



Citation: *NS v Minister of Employment and Social Development*, 2024 SST 93

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: N. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 22, 2022 (issued by
Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Videoconference

Hearing date: January 9, 2024

Hearing participant: Appellant

Decision date: January 29, 2024

File number: GP-23-554

Decision

[1] The appeal is allowed.

[2] The Appellant, N. S., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of January 2021. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 38 years old. He stopped working in November 2018 to have thyroid and oral surgeries. During the recovery period in July 2019, a rib graft surgery he had on his nose in 2016 failed. He's had problems breathing, swallowing, and doing most other basic things since then.

[4] The Appellant applied for a CPP disability pension on December 5, 2021. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says he has a severe and prolonged disability. His symptoms are overwhelming. The very little he can do takes him a long time and is exhausting. He waited for corrective surgery for almost three years until recently told that he'll have to find another surgeon. He currently has no realistic treatment plan for his condition.

[6] The Minister says the evidence doesn't support that the Appellant was unable to work any job suitable to his limitations. His family doctor said that it was possible that he could do sedentary part-time work from home. His age and education are favourable to him performing alternate work. Although his surgery has been delayed, it is expected to improve his symptoms. After a recovery period from surgery, it is anticipated that he could return to work.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2021. In other words, no later than December 31, 2021. This date is based on his CPP contributions.¹ He must also prove that he continues to be disabled.²

[8] The *Canada Pension Plan* defines “severe” and “prolonged.”

[9] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.³

[10] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether his disability is severe. If the Appellant is capable regularly of doing some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

[12] This means the Appellant’s disability can’t have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

¹ Service Canada uses an appellant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are at GD2-40 to 42.

² In *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that the appellant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2001 FCA 318.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability. Section 68.1 of the *Canada Pension Plan Regulations* says a job is “substantially gainful” if it pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[13] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he is disabled.

Reasons for my decision

[14] I find that the Appellant had a severe and prolonged disability as of between July and September 2019, around the time the rib graft in his nose failed. He continues to be disabled. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

[15] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affected his ability to work

[16] The Appellant has been diagnosed with the following conditions:

- acquired nasal deformity (collapsed sinus cavity)
- obsessive compulsive disorder (OCD)
- ADHD
- depression
- somatic symptom disorder

[17] However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether he has functional limitations that got in the way of him earning a living.⁶ When I do this, I have to look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected his ability to work.⁷

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[18] I find that the Appellant has functional limitations that affected his ability to work.

– **What the Appellant says about his functional limitations**

[19] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. The little he can do takes a very long time and takes a lot out of him. As the Appellant put it, “every second of every day is work for me at this point.”⁸

[20] The Appellant has had difficulty breathing since childhood. He had surgery on his nose in 2003 to address the issue. His breathing improved at first, but over time, his breathing and sinus issues continued to deteriorate.

[21] He had another surgery (rib graft) on his nose in 2016. After the surgery, he started having regular sinus infections. He was missing a lot of work. He also had problems swallowing. He saw various doctors about his health concerns. They eventually discovered a benign tumour as well as an infected tooth, both of which required surgery.

[22] He stopped working his job as a courier in November 2018 to have thyroid and oral surgery. He had three surgeries, the last one in May 2019. During the recovery, his swallowing issues returned. His breathing became worse. He was dizzy all day with no energy. He had nasal blockage issues, with pieces coming out of his nose all day. A couple of weeks later (which he estimated was around July 2019), he noticed the rib graft in his nose had become twisted, and the right nostril was visibly collapsed.

[23] As he always did, the Appellant tried to find answers to his medical problems. He was eventually referred to Dr. Ansari. There was a long wait to see him. In July 2020, Dr. Ansari recommended surgery.⁹ The Appellant was placed on a wait list for surgery. Dr. Ansari told the Appellant that it was a challenging procedure, but he thought he could at least restore the Appellant’s breathing to the point he could live a normal life.

⁸ See Appellant’s letter to Service Canada, dated May 21, 2022, at GD2-16.

⁹ See Dr. Ansari’s letter, dated July 20, 2020, at GD2-89.

[24] The Appellant remained on the wait list for surgery until June 26, 2023, when he was informed by Dr. Ansari's office that he couldn't perform the surgery.¹⁰ He hasn't been referred to any other surgeon.

[25] The Appellant's symptoms came on quickly around the time the rib graft failed (between July 2019 and September 2019). They have worsened since then. The Appellant has had the following limitations because of his medical conditions since at least September 2019:

- **Breathing** – He struggles to breathe properly. He can't exert himself. Clearing his nose has become near impossible. He spends most of his time trying to clear out discharge through the back of the sinuses and out his throat. He must clear his sinuses every hour – if he doesn't, the build-up that blocks his air becomes harder to clear.
- **Eating** – The constant blockage at the back of his throat means that he often chokes on his food. He has to eat very slowly. It takes him up to 90 minutes to eat a meal. Eating is exhausting. He has to rest after.
- **Energy** – He has no energy. He feels tired all day.
- **Sleep** – He hasn't had a good night's sleep since the rib graft failed. He sleeps sitting up. He finds it too hard to breathe when lying down. He is in and out of sleep throughout the day.
- **Daily activity** – His ability to complete tasks is very limited. He can only drive short distances. It takes him hours to get ready to leave the house. It is difficult to shower and shave. He can't do housework or anything physical. He relies on his parents for help.
- **Concentration** – He loses concentration after about 20 to 30 minutes. Everything takes a really long time to complete.
- **Computer work** – He can only stare at a computer screen for 30 minutes before starting to get a headache and feel dizzy.

¹⁰ See email from Dr. Ansari's assistant, dated June 26, 2023, at GD6-24.

- **Social interaction** – He rarely leaves the house. When he does, it takes him a very long time to get ready. He struggles to be around other people because he always needs to clear his sinuses. He finds it difficult to have a conversation because of his twitching and sniffing.
- **Mood** – His limitations are making him more and more depressed. The recent setback with his surgery has left him hopeless.

[26] The Appellant hasn't worked since November 2018.¹¹ He helped at his parent's restaurant on weekends bartending for a few months in late 2019, early 2020.¹² It would take him all day to get ready. His shifts were four hours, but he spent half the time in the back clearing his sinuses. Sometimes he couldn't make it in. He didn't get paid. He did it as a way to get out of the house and deal with his depression.

– **What the medical evidence says about the Appellant's functional limitations**

[27] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work no later than December 31, 2021.¹³

[28] The medical evidence supports what the Appellant says.

[29] The Appellant's family doctor at the time, Dr. Fowler, supported a diagnosis of an acquired nasal deformity (saddle deformity) with large nasal perforation with an onset date of November 2017.¹⁴ Dr. Fowler noted the following symptoms and limitations:

- bilateral nasal obstruction with shortness of breath and difficulty breathing on mild exertion
- difficulty swallowing with frequent choking episodes – must eat slowly
- easily fatigued

¹¹ The Appellant had earnings of \$11,487 in 2019: see GD2-40. He explained at the hearing that these earnings were disability payments from his private insurer and not earnings from actual work.

¹² The Appellant's father gave brief evidence at the hearing that his son bartended from October 2019 to January 2020.

¹³ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁴ See medical report, dated January 3, 2022, at GD2-107.

[30] Dr. Fowler recommended that the Appellant stop working November 19, 2018.¹⁵ Dr. Fowler wrote letters of absence for the Appellant covering the period of November 2018 to July 2019 for the Appellant to have thyroid and oral surgeries.¹⁶ His last surgery was in May 2019 with a recovery period until July 2019.¹⁷

[31] Dr. Fowler's chart notes show an appointment in September 2019 when it was noted that the Appellant's nasal septum had collapsed and deviated to the right in the last few weeks.¹⁸ He was having difficulty breathing through the right side.

[32] The Appellant was eventually referred to a specialist surgeon, Dr. Ansari, who had initially agreed to perform a corrective surgery.¹⁹ Dr. Ansari's examination in March 2021 noted a severe tip ptosis (dropping nasal tip).²⁰ The Appellant's right nostril was completely collapsed, and his left nostril was almost 75% collapsed. Dr. Ansari said it would be difficult for the Appellant to complete the heavy physical activity required of his job as a delivery person.

[33] There is also some medical evidence of mental health conditions. Dr. Fowler noted in September 2019 mental health concerns, including low mood, withdrawal, and difficulty leaving his house.²¹ He was prescribed escitalopram. He was referred to a psychiatrist, Dr. Atigari, who in January 2020 diagnosed somatic symptom disorder, and persistent depressive disorder.²² The Appellant was further assessed in September 2020 by another psychiatrist, Dr. Pierson, whose diagnosis was instead OCD (chronic preoccupation with clearing his sinuses) and ADHD.²³

[34] In March 2021, Dr. Fowler said that the Appellant may be capable of working from home in a sedentary part-time position with flexible hours.²⁴ He wasn't capable of

¹⁵ See medical report, dated January 3, 2022, at GD2-108.

¹⁶ See certificates of absence, at GD2-67 to 70.

¹⁷ See Dr. Habijanac's letter, dated June 13, 2019, at GD2-57 to 59; and certificate of absence, dated March 13 and June 26, 2019, at GD2-69 and 70.

¹⁸ See chart notes, dated September 18, 2019, at GD2-114.

¹⁹ See Dr. Ansari's letter, dated July 20, 2020, at GD2-89 and 90.

²⁰ See Dr. Ansari's letter, dated March 5, 2021, at GD2-87 and 88.

²¹ See chart notes, dated September 18, 2019, at GD2-114.

²² See Dr. Antigari's letter, dated January 22, 2020, at GD2-55 and 56.

²³ See Dr. Pierson's assessment, dated September 14, 2020, at GD2-63 to 65.

²⁴ See Dr. Fowler's letter, dated March 7, 2021, at GD2-74.

working outside the home, full-time, or in a job that requires physical exertion. As of January 2022, Dr. Fowler expected the Appellant to return to work in the next 12 to 24 months.²⁵ Corrective surgery was pending, which had been on hold because of the Covid pandemic.

[35] The medical evidence supports that the Appellant's functional limitations affected his ability to work.

[36] Next, I will look at whether the Appellant followed medical advice.

– **The Appellant has reasonably followed medical advice**

[37] To receive a disability pension, an appellant must follow medical advice.²⁶ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.²⁷

[38] The Appellant has reasonably followed medical advice.²⁸ He's seen many different doctors to address his symptoms. He's taken medication as prescribed. He's prepared to have corrective surgery. He's tried mental health therapy, but stopped because he didn't find it helpful.

[39] I find the Appellant has a reasonable explanation for not continuing with psychotherapy. He tried and it made him feel more depressed. He saw a therapist for several months until October 2019.²⁹ He was then referred to Dr. Antigari in January 2020 and had a bad experience. He was made to feel like his symptoms were all in his head. He felt that he was proven right by Dr. Ansari's opinion. He met with Dr. Pierson in September 2020, which was a better experience, but it still didn't help. The Appellant believes that his mental health problems are tied to his sinus condition, and once he gets the help he needs, his mental state will improve.

²⁵ See medical report, dated January 3, 2022, at GD2-108.

²⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁷ See *Brown v Canada (Attorney General)*, 2022 FCA 104.

²⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁹ See chart notes, dated September 18, 2019, and October 17, 2019, at GD2-114 and 115.

[40] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.³⁰

– **The Appellant can't work in the real world**

[41] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language abilities
- past work and life experience

[42] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.³¹

[43] If the Appellant can work in the real world, he must show that he tried to find and keep a suitable job. He must also show his efforts weren't successful because of his medical conditions.³² Finding and keeping a suitable job includes retraining or looking for a job he can do with his functional limitations.³³

[44] I find that the Appellant can't work in the real world. He hasn't been able to work since at least September 2019 when the symptoms from the nasal collapse worsened. I disagree with the Minister that the Appellant has the capacity for substantially gainful work. He is young, has work experience in various industries, and three years of college education. These factors could help him find work. However, they couldn't overcome his severe limitations that prevent him from doing any substantially gainful job.

³⁰ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

³¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³² See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³³ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[45] The Appellant's medical conditions have severely limited his ability to do the following since at least September 2019:

- **Complete physical tasks** – He is constantly tired. He can't exert himself. His parents help him with most daily tasks.
- **Complete sedentary tasks** – He can't focus for more than 30 minutes at a time, including when using a computer. If he pushes himself, he pays for it later.
- **Function in public** – He rarely leaves the house. He has a hard time with social interaction.
- **Meet a schedule** – It takes him hours to prepare to leave the house, and he still manages to be late for appointments. It takes him a very long time to do anything. He must rest frequently throughout the day.

[46] I disagree with the Minister that the evidence supports a capacity for sedentary work. Dr. Fowler said in March 2021 that the Appellant “**may be capable** of working from home in a sedentary part-time position with flexible hours,” not that he was capable or likely capable.³⁴ Meanwhile, the Appellant's evidence strongly supports that he can't work any job.

[47] His only “attempt” to work was for free as a bartender on weekends at his parent's restaurant, which was further evidence that he can't do substantially gainful work. He spent half his shift dealing with his sinuses. He found it mentally and physically exhausting. After a few months, he had to stop.

[48] In my view, substantially gainful work is unrealistic, even if part-time and from home. I accept the Appellant's evidence about the ways in which he is severely limited everyday in what he can do. The little he can do takes a very long time and requires many rest breaks that may include sleeping. He can't be expected to leave the house, work on a computer, or be productive in any way. It's hard to imagine a substantially gainful job that could accommodate these significant limitations.

³⁴ See Dr. Fowler's letter, dated March 7, 2021, at GD2-74.

[49] I find that the Appellant's disability was severe as of September 2019.

Was the Appellant's disability prolonged?

[50] The Appellant's disability was prolonged.

[51] The Appellant's conditions began shortly after the rib graft in his nose failed, which was no later than September 2019. These conditions have continued since then.³⁵ His symptoms have only worsened. While there was hope for corrective surgery, that has not happened yet.

[52] The Appellant's conditions will more than likely continue indefinitely. The following evidence supports that there is currently no reasonably foreseeable solution to his nasal condition:

- **He's no longer on a waitlist for surgery** – The Appellant was told in June 2023 that Dr. Ansari had reviewed his file and decided that he would have to refer the Appellant to another surgeon.³⁶
- **He doesn't have a surgeon** – The Appellant hasn't been referred to another surgeon. There are no other surgeons in Alberta or British Columbia that have the required level of expertise.³⁷ Two surgeons in Ontario and one in the United States were suggested by Dr. Ansari's office, but the Appellant doesn't have the financial ability to pursue those options.
- **The surgery is complex** – Dr. Ansari didn't believe that he has the experience or skill level to address the Appellant's "complex nasal issues."³⁸ In my view, the complicated nature of his condition not only limits who could perform the surgery, but also the likelihood of its success. The Appellant's past surgeries haven't resolved his nasal issues.

³⁵ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant has to show a severe and prolonged disability no later than the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

³⁶ See email from Dr. Ansari's assistant, dated June 26, 2023, at GD6-24.

³⁷ See email from Dr. Ansari's assistant, dated September 8, 2023, at GD6-38.

³⁸ See email from Dr. Ansari's assistant, dated September 8, 2023, at GD6-38.

[53] I find that the Appellant's disability was prolonged as of September 2019. There is currently no timeline for surgery. He was on a waitlist for almost three years before Dr. Ansari decided that he couldn't perform the surgery, so it is likely that he will wait a long time again, assuming he can even find a surgeon willing and able to do it. And even if he does find a surgeon, it would be speculative to presume that this type of complex surgery would be successful.

When payments start

[54] The Appellant had a severe and prolonged disability by September 2019.

[55] However, the *Canada Pension Plan* says a person can't be considered disabled more than 15 months before the Minister receives their disability pension application.³⁹ After that, there is a 4-month waiting period before payments start.⁴⁰

[56] The Minister received the Appellant's application in December 2021. That means he is considered to have become disabled in September 2020.

[57] His pension payments start as of January 2021.

Conclusion

[58] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged.

[59] This means the appeal is allowed.

Michael Medeiros

Member, General Division – Income Security Section

³⁹ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

⁴⁰ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.