2007**

**Case Number:** T 0537/04 - 3.5.01

**Application Number:** 96938714.1

**Publication Number:** 0859981

**IPC:** G06F 15/02

**Language of the proceedings:** EN

**Title of invention:**  
Slimmer's calculator

**Applicant:**  
Weight Watchers (UK) Limited

**Opponent:**  
-

**Headword:**  
Slimmer's calculator/WEIGHT WATCHERS

**Relevant legal provisions:**  
EPC Art. 52(2), 52(3), 52(4), 56

**Keyword:**  
"Inventive step - all requests (no)"  
"Insufficient evidence for technical effect relied on"

**Decisions cited:**  
T 0641/00, T 0144/83, T 1172/03

**Catchword:**  
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Case Number: T 0537/04 - 3.5.01

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.01  
of 13 February 2007

**Appellant:**

Weight Watchers (UK) Limited  
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**Representative:**

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**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 10 December 2003  
refusing European application No. 96938714.1  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** S. Steinbrener

**Members:** W. Chandler  
P. Schmitz

## Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division to refuse the application on the ground that claim 1 of the main request and of auxiliary requests 1 and 3 did not involve an inventive step (Article 56 EPC) over Document WO-A-93/07570 (D1). Claim 1 of the second auxiliary request was found to violate Article 123(2) EPC.
- II. In the grounds of appeal, the appellant requested that the decision be set aside and that a patent be granted on the basis of claims 1 to 14 submitted therewith.
- III. In the communication accompanying the summons to oral proceedings, the Board summarised the issues to be discussed and expressed some doubts about the admissibility of method claim 1 under Articles 52(2), (3) and (4) and 123(2) EPC and the inventive step of both independent method claim 1 and apparatus claim 8.
- IV. At the oral proceedings, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request filed with the statement of grounds of appeal, or on the basis of auxiliary requests 1 or 2 filed during oral proceedings.
- V. At the end of the oral proceedings, the Chairman announced the decision.
- VI. Claim 8 of the main request reads as follows:

"A calculator for assisting a person on a diet regime

wherein said person is allocated a maximum daily points target related to the calorific value of food ingested, the calculator comprising means (3) for inputting a first number related to the calorific value of a food item, display means (5) and processing means (25) programmed to perform an algorithm to produce a resultant points value and to control the display to display said resultant points value, characterised by means (3) for inputting a second number related to a nutritional parameter other than calorific value and in that the algorithm is:-

$$p = \frac{c}{k_1} + \frac{f}{k_2}$$

where p is the resultant points value, c is the calorific value related number, f is the number related to the other parameter, and k<sub>1</sub> and k<sub>2</sub> are constants."

Claim 1 defines a corresponding method.

Claim 8 of the first auxiliary request differs in substance from claim 8 of the main request only in that the "a nutritional parameter other than calorific value" and "the other parameter" are replaced by "the saturated fat content of the food item".

Method claim 1 is the same as in the main request.

VII. The second auxiliary request contains only method claims, and claim 1 reads as follows:

"A method of non-therapeutic slimming comprising: allocating a maximum daily target to a person, said target being a function of food calorific value; and

said person ingesting food in accordance with said target so as to effect a bodily size reduction, characterised in that said target is a single value which is also a function of the saturated fat content of the food and by the step of determining a value, in the units of said target, for a food item to be ingested in said period according to the formula:-

$$p = \frac{c}{k_1} + \frac{f}{k_2}$$

where p is the resultant value in the units of said target, c is the calorific value related number, f is the number related to the saturated fat content of the food item, and k<sub>1</sub> and k<sub>2</sub> are constants."

VIII. The appellant argued essentially as follows:

The algorithm of the invention combined the calorific value c and the saturated fat f of the food into a single parameter. This enabled a diet regime in which the complete spectrum of food could be eaten based on a single value, whereas in other diets certain types of food were usually banned. This discovery as a result of scientific effort was made usable in a practical device according to claim 8.

The algorithm was not non-technical in that way that the business concept in T 641/00 was, and did not relate to some "psychological domain" as stated by the examining division. It embodied information relating to physiology and, in particular metabolism and, consequently, had technical significance. The effect of the algorithm was to provide a better slimmer's

calculator, which was technical. Furthermore, it had the effect of making it easier for a slimmer to follow a diet regime, which was a technical process.

Since the algorithm was not disclosed in the prior art, in particular in D1, it could not have been obvious to the skilled person to adapt a prior art slimmer's calculator to operate according to it.

Method claim 1 of the second auxiliary request had technical character as a whole because it was directed to the technical process of reducing the weight of a person and involved the technical step of ingesting food. This was in accordance with decision T 144/83. Furthermore, by means of the disclaimer the claim was directed to "non-therapeutic" slimming and was thus not a therapy. The outcome of the algorithm of the method was actively used to achieve the technical effect of weight loss.

## **Reasons for the Decision**

1. The appeal complies with the requirements referred to in Rule 65(1) EPC and is therefore admissible.

### *Background*

2. The application relates to a calculator and corresponding method for assisting a person on a diet. An algorithm calculates a "points value"  $p$  for each item of food eaten as a function of the calorific value of the food  $c$  and another parameter  $f$ , e.g. saturated fat. This may be subtracted from a maximum daily points

target to give the points left for the current day (see pages 1 to 3 of the description).

*Article 56 EPC*

3. The Board prefers first to deal with claim 8 because it is a claim to a calculator and therefore clearly not excluded under Article 52(2) EPC.
4. It is common ground that the calculator of the invention differs from known devices, e.g. according to D1 (see in particular Figures 1 and 2 and the corresponding text), in that the algorithm combines the calorific value and the other nutritional parameter, e.g. saturated fat, of food items into a single parameter or "points value".
5. According to the approach defined in T 641/00 - Two identities/COMVIK (OJ EPO 2003, 352), only features that contribute to the technical character of the invention can be taken into account for assessing inventive step. It is therefore crucial to what extent the "points value" contributes to the technical character, e.g. by being technical itself, or by giving rise to a technical effect alone or by interacting with other technical features of the claim. To answer this question, the Board will first consider claim 8 of the first auxiliary request because it specifies the "other" parameter f as the saturated fat content, which makes it easier to analyse its effect.

*First auxiliary request*

6. The applicant argues that the algorithm, and thus the "points value", embodies information relating to physiology and, in particular metabolism and, consequently, has technical significance. However, the Board considers that even if the ideas of "calorie counting" and considering the amount of saturated fat ingested, have such technical significance, these are per se known from the prior art (see e.g. D1, Figure 4c and Table 4). The distinguishing feature represented by the "points value" is in fact only that these known parameters are combined into a single parameter. The Board does not consider that the "points value" itself has technical character since it is merely a numerical value. The question is therefore whether this combination gives rise to or contributes to any technical effect.
  
7. The description of the present application states at page 1, line 30 to page 2, line 3, that it is the aim and, hence, the effect of the calculator to improve the "calorie counting" method of dieting and to assist the dieter to perform more complex mathematics. According to the description at page 2, lines 20 to 26, such assistance comes about because the constants  $k_1$  and  $k_2$  in the algorithm for calculating the "points value" result in numbers in the low tens. These are said to be easier for people to deal with than numbers in the thousands, which "calorie counting" involves. However, apart from the fact that the values of these constants are not claimed so that this effect is not necessarily achieved by the claim, the Board cannot see, nor was it argued, that such mental assistance in simplifying



mathematics contributes to the technical character of the invention.

8. One of the appellant's arguments as to why there is technical character is that the incorporation of the saturated fat value into the traditional "calorie counting" diet in the form of a single parameter results in a better slimmer's calculator, which is technical. The Board notes that the mere fact that an apparatus is improved in abstract terms is not enough since in T 641/00 the features found to be non-technical (see point 12 ff.) could be said to result in a "better" GSM system. Thus, the specific effect of the improvement to the calculator needs to be considered.
9. In this respect, the appellant alleges that the invention, by allowing the complete spectrum of food to be eaten, governed only by a single parameter, has the effect of making the technical process of dieting more efficient compared to other diets where certain types of food are usually banned, which may in time cause the dieter to lose interest in the diet and give up.
10. However, even assuming that the activity of following a diet, which involves choices and hence requires human intervention, and assuming that the effect of dieting are technical, the Board cannot accept the appellant's argument. This is because all the arguments relating to the effect put forward by the appellant are speculative. Firstly, it is prima facie not apparent that the effect is actually achieved by the claimed subject-matter. For example, although the slimmer appears to be generally penalised by eating saturated fat, the invention does not prevent the slimmer from following an extremely

unhealthy diet consisting only of saturated fat or following some other monotonous diet, provided that it stays within the points target. This would in all probability not achieve the alleged effect of improving the diet by preventing giving up. Moreover, the application is silent in this respect and does not give any details as to why the effect might be achieved, nor any proof of it, e.g. by means of some objective tests. In a case such as the present one where there is at most an indirect link to the (alleged) technical effect relying on a psychological response and therefore not predictable, the Board considers that there must be sufficient evidence for such an effect to be taken into account for inventive step (see also "Case Law of the Boards of Appeal of the European Patent Office", 5th edition 2006, European Patent Office 2006, at section I.D.4.2 "Alleged advantages").

11. The Board therefore judges that the alleged effect cannot be taken into account for inventive step. Since no further technical effect is apparent, the combination of the known parameters into a single parameter does not contribute to inventive step. Hence, the only technical contribution of claim 8 over D1 resides in the implementation of the algorithm on a calculator. However, neither providing the basic components of a calculator, nor programming it to calculate the points value according to the formula defined in claim 8 requires a non-obvious effort by the skilled person.
  
12. Accordingly, the subject-matter of claim 8 of the first auxiliary request lacks an inventive step (Article 56 EPC).

*Main request*

13. In claim 8 of the main request, the other parameter f is not specified as being the saturated fat content of the food item. Thus the claim is more general and covers claim 8 of the first auxiliary request. Therefore, the subject-matter of claim 8 of the main request lacks an inventive step for the same reasons as claim 8 of the first auxiliary request.

*Second auxiliary request*

14. The second auxiliary request contains only the method claims of the first auxiliary request.
15. The appellant argues that method claim 1 has technical character as a whole (Articles 52(2) and (3) EPC) because it is directed to the technical process of reducing the weight of a person and involves the technical step of ingesting food. This is also said to be in accordance with decision T 144/83 (OJ EPO 1986, 301). Furthermore, by means of the disclaimer the claim is directed to "non-therapeutic" slimming and is thus not a therapy (Article 52(4) EPC). However, the Board has doubts that the use of such a disclaimer limits the method to cosmetic purposes in order to fulfill the requirement of Article 52(4) EPC, in the light of decision T 1172/03 (not published in OJ EPO) and of the fact that the method steps specifying the claim define measures usually used for a therapeutic purpose.
16. Nevertheless, even considering the subject-matter of claim 1 to be non-therapeutic and not excluded under

Article 52(4) EPC, it does not involve an inventive step because by corresponding to apparatus claim 8, it essentially differs from the known methods of dieting by the same non-technical and non-inventive features as claim 8 of the first auxiliary request.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

T. Buschek

S. Steinbrener