

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Darold B. Shiek,

Appellant,

vs.

North Dakota Workers' Compensation
Bureau and North Dakota State
University,

Appellees.

Supreme Court No. 20010030

FILED
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STATE OF NORTH DAKOTA

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**BRIEF OF APPELLEE NORTH DAKOTA
WORKERS' COMPENSATION BUREAU**

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APPEAL FROM JUDGMENT OF NOVEMBER 20, 2000
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE MICHAEL O. McGUIRE

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Andrew L. B. Noah (ID# 05119)
Jacqueline S. Anderson (ID # 05322)
Special Assistant Attorney Generals
for the ND Workers Compensation Bureau
NILLES, HANSEN & DAVIES, LTD.
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544

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STATEMENT OF THE ISSUES

- I. WHETHER A REASONING MIND COULD REASONABLY DETERMINE THAT SHIEK RETIRED FROM THE LABOR MARKET VOLUNTARILY RATHER THAN HAVING BEEN FORCED FROM THE MARKET BY A DISABILITY.

STATEMENT OF CASE

On August 2, 1991, Darold Shiek ("Shiek") filed a claim for benefits with the North Dakota Workers' Compensation Bureau ("Bureau"), as a result of a right shoulder injury he sustained on July 30, 1991. (R. 1¹) The Bureau accepted the claim and paid the associated benefits. (R. 3) On August 22, 1992, Shiek filed an additional claim for benefits with the Bureau, alleging that he had also injured his left knee on July 30, 1991. (R. 7) The claim for injury to the left knee was consolidated with that of the claim for injury to the right shoulder. (R. 12)

On January 10, 1995, the Bureau issued an Order Denying Further Benefits. (R. 20-22) Shiek filed a timely Petition for Reconsideration. (R. 23-24)

A formal administrative hearing was held on July 25, 1995, in Fargo, before Administrative Law Judge ("ALJ") Robert P. Brady. (R. 285) On August 14, 1995, ALJ Brady issued his Recommended Findings of Fact and Conclusions of Law. (R. 35-45) On September 22, 1995, the Bureau adopted ALJ Brady's Recommended Findings of Fact and Conclusions of Law as its Final Order. (R. 46-47)

On October 16, 1995, Shiek filed an appeal to the District Court, Cass County, North Dakota. (R. 48-54) Following submission of written briefs, the District Court, The

¹ "R." will refer to the corresponding pages in the Stipulated Abstract of Record on Appeal to District Court, dated July 14, 2000.

Honorable Michael McGuire issued an Opinion on Appeal from Administrative Agency dated August 14, 1997, and an Order for Judgment dated August 18, 1997, affirming the Bureau's Order of September 22, 1995. (R. 299, pp. 7-10)

On October 21, 1997, Shiek filed a Notice of Appeal with the North Dakota Supreme Court. (R. 299, p. 13) On July 16, 1998, this Court issued an opinion reversing the District Court judgment remanding the case "... to the Bureau for the proper application of the retirement presumption law, the admission of any necessary evidence, and the preparation of findings necessary to properly adjudicate Shiek's claim for benefits." Shiek v. North Dakota Workers' Compensation Bureau, 1998 ND 139, ¶ 26, 582 N.W.2d 693 (hereinafter "Shiek I").

On September 2, 1999, ALJ Daniel L. Hovland issued a Notice of Hearing along with a Specification of Issues identifying the issues, two of which are relevant to this appeal. (R. 355, pp. 440-441) A second formal administrative hearing was held on October 14, 1999, in Fargo before ALJ Hovland (R. 386, p. 491), after which post-hearing briefs were submitted. (R. 387-389, pp. 492-568) On January 5, 2000, ALJ Hovland issued Recommended Findings of Fact, Conclusions of Law and Order which once again affirmed the Order Denying Further Benefits dated January 10, 1995. (App.² p. 37) On January 27, 2000, the Bureau adopted ALJ Hovland's Recommended Findings of Fact, Conclusions of Law and Order as its Final Order. (App. p. 56)

On February 25, 2000, Shiek filed an appeal with the District Court, Cass County, North Dakota. (Cass County District Court Docket #1; see App. p. 1) After submission of written briefs, on November 2, 2000, the District Court, The Honorable Michael O.

² App. refers to Appellant's Appendix.

McGuire issued an Order on Appeal from Administrative Agency, affirming the Bureau's Order of January 27, 2000. (App. p. 57-59) Judgment was entered November 20, 2000. (App. p. 60) This appeal followed. (App. p. 3)

STATEMENT OF FACTS

On July 30, 1991, Shiek injured his right shoulder while at work at North Dakota State University ("NDSU"). (R. 1.) Shiek filed a claim for benefits from the Bureau dated August 2, 1991. (R. 1) The Bureau accepted liability for the right shoulder injury and awarded Shiek benefits. (R. 3) Shiek did not work from July 31, 1991 through March 2, 1992, and received disability benefits during that time. (R. 285. Exhibit 11, p. 3.³)

On February 28, 1992, Dr. Charles Hartz, the physician who performed the surgery on Shiek's right shoulder, released Shiek to return to work "with restrictions on lifting and overhead work, that is to make it light duty for the right arm." (R. 88) NDSU accommodated the restrictions outlined by Dr. Hartz, and Shiek returned to work on March 3, 1992, in a modified light duty position. (R. 285. p. 204) Dr. Hartz approved the modified position at NDSU. (R. 89, 90-91)

On April 28, 1992, Shiek saw Dr. Hartz and indicated that the only problem he was having at work related to painting and having to reach up. (R. 92; 285, p. 205) Dr. Hartz, therefore, recommended that Shiek "work at waist level or below." (R. 92) NDSU once again accommodated the restriction recommended by Dr. Hartz and further modified Shiek's light duty cleaner/painter position. (R. 284a, Exhibit 8, p. 2; R. 285, p. 205). See also July

³References to "Exhibit" refer to the exhibits attached to the transcript of the formal administrative hearing which is part of the Stipulated Abstract of Record at 285.

27, 1994, letter of Vocational Consultant Mike Carlson to Cora Miller at the Bureau. (R. 286, pp. 295-96)

On June 26, 1992, nearly eleven months after the July 30, 1991 work injury, Shiek saw Dr. William Ferguson and complained of problems with his left knee. (R. 109) Dr. Ferguson noted that he had previously operated on Shiek's left knee following an injury in 1968. (R. 109) Dr. Humphrey also indicated that Shiek "had a history of multiple injuries to his left knee" (R. 111; see also R. 110) Shiek continued working until August 4, 1992.⁴ On August 4, 1992, Dr. David Humphrey operated on Shiek's left knee. (R. 94-103) On August 10, 1992, Dr. Humphrey released Shiek to return to work "in one week with advice that it be light work and no ladder climbing, etc." (R. 112) Shiek returned to his twice-modified light duty job at NDSU on August 17, 1992. (R. 285, Exhibit 5) Shiek received disability benefits for the period August 4, 1992 through August 16, 1992. (R. 285, Exhibit 5)

On August 17, 1992, Shiek submitted his voluntary resignation to NDSU indicating that the resignation would be effective September 25, 1992. (R. 285, Exhibit E) Although the resignation form provided an area to indicate a reason for the submission of the resignation, Shiek did not provide a reason. (Id.)

Shiek worked from August 17, 1992, until August 31, 1992, in his modified light duty position at NDSU. (R. 285, Exhibit 4) On August 31, 1992, Shiek presented to Dr.

⁴Shiek submitted a Worker's Claim for Injury form (C1) dated August 22, 1992, which indicated that he had also hurt his left knee when he sustained the injury to his right shoulder on July 30, 1991. (R. 5) Shiek indicated on the C1 that he had no prior injuries to his left knee, although he had a history of left knee surgery. (R. 110, 111)

Humphrey with some swelling in his knee, and Dr. Humphrey took Shiek off work for a few days. (R. 112.) Shiek was off work from September 1 through September 3, 1992, and returned to work on September 4, 1992. (R. 285, Exhibit 4. 5) On September 21, 1992, Shiek saw Dr. Humphrey, who advised that "[w]e will need to keep him off work probably the rest of this week." (R. 115) Dr. Humphrey did not advise Shiek to be off work beyond the week of September 21, 1992, and has "never restricted him from work on a long term basis." (R. 117, 118) In fact, Shiek was never advised by Dr. Humphrey, Dr. Ferguson, or any other physician to quit his job at NDSU because of medical reasons. (R. 285, pp. 217-218; R. 285, Exhibit 5; R. 386, p. 491 at 45-47)

In accordance with the resignation he submitted on August 17, 1992, Shiek voluntarily resigned his position at NDSU on Friday, September 25, 1992, Shiek's sixty-second birthday. (R. 285, Exhibit 4; R. 285, pp. 116-118). Shiek attended a retirement party at NDSU on September 25, 1992, which was held in his honor. (R. 285, pp. 115-116)

On January 10, 1995, the Bureau issued an Order Denying Further Benefits which concluded that Shiek voluntarily retired from the work force on September 25, 1992, and therefore was not entitled to any further disability benefits pursuant to N.D.C.C. § 65-05-09.3. (R. 20-22) Shiek appealed the January 10, 1995, Order and requested a formal administrative hearing. (R. 23) A formal administrative hearing was held on July 25, 1995, before ALJ Robert Brady. (R. 285) Following the hearing, ALJ Brady issued Recommended Findings of Fact and Conclusions of Law dated August 14, 1995, which affirmed the Bureau Order of January 10, 1995. (R. 35-45) ALJ Brady made the following findings and conclusions:

1. (Findings of fact) Darold Shiek regularly made it known to his fellow employees at the heating plant at North Dakota State University, at least as far back as 1990, and prior to a work-related injury he experienced on July 30, 1991, that he was going to retire at age 62. Consistent with that expressed intent, he kept a calendar in his locker in which he crossed off the days until his sixty-second birthday. Mr. Shiek did not express a change in his intended retirement plans at any time prior to his July 30, 1991 work-related injury, and did not inform his doctors, work supervisors, or vocational rehabilitation coordinators, at any time following his work-related injury, that he was going to have to quit work because of the effects of that work-related injury.
2. (Findings of fact) Darold Shiek was born on September 25, 1930 and became sixty-two years of age on September 25, 1992. On August 17, 1992 Mr. Shiek notified his employer that he was "voluntarily resigning" his employment as of September 25, 1992.
3. (Findings of fact) Darold Shiek voluntarily withdrew from the labor force and retired from the labor market effective September 25, 1992, the date of his sixty-second birthday anniversary, in accordance with plans made years before to retire upon reaching age sixty-two, and not because of his work-related injury. Mr. Shiek has not, subsequent to September 25, 1992, re-entered the labor market.
4. (Conclusion of law) Darold Shiek is not entitled to either temporary total disability benefits or permanent total disability benefits calculated

pursuant to N.D.C.C. § 65-05-09 after September 25, 1992, as those benefits are premised on a theory of wage replacement, and are, thus, intended to compensate an injured employee for lost wages. Because Mr. Shiek voluntarily withdrew from the labor market as of September 25, 1992 in accordance with this planned retirement, he surrendered his capacity to earn, and, conversely, to lose, wages, at least until such time as he might re-enter the labor market, with the result that he can claim no lost wages subsequent to that date for which he is entitled to compensation.

5. The Bureau's January 10, 1995 Order Denying Further Benefits, insofar as it determined that Darold Shiek has voluntarily withdrawn from the labor market and was, therefore, not entitled to either temporary total, or permanent total, disability benefits representing lost wages, was supported by a preponderance of the evidence presented at Mr. Shiek's formal hearing.

(R. 43-45) On September 22, 1995, the Bureau adopted the Recommended Findings of Fact and Conclusions of Law of ALJ Brady as its Final Order. (R. 46-47)

Shiek appealed to the District Court of Cass County. (R. 48-54) Following submission of briefs, the Court, The Honorable Michael McGuire issued an Order on Appeal from Administrative Agency wherein the Bureau's Order of September 22, 1995, was affirmed. (R. 299, pp. 7-10) The District Court issued Findings of Fact, Conclusions of Law and Order, and Judgment was entered August 19, 1997. (R. 299, pp. 9-11) Shiek appealed the District Court's Order to this Court.

On July 16, 1998, this Court reversed and remanded, concluding ALJ Brady and the Bureau had “misapplied the retirement presumption law under N.D.C.C. § 65-05-09.3 in considering Shiek’s claim.” Shiek I. ¶ 1, 582 N.W.2d at 640. As to the proper application of the retirement presumption statute, N.D.C.C. § 65-05-09.3, this Court stated:

We conclude once the claimant has established by a preponderance of the evidence that he or she is totally and permanently disabled, the Bureau must prove, without the aid of a presumption, the claimant is retired from the labor market. In other words, if the claimant demonstrates he or she is permanently and totally disabled, the burden shifts to the Bureau to prove the claimant is not permanently and totally disabled or that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability, if the Bureau seeks to hold the claimant ineligible for further benefits.

Shiek I., at ¶ 21 (emphasis supplied). This Court’s remand was for “the proper application of the retirement presumption law, the admission of any necessary evidence, and the preparation of findings necessary to properly adjudicate Shiek’s claim for benefits.” Shiek I., at ¶ 26.

On remand, an additional hearing was scheduled before ALJ Daniel Hovland. The issues specified for consideration at the second formal administrative hearing were taken directly from this Court’s opinion in Shiek I. as follows:

1. WHETHER THE CLAIMANT HAS MET HIS BURDEN OF PROOF AND ESTABLISHED THAT HE WAS TOTALLY DISABLED AT THE TIME OF HIS RETIREMENT ON SEPTEMBER 25, 1992.

2. IN THE EVENT THAT THE CLAIMANT HAS DEMONSTRATED THAT HE WAS TOTALLY DISABLED AT THE TIME OF HIS RETIREMENT, WHETHER THE BUREAU HAS MET ITS BURDEN OF PROOF AND ESTABLISHED THAT THE CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED, OR THAT THE CLAIMANT RETIRED FROM THE LABOR MARKET VOLUNTARILY RATHER THAN HAVING BEEN FORCED FROM THE MARKET BY THE DISABILITY.

(R. 355 at p. 440) At the commencement of the second formal administrative hearing held October 14, 1999, ALJ Hovland repeated the two issues specified in the Specification of Issues and both counsel agreed to the same. (R. 386. p. 491 at 4-6).

As to the first issue regarding permanent and total disability, Shiek introduced testimony from a vocational expert to the effect that Shiek was permanently and totally disabled on September 25, 1992. The Bureau introduced the deposition testimony of Dr. Humphrey, Shiek's treating physician, which was taken following this Court's remand. (R. 354). Dr. Humphrey testified unequivocally at his deposition that he never advised Shiek that Shiek was permanently and totally disabled, that he never advised Shiek to remain off work permanently as of September 25, 1992, that it was his opinion that Shiek was capable of working after September 25, 1992, and that it was his opinion that Shiek should not remain off work permanently. (R. 354, pp. 27-28, 32)

On the second issue, regarding the voluntary retirement, the only additional evidence introduced by Shiek was Shiek's own testimony.

Following the second hearing and submission of post-hearing briefs, the ALJ issued Recommending Findings of Fact, Conclusions of Law and Order affirming the Bureau's January 10, 1995, Order Denying Further Benefits. (App. p. 37) Paragraph 6 of ALJ Hovland's Conclusions of Law provides:

Section 65-05-09.3, N.D.C.C. (1993) states that an employee who "has retired or voluntarily withdrawn from the labor force is presumed retired from the labor market and is ineligible for receipt of disability benefits under this title." The statute specifies how the presumption may be rebutted and provides that the presumption "does not apply to any employee who is permanently and totally disabled as defined under this title." *Id.* The Supreme Court in Shiek held that once the claimant has established by a preponderance of the evidence that he is totally and permanently disabled, the Bureau must prove, without the aid of a presumption, that the claimant is retired from the labor market. 582 N.W.2d 639, 644. In other words, if the claimant establishes that he is permanently and totally disabled, the burden then shifts to the Bureau to prove that the claimant is not permanently or totally disabled or that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability, if the Bureau seeks to hold the claimant ineligible for further benefits. 582 N.W.2d 639, 644.

(App. p. 52) (Emphasis original).

On the first issue, ALJ Hovland concluded that Shiek established that he was permanently and totally disabled as of September 25, 1992. (App. pp. 52-53) On the second issue, the ALJ concluded:

The ALJ also concludes, as a matter of law, that Darold Shiek voluntarily withdrew from the labor force and retired from the labor market effective September 25, 1992, the date of his 62nd birthday. See Shiek, 582 N.W.2d 639, 644 (the North Dakota Supreme Court specifically held that, "The Bureau's finding that Shiek voluntarily retired on September 25, 1992, in accordance with his long-standing plan to retire is supported by a preponderance of the evidence.") This voluntary retirement was in accordance with his long-standing plans to retire upon reaching the age of 62 and not because of his work-related injury or injuries. Although the claimant has established by a preponderance of the evidence that he was totally and permanently disabled as of September 25, 1992, the Bureau has proven, by the greater weight or a preponderance of the evidence, and without the aid of a statutory presumption that Darold Shiek voluntarily retired from the labor market on September 25, 1992. The Bureau has met its burden of proof and clearly established that the claimant retired from the labor market voluntarily rather than having been forced from the market by a disability. As such, the claimant is ineligible from further benefits. A preponderance of the evidence has clearly shown that Shiek voluntarily retired from his position at NDSU on September 25, 1992, in accordance with his long-standing plans to retire at that time and not

because of any disability. Shiek told employees years before his retirement date that he planned to retire at age 62 years of age. He made notations in his log book and kept a calendar at work counting down the days left until retirement. Shiek also told a vocational specialist and his treating physicians of his planned retirement at age 62. The greater weight or a preponderance of the evidence is overwhelming on this issue. Any reasonable person would conclude from the evidence that Shiek's retirement was voluntary rather than forced due to his disability.

(App. pp. 53-54) (Emphasis supplied). Accordingly, the ALJ affirmed the Order Denying Further Benefits dated January 10, 1995. The Bureau adopted ALJ Hovland's Recommended Findings and Conclusions as its Final Order. (App. p. 56)

Once again, Shiek appealed the Bureau's Final Order to the District Court, Cass County. On November 2, 2000, the District Court, The Honorable Michael O. McGuire, issued an Order on Appeal from Administrative Agency, affirming the Bureau's Final Order. (App. p. 57) The District Court stated:

The Bureau's construction of the law and the interpretation of it are not erroneous and are legally supported based on existing significant facts and applicable law. Using the reasoning mind standard, this Court is of the opinion that the Bureau's findings were supported and proved by the weight of the evidence of the entire record. Furthermore, the Bureau's conclusions of law are supported by the findings of fact and the decision is in accordance with the Worker's Compensation statutory provisions.

(App. p. 59) Shiek now appeals to this Court.

LAW AND ARGUMENT

I. BURDEN OF PROOF AND SCOPE OF REVIEW OF AGENCY DECISION.

A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Nemec v. North Dakota Workers Compensation Bureau, 543 N.W.2d 233, 237 (N.D. 1996); N.D.C.C. § 65-01-11. This burden requires a proof by a preponderance of the evidence that the claimant is entitled to benefits available from the Fund. Boger v. North Dakota Workers Compensation Bureau, 1999 ND 192 ¶ 11, 600 N.W.2d 877, 880, citing Spangler v. North Dakota Workers Compensation Bureau, 519 N.D.2d 576, 577 (N.D. 1994). A preponderance of the evidence is defined as "evidence more worthy of belief," or "the greater weight of the evidence," or "testimony that brings the greater conviction of the truth." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

On appeal, this Court reviews the Bureau's decision, not that of the district court. Buchmann v. North Dakota Workers Compensation Bureau, 2000 ND 79 ¶ 10, 609 N.W.2d 437, 441. The analysis of the district court, however, is entitled to respect. Wanstrom v. North Dakota Workers Compensation Bureau, 2000 ND 17 ¶ 5, 604 N.W.2d 860; Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200, 201 (N.D. 1990); MedCenter One, Inc. v. Job Service North Dakota, 410 N.W.2d 521, 524 (N.D.1987). Decisions by administrative agencies are "presumed correct". Hanson v. Industrial Commission of North Dakota, 466 N.W.2d 587, 590 (N.D. 1991).

Under N.D.C.C. § 28-32-19, the Bureau's decision must be affirmed unless its "findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions

of law, or its decision is not in accordance with the law.” Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. This Court accords great deference to administrative agency rulings, and does not make independent findings of fact or substitute its judgment for that of the agency. Hoffner v. North Dakota Workers Compensation Bureau, 2000 ND 123 ¶ 27, 612 N.W.2d 263, 270; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40 ¶8, 575 N.W.2d 436, 437; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court determines “only whether or not a reasoning mind could have reasonably determined that the Bureau's factual determinations were supported by the evidence.” Johnson v. North Dakota Workers Compensation Bureau, 496 N.W.2d 562, 564 (N.D. 1993); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1992). See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93, 576 N.W.2d 861.

On appeal, however, the question is not whether this Court would have weighed the evidence differently or reached a different conclusion than that which was reached by the Bureau. In Re Claim of Vail, 522 N.W.2d 480, 482 (N.D. 1994). The reviewing cannot substitute its judgment for that of the agency. See S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). Rather, the issue is whether a reasoning mind could find that the weight of the evidence supports the Bureau's findings. Vail, 522 N.W.2d at 482.

Questions of law on appeal are fully reviewable. Kallhoff v. North Dakota Workers Compensation Bureau, 484 N.W.2d 510 (N.D. 1992); Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218 (N.D. 1992). The primary objective of in reviewing a question of law is to ascertain the intent of the legislature. Kallhoff, supra at 512.

II. THE ISSUE INVOLVED IN THIS CASE IS A QUESTION OF FACT.

Shiek argues that the issue on appeal involves a question of law rather than a question of fact. Specifically, Shiek asserts that the issue involves the interpretation of the retirement presumption statute, and therefore involves a question of law. Shiek's assertion is misplaced.

This Court in Shiek I addressed a question of law of interpreting the retirement presumption statute, N.D.C.C. § 65-05-09.3, and remanding the matter "to the Bureau for the proper application of the retirement presumption law, the admission of any necessary evidence and the preparation of findings necessary to properly adjudicate Shiek's claim for benefits." Shiek I, ¶¶ 16, 26 (emphasis added). The issue before this Court, therefore, is not the interpretation of N.D.C.C. § 65-05-09.3. Rather, it is the application of that statute to the facts.

On remand, the ALJ determined, and the Bureau adopted the finding, that Shiek had proven he was permanently and totally disabled on September 25, 1992. That finding of fact is not being challenged. Shiek is, however, challenging the determination that the Bureau met its burden of proof that Shiek had retired from the labor market voluntarily rather than having been forced from the market by the disability, without the aid of the presumption in N.D.C.C. § 65-05-09.3. This finding is a question of fact. Accordingly, this Court's review is limited to determining whether a reasoning mind could have reasonably determined that the Bureau's factual determination, i.e. that Shiek retired from the labor market voluntarily rather than having been forced from the market because of a disability, is supported by the evidence. Johnson, 496 N.W.2d at 564; Pleinis, 472 N.W.2d at 462.

III. THE FINDINGS ON REMAND ARE CONSISTENT WITH THIS COURT'S DIRECTION IN SHIEK I.

On appeal, Shiek contends that the ALJ's finding of permanent total disability as of September 25, 1992, precludes a finding of voluntary retirement, and that the Bureau therefore has misconstrued this Court's directions on remand from Shiek I. Shiek's arguments are without merit.

In Shiek I., this Court remanded the case to the Bureau "for proper application of the retirement presumption law, the admission of any necessary evidence, and the preparation of findings necessary to properly adjudicate Shiek's claim for benefits." Shiek I., ¶ 26. The Court's instructions on the proper application of the retirement presumption statute formed the basis of the Specifications of Issue at the hearing on remand, to which counsel for Shiek and the Bureau agreed. (See App. p. 37) Specifically, this Court stated:

We conclude once the claimant has established by a preponderance of the evidence that he or she is totally and permanently disabled, the Bureau must prove, without the aid of a presumption, the claimant is retired from the labor market. In other words, if the claimant demonstrates he or she is permanently and totally disabled, the burden shifts to the Bureau to prove the claimant is not permanently and totally disabled or that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability, if the Bureau seeks to hold the claimant ineligible for further benefits.

Shiek I., ¶ 21 (emphasis supplied). Shiek's argument that the finding of permanent total disability precludes a subsequent finding of ineligibility for disability benefits completely ignores the conjunction "or" in this Court's opinion in Shiek I. Thus, it is Shiek's

application, rather than the Bureau's, which contravenes the principle of the "law of the case," as Shiek seeks in this appeal to have the Court now hold that if he establishes he is permanently and totally disabled he could not have voluntarily withdrawn from the work force. The legal question of interpreting N.D.C.C. § 65-05-09.3 was decided in Shiek I, and cannot now be determined differently in this subsequent appeal in the same case. Robertson v. North Dakota Workers Compensation Bureau, 2000 ND 167 ¶ 18, 616 N.W.2d 844, 850.

What was "missing" in the findings reviewed in Shiek I was both a "clear determination whether Shiek in fact was permanently and totally disabled" and the proper application of the retirement presumption statute. See Shiek I ¶ 23 (noting Bureau's finding Shiek voluntarily retired does not give rise to presumption if Shiek is permanently and totally disabled). Accordingly, on remand it was necessary for the Bureau/ALJ to determine whether Shiek had established he was permanently and totally disabled. Shiek I, ¶ 21. Shiek did so. (App. p. 53) It was then necessary for the Bureau to prove "without the aid of a presumption" that Shiek retired from the labor market. Shiek I, ¶ 21. The Bureau did so. (App. pp. 49, 53-54) The ALJ/Bureau's application of the retirement presumption statute was entirely consistent with this Court's interpretation in Shiek I. The District Court agreed. (App. p. 59)

IV. A REASONING MIND COULD HAVE REASONABLY DETERMINED THAT SHIEK RETIRED FROM THE LABOR MARKET VOLUNTARILY RATHER THAN HAVING BEEN FORCED FROM THE MARKET BY A DISABILITY.

According to this Court's opinion in Shiek I, under N.D.C.C. § 65-05-09.3, if a claimant (such as Shiek in this case) proves that he was permanently and totally disabled, the burden shifts to the Bureau to prove either: (1) that the claimant is not permanently or

totally disabled; or (2) that the claimant retired from the labor market voluntarily rather than having been forced from that market by the disability. Shiek, at ¶ 21. On remand, although Shiek established that he was permanently and totally disabled on September 25, 1992, the ALJ further found, without the aid of the presumption in N.D.C.C. § 65-05-09.3, that Shiek was still ineligible for further benefits because he voluntarily retired in accordance with this long-standing plan to retire on his 62nd birthday, and not because of any work-related disability. (App. p. 49, 53-54) This finding is supported by the preponderance of the evidence and must be affirmed. See Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112 ¶ 22, 595 N.W.2d 312.

The record overwhelming establishes that Shiek had a long-standing and well-known plan to retire upon turning age 62. The record establishes that Shiek told several of his co-workers at NDSU that he planned to retire at age 62 (Robert Barkley, Roger Emineth, Ray Boyer). (R. 285, pp. 105, 109, 117-118; R. 285, Exhibit A; R. 285, pp. 80-81). In fact, Robert Barkley testified that it was common knowledge among Shiek's co-workers that Shiek was planning on retiring at age 62. (R. 285, pp. 109-110). Shiek indicated to at least two vocational consultants that he planned to retire in September of 1992 (Kristine Pederson and Michael Carlson). (R. 286, p. 287, 289, 294, 295, 298; R., 285, p. 216.) Shiek told his treating physician, Dr. Ferguson, on June 26, 1992, that he was going to retire when he turned 62. (R. 109.) Shiek told his treating physician, Dr. Humphrey, that he was going to retire in September of 1992. (R. 113.) Shiek kept a calendar in plain view of his co-workers upon which he openly crossed off dates until his 62nd birthday and retirement. (R. 285, p. 109, 220.) Shiek made a completely gratuitous entry in a log book at the NDSU power plan on June 24, 1992, which provided "(92 days

left)" – which was a reference to a countdown of days until his retirement on September 25, 1992. (R. 285, p. 113, 222; R. 284a, Exhibit C.) Shiek submitted a signed resignation form to NDSU on August 17, 1992, which by Shiek's notation was to be effective on September 25, 1992 (Shiek's 62nd birthday). (R. 284a, Exhibit E.) Shiek attended a retirement party held in his honor on September 25, 1992 (Shiek's 62nd birthday). (R. 285, p. 116.)

The record also establishes that Shiek never indicated that he was retiring because of medical reasons or any work-related disability. Robert Barkley and Ray Boyer both testified that Shiek never told either of them or anyone else at NDSU that Shiek was retiring because of medical reasons. (R. 285, pp. 108-109, pp. 80-81.) There is no indication in the record that Shiek told any vocational consultants that he was working with that he was going to have to retire because of medical reasons. Likewise, there is no indication in the record that Shiek ever told any of his doctors that he was going to have to retire because of medical reasons. Shiek did not indicate on his written resignation that he was retiring because of medical reasons although the form had an area to provide the reasons for the resignation. (See R. 284a, Exhibit E.) Shiek never indicated to anyone at his retirement party at NDSU that he was retiring because of medical reasons. (R. 285, p. 116.) Shiek also testified that no physician ever advised him to quit work at NDSU because of medical reasons. (R. 386, p. 491 at 45.)

In attempting to respond to this overwhelming evidence, Shiek testified: (1) that he did not recall telling Robert Barkley that he was going to retire (R. 285, p. 219); (2) that the calendar and log book entry were jokes (R. 285, p. 220, 222); (3) that he "probably" told Roger Emineth that he was going to retire, but that it was a joke (R. 285,

p. 221); (4) that he had no recollection of Kristine Pederson or Michael Carlson, the vocational consultants whose reports indicate Shiek told them he was going to retire in September of 1992 (R. 285, p. 215); and (5) that he never told Dr. Ferguson or Dr. Humphrey that he was going to retire (R. 285, p. 221).

Following remand, the only additional evidence presented by Shiek on his reason for retiring was Shiek's own testimony. Shiek testified that initially his plan to retire was a joke and then his leg got worse to the point that he could not cope with it. (R. 386, p. 491 at 58-59.) Shiek's additional testimony is not credible in light of the overwhelming contradictory evidence of record.

After the first administrative hearing, ALJ Brady, who had an opportunity to assess the credibility of all of the witnesses, concluded that Shiek's testimony that he retired because of medical reasons was not credible in light of the evidence of record. R. 38-40. Specifically, ALJ Brady determined that Robert Barkley's testimony was more credible than Shiek's and concluded:

I find Mr. Barkley to be a credible witness and find his testimony to be truthful. Shiek's testimony, that he never intended to retire at age sixty-two, is inconsistent and unreconcilable with Barkley's testimony. I find Barkley's testimony to be more credible than Shiek's. Had Shiek testified that he had planned to retire at age sixty-two but subsequently realized he could not financially afford to do so and changed his plans, but did not tell his fellow employees, and later his knee became so bad that he had to quit his job, his testimony might have had some plausibility. However, that was not his testimony, and I do not find his assertion that he never

intended to retire at age sixty-two to be truthful. Likewise, if he had said anything to his doctors, work supervisors, or his vocational rehabilitation coordinator that he was going to have to quit work because of his knee problems, his assertion he quit work because of his injuries might have had some weight. However, he did not. I find, then, that Shiek voluntarily terminated his employment with NDSU on September 25, 1992, upon reaching his sixty-second birthday, in accordance with a long-standing plan to retire upon reaching age sixty-two and not because he was unable to continue working due to his work-related injuries.

(R. 39.)

Shiek's testimony at the second hearing was equally unpersuasive and lacking credibility, whether purposeful or not. Shiek could not recall basic facts, testified inconsistent with his prior testimony, appeared confused about his own testimony, and testified inconsistent with basic and essentially undisputed facts.⁵ Shiek's testimony, unsupported by any other evidence in the record, that he retired because of medical reasons and not because of his long-standing plan to retire at age 62 is simply not credible, in light of the overwhelming evidence to the contrary.

If in fact Shiek retired because of medical reasons, he would have told his co-workers, his supervisors, his vocational consultants, and/or his doctors. Shiek told no one. The record establishes that Shiek communicated quite freely with his co-workers.

⁵ For example, in the first hearing Shiek testified that NDSU modified his job a couple of times after his injury, however, in the second hearing, Shiek testified that NDSU never modified his job after his injury. Cf. R. 285, p. 204-205 with R. 386, p. 491 at 43-45.

vocational consultants and doctors about various matters, yet he never told anyone that the “joke” was up and that he was retiring because of medical reasons. As noted above, Shiek told several people he planned to retire in September of 1992 when he turned age 62, but he did not tell any of these people he was retiring because of medical reasons. Shiek’s testimony simply does not add up and is not credible when compared to the significant testimony and documentary evidence to the contrary. The evidence establishes that Shiek voluntarily retired in accordance with his long-standing and well known plan to retire at age 62, and not because he was forced from the labor market because of any disability. ALJ Hovland specifically found:

The greater weight or preponderance of the evidence has clearly demonstrated that the claimant, Darold Shiek, voluntarily resigned and retired from the labor market effective September 25, 1992, which was the date of his 62nd birthday. This voluntary action was done in accordance with plans that the claimant had made years before to retire upon reaching the age of 62. This decision was not based upon on (sic) his work-related injuries. A preponderance of the evidence has shown, without the aid of the retirement presumption, that the claimant voluntarily retired from the labor market in September of 1992 rather than having been forced from the market by any disability. As such, the claimant is ineligible for further benefits.

(App. p. 49) ALJ Hovland went on to conclude that “. . . the Bureau has proven by the greater weight or a preponderance of the evidence, and without the aid of statutory presumption, that Darold Shiek voluntarily retired from the labor market on September 25,

1992.” (Emphasis original.) (App. pp. 53-54) ALJ Hovland also concluded that “[t]he greater weight or the preponderance of the evidence is overwhelming on this issue. Any reasonable person would conclude from the evidence that Shiek’s retirement was voluntary rather than forced due to his disability.” (Emphasis added) (App. p. 54) Because a reasoning mind could have determined that Shiek retired voluntarily, rather than being forced due to his disability, the Bureau’s decision denying Shiek disability benefits should be affirmed.⁶ See Sprunk, 1998 ND 93 ¶ 12, 576 N.W.2d at 867.

⁶ On page 4 of Appellant’s Brief, Shiek attempts to raise a due process argument and an argument regarding disability benefits for the period September 21, 1992 through September 25, 1992. These issues may not properly be raised for the first time in this appeal. Failure to raise an issue before an administrative agency, such as the Bureau, is fatal to consideration of the issue by this Court on appeal. See Gramling v. North Dakota Workmen’s Compensation Bureau, 303 N.W.2d 323, 327 (N.D. 1981) (noting failure to properly bring question before court on appeal where claimant failed to object to introduction of evidence at administrative level); Symington v. North Dakota Workers Compensation Bureau, 545 N.W.2d 806, (N.D. 1996) (noting court reviewing agency decision only reviews issues raised in agency proceeding); Hoyem v. North Dakota Workers Compensation Bureau, 1998 ND 86, ¶ 16, 578 N.W.2d 117 (noting issues not raised before administrative agency will not be considered for first time on appeal). Furthermore, as noted recently by this Court in Aalund v. North Dakota Workers’ Compensation Bureau, 2001 ND 32 ¶ 12, 622 N.W.2d 210, in appeals from administrative agency decisions, the court “may consider only those grounds identified in specifications of error under N.D.C.C. § 28-32-15, and the grounds specified must come

CONCLUSION

For the foregoing reasons, the Bureau respectfully requests that this Court affirm the Findings of Fact, Conclusions of Law and Order dated January 27, 2000.

DATED this 30th day of March, 2001.



Andrew L.B. Noah, ID # 05119
Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney Generals
for the ND Workers Compensation Bureau
NILLES, HANSEN & DAVIES, LTD.
1800 Radisson Tower
201 North 5th Street
PO Box 2626
Fargo, ND 58108
(701) 237-5544

within the provisions of N.D.C.C. § 28-32-19. Shiek did not raise these issues in his Specifications of Error. Accordingly, this Court should not consider Shiek's arguments relating to the due process or disability benefits for September 21, 1992, through September 25, 1992. Aalund, ¶ 12.