Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *T. L. v Minister of Employment and Social Development*, 2020 SST 308

Tribunal File Number: AD-20-574

BETWEEN:

T. L.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 14, 2020

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Claimant was born in 1981 and has experienced heart palpitations since she was a teenager. After graduating from high school, she earned diplomas in cosmetology and in hotel and restaurant management. Over the years, she has worked as a delivery driver, restaurant server, and esthetician. She was most recently employed as a hotel housekeeper, a job she gave up in June 2017 because she had no access to childcare.[1]

[3] In November 2017, the Claimant applied for Canada Pension Plan (CPP) disability benefits, claiming that she could no longer work because her heart condition had left her weak and unable to stand for extended periods.

[4] The Minister refused the application because, in its view, the Claimant had not shown that she suffered from a "severe and prolonged" disability.

[5] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated February 29, 2020, dismissed the appeal because it found insufficient medical evidence that the Claimant was disabled as of the hearing date. The General Division noted that the Claimant's only medical diagnosis was paroxysmal supraventricular tachycardia (PSVT). It noted that she sometimes went several months without symptoms. It noted that PSVT had not prevented the Claimant from working at various jobs. It noted that she had left her last job for non-medical reasons. It found no evidence that her condition had worsened.

[1] Claimant's CPP questionnaire dated November 10, 2017, GD2-130.

THE CLAIMANT'S REASONS FOR APPEALING

[6] On March 20, 2020, the Claimant applied for leave to appeal from the Appeal Division, alleging various errors on the part of the General Division, in particular:

(i) The General Division failed to appreciate the severity of the Claimant's condition. She has had PSVT from birth and has been hospitalized for it many times. Medications have never relieved or controlled her heart palpitations.

(ii) The General Division failed to understand that, if the Claimant discloses her heart condition to her employers or co-workers, she will lose her job. If she mentions her health to a prospective employer, she will not get the job.

(iii) The General Division committed an error when it found that the Claimant had experienced intermittent heart palpitations since she was a teenager. In fact, she has had that condition from birth.

(iv) The General Division committed an error when it found that the Claimant stopped working in June 2017 because she needed to take care of her child. In fact, she stopped working for the purpose of seeing a heart specialist to fix a lifelong problem.

(v) The General Division found that the Claimant had admitted to being able to work as a receptionist or secretary. In doing so, it failed to consider her lack of education or experience in these areas.

(vi) The General Division found that the Claimant's episodes are intermittent and that she is "sometimes symptom-free for several months." In fact, she testified that she can go up to three months without an episode, although her symptoms can flare up unpredictably.

(vii) The General Division found that the Claimant's condition is under control. The Claimant denies that her condition has ever been under control and alleges that the General Division ignored evidence that her medications are ineffective.

(viii) The General Division, found that her episodes were very short, "blowing over within a few seconds to minutes." In doing so, it downplayed the severity of her condition and ignored evidence that her episodes last between 30 minutes and six hours.

(ix) The General Division took into account her the Claimant's age, education, language proficiency, and life experience. The Claimant denies that these factors have anything to do with her heart condition.

(x) The General Division found that the Claimant had not shown sufficient effort to obtain employment after June 2017. The Claimant replies that she should not have to restart her career at "square one" and remain at low income levels for the rest of her life.

(xi) The General Division found that the Claimant did not have a "severe and prolonged" disability. The Claimant wonders how it was able to come to this conclusion via teleconference and without the benefit of seeing her in person. She claims that she never expressed a preference for a hearing by telephone.

The Claimant also indicated that she wished to provide new evidence and clarify what she described as "shortened, inconsistent, and misguided statements" in the General Division's decision.

ISSUE

[7] I have to decide whether any of the Claimant's reasons for appealing would have a reasonable chance of success on appeal.

ANALYSIS

[8] I have reviewed the General Division's decision against the underlying record. I have concluded that the Claimant has not made any arguments that would have a reasonable chance of success on appeal.

[9] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division:

> (i) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (ii) erred in law, whether or not the error appears on the face of the record; or
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> (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[10] An appeal can proceed only if the Appeal Division first grants leave to appeal.[2] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[3] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[4]

Issue 1: Is there an arguable case that the General Division failed to appreciate the severity of the Claimant's condition?

[11] The Claimant takes issue with nearly all aspects of the General Division's decision, but I do not see an arguable case that broad disagreement amounts to an error under the law.

[12] Much of the Claimant argument essentially asks me to reconsider the substance of her disability claim. I cannot fulfill this request, given the restrictions of the DESDA, which only permit the Appeal Division to consider whether the General Division committed an error that falls within one of three precisely defined categories. Those restrictions effectively prevent the Appeal Division from considering evidence on its merits—either new evidence or evidence that was already assessed by the General Division. In short, an appeal to the Appeal Division is not intended to be a "redo" of the General Division hearing.

[13] The General Division dismissed the Claimant's appeal because it found insufficient evidence that she had a severe disability. The General Division arrived at this conclusion because

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[2] DESDA, sections56(1) and 58(3).
[3] DESDA, section 58(2).
[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

the Claimant had: (i) worked at several jobs despite her PSVT diagnosis; (ii) left her housekeeping job for reasons unrelated to her medical condition; (iii) experienced heart palpitations no more than every few months; (iv) controlled her condition with medication; (v) testified she was capable of working in a clerical position; and (vi) failed to make a sufficient effort to return to the workforce. The General Division then considered the Claimant's mental and physical condition in the context of her relative youth, her post-secondary training, and her fluency in English. It concluded that her age, education, and language skills would not prevent her from re-entering the labour market.[5]

[14] In the end, the General Division found that the Claimant was, more likely than not, regularly capable of substantially gainful employment. In its role as finder of fact, the General Division should be given some leeway in how it assesses the evidence. In this case, I see no reason to interfere with its conclusions.

Issue 2: Is there an arguable case that the General Division failed to understand the impact of the Claimant's heart condition on her perceived employability?

[15] At the General Division, the Claimant argued that she is in an impossible position, because no one will hire her if they know about her heart condition.

[16] I do not see an arguable case that the General Division disregarded this point. The test for disability has nothing to do with whether a claimant perceives himself or herself to be disabled. It also does not matter whether prospective employers or coworkers perceive the claimant to be disabled. What matters is whether the claimant can, **in fact**, regularly pursue substantially gainful employment. That depends on a range of factors, including, but not limited to, what the medical evidence says about the claimant's condition, what treatments the claimant has been receiving for that condition, what the claimant is actually capable of on a day-to-day basis, and what effort the claimant has made to remain in the labour market despite his or her impairments.

Issue 3: Is there an arguable case that the General Division based its decision on an erroneous finding about when the Claimant's heart condition began?

[5] General Division decision, paragraph 16.

[17] The Claimant argues that the General Division erred when it found that the Claimant had experienced intermittent heart palpitations since she was a teenager.[6]

[18] I do not see an arguable case here. The Claimant testified that she began experiencing symptoms related to PSVT when she was 15 years old.[7] Some of the written medical evidence suggests that the condition did not begin or, at the very least, did not become a significant problem, until 2001, when the Claimant was 20. Dr. Murphy saw the Claimant for "recurrent episodes of PSVT over the past two years."[8] Later, Dr. Andrew relayed a history of "sudden onset of rapid heartbeat since [the Claimant's] teenage years."[9]

[19] In any event, even if the General Division had made a factual error and ignored evidence that the Claimant has had heart palpitation episodes since birth, I do not see how that error would have been significant. According to the DESDA, a General Division decision can be overturned only if it is **based** on an erroneous finding of fact that is "perverse, capricious, or made without regard for the material before it." This wording suggests that the factual error must be, not just extraordinary, but also material. If the General Division did commit an error on this point, and I see no arguable case that it did, I doubt that the error met that standard, particularly since the larger question for the General Division was not whether the Claimant had a heart condition as a child, but whether it was severe enough to disable her as adult.

Issue 4: Is there an arguable case that the General Division erred when it found that the Claimant stopped working in June 2017 because she needed to take care of her child?

[20] The Claimant denies the General Division's finding that she left her last job for non-medical reasons. She claims that she told the General Division that she stopped working as a housekeeper to pursue comprehensive medical treatment.

[21] I do not see an arguable case on this point. In its decision, the General Division wrote:

> She last worked as a housekeeper in a hotel from January 1, 2017 to June 24, 2017, and has not worked since. Her duties included cleaning rooms and common areas. She noted in the Questionnaire for Disability

[6] See paragraph 10 of the General Division's decision.
[7] Hearing recording, 42:20.
[8] Report by J.P. Murphy, cardiologist, dated October 1, 2001, GD2-123.
[9] Report by Dr. Philip Andrew, cardiologist, dated December 21, 2017, GD2-30.

> Benefits dated November 10, 2017, and testified, she stopped working June 24, 2017 to care for her daughter. School had ended for the summer and she had no childcare.[10]
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> […]
>
> The Claimant collected regular Employment Insurance benefits after she stopped working beginning September 4, 2017. I asked her if she was ready, willing, and able to work after June 24, 2017. She said she could have worked, but needed daycare. If daycare had been available, she would have continued working, but not at the hotel, as she wanted to advance her career.[11]

I have listened to the recording of the hearing before the General Division and heard nothing to contradict the above account. As the General Division rightly notes, the Claimant did answer "no child care" when asked on her questionnaire why she stopped working in June 2017.[12] At the hearing, the presiding General Division member questioned her about this response:

> Claimant: I was removed from that position for my heart because I [inaudible] work. I told my employer about it, and a day later I showed up for my next shift, and she said, "I'm sorry but we don't need you." But it wasn't due to my performance or my attitude or my ability to show up at work.
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> Member: So what do you think went wrong?
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> Claimant: Having a heart episode at work and telling my boss.
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> Member: So, in the questionnaire regarding your last job, it says, "Why did you stop working?" and you said "No child care," and the last day was June 24, 2017, which is about the end of the school year. So was your daughter in school at that time and was she then going to be off for the summer?
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> Claimant: Yes. I also had no help with childcare because her dad's father was dying so the son and the mother were occupied…[13]

[10] General Division decision, paragraph 7
[11] General Division decision, paragraph 9.
[12] See GD2-130.
[13] Recording of hearing, 27:45.

[22] The Claimant then testified that she applied for regular Employment Insurance benefits but was rejected at first because she wasn't ready, willing, and able to work at all hours. She described it as a Catch 22 situation, because her availability was limited by her need to take care of her daughter:

> Member: So if you'd had daycare, you would have gone to work?
>
> Claimant: Yes.
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> Member: Would you have continued at X if you'd had daycare?
>
> Claimant: No.
>
> Member: Why not?
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> Claimant: No, because I started getting heart palpitations at work and they turned on me rather quick.
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> Member: If they hadn't turned on you, would you have stayed? Because you said you could do the job.
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> Claimant: No, I still would have kept looking for something else because I like the opportunity to advance and, at that place, there was no advancing. You had to stay in the same position, whatever position it was you were given, and that's it. I want to move up, but I want to be able to make money, but it's hard when you consistently stay at square one.[14]

[23] These extracts indicate that, while the Claimant testified that a palpitation episode may have led to negative feedback from her supervisors, she left her last job largely because the school year had ended and she had no one to take care of her daughter during the day. However, a lack of childcare options does not relieve disability claimants of their obligation to seek alternative employment that might be better suited to their health condition. In this case, the General Division found that the Claimant had not made a reasonable effort to discharge that obligation. I see no reason to interfere with that finding.

Issue 5: Is there an arguable case that the General Division erred when it found that the Claimant could work as a receptionist or secretary?

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[14] Recording of hearing, 31:25.

[24] The Claimant objects to the General Division's finding that she might be capable of clerical work, even though she has no education or experience for such a position.

[25] I do not see an arguable case here either. In its decision, the General Division did not find the Claimant capable of clerical work, as much as it found that she had made insufficient effort to pursue alternative work that might have been better suited to her medical condition. In doing so, it relied on a case called *Inclima v Canada*,[15] which requires disability claimants to show that **reasonable** attempts to obtain and secure employment have been unsuccessful because of their health condition. Claimants must also show a good-faith preparedness to participate in retraining and educational programs that will enable them to find alternative employment.[16]

[26] At the hearing, the General Division asked relevant questions that were aimed at determining what the Claimant had done to get back into the workforce:

> I asked the Claimant if she looked for work since she stopped working in June 2017. She looked a "little". She acknowledged there are jobs she could/can do such as receptionist, secretary, and other clerical type positions. She noted in the Questionnaire she planned to work in the near future, possibly running her own business. She has not pursued running her own business. She does not want to return to school.[17]

[27] These findings are consistent with what I heard in the hearing recording and read in the document file. Based on these findings, the General Division concluded:

> She has not made any significant efforts to look for work, or attend a retraining or educational upgrading program. She testified she is capable of working at clerical type positions.[18]

[28] Ultimately, the Claimant's appeal failed because the General Division found that she had not made a serious attempt to work or retrain since leaving her job as a hotel housekeeper. The General Division weighed the available evidence and found that the frequency (every few months) and duration (a few seconds to minutes) of the Claimant's palpitation episodes did not prevent her from pursuing other occupations. The Claimant maintained that the unpredictability

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[15] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[16] *Lombardo v Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).
[17] General Division decision, paragraph 11.
[18] General Division decision, paragraph 19.

of these episodes made it impossible for her to succeed in any job but, as the General Division noted, there was no clear evidence that she had been terminated from her previous positions **because** of her health condition.

Issue 6: Is there an arguable case that the General Division erred by minimizing the unpredictability of the Claimant's episodes?

[29] The Claimant alleges that the General Division "played down" her symptoms, and she insists that the unpredictability of her palpation episodes makes her incapable of regularly pursuing a substantially gainful occupation.

[30] I do not see an arguable case that the General Division failed to appreciate the irregular pattern of the Claimant's episodes. In its decision, the General Division wrote:

> The Claimant's symptoms are **intermittent** (paroxysmal). She is **sometimes symptom-free for several months**. Her employers/co-workers often did not know she had a medical condition, as she worked for months without any issues. Her condition does not preclude her working, but some of her employers laid her off after learning she has a medical condition. She just needed a short break after onset of palpitations, after which she could return to work [emphasis added].[19]

This passage accurately reflects evidence that the Claimant can go long periods between palpitation episodes. Use of the qualifier "sometimes" indicates that the General Division was aware that the frequency of the Claimant's episodes was subject to variation. However, it ultimately concluded that, even with that element of unpredictability, the Claimant was still employable given medical evidence that the episodes tended to be relatively short and mild. In its role of finder of fact, the General Division was within its authority to arrive at what seems to me a defensible conclusion.

Issue 7: Is there an arguable case that the General Division erred when it found that the Claimant's condition was controlled by medication?

[31] The Claimant denies, contrary to the General Division's finding, that drugs help her condition.

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[19] General Division decision, paragraph 12.

[32] I do not see an arguable case for this submission. In its decision, the General Division relied on a December 2017 medical questionnaire in which Dr. Vornberger reported that the Claimant had not had any flare-ups since 2010 and that her condition was controlled by acebutolol, a beta-blocker.[20] At the hearing, the Claimant testified that acebutolol was no longer being manufactured and that the prescribed alternative produced unwanted side effects.[21] It was for that reason, she said, that she had not been on any medication for the past two years. She did not offer evidence that the drug had been discontinued or that any such discontinuance was permanent. She did not explain why her treatment providers had not tried other alternatives.[22] The fact remains that her condition, according to her primary caregiver, was under control.

Issue 8: Is there an arguable case that the General Division erred by mischaracterizing the length of the Claimant's episodes?

[33] The Claimant alleges that the General Division found that her palpitation episodes were shorter than they really were. In paragraph 15 of its decision, the General Division described the episodes as "very short, blowing over within a few seconds to minutes." In doing so, the Claimant said, the General Division downplayed the severity of her condition and ignored evidence that her episodes last between 30 minutes and six hours.

[34] I do not see an arguable case for this allegation. Again, the General Division, as finder of fact, is free to weigh competing evidence as it sees fit, so long as it comes to a defensible conclusion. In this case, the General Division was doing no more than referring to the findings of the Claimant's own cardiologist, whose December 2017 report described results from a 48-hour Holter monitor.[23] Dr. Andrew noted that, although the Claimant experienced at least 81 minutes of tachycardia (elevated heartbeat), she was largely asymptomatic during that period. For that reason, he chose not to recommend an episode-focused medication because a "pill in the pocket" would of little use for spells, such as the Claimant's, that were "very short, blowing over within a few seconds to minutes."

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[20] CPP medical report by Dr. William Vornberger dated December 11, 2017 reported GD2-115.
[21] Hearing recording, 40:00.
[22] I note that, in his report dated December 21, 2017 (GD2-30), Dr. Philip Andrew, a cardiologist, recommended a doubling of the Claimant's dose of acebutolol and also suggested several alternatives. The record does not indicate whether these recommendations were followed up.
[23] Dr. Andrew's report, GD2-33.

[35] The Claimant insisted, in her testimony and in her symptom diary, that her palpitation episodes were long, intense, and incapacitating, but the General Division chose to place more weight on Dr. Vornberger's and Dr. Andrew's reports suggesting that her symptoms were far less severe. I see no reason to interfere with this finding.

Issue 9: Is there an arguable case that the General Division erred when it took into account the Claimant's age, education, language proficiency, and life experience?

[36] In its decision, the General Division wrote that it was required to assess the severity of the Claimant's claimed disability in a "real world context."[24] The Claimant denies that her age, education, language proficiency, and life experience have anything to do with her heart condition.

[37] I do not see an arguable case in this instance. When it found that the Claimant's background did not limit her residual capacity to work, the General Division was merely citing *Villani v Canada*,[25] the leading authority on CPP disability, the Federal Court of Appeal urged decision-makers to look at disability claimants as whole persons and assess their employability based, not just on their impairments, but also on their background and personal characteristics. I do not see how the General Division's invocation or application of relevant law amounted to an error.

Issue 10: Is there an arguable case that the General Division erred when it found that the Claimant had not shown sufficient effort to obtain alternative employment?

[38] I have also addressed this question in my discussion of Issue 5. The Claimant has always maintained, first at the General Division, now at the Appeal Division, that her PSVT and associated heart palpitations are responsible for her pattern of cycling from one short-lived job to another.

[39] I do not see a case that the General Division ignored or misunderstood this argument. The General Division was aware of the Claimant's pattern of short-lived jobs. However, it found little evidence that those jobs were cut short mainly because of her health condition. The available

[24] General Division decision, paragraph 16.
[25] *Villani v Canada (Attorney General)*, 2001 FCA 248.

medical reports indicated that her PSVT was under control and her symptom were less that severe. At the hearing, the Claimant herself admitted that she had left her jobs for non-medical reasons. As the General Division noted:

> The Claimant's work history prior to January 2017 included delivery driver for a pharmacy, customer service in a nail and tanning salon and a Subway sandwich outlet, busgirl in a bar, and esthetician. She stopped working at these jobs either because she was laid off, did not enjoy the work and/or her coworkers, or for higher wages.[26]

I heard nothing in the recording of the hearing to contradict the General Division's account.

Issue 11: Is there an arguable case that the General Division acted unfairly by holding a hearing by teleconference?

[40] The Claimant wonders how the General Division could have come to the conclusion that she was not disabled if it never saw or spoke to her in person. She claims that she never expressed a preference for a hearing by telephone.

[41] I do not see an arguable case that the General Division acted unfairly by conducting the Claimant's appeal by telephone.

[42] Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference, or personal appearance. Use of the word "may," in the absence of qualifiers or conditions, suggests that the General Division has wide discretion to make this decision.

[43] However, such discretion must be exercised in compliance with the rules of procedural fairness. In *Baker v Canada*,[27] the Supreme Court of Canada held that the concept of procedural fairness is variable and is to be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered when determine what the duty of fairness requires in a particular case, including the nature of the decision being made; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and

[26] General Division decision, paragraph 8.
[27] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

the choices of procedure made by the tribunal itself, particularly when the legislation gives decision-makers the ability to choose their own procedures.

[44] The General Division had to consider a number of factors in deciding what form of hearing was appropriate. I accept that the issues in this matter are important to the Claimant, but I also place great weight on the nature of the statutory scheme that governs the General Division. The Social Security Tribunal was designed to provide for the most expeditious and cost-effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the General Division the discretion to determine how hearings are held.

[45] The Claimant may not have requested a hearing by teleconference, but she did not rule it out either. In its notice of hearing, the General Division noted that the Claimant had not expressed a preference for a particular form of hearing.[28] This is true largely because, I suspect, the Claimant requested her appeal by way of a letter and did not use the prescribed form for the notice of appeal, which explicitly asks claimants to indicate what form of hearing they prefer. However, even if the Claimant had expressed a preference for a videoconference or an in-person hearing, that would not have decided the matter. The Claimant suggests that the General Division needed to see her to make a fully informed decision about the extent of her disability. I disagree. A General Division hearing is not a medical examination, and a member is not a doctor. The purpose of a hearing is to give the parties a fuller opportunity to make their case and to give the General Division another opportunity to gather information and, if necessary, assess credibility. Under most circumstances, these tasks can be accomplished effectively through a telephone interview, without visual inspection.

[46] The Federal Court of Appeal has confirmed that setting aside a discretionary order requires a claimant to prove that the decision-maker committed a "palpable and overriding error"[29] I see nothing like that here.

CONCLUSION

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[28] Notice of Hearing dated January 14, 2010, GD0.
[29] *Imperial Manufacturing Group Inc. v Décor Grates Incorporated*, 2015 FCA 100; *Horseman v Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139.

[47] My review of the decision indicates that the General Division meaningfully analyzed the evidence and came to the defensible conclusion that, more likely than not, the Claimant was regularly capable of substantially gainful employment as of the hearing date.

[48] Since the Claimant has not put forward any arguments that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	T. L., self-represented