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**Datasheet for the decision
of 7 April 2021**

Case Number: T 0979/18 - 3.5.05

Application Number: 10738058.6

Publication Number: 2419852

IPC: G06F19/00

Language of the proceedings: EN

Title of invention:

MANAGEMENT OF SESSION HISTORY DATA FOR IMPLANTABLE FLUID
DELIVERY DEVICE

Applicant:

Medtronic, Inc

Headword:

Availability of session history data/MEDTRONIC

Relevant legal provisions:

EPC Art. 56, 123(2)
RPBA 2020 Art. 13(2)

Keyword:

Inventive step - (no)
Amendments - extension beyond the content of the application
as filed (yes)
Amendment after summons - exceptional circumstances (no)



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0979/18 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 7 April 2021

Appellant: Medtronic, Inc
(Applicant) 710 Medtronic Parkway NE
Minneapolis, MN 55432 (US)

Representative: Dehns
St. Bride's House
10 Salisbury Square
London EC4Y 8JD (GB)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 12 October 2017
refusing European patent application No.
10738058.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair A. Ritzka
Members: E. Konak
F. Blumer

Summary of Facts and Submissions

- I. The appeal is against the decision of the examining division to refuse the patent application on the grounds that the main request then on file did not meet the requirements of Articles 54, 56 and 84 EPC and that the first and second auxiliary requests then on file did not meet the requirements of Articles 123(2), 56 and 84 EPC.
- II. The following document, *inter alia*, was cited in the contested decision:

D1: US 2009/093756 A1
- III. With its statement setting out the grounds of appeal, the appellant filed a main, first and second auxiliary requests (corresponding to the requests on which the contested decision was based except that claim 11 was amended to be dependent on claim 10). It requested that the decision be set aside and that a patent be granted on the basis of one of these requests and oral proceedings as an auxiliary measure.
- IV. In its preliminary opinion issued in preparation for the oral proceedings, the board raised objections under Articles 123(2), 84, 54 and 56 EPC.
- V. With its letter of reply dated 8 March 2021, the appellant filed a third auxiliary request.
- VI. Oral proceedings were held before the board during which the appellant filed a fourth auxiliary request.

VII. Claim 1 of the main request and the third auxiliary request reads as follow:

"A method for improving the availability of session history data for a patient using an implantable fluid therapy delivery device, the method comprising: storing, in a memory of the implantable fluid delivery device, therapy session information for a plurality of therapy sessions that have been administered by the implantable device to a patient, each therapy session of the plurality of therapy sessions corresponding to a period of time between respective successive programming sessions for the implantable fluid delivery device; retrieving from the memory of the implantable fluid delivery device, with a programming device for programming the implantable fluid delivery device, during each programming session, therapy session information for a plurality of the therapy sessions that have been administered by the implantable fluid delivery device to the patient; inviting a user to input to the programming device a selection of a portion of all of the available, retrieved, therapy session information; displaying, with the programming device, a graphical representation of the selected portion of the therapy session information stored in the memory of the implantable fluid delivery device for each of the plurality of therapy sessions."

VIII. Claim 1 of the first auxiliary request reads as follows:

"A method for improving the availability of session history data for a patient using an implantable fluid therapy delivery device, the method comprising:

storing, in a memory of the implantable fluid delivery device, therapy session information for a plurality of therapy sessions that have been administered by the implantable device to a patient, each therapy session of the plurality of therapy sessions corresponding to a period of time between successive programming sessions for the implantable fluid delivery device;

presenting, using a programming device different from programming device(s) used in the successive programming sessions; an option to interrogate the implantable device;

retrieving, in response to the selection of the option to interrogate, from the memory of the implantable fluid delivery device, with the different programming device, in a next session, for programming the implantable fluid delivery device, therapy session information for a plurality of the therapy sessions that have been administered by the implantable fluid delivery device to the patient;

inviting a user to input to the different programming device a selection of a portion of the available therapy session information;

displaying, with the different programming device, a graphical representation of the selected portion of the therapy session information stored in the memory of the implantable fluid delivery device for each of the plurality of therapy sessions."

IX. Claim 1 of the second auxiliary request reads as follows:

"A method for improving the availability of session history data for a patient using an implantable fluid therapy delivery device, the method comprising:
storing, in a memory of the implantable fluid delivery device, therapy session information for a plurality of

therapy sessions that have been administered by the implantable device to a patient, each therapy session of the plurality of therapy sessions corresponding to a period of time between successive programming sessions for the implantable fluid delivery device, wherein the therapy session information includes information from the implantation of the implantable fluid delivery device;

presenting, using a programming device different from programming device(s) used in the successive programming sessions; an option to interrogate the implantable device;

retrieving, in response to the selection of the option to interrogate, from the memory of the implantable fluid delivery device, with a programming device for programming the implantable fluid delivery device during each programming session, therapy session information for a plurality of the therapy sessions that have been administered by the implantable fluid delivery device to the patient;

inviting a user to input to the programming device a selection of a portion of the available therapy session information;

displaying, with the programming device, a graphical representation of the selected portion of the therapy session information stored in the memory of the implantable fluid delivery device for each of the plurality of therapy sessions."

X. Claim 1 of the fourth auxiliary request reads as follows:

"A method for improving the availability of session history data for a patient using an implantable fluid therapy delivery device, the method comprising:

storing, in a memory of the implantable fluid delivery device, therapy session information for a plurality of therapy sessions that have been administered by the implantable device to a patient, each therapy session of the plurality of therapy sessions corresponding to a period of time between successive programming sessions for the implantable fluid delivery device, wherein the therapy session information includes information from the implantation of the implantable fluid delivery device;

retrieving from the memory of the implantable fluid delivery device, with a programming device for programming the implantable fluid delivery device during each programming session, therapy session information for a plurality of the therapy sessions that have been administered by the implantable fluid delivery device to the patient;

inviting a user to input to the programming device a selection of a portion of the available therapy session information;

displaying, with the programming device, a graphical representation of the selected portion of the therapy session information stored in the memory of the implantable fluid delivery device for each of the plurality of therapy sessions."

Reasons for the Decision

1. Main request
 - 1.1 The appellant submitted that the term "programming session" would have been understood in the context of an implantable fluid therapy device as the programming of the device by a clinician to set out the regimes by which the device operates and the term "therapy

session" as the periods of time between successive programming sessions governed by the rules set during the last programming session. Any subsequent adjustment made by the patient during a therapy session, such as for a bolus delivery, would have to be within the confines set by the clinician in the programming session. Such a subsequent adjustment would not have been considered a programming session by the skilled person.

Although the contested decision seems to have interpreted these terms as synonyms and accordingly came to the conclusion that the subject-matter of claim 1 of the main request lacks novelty over D1, the board will assess inventive step on the basis of the appellant's interpretation of claim 1 for the sake of argument.

- 1.2 Following this interpretation, the appellant submitted that the method of claim 1 of the main request differs from document D1 in that it stores in the implantable fluid therapy device a collection of historical data, namely therapy session information for a plurality of therapy sessions. D1 stored only information related to the current programming session, i.e. information available from the immediately preceding therapy session. Therefore, when a clinician retrieved data with the method of D1, there was no historical data available from previous therapy sessions. This presented significant issues if, for example, the patient was seen by a new clinician whom they had not seen before. The effect of this distinguishing feature was therefore that the device stored historical data that could be accessed by other clinicians. Thus, it was not necessary for the patient to always see the same clinician. The problem solved could be considered

how to improve the availability of historical data related to previous therapy sessions. To solve this problem, the skilled person would have required inventive skill to modify the method of D1.

However, the appellant's arguments do not convince the board. Leaving aside the issue of whether the effect and the problem formulated by the appellant are technical, it is a mere matter of common sense that to ensure the availability of data, it must not be deleted from where it is stored. Since the relevant data is stored initially on the implantable fluid delivery device in the case at hand, as long as it is not deleted, it would obviously be kept stored on the same device as historical data.

1.3 Therefore, the subject-matter of claim 1 of the main request does not involve any inventive step (Article 56 EPC).

2. First and second auxiliary requests

2.1 Claim 1 of the first auxiliary requests differs from claim 1 of the main request in that, *inter alia*, the step of "*presenting, using a programming device different from programming device(s) used in the successive programming sessions; [sic] an option to interrogate the implantable device*" was added. The contested decision found this amendment to contain subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC) as the basis indicated by the appellant, i.e. page 25, lines 13 to 19, was in a different context than the method claimed in claim 1. The board agrees with this finding. This passage relates to the embodiment in Figure 5A in which an "Interrogate Pump" button may be selected on a

programmer to populate it with data from previous therapy sessions of the implantable device, possibly programmed using different programmers. This embodiment does not involve, for instance, a step of inviting the user to select a portion of available therapy information and displaying it as a graphical representation as in the method of claim 1.

2.2 In the statement setting out the grounds of appeal, the appellant added page 18, first paragraph, as another basis for this amendment. The appellant further cited a number of further passages at the oral proceedings, including page 6, lines 23 to 25; page 29, lines 29-30; and the paragraph bridging pages 48 and 49, as a possible basis for the contested amendment. However, none of these passages discloses an embodiment in which presenting an option to interrogate an implantable device is disclosed within the other features of the method claim 1, for instance, a step of inviting the user to select a portion of available therapy information and displaying it as a graphical representation.

2.3 For these reasons, the first auxiliary request does not meet the requirements of Article 123(2) EPC. Since the same amendments were also made to claim 1 of the second auxiliary request, this request also does not meet the requirements of Article 123(2) EPC.

3. Third auxiliary request

As claim 1 of the third auxiliary request is identical to claim 1 of the main request, its subject-matter does not involve an inventive step for the same reasons as for the main request (Article 56 EPC).

4. Fourth auxiliary request

4.1 This request was filed during the oral proceedings before the board and is therefore late-filed. Such requests shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the appellant (Article 13(2) RPBA).

4.2 This request was drafted based on the second auxiliary request. The appellant deleted the features which were objected to for adding subject-matter to claim 1 of the first and second auxiliary requests. It argued that it intended to address the outstanding objections under Article 123(2) EPC through this amendment. However, the contested decision had already refused the second auxiliary request for violating Article 123(2) EPC, and the board agreed with this finding in its preliminary opinion. Therefore, there are no exceptional circumstances justifying the filing of a request attempting to address these objections at this advanced stage of the proceedings.

4.3 For these reasons, the board does not admit the fourth auxiliary request (Article 13(2) RPBA).

5. Since there is no allowable request on file, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated