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Datasheet for the decision of 12 February 2021

Case Number: T 1829/16 - 3.4.02

Application Number: 10750216.3

Publication Number: 2473876

IPC: G02C7/04, A61F2/16

Language of the proceedings: EN

Title of invention:
MULTIFOCAL CORRECTION PROVIDING IMPROVED QUALITY OF VISION

Applicants:
Bradley, Arthur
Kollbaum, Pete S.
Thibos, Larry N.

Headword:

Relevant legal provisions:
EPC Art. 54(1)
RPBA Art. 13(1)

Keyword:
Novelty - (no)
Late-filed auxiliary requests - admitted (no)

Decisions cited:

Catchword:

Europäisches Patentamt
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Office européen des brevets

Beschwerdekammern

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Case Number: T 1829/16 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 12 February 2021

Appellants: (Applicants)	Bradley, Arthur 1735 Durham Drive Bloomington, IN 47401 (US) Kollbaum, Pete S. 1512 South High Street Bloomington, IN 47401 (US) Thibos, Larry N. 1809 Windsor Dr. Bloomington, IN 47401 (US)
Representative:	Hanna Moore + Curley Garryard House 25-26 Earlsfort Terrace Dublin 2, D02 PX51 (IE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 25 February 2016 refusing European patent application No. 10750216.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	R. Bekkering
Members:	H. von Gronau
	T. Karamanli

Summary of Facts and Submissions

I. The joint applicants' appeal is directed against the decision of the examining division to refuse European patent application No. 10750216.3. The examining division refused the application according to the state of the file, as requested by the applicant, on the grounds that the subject-matter of claim 1 was not novel in view of document

D1: WO 01/82839 A1

(see communication annexed to the summons to oral proceedings dated 11 September 2015, point 6.1) or

D3: WO 02/21194 A2

(see communication annexed to the summons to oral proceedings dated 11 September 2015, point 6.2), and that the subject-matter of the then claim 7 had no clear distinguishing features with respect to the lens of D3 (see result of the telephone consultation with the applicant dated 3 February 2016, point 5.5).

II. With the statement setting out the grounds of appeal, the appellants requested that "*the application either be allowed to grant under Art. 109(1) EPC*", with the amended claims submitted with the grounds of appeal, "*or returned to the Examination Division to continue the examination proceedings of those claims in writing*", or that oral proceedings be appointed in light of the above submissions.

III. On 24 October 2019 a summons to oral proceedings scheduled for 15 May 2020 was issued. In a

communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal in the version of 2007 (RPBA 2007, OJ EPO 2007, 536), dated 12 December 2019, the board expressed its provisional opinion essentially agreeing with the finding of the examining division that the lens disclosed in Figure 8 of document D1 had all the technical features of the claimed lens.

IV. By letter dated 8 April 2020, the appellants requested that the oral proceedings scheduled for 15 May 2020 be postponed.

V. By letter dated 14 April 2020, the appellants filed claims according to first to fourth auxiliary requests and put forward arguments in support of the main request and the auxiliary requests.

VI. By communication dated 20 April 2020, the board informed the appellants that the oral proceedings scheduled for 15 May 2020 were postponed and that the board would appoint a new date for the oral proceedings as soon as possible.

VII. By communication dated 16 September 2020, the registrar of the board informed the appellants that the oral proceedings appointed for 15 May 2020 had been rescheduled to 12 February 2021.

VIII. In view of the COVID-19 outbreak and in preparation for the oral proceedings, the board issued a further communication dated 28 January 2021, *inter alia*, inviting the appellants to inform the board whether they agreed to oral proceedings held by videoconference or whether they would be attending the oral proceedings in person. This communication had been sent to the

appellants in advance by email dated 25 January 2021.

IX. By reply dated 29 January 2021, the appellants informed the board that they would not be able to attend the oral proceedings in Haar because of the COVID-19 pandemic. They also indicated that they agreed to oral proceedings held by videoconference.

X. By communication dated 5 February 2021, the registrar of the board informed the appellants that the oral proceedings scheduled for 12 February 2021 would be held by videoconference.

XI. By letter dated 10 February 2021, received at the EPO on 11 February 2021, the appellants put forward further arguments and filed some notes and drawings that would be referenced when discussing the differences between the arrangement of the cited reference and that of the claims. Additional comments and feedback from the applicant were provided.

XII. Oral proceedings were held on 12 February 2021 by videoconference. At these oral proceedings the appellants filed a new auxiliary request 1A and stated that this request was a lower-order request with respect to the main request and a higher-order request with respect to auxiliary requests 1 to 4.

As their final requests, the appellants requested that the decision under appeal be set aside and, as their main request, that either a patent be granted on the basis of the claims of the main request filed with the statement of grounds of appeal dated 4 July 2016, or that the case be remitted to the examining division for further prosecution. As an auxiliary measure, they requested that the decision under appeal be set aside

and that a patent be granted on the basis of the claims of auxiliary request 1A filed at the oral proceedings on 12 February 2021, or of one of auxiliary requests 1 to 4, all filed by letter dated 14 April 2020.

At the end of the oral proceedings, the chairman announced the board's decision.

XIII. Claim 1 as filed with the statement of grounds of appeal reads as follows:

"1. A corrective optical lens for a presbyopic or pseudophakic eye adapted to provide radially symmetric power changes in the distance and near corrections, comprising:
a near first radially extending optical zone having a first power that increases as the radius of the first radially extending optical zone increases such that the near correction will include positive spherical aberration; and
a distance second radially extending optical zone having a second power that decreases as the radius of the second radially extending optical zone increases such that the distance correction will include negative spherical aberration;
wherein the first net power is greater than the second net power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Claim 1 of auxiliary request 1A reads as follows:

"A simultaneous vision bifocal corrective optical lens for a presbyopic or pseudophakic eye adapted to provide radially symmetric power changes in the distance and near corrections, comprising:
a near first radially extending optical zone having a first power that increases as the radius of the first radially extending optical zone increases such that the near correction will include positive spherical aberration wherein the first power is a near add power; and
a distance second radially extending optical zone having a second power that decreases as the radius of the second radially extending optical zone increases such that the distance correction will include negative spherical aberration, wherein the second power is a distance power;
wherein the first power is greater than the second power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Claim 1 of auxiliary request 1 reads as follows:

"A corrective optical lens for a presbyopic or pseudophakic eye adapted to provide radially symmetric power changes in the distance and near corrections, comprising:
a near first radially extending optical zone extending from a center of the corrective optical lens to a first diameter and having a first power that increases as the radius of the first radially extending optical zone

increases such that the near correction will include positive spherical aberration; and
a distance second radially extending optical zone extending out from a second diameter larger than the first diameter and having a second power that decreases as the radius of the second radially extending optical zone increases such that the distance correction will include negative spherical aberration;
wherein the first power is greater than the second power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Claim 1 of auxiliary request 2 reads as follows:

"A corrective optical lens for a presbyopic or pseudophakic eye adapted to provide radially symmetric power changes in the distance and near corrections, comprising:
a near first radially extending optical zone having a first power that increases as the radius of the first radially extending optical zone increases such that the near correction will include positive spherical aberration, wherein the near first radially extending optical zone is adapted to cover a first range of objects including the most near; and
a distance second radially extending optical zone having a second power that decreases as the radius of the second radially extending optical zone increases such that the distance correction will include negative spherical aberration, wherein the distance second

radially extending optical zone is adapted to cover a second range of objects including the most distant;
wherein the first power is greater than the second power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Claim 1 of auxiliary request 3 reads as follows:

"A corrective optical lens for a presbyopic or pseudophakic eye, the lens being a bifocal simultaneous vision lens arranged such that, when in an eye, in addition to the light that is focused on the retina by one optical power there is simultaneously present defocused light that is being imaged by the other power; the lens having a distance correction and a near correction, the near correction having a near vision add power to focus a near object, and the distance correction configured to focus a distant object;
wherein the lens is adapted to provide radially symmetric power changes in the distance and near corrections;
the near correction comprising a first radially extending optical zone having a first power that increases as the radius of the first radially extending optical zone increases and configured such that the near correction will include positive spherical aberration when the lens is in an eye;
wherein the near correction add power is configured to provide a focused image of a near object on the retina,
wherein the positive spherical aberration of the near correction is configured to limit visibility of

defocused portions of an image of a distant object produced by the near correction on the retina, wherein the defocus caused by the near add is a positive defocus due to an excess of power when viewing the distant object;
the distance correction comprising a second radially extending optical zone having a second power that decreases as the radius of the second radially extending optical zone increases and configured such that the distance correction will include negative spherical aberration when the lens is in an eye;
wherein the distance correction is configured to provide a focused image of a distant object on the retina, wherein the negative spherical aberration of the distance correction is configured to limit visibility of defocused potions of an image of a near object produced by the distance correction on the retina, wherein the defocus caused by the distance correction is a negative defocus due to an insufficiency of power when viewing the near object;
wherein the first power is greater than the second power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Claim 1 of auxiliary request 4 reads as follows:

"A corrective optical lens for a presbyopic or pseudophakic eye, the lens being a simultaneous vision lens arranged such that, when in an eye, in addition to the light that is focused on the retina by one optical power there is simultaneously present defocused light

that is being imaged by the other power; the lens having a distance correction and a near correction, the near correction having a near vision add power to focus a near object, and the distance correction configured to focus a distant object;
the lens being adapted to correct for ocular spherical aberration;
wherein the lens is adapted to provide radially symmetric power changes in the distance and near corrections;
characterized in that:
the near correction comprising a first radially extending optical zone having a first power that increases as the radius of the first radially extending optical zone increases and configured such that the near correction will have a positive spherical aberration when the lens is in place in an eye;
wherein the near correction add power is configured to provide a focused image of a near object on the retina, wherein the positive spherical aberration of the near correction is configured to limit visibility of defocused portions of an image of a distant object produced by the near correction on the retina, wherein the defocus caused by the near add is a positive defocus due to an excess of power when viewing the distant object;
the distance correction comprising a second radially extending optical zone having a second power that decreases as the radius of the second radially extending optical zone increases and configured such that the distance correction will have a negative spherical aberration when the lens is in place in an eye;
wherein the distance correction is configured to provide a focused image of a distant object on the retina, wherein the negative spherical aberration of

the distance correction is configured to limit visibility of defocused potions of an image of a near object produced by the distance correction on the retina, wherein the defocus caused by the distance correction is a negative defocus due to an insufficiency of power when viewing the near object; wherein the first power is greater than the second power; and
wherein the sizes and powers of the first and second radially extending optical zones are adapted to limit visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone."

Reasons for the Decision

1. The appeal is admissible.

2. Main request - claim 1 - novelty (Article 54(1) EPC)

2.1 The examining division, in its communication dated 11 September 2015, section 6.1, concluded that document D1 was novelty-destroying, as Figure 8 disclosed a power increase in the high power (intermediate vision) region (see Ref. 238) and a power decrease in the low power region (see Ref. 241).

2.2 The appellants put forward that the present invention, compared to the prior art disclosed in document D1, provided a different solution that minimised the visibility of defocused ghost images (see grounds of appeal, point 9).

Document D1 did not disclose a near optical zone; it only disclosed a base diopter power and an intermediate vision correction power (see grounds of appeal, point 11). Document D1 was dedicated to correcting aberrations to provide clarity of vision, whereas the invention limited the visibility of defocused portions of an image. In document D1 the spherical aberration was only to correct aberration of the eye which resulted in a net zero aberration (see statement of grounds of appeal, point 12).

Document D1 was directed to a system of lenses to adapt the power (see statement of grounds of appeal, point 14). The lens of the claimed invention improved image quality and vision by effectively decreasing the contrast of the defocused image and therefore reducing the visibility of such image (see statement of grounds of appeal, point 15).

In their letter dated 14 April 2020, the appellants explained that D1 distinguished between near and intermediate ranges (see section bridging pages 2 and 3), and that the subject-matter of claim 1 was new and involved an inventive step because D1 taught away from providing a lens having a near correction add power to address the problem of the occurrence of halos. Document D1 taught the correction of spherical aberration of the eye, whereas the purpose of the optics in the claimed invention was to add additional spherical aberration in a manner that limited visibility of defocused portions of an image simultaneously viewed through the first radially extending optical zone and the second radially extending optical zone (see section "Novelty and Inventive Step" on pages 3 to 5).

The appellants further argued that document D1 described an arrangement that did not introduce sufficient power to provide a near vision. With respect to the spherical aberration (SA), they argued that the present patent application would introduce -SA in excess of what was required to correct ocular +SA to ensure that the resultant sum of the eye + IOL (inter ocular lens) or eye + CL (contact lens) would have a "net" -SA for all distance optical zones. In D1 only small -SA was introduced into zone 241 to correct for ocular SA. It also introduced only a small amount of positive SA in zones 238 and 243 (see Annex 1 to the letter dated 14 April 2020, section 4).

In their letter dated 10 February 2021, the appellants again emphasised the difference of the claimed invention with respect to the disclosure of document D1. Document D1 was not relevant to the claims of the present invention. The present application was not directed to an accommodating IOL, did not include intermediate power in the bifocal, and did not attempt to reduce SA when on the eye. Further, the present application did not reduce halos by making them smaller, but was rather directed by the features of the claims to making them bigger and more blurred.

During the oral proceedings before the board, the appellants emphasised that the structure disclosed in document D1 did not destroy the novelty of the claimed subject-matter, because D1 did not disclose a near optical zone. The intermediate optical zone in document D1 could not be regarded as near optical zone, merely because the former was suitable for near vision together with the accommodation movement of the eye, as disclosed on page 26 of document D1. The lens in Figure 8 of document D1 had only a vision correction power

which was the add power for intermediate vision correction.

2.3 The board agrees with the opinion of the examining division that the lens disclosed in Figure 8 of document D1 has all the technical features of the claimed lens. In particular, document D1 discloses corrective optical lenses for a pseudophakic eye adapted to provide radially symmetric power changes in the distance and near corrections (see page 1, lines 1 to 17). The lens disclosed in Figure 8 comprises:

a near first radially extending optical zone (see Ref. 238; page 26, second and third paragraphs; the expression "near" is a relative term, the zone for near correction corrects images that are nearer than distant images; the intermediate power is for correcting relatively "near" images in comparison to the base diopter power and increases the near visual quality) having a first power that increases as the radius of the first radially extending optical zone increases such that the near correction will include positive spherical aberration (see page 26, lines 2 to 9); and

a distance second radially extending optical zone 241 having a second power that decreases as the radius of the second radially extending optical zone increases such that the distance correction will include negative spherical aberration (see page 25, line 27 to page 26, line 1);

wherein the first net power of the lens in zone 238 is greater than the second net power in zone 241.

The last paragraph of the claim does not limit the subject-matter of claim 1 to render the lens novel. It

only specifies an effect the lens should have. The description reveals that any positive spherical aberration in a near correction zone and any negative spherical aberration in a distance correction zone, without specifying quantities of the respective aberrations, is sufficient to result in a defocused image that de-emphasises the blurred image by reducing contrast (see originally filed description, paragraph [0023], the explanations with regard to Figures 2b and 2c). Since the lens in document D1 also has such aberrations, it discloses all the technical features that are required to achieve the claimed result.

The board is not convinced by the appellants' argument that the small amounts of negative aberration in the distance correction disclosed in document D1 were only intended to correct or compensate for any ocular positive spherical aberration which resulted in a net aberration of zero but which could not achieve the intended goal of the invention. The lens disclosed in document D1 might provide a particular effect in combination with a specific eye, but the subject-matter of claim 1 is directed to a corrective optical lens as such, and not to a combination of a lens with a specific eye. The lens disclosed in relation to Figure 8 of document D1 has the features defined in claim 1 and therefore provides the same effects in the same circumstances as the claimed lens.

The appellants argued that the positive and negative aberrations disclosed in D1 had small values, and that in the application the power changes within each zone were far larger. However, the claim does not specify such a specific amount of spherical aberration.

All the defined features in claim 1 of the lens are therefore known from document D1 and thus the subject-matter of claim 1 is not new.

3. Request for remittal of the main request (Article 111(1) EPC)

3.1 Article 111(1), first sentence, EPC stipulates that, following the examination as to the allowability of the appeal, the board has to decide on the appeal. According to Article 111(1), second sentence, EPC, the board may exercise any power within the competence of the examining division (which was responsible for the decision under appeal) or remit the case to that department for further prosecution. It is thus at the board's discretion whether it examines and decides on the appeal case or whether it remits the case to the department of first instance.

In view of the above, the board carried out an examination of the present claims according to the main request as to the patentability requirements of Article 54(1) EPC in particular, and it decided that the claims of the main request do not meet the requirements of Article 54(1) EPC. Hence, the board sees no reason to exercise its discretion under Article 111(1), second sentence, EPC to remit the case to the examining division for further prosecution.

4. Auxiliary request 1A - admittance (Article 13 RPBA 2007)

4.1 In the present case, the summons to oral proceedings was notified before 1 January 2020. Thus, in accordance with Article 25(3) RPBA 2020, Article 13(2) RPBA 2020

does not apply. Instead, Article 13 RPBA 2007 continues to apply.

According to Article 13(1) RPBA 2007, the board has the discretion to admit and consider amendments made to a party's case after it has filed its statement of grounds of appeal or reply. The discretion has to be exercised in view of, *inter alia*, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Article 13(3) RPBA 2007 adds that amendments sought to be made after the oral proceedings have been arranged will not be admitted "*if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings*".

4.2 During the oral proceedings before the board, the appellants filed claims 1 to 8 of auxiliary request 1A.

4.3 The appellants put forward that they recognised, during the oral proceedings, how the board understood claim 1 and interpreted the terms in claim 1 of the main request. The amendments were added to better highlight the difference between document D1 and the invention.

4.4 It is the established case law of the boards of appeal that the appeal procedure is designed to ensure that the proceedings are as brief and concentrated as possible and ready for decision at the conclusion of oral proceedings, if scheduled. An important aim of Articles 12 and 13 RPBA 2007 is that the parties' submissions are concentrated at as early a stage as possible so that the case is as complete as possible when it comes to oral proceedings. Under Article 13(1) RPBA 2007, the board must exercise its discretion in

view of the need for procedural economy, namely the need to conclude proceedings swiftly and to create legal certainty.

A board in an *ex parte* case has discretion over whether or not to admit requests which could have been presented earlier, but were not. It must exercise that discretion having regard to the particular circumstances of the individual case.

In the case in hand, the applicant had several opportunities to file amended claims in the first-instance proceedings. The board notes that no auxiliary requests were filed in the proceedings before the examining division or with the grounds of appeal, although the examining division repeatedly pointed out deficiencies. The present auxiliary request 1A was filed at a very late stage of the appeal proceedings and incorporates features from the description. Admitting this request into the appeal proceedings would mean that the board would have to examine them for the first time in appeal proceedings, or refer the matter back to the examining division. Both options are not acceptable. The board did not present any new facts or arguments in its communication under Article 15(1) RPBA 2007 or during the oral proceedings before it that would justify the filing of the auxiliary request at the oral proceedings; it only shared, as in the provisional opinion of the board in its communication pursuant Article 15(1) RPBA 2007, the opinion of the examining division that the subject-matter of claim 1 was not new in view of document D1. Furthermore, the amendments in claim 1 raise new questions of added subject-matter.

4.5 Exercising its discretion under Article 13(1) RPBA 2007, the board therefore did not admit auxiliary request 1A into the appeal proceedings.

5. Auxiliary request 1 - admittance (Article 13 RPBA 2007)

5.1 The appellants put forward that the amendments were provided to further highlight differences with respect to document D1. Document D1 did not disclose a near optical zone extending from a centre of the optical lens.

Although this feature was not literally disclosed in the application as filed, it could be derived from the application, in particular paragraphs 0030, 0008 and 0023, and Figures 2a to 2c (see in particular the letter dated 14 April 2020, section "First Auxiliary Claim Set"). At the oral proceedings before the board, the appellants added that this feature was already present in previous claim 6. In the first-instance proceedings they considered document D1 irrelevant for the claimed invention and could therefore file the auxiliary request only in response to the provisional opinion of the board.

5.2 The board notes that auxiliary request 1 had not been filed in the first-instance proceedings or with the grounds of appeal, although the examining division repeatedly pointed out deficiencies. The present auxiliary request 1 was filed at a very late stage of the appeal proceedings and claim 1 of this request incorporates features from the description. The board, in its provisional opinion, did not present any new facts or arguments but only shared the opinion of the examining division that the subject-matter of claim 1 of the present main request was not new in view of D1.

Furthermore, the amendments to claim 1 raise new issues, in particular with respect to added subject-matter.

5.3 Exercising its discretion under Article 13(1) RPBA 2007, the board therefore decided not to admit auxiliary request 1 into the appeal proceedings.

6. Auxiliary request 2 - admittance (Article 13 RPBA 2007)

6.1 The appellants argued that the basis for the subject-matter of claim 1 could be found in paragraphs 0008, 0013, 0015 and 0023 to 0026 and in Figures 2a to 2c of the application as filed. Claim 1 clarified the range of the near and distance zones compared to the intermediate and distance zones disclosed in document D1 (see in particular the letter dated 14 April 2020, section "Second Auxiliary Claim Set"). At the oral proceedings before the board, the appellants were of the opinion that they could not have filed the request earlier, because they could not have expected document D1 to be considered relevant by the board.

6.2 The present auxiliary request 2 was filed at a very late stage of the appeal proceedings and incorporates features from the description. The board, in its provisional opinion, did not present any new facts or arguments but only shared the opinion of the examining division that the subject-matter of claim 1 of the main request was not new in view of document D1. Furthermore, with respect to the amendments to this claim 1, new issues in particular concerning added subject-matter arise.

6.3 Exercising its discretion under Article 13(1) RPBA 2007, the board therefore decided not to admit auxiliary request 2 into the appeal proceedings.

7. Auxiliary request 3 - admittance (Article 13 RPBA 2007)

7.1 The appellants argued that the claims had been amended to clarify the near and distance corrections and to further specify the combination of features of the simultaneous vision lens and how the lens was configured such that when implanted in an eye the spherical aberration was configured to address defocused images or ghost images produced on the retina. The basis for the amendments could be found in paragraphs 0024 to 0027 of the application as filed (see in particular the letter dated 14 April 2020, section "Third Auxiliary Claim Set"). The appellants argued again at the oral proceedings before the board that the amended claims could not have been filed earlier, because the examining division did not accept that document D1 was irrelevant for the present invention. The appellants were acting honourably in the first-instance proceedings and did not want to limit the claimed subject-matter too much. The amended claims of auxiliary request 3 were therefore a reaction to the provisional opinion of the board.

7.2 The present auxiliary request 3 was filed at a very late stage of the appeal proceedings and incorporates features from the description. The board, in its provisional opinion, did not present any new facts or arguments but only shared the opinion of the examining division that the subject-matter of claim 1 of the main request was not new in view of D1. Furthermore, with respect to the amendments to claim 1 of auxiliary

request 3, new questions in particular of added subject-matter arise.

7.3 Exercising its discretion under Article 13(1) RPBA 2007, the board therefore decided not to admit auxiliary request 3 into the appeal proceedings.

8. Auxiliary request 4 - admittance (Article 13 RPBA 2007)

8.1 The appellants put forward at the oral proceedings before the board that independent claim 1 was drafted to get to the heart of the problem and to clarify the difference with respect to the prior art. The amendment did not change the scope of the invention and the amendment was not complex, as the specification was short and made it possible to identify the amended features easily. Further amendments had been made to claim 1 of auxiliary request 3 to consider the correction of ocular spherical aberration and to place the claims in the two-part form. The basis for the amendments could be found in paragraphs 0024 to 0027 of the application as filed (see in particular the letter dated 14 April 2020, section "Fourth Auxiliary Claim Set").

8.2 Again, the present auxiliary request 4 was filed at a very late stage of the appeal proceedings and claim 1 of this request incorporates features from the description. The board did not present any new facts or arguments in its provisional opinion but only shared the opinion of the examining division that the subject-matter of claim 1 of the main request was not new in view of D1. Furthermore, with respect to the amendments to claim 1, new issues in particular of added subject-matter arise.

8.3 Exercising its discretion under Article 13(1) RPBA 2007, the board therefore decided not to admit auxiliary request 4 into the appeal proceedings.

9. In summary, none of the appellants' requests is allowable. Therefore, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Gabor R. Bekkering

Decision electronically authenticated