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**Datasheet for the decision
of 9 January 2024**

Case Number: T 1240/20 - 3.2.02

Application Number: 16179841.8

Publication Number: 3115914

IPC: G06F17/40, A61B5/00

Language of the proceedings: EN

Title of invention:

BODY PARAMETER SENSOR AND MONITOR INTERFACE

Patent Proprietor:

Edwards Lifesciences Corporation

Opponent:

Pulsion Medical Systems SE

Headword:

Relevant legal provisions:

EPC Art. 100(b), 111(1), 113(1)

EPC R. 103(1)(a)

RPBA 2020 Art. 11

Keyword:

Grounds for opposition - insufficiency of disclosure
Right to be heard - substantial procedural violation (yes)
Appeal decision - remittal to the department of first instance
(yes)
Reimbursement of appeal fee - (yes)

Decisions cited:

T 0763/04, R 0004/14

Catchword:



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 1240/20 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 9 January 2024

Appellant: Pulsion Medical Systems SE
(Opponent) Hans-Riedl-Str. 21
85622 Feldkirchen (DE)

Representative: Kehl, Ascherl, Liebhoff & Ettmayr
Patentanwälte Partnerschaft mbB
Emil-Riedel-Straße 18
80538 München (DE)

Respondent: Edwards Lifesciences Corporation
(Patent Proprietor) One Edwards Way
Irvine, CA 92614 (US)

Representative: Eisenführ Speiser
Patentanwälte Rechtsanwälte PartGmbH
Postfach 31 02 60
80102 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 March 2020
rejecting the opposition filed against European
patent No. 3115914 pursuant to Article 101(2)
EPC**

Composition of the Board:

Chairman M. Alvazzi Delfrate
Members: D. Ceccarelli
N. Obrovski

Summary of Facts and Submissions

- I. The opponent appealed against the Opposition Division's decision to reject the opposition to the European patent.

The patent was opposed on the grounds of insufficiency of disclosure, lack of novelty and lack of inventive step.

- II. In a communication, the Board informed the parties of its intention to remit the case to the Opposition Division and order the reimbursement of the appeal fee by reason of a substantial procedural violation. Furthermore, it observed that a decision to this effect could be issued in writing if the parties withdrew their requests for oral proceedings.

- III. The parties withdrew their requests for oral proceedings on condition that the Board decided to remit the case.

- IV. The appellant requested that the decision under appeal be set aside and that the patent be revoked. It also requested reimbursement of the appeal fee by reason of a substantial procedural violation.

The respondent requested that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of one of auxiliary requests 1 to 5, filed with the reply to the statement of grounds of 3 December 2020, and 6 and 7, filed by letter dated 18 May 2021.

V. Claim 1 of the patent as granted (main request) reads as follows.

"A system (10) for sensing a physiological parameter for use in conjunction with a remote processor that is external to the system, the system comprising:

a physiological sensor (12) coupled to the remote processor, and adapted to output a sensor signal representative of a sensed physiological parameter to the remote processor;

a microcontroller (16) located locally within the system and fixedly attached to the physiological sensor (12), the microcontroller adapted to exchange data with the remote processor, the microcontroller (16) having a first memory (14) and a second memory (22); wherein the first memory (14) is adapted to store an authentication algorithm and the microcontroller (16) configured to engage in an authentication process through the authentication algorithm to ensure that the physiological sensor is appropriate for use when queried by the remote processor; **characterised in that** the second memory (22) is configured to receive processed sensor data from the remote processor and store at least the processed sensor data and calibration information pertaining to the physiological sensor (12); and wherein the authentication process is configured to ensure that the physiological sensor is of a type that has calibration information stored thereon."

VI. The appellant's arguments, where relevant to the present decision, may be summarised as follows.

The Opposition Division had committed a substantial procedural violation in that it had ignored the

appellant's arguments on insufficiency of disclosure. Hence, the appellant had been deprived of its right to be heard.

More specifically, the Opposition Division had ignored the objection that the patent was completely silent on any specific feature of an authentication process that would "ensure that the physiological sensor is of a type that has calibration information stored thereon", as specified in claim 1 of the patent as granted. The authentication described in the patent merely verified sensor identity. The authentication algorithm could not determine whether calibration information was stored on the sensor.

This objection had been raised in the notice of opposition, and reiterated in the letters of 24 May 2019 (item 2 on page 2) and 13 December 2019 (page 4, penultimate paragraph, to page 5, first paragraph).

In the impugned decision, the Opposition Division had merely stated that "the specific definition of the authentication process carried out by the microcontroller could be considered to be to a certain extent unclear" but had provided no explanation of where or how the patent disclosed any authentication process capable of ensuring that the physiological sensor was of a type that actually had calibration information stored thereon.

According to T 763/04, in line with other case law of the Boards of Appeal, Article 113(1) EPC required not merely that a party be given an opportunity to voice comments, but more importantly it required that the deciding instance demonstrably heard and considered

these comments.

The question of sufficient disclosure had in fact been discussed before the Opposition Division, given that the first-instance proceedings comprised written proceedings prior to the oral proceedings. The Opposition Division's failure was merely to duly consider the opponent's arguments on that point.

The appellant agreed to remittal of the case to the Opposition Division for further prosecution without oral proceedings being scheduled beforehand.

VII. The respondent's arguments, where relevant to the present decision, may be summarised as follows.

It was established jurisprudence that it was not necessary to consider each and every argument of the parties in detail in a decision (Case Law of the Boards of Appeal, V.B.4.3.10.b)). The impugned decision was clear: the Opposition Division had considered that the appellant's arguments presented under Article 100(b) EPC in fact concerned Article 84 EPC.

The Opposition Division was of the opinion that the lack of disclosure asserted by the appellant was a matter of clarity, and thus not a ground for opposition, so it was not discussed before the Opposition Division.

The patent proprietor agreed to the Board's proposal to continue the proceedings regarding a remittal of the case to the Opposition Division by written procedure, and withdrew its request for oral proceedings.

Reasons for the Decision

1. The patent

The patent relates to a system for sensing a physiological parameter for use in conjunction with a remote processor.

The system comprises a physiological sensor, typically for application to a patient. The sensor is coupled to the remote processor.

The system also comprises a microcontroller, fixedly attached to the physiological sensor and adapted to exchange data with the remote processor. The microcontroller has a first and a second memory.

The first memory is adapted to store an authentication algorithm and the microcontroller is configured to engage in an authentication process through the authentication algorithm to ensure that the physiological sensor is appropriate for use when queried by the remote processor.

The second memory is configured to receive processed sensor data from the remote processor and store at least the processed sensor data and calibration information pertaining to the physiological sensor.

The authentication process is configured to ensure that the physiological sensor is of a type that has calibration information stored on it.

The claimed invention has the aim of implementing a complete modular monitoring system with a plurality of

separate sensors, all functionally connected to a remote processor.

2. Substantial procedural violation in the first-instance proceedings

2.1 The appellant argued that the Opposition Division had ignored its objection of insufficiency of disclosure, namely that the patent was completely silent on any specific feature of an authentication process that would "ensure that the physiological sensor is of a type that has calibration information stored thereon".

In the appellant's view, the authentication described in the patent merely verified sensor identity. The authentication algorithm could not determine whether calibration information was stored on the sensor.

The fact that the Opposition Division, in the impugned decision, had ignored the appellant's objection amounted to a substantial procedural violation.

2.2 The Board shares the appellant's view on this latter issue. The only passage in the Reasons for the impugned decision which could be seen to relate to the appellant's objection is the sentence (point 1.2 of the Reasons): "Likewise, the specific definition of the authentication process carried out by the microcontroller could be considered to be to a certain extent unclear (Article 84 EPC), but as already stated above, clarity is not a ground for opposition (Article 100 EPC)."

This sentence is a bald, unsubstantiated statement, which does not make it possible to establish whether the Opposition Division considered the appellant's

arguments. As stated in T 763/04, Reasons 4.4, referred to by the appellant, "Article 113(1) requires not merely that a party be given an opportunity to voice comments, but more importantly it requires that the deciding instance demonstrably hears and considers these comments" (see also R 4/14, Reasons 12).

- 2.3 The respondent's argument that it was clear from the decision that the Opposition Division was of the view that the appellant's arguments presented under Article 100(b) EPC in fact concerned Article 84 EPC is not convincing. Even under this assumption, the Opposition Division would still have been obliged to provide reasons for its view, including why the appellant's arguments exclusively concerned Article 84 EPC. However, no such reasons were provided.

The respondent's reference to the case law (Case Law of the Boards of Appeal, 10th Edition, V.B.4.3.10.b)), according to which it was not necessary to consider each and every argument of the parties in detail in a decision, is not convincing either. The case law referred to by the respondent, which concerns alleged fundamental procedural violations in the context of petitions for review, does not provide support for completely ignoring an objection and the arguments underpinning it in opposition proceedings.

- 2.4 In conclusion, since the Opposition Division provided no reasons addressing the opponent's objection of insufficiency of disclosure, it contravened Article 113(1) EPC and committed a substantial procedural violation which led to a fundamental deficiency in the first-instance proceedings.

3. According to Article 11 RPBA, the Board must not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.
4. In view of this article, and to allow the parties to have the objection of insufficiency of disclosure duly considered by the department of first instance, the Board finds it appropriate to remit the case to the Opposition Division for further prosecution, in accordance with Article 111(1) EPC.
5. Under Rule 103(1) (a) EPC the appeal fee is to be reimbursed in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.
3. The appeal fee is reimbursed in full.

The Registrar:

The Chairman:



A. Chavinier-Tomsic

M. Alvazzi Delfrate

Decision electronically authenticated