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Datasheet for the decision of 26 September 2023

Case Number: T 2018/20 - 3.2.02

Application Number: 11179447.5

Publication Number: 2394576

IPC: A61B5/145, A61B5/1468

Language of the proceedings: EN

Title of invention:
Iconic display of markers for a meter

Applicant:
Ascensia Diabetes Care Holdings AG

Headword:

Relevant legal provisions:
EPC Art. 76(1), 123(2), 111(1)
RPBA 2020 Art. 11, 12(2)

Keyword:
Divisional application - added subject-matter - main request (yes) - first auxiliary request (no)
Remittal - (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 2018/20 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 26 September 2023

Appellant: (Applicant)	Ascensia Diabetes Care Holdings AG Peter-Merian Strasse 90 4052 Basel (CH)
Representative:	Cohausz & Florack Patent- & Rechtsanwälte Partnerschaftsgesellschaft mbB Postfach 10 18 30 40009 Düsseldorf (DE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 3 July 2020 refusing European patent application No. 11179447.5 pursuant to Article 97(2) EPC**

Composition of the Board:

Chairwoman	S. Böttcher
Members:	D. Ceccarelli
	Y. Podbielski

Summary of Facts and Submissions

I. The applicant appealed against the Examining Division's decision to refuse European patent application No. 11179447.5 for added subject-matter.

II. The Board summoned the appellant to oral proceedings and conveyed its preliminary opinion in a communication in which objections of added subject-matter, other than the ones on which the impugned decision was based, were raised.

III. After receipt of the communication, the appellant filed an amended first auxiliary request addressing the objections raised.

The appellant requested that the decision under appeal be set aside and that a patent be granted or that the case be remitted to the Examining Division for further prosecution on the basis of the claims according to the main request, filed with the statement of grounds of appeal dated 9 October 2020.

As a first auxiliary request, the appellant requested that the decision under appeal be set aside and that a patent be granted or that the case be remitted to the Examining Division for further prosecution on the basis of the claims according to the first auxiliary request filed with the letter dated 23 May 2023.

As a second auxiliary request, the appellant requested that oral proceedings be conducted.

As a precautionary measure, the appellant requested that the decision under appeal be set aside and that a

patent be granted or that the case be remitted to the Examining Division for further prosecution on the basis of the claims of one of the third to ninth auxiliary requests filed with the letter dated 23 May 2023.

IV. The Board cancelled the oral proceedings.

V. Claim 1 of the **main request** reads as follows:

"A method of marking an analyte concentration, the method comprising the acts of:
placing a first fluid sample on a first test strip before an event;
using a meter and the first test strip to determine a pre-event analyte concentration of the first fluid sample;
displaying the pre-event analyte concentration on a display;
using a marking means to initiate selection of a pre-event iconic marker, the pre-event iconic marker being a first non-language based graphical image;
storing the pre-event analyte concentration with the selected pre-event event iconic marker in the meter;
placing a second fluid sample on a second test strip after the event;
using the meter and the second test strip to determine a post-event analyte concentration of the second fluid sample;
displaying the post-event analyte concentration on the display;
using the marking means to initiate selection of a post-event iconic marker, the post-event iconic marker being a second non-language based graphical image, the pre-event iconic marker and the post-event iconic marker being paired non-language based graphical images;

storing the post-event analyte concentration with the selected post-event iconic marker in the meter; and comparing the pre-event analyte concentration to the post-event analyte concentration".

Claim 1 of the **first auxiliary request** reads as follows (amendments compared to the main request highlighted by the Board):

"A method of marking an analyte concentration, the method comprising the acts of:
placing a first fluid sample on a first test strip before an event;
contacting the first test strip with a meter ~~using a meter and the first test strip~~ to determine a pre-event analyte concentration of the first fluid sample;
displaying the pre-event analyte concentration on a display;
using a button ~~marking means~~ to initiate selection of a pre-event iconic marker, the pre-event iconic marker being a first non-language based graphical image;
storing the pre-event analyte concentration with the selected pre-event event iconic marker in the meter;
placing a second fluid sample on a second test strip after the event;
contacting the second test strip with the meter ~~using the meter and the second test strip~~ to determine a post-event analyte concentration of the second fluid sample;
displaying the post-event analyte concentration on the display;
using the button ~~marking means~~ to initiate selection of a post-event iconic marker, the post-event iconic marker being a second non-language based graphical image, the pre-event iconic marker and the post-event iconic marker being paired non-language based graphical

images;
storing the post-event analyte concentration with the selected post-event iconic marker in the meter; and comparing the pre-event analyte concentration to the post-event analyte concentration."

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

Paragraphs [002] to [008], [034], [035] and [039] to [042] of the parent application as filed provided a basis for the features of determining the analyte concentration of a second fluid sample and comparing the pre-event analyte concentration to the post-event analyte concentration, as defined in claim 1 of the main and the first auxiliary request.

The appellant provided no arguments on the feature in claim 1 of the main request on the use of a meter and test strips for determining a pre-event and a post-event analyte concentration objected to by the Board in the communication.

Reasons for the Decision

1. The application

The application relates to a method of marking an analyte concentration. According to the description, the analyte is typically blood glucose, and the method is applied for managing diabetes.

The method comprises placing a first fluid sample on a first test strip before an event. Typically, the fluid is a person's blood, and the event may be a meal or an

exercise session, which may have a major impact on the level of blood glucose.

According to claim 1 of the first auxiliary request, the method further comprises contacting the first test strip with a meter to determine a pre-event analyte concentration of the first fluid sample; displaying the pre-event analyte concentration on a display; using a button to initiate selection of a pre-event iconic marker, the pre-event iconic marker being a first non-language based graphical image; and storing the pre-event analyte concentration with the selected pre-event event iconic marker in the meter.

In essence, an icon indicating that the test reading was done before the event is associated with the test reading.

The method further comprises placing a second fluid sample on a second test strip after the event; contacting the second test strip with the meter to determine a post-event analyte concentration of the second fluid sample; displaying the post-event analyte concentration on the display; using the button to initiate selection of a post-event iconic marker, the post-event iconic marker being a second non-language based graphical image, the pre-event iconic marker and the post-event iconic marker being paired non-language based graphical images; and storing the post-event analyte concentration with the selected post-event iconic marker in the meter.

In essence, an icon indicating that the test reading was done after the event, the icon being similar to the one indicative of the pre-event reading (Figures 3a to 3l of the application), is associated with the test

reading.

Finally, the method comprises comparing the pre-event analyte concentration to the post-event analyte concentration.

2. The application is a divisional application of European patent application 06 720 920.5, published as WO 2006/091564 A1 under the PCT. The present application and the parent application as filed have the same description and drawings. For assessing compliance of the claims with Articles 76(1) and 123(2) EPC, it is sufficient to consider whether the description and drawings of the parent application as filed provide a basis for the subject-matter claimed.

3. Main request - added subject-matter

Claim 1 of the main request is mainly based on "Alternative Process K" (paragraph [057]) of the parent application as filed.

Compared with paragraph [057] of the parent application as filed, however, claim 1 recites that the determination of the analyte concentration of a fluid on a test strip is done "using a meter" instead of "contacting the test strip with a meter".

As pointed out in the communication of the Board, the parent application as filed does not disclose any way of determining the analyte concentration of a fluid other than contacting the test strip with the meter. This is also the way in which test strips and meters of the kind disclosed in the application are used in the art. The wording "using a meter" conveys the technical

information - not disclosed in the parent application as filed - that the analyte concentration could also be determined without contact.

For this reason, claim 1 of the main request extends beyond the content of the parent application as filed, in contravention of Article 76(1) EPC. Hence, the main request is not allowable.

4. First auxiliary request

Claim 1 of the first auxiliary request recites that the determination of the analyte concentration of a fluid on a test strip is done "contacting the test strip with a meter". This overcomes the Board's objection against claim 1 of the main request.

Compared with paragraph [057] of the parent application as filed, claim 1 recites that the selection of iconic markers is done using a button. This is disclosed in paragraphs [042], [046] and [058] of the parent application as filed. In its communication, the Board stated that omitting from the claim that the iconic markers are displayed on a display of the meter together with the analyte concentration appeared to be a non-allowable intermediate generalisation. However, paragraphs [057] and [058] of the parent application as filed, which do not specify on which display the markers are displayed, provide a basis for the omission.

Compared with paragraph [057] of the parent application as filed, claim 1 of the first auxiliary request further specifies that the pre-event and the post-event iconic markers are "paired non-language based graphical images".

The iconic markers shown in Figures 3a to 3l and described in paragraphs [042] and [043] of the parent application as filed provide a basis for the markers being non-language based graphical images. As regards the feature that the iconic markers are "paired", this is disclosed in paragraph [043], second sentence and is also derivable from Figures 3a to 3l alone.

Claim 1 of the first auxiliary request is further distinguished from paragraph [057] of the parent application as filed in that it recites that a first and a second fluid sample are analysed and that the pre-event analyte concentration and the post-event analyte concentration are compared.

In the impugned decision, the Examining Division held that these differences added subject-matter.

The Board does not share this view.

The analysis of two fluid samples, i.e. before an event and after an event, is implied in paragraph [057] of the parent application as filed, which specifies the selection of "a pre-event iconic marker or a post-event iconic marker". This means that the analysis can be done before and after an event. Moreover, the description makes clear that the meter is for performing several tests, especially before and after an event. This is disclosed, as the appellant pointed out, in paragraphs [003] and [042] of the parent application as filed. The fact that paragraph [003] relates to the background of the invention does not matter since paragraph [006] specifies that it would be desirable to overcome disadvantages in existing glucose meters relating especially to the fact that readings

were stored without differentiating between pre-meal and post-meal readings (paragraph [005]). This implies that the invention is concerned with pre-meal (pre-event) and post-meal (post-event) readings. The Examining Division's observation that the parent application as filed only specified how a single analysis is performed but not how a second analysis should be performed is not convincing. The way a fluid is analysed is disclosed. This applies, at least implicitly, to all the analyses carried out with the meter.

As regards the comparison of the pre-event analyte concentration and the post-event analyte concentration, paragraph [042], last sentence of the parent application as filed expressly discloses this. The Examining Division's observation that this sentence did not specify which readings are compared is not convincing either. According to the previous sentences of paragraph [042], readings associated with a pre-meal marker and readings associated with a post-meal marker are stored in memory. These readings are compared. Moreover, the person skilled in the art knows that it is significant to compare the readings before and after a certain event. This is especially so in view of paragraph [003] of the parent application as filed, which states that "an individual may test his blood-glucose level before eating to assist in determining what amount of sugar is safe to consume during that meal" and "also test his blood-glucose after eating to determine whether he consumed too much or too little sugar during his meal".

In conclusion, claim 1 of the first auxiliary request complies with Articles 76(1) and 123(2) EPC.

5. There are no further grounds for refusal left for the Board to review on appeal.

In view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner (Article 12(2) RPBA 2020), there is a special reason within the meaning of Article 11 RPBA 2020 for remitting the case to the Examining Division for further prosecution under Article 111(1) EPC, in accordance with the appellant's request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Examining Division for further prosecution.

The Registrar: The Chairwoman:

A. Chavinier-Tomsic S. Böttcher

Decision electronically authenticated