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**Datasheet for the decision
of 23 February 2023**

Case Number: T 0050/21 - 3.5.05

Application Number: 13189919.7

Publication Number: 2725508

IPC: G06F19/00, A61B3/10

Language of the proceedings: EN

Title of invention:
Ophthalmic analysis apparatus

Applicant:
Nidek Co., Ltd.

Headword:
Ophthalmic analysis/NIDEK

Relevant legal provisions:
RPBA 2020 Art. 12(4), 12(6)
EPC R. 103(4)(c)

Keyword:
Amendment to case - requirements of Art. 12(2) RPBA 2020 met
(no) - amendment within meaning of Art. 12(4) RPBA 2020 -
admissibly raised and maintained (no) - amendment admitted (no)
Reimbursement of appeal fee - (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 0050/21 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 23 February 2023

Appellant: Nidek Co., Ltd.
(Applicant) 34-14, Maehama
Hiroishi-cho
Gamagori
Aichi (JP)

Representative: Hoefler & Partner Patentanwälte mbB
Pilgersheimer Straße 20
81543 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 9 July 2020
refusing European patent application No.
13189919.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair A. Ritzka
Members: E. Konak
E. Mille

Summary of Facts and Submissions

- I. The appeal is against the examining division's decision to refuse the application. The examining division decided that the main request and auxiliary requests 1 to 4 then on file did not involve an inventive step (Article 56 EPC). Auxiliary requests 3 and 4 were further found not to meet the requirements of Article 84 EPC.
- II. With its statement setting out the grounds of appeal, the appellant filed a new main request and new auxiliary requests 1 to 3. It requested that the decision be set aside and that a patent be granted on the basis of one of these requests. It further requested oral proceedings as an auxiliary measure.
- III. With its preliminary opinion issued pursuant to Article 15(1) RPBA, the board informed the appellant of its intention not to admit any of the requests filed with the statement setting out the grounds of appeal.
- IV. In reply, the appellant withdrew its request for oral proceedings and requested partial reimbursement of the appeal fee. The oral proceedings were thus cancelled.
- V. Claim 1 of the main request reads as follows:

"An ophthalmic analysis apparatus comprising:
obtaining means for obtaining analysis results of tomography images of a subject eye acquired at different dates by ophthalmic optical coherence tomography;

instruction receiving means for receiving, from an examiner, selection instructions to select an analytical region on the eye;

a controller for respectively acquiring analysis results in the analytical region selected by the instruction receiving means with respect to tomography images acquired at the different dates and generating statistical information formed based on time-series data of the acquired analysis result; and

output means for outputting the generated statistical information,

wherein the instruction receiving means receives, from the examiner, the selection instructions for a two-dimensional image at an examination date at which an analysis result is acquired;

wherein the two-dimensional image includes an analysis chart; and

wherein the instruction receiving means receives, from the examiner, the selection instructions to select, as the analytical region, at least one section divided by the analysis chart indicating a fundamental statistic of an analysis result for every preset section."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request as follows (with the additions underlined and the deletions ~~struck through~~):

"[...]

~~wherein the instruction receiving means receives, from the examiner, the selection instructions to select, as the analytical region,~~ is at least one section ~~divided by~~ in the analysis chart including a plurality of sections, in which ~~indicating a~~ fundamental statistic of an analysis result is indicated for every preset section."

Claim 1 of auxiliary request 2 differs from claim 1 of the main request as follows (with the additions underlined and the deletions ~~struck through~~):

"[...]

wherein the two-dimensional image includes an analysis chart; ~~and~~

wherein the instruction receiving means receives, from the examiner, the selection instructions to select, as the analytical region, at least one section divided by the analysis chart indicating a fundamental statistic of an analysis result for every preset section; and

wherein the instruction receiver outputs, to a display screen of a display unit of the output means, a section selector having a selective region formed in a position corresponding to each section of the analysis chart, wherein the section selector is graphics simulating the analysis chart, and the divided selective region may function as a selection button."

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 2 as follows (with the additions underlined):

"[...];

wherein the output means displays a time-series graph in a graph display region (150) using time-series data of the acquired analysis result, the time-series graph (150a) has characteristics as a trend graph indicating a trend of a temporal change in the time-series data of the acquired analysis result,

wherein the output means display an analytical region display (170) showing an analytical region

corresponding to the acquired analysis result shown by the time-series graph (150a) together with the time-series graph (150a),

wherein the output means displays a chart in which a section corresponding to the analysis chart is formed as the analytical region display (170) and a color of the section set on the chart as a trend graph creation region is associated with at least any of a regression line and a point of a graph corresponding to the acquired analysis result in its section."

Reasons for the Decision

1. Admission of the requests filed with the statement setting out the grounds of appeal
- 1.1 In view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, an appellant's appeal case must be directed to the requests on which the decision under appeal was based (Article 12(2) RPBA). Any part of an appellant's appeal case which does not meet this requirement is to be regarded as an amendment, unless the appellant demonstrates that this part was admissibly raised and maintained in the proceedings leading to the decision under appeal. Any such amendment may be admitted only at the discretion of the board. The appellant should provide reasons for submitting the amendments in appeal proceedings (Article 12(4) RPBA).
- 1.2 In the present case, the contested decision is not based on any of the requests filed with the statement setting out the grounds of appeal. Therefore all requests on file are amendments within the meaning of Article 12(2) and (4) RPBA, and thus can only be admitted at the discretion of the board.

1.3 As for reasons for submitting the new requests in appeal proceedings, the appellant argued that it had become clear to the appellant only at the oral proceedings to what extent the examining division saw a lack of clarity in auxiliary request 3 then on file. Since the clarity objections were discussed for the first time at the oral proceedings, requests addressing these objections could not have been filed earlier.

These arguments do not convince the board. It follows from the fact that the appellant became aware of the extent of the clarity objections at the oral proceedings that the appellant could have filed amendments addressing them at the oral proceedings. Indeed, the appellant requested a break during the oral proceedings and filed what was then auxiliary request 4 (see minutes, point 8). Although it could have filed further auxiliary requests, it decided not to do so (see minutes, point 11).

According to Article 12(6) RPBA, the board should not admit requests which should have been submitted in the proceedings leading to the decision under appeal. In the present case, any request addressing the outstanding clarity objections of the examining division could and should have been filed before the examining division.

1.4 Therefore the board did not admit the requests filed with the statement setting out the grounds of appeal.

2. Request for partial reimbursement of the appeal fee

2.1 In accordance with Rule 103(4)(c) EPC, the appeal fee must be reimbursed at 25% if any request for oral

proceedings is withdrawn within one month of notification of the communication issued by the board in preparation for the oral proceedings and no oral proceedings take place.

- 2.2 In this case, the communication in preparation for oral proceedings was dispatched on 8 December 2022. The withdrawal of the request for oral proceedings was received on 22 February 2023, i.e. after the time limit established in Rule 103(4)(c) EPC. Thus the request for partial reimbursement of the appeal fee is rejected.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated