

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

November 28, 2023

Middlesex, ss.

Docket No. VS-19-0122

RACHEAL M. BRIMBERRY, Petitioner

v.

**EXECUTIVE OFFICE OF VETERANS' SERVICES (f/k/a/ DEPARTMENT OF
VETERANS' SERVICES), Respondent**

DECISION - ORDER OF DISMISSAL

Appearance for the Petitioner:

Racheal M. Brimberry, *pro se*
(formerly 258 School St. Winchendon, MA
01475; Notice of Decision via publication by
posting to DALA website)

Appearance for the Implied Intervenor:

Stephen Bassett, Veterans' Services Officer
Winchendon Dep't of Veterans' Services
109 Front St.
Winchendon, MA 01475

Appearance for the Respondent:

Alexandra Ford, Esq.
Mass. Executive Office of Veterans' Services
Legal Office
600 Washington St., 2nd floor
Boston, MA 02111

Administrative Magistrate:

Mark L. Silverstein, Esq.

*Summary of Decision***Veterans' Benefits Appeals - Dismissal - Lack of Prosecution - Notice of Decision - Publication**

A veteran's appeal challenging the termination of M.G.L. c. 115 state veterans' benefits is dismissed for lack of prosecution (failure to file a response to the Executive Office of Veterans' Services' motion to dismiss, a prior refusal to comply with an order to file information regarding the petitioner's finances and medical condition in order to determine her eligibility for Chapter 115 benefits, and failure to serve filings upon DVS and the local Veterans' Services Officer). Because the petitioner supplied no email address, recent mailings to her by EOVS were returned as undeliverable and not forwardable, and the agency was unable to contact her by telephone because her only phone number of record had been disconnected, notice to the petitioner of this Decision will be via publication, by posting it to DALA's website.

Background

Petitioner Racheal M. Brimberry, a United States Air Force veteran,¹ appealed the August 22, 2018 decision of the Massachusetts Department of Veterans' Services (DVS; now, the Executive Office of Veterans' Services. EOVS) sustaining, after a hearing, the termination of her M.G.L. c. 115 benefits payments by the Winchendon Department of Veterans' Services (Winchendon DVS). Winchendon DVS's action was based upon Ms. Brimberry's failure to cooperate with the local Veterans' Services Officer (VSO), as required by 108 C.M.R. § 8.05, by failing to furnish information the VSO needed to determine her financial eligibility for Chapter 115 benefits (her most recent bank statements) and the reasons for her unemployment (a physician's statement verifying her

^{1/} Per her Form DD 214 discharge record, Sgt. Brimberry served in the Air Force as a Services Specialist for three years and ten months, from December 12, 1985 until December 11, 1989, when she was released from active duty and received an honorable discharge.

inability to work for medical reasons).²

On April 24, 2018, Winchendon DVS sent Ms. Brimberry a notice of intent to terminate her M.G.L. c. 115 benefits payments because (1) it had requested copies of her bank statements for the preceding three months, which apparently she had not furnished; and (2) it had nothing on file showing why she was not working, and requested that she either furnish medical documentation to support her unemployment, or use the forms Winchendon DVS enclosed to perform job searches. (DVS Hrg. Exh. 2.) The Winchendon VSO had requested this documentation in the course of completing Ms. Brimberry's annual Chapter 115 benefits recertification. (*See* DVS Dec. (Aug. 22, 2018) at 3.)³ When she still did not produce it in response to the notice of intent, Winchendon DVS terminated Chapter 115 benefits payments to Ms. Brimberry for noncooperation, by notice of action dated May 30, 2018, *citing* 108 C.M.R. §§ 3.07 and 4.02(3). (DVS Hrg. Exh. 1.) Winchendon's

^{2/} 108 C.M.R. § 8.05 (entitled "General Rule for Cooperation") provides that:

(1) The applicant or recipient of benefits is required to reasonably cooperate with the VSO and DVS in the processing of his or her application and maintaining his or her eligibility. Such cooperation shall include, but is not limited to, giving his signed consent for medical treatment, physical or mental examinations, power of attorney to examine VA records, court records, tax or financial records, and investigation of efforts to obtain employment pursuant to 108 CMR 7.01(3) and (4). The VSO shall determine what constitutes reasonable cooperation on the basis of the facts peculiar to each case.

(2) Where the VSO feels that the applicant or recipient is not providing reasonable cooperation, he or she shall issue a written Notice of Intent in accordance with 108 CMR 8.02 that failure to cooperate may result in the suspension of benefits payment to the recipient. If the applicant or recipient persists in his or her failure to cooperate, the VSO shall issue a Notice of Action in accordance with 108 CMR 8.03.

^{3/} 108 C.M.R. § 3.07(1) requires, in pertinent part, that a Chapter 115 benefits applicant submit to the veterans' agent, who shall submit it in turn to DVS, supporting documents to verify the applicant's income. 108 C.M.R. § 4.02(3)(c) requires that recipients of Chapter 115 benefits "provide proof of income and shelter expenses" each January.

notice of action also advised Ms. Brimberry that “[t]he time is now to utilize the Montachusett Veterans Outreach Center for federal assistance” (referring to Mr. Brimberry’s need to apply for federal benefits to which she might be entitled).

Ms. Brimberry timely appealed the termination of her Chapter 115 benefits payments to DVS, which held a hearing on July 19, 2018. Ms. Brimberry submitted a chiropractor’s letter, dated February 20, 2018, stating that due to a “chronic neck condition,” she was “advised not to lift over 5 lbs,” and that as a result she “should not be moving boxes as it may aggravate her neck.” (DVS Hrg. Exh. 6.) However, the chiropractor’s letter did not state that Ms. Brimberry was unable to work. Noting this, the DVS Hearing Officer found that Ms. Brimberry had not supported her claim of being unable to work with medical documentation. (DVS Dec. at 4.)

This appeal to the Division of Administrative Law Appeals (DALA) followed. DALA scheduled a prehearing conference for April 23, 2019. The conference was continued to May 23, 2019 after Ms. Brimberry requested a continuance to a later date so she could arrange transportation to DALA or make arrangements to participate in a conference by telephone. Because Ms. Brimberry explained that she had a cell phone with limited minutes and unreliable reception, I suggested that she participate in a telephone conference from the Winchendon VSO’s office. In my April 18, 2019 Order continuing the prehearing conference, I also offered to assist with resolving the appeal, and Ms. Brimberry’s financial eligibility for Chapter 115 benefits, by reviewing key documentation.

The Order identified the documents I would need to resolve the matter by agreement or formal adjudication, including her three most recent bank statements, and a statement from a doctor (or other medical professional) stating clearly whether or not she could work. The Order explained

that:

A doctor's (or other type of licensed caregiver's) statement should state whether he or she is treating Ms. Brimberry, what type of care is being given and for what conditions, and an identification of any disability she claims and the extent to which she can perform any type of work with or without restriction, in the doctor's or caregiver's opinion. I would also need to know the status of Ms. Brimberry's application (if any) for other types of benefits from Social Security and the U.S. Veterans' Administration. The reason for this is that Massachusetts state veterans' benefits under M.G.L. c. 115 are a form of needs-based public assistance. A veteran's income from all other sources, and her health and work abilities, is relevant to her need for Chapter 115 benefits.

I also stated in the Order that I was:

available to assist the parties in attempting to resolve this appeal by agreement, and I would like to do so. It would be helpful to me to have the documentation that the VSO requested regarding Ms. Brimberry's income, including benefits payments from other sources, and also regarding her medical condition and her ability to work. Having this documentation would likely show whether Ms. Brimberry's financial and medical situations (including whether she is able to work and, if so, with what restrictions) qualify her for Chapter 115 benefits, and under what conditions. It would also be helpful for me to have this information before the prehearing conference, so that I could discuss with the parties Ms. Brimberry's eligibility for Chapter 115 benefits and, if she qualifies, what type of benefits could be granted or resumed.

I again cancelled the prehearing conference subsequently, this time at the request of DVS counsel based upon actual engagement in a court case. In doing so, I noted, from her filings, Ms. Brimberry's continuing inability to arrange transportation to a conference and also her reluctance to participate in a conference from the Winchester VSO's office. I also renewed my offer to attempt resolving the appeal, and again explained, for Ms. Brimberry's benefit, what documentation she needed to provide. My May 21, 2019 Order cancelling the conference without setting a new conference date stated that:

Before I reschedule it, I would like to state, first, my concern with Ms. Brimberry's

current health, as she described it in her April 25, 2019 letter (third page)—in particular, a recent diagnosis of “a progressive, deteriorating neurodegenerative disease,” and living with chronic pain that leaves her “sometimes unable to move [her] neck or walk.” Ms. Brimberry’s letter also states that she is going to several specialists and having tests done for other symptoms and pain” with which her doctor is concerned. She also described (at the letter’s fifth page) having difficulty with limited mobility as a result of physical limitations, and also the limited availability of a shuttle for transportation as it “only runs once a week for a few hours.” In addition, Ms. Brimberry described what appears to be a conflict with the VSO that, as I interpret the letter, has left her reluctant to participate in a prehearing conference by telephone from his office or from another town office, a suggestion I had made in my April 18, 2019 order. Ms. Brimberry’s letter also states her reluctance to submit any further materials to the VSO.

It is not my intention to find fault with anyone, and nor do I want any conflict between Ms. Brimberry and the VSO to delay resolving this matter. However, there may be a way for me to obtain the information I need to evaluate this appeal and how it might be resolved before I reschedule the prehearing conference.

The issue I have to decide here is whether Ms. Brimberry qualifies financially for Chapter 115 veterans’ benefits. I have no information about her current income or expenses. Her letters suggest strongly that she is in financial difficulty. I am mindful of Ms. Brimberry’s earlier statement, in one of the DVS hearing exhibits, that she needed shoes for medical reasons that she had been unable to afford for two years. (Exh. 5: Ms. Brimberry’s “Timeline from March 2017–June 2018, seventh page). I am very concerned about this, because it suggests strongly her need for financial assistance, but I must confirm whether she meets the income standards for Chapter 115 benefits eligibility. It should not be difficult to confirm what her financial situation is, but I need documentation to do that.

Before I do anything else, I need to know if Ms. Brimberry is willing to send the relevant information to me, which I do not have, but which I need to determine her current monthly income and expenses and whether she qualifies financially for Chapter 115 benefits. I would need this information if I held a hearing; it would be especially helpful to me if I had it now. The documents that would help me make this determination are:

- (1) Ms. Brimberry’s three most recent bank statements;
- (2) A letter or note from her doctor describing her most recent diagnosis and/or condition, and stating whether, and to what degree, this has made her unable

to work for medical reasons;

(3) Her housing status—any current lease, or other written agreement, regarding her current living arrangements, any rent she is paying, and for how long she can continue living there;

(4) Her other expenses that are not being paid for by any other source (for example, gas and/or electric bills, and telephone bills); and

(5) Any paperwork she has received that states whether she has been approved to receive, or is receiving, Social Security payments and/or federal veterans' benefits . . .

I am doing this in view of what appears to be a financial and medical hardship on Ms. Brimberry's part. I also want to resolve whether she can obtain Chapter 115 benefits as quickly as I can, and, at the same time, minimize the stress she has described without having to fault anyone for it. Fault is unimportant; Ms. Brimberry's financial situation is, however, of the utmost importance.

Therefore, I am requesting that Ms. Brimberry mail me the information I listed above, and that she do so **by or before June 28, 2019**. If she has any problem sending this information to me, I need a letter from her stating what those reasons are. I will extend her time to mail this information to me (if she chooses to do so) if she is having difficulty obtaining it and mailing it. Prior conflicts with the VSO will not be enough to show why she cannot send it if she declines my request that she do so.

Ms. Brimberry filed a response to my May 21, 2019 Order in which she identified financial information she had, or expected to receive shortly, including information stating whether she qualified for Social Security Disability benefits and Massachusetts Transitional Assistance benefits. Ms. Brimberry also stated that her bank statements showed a continuing low balance; student loan debt was in excess of \$70,000; and a remaining balance of \$1,000 on a 7-8 year old bank loan. Ms. Brimberry also stated that she was living in an apartment without a written lease. On July 15, 2019, I issued an order extending the continuance of the prehearing conference but ordered that Ms.

Brimberry file information regarding the income and expenses she identified in her response to the prior order and, as well, her most recent telephone bill and information regarding her rental and utility expenses, and confirmation of her medical condition.

Ms. Brimberry's response to the Order was due by August 23, 2019. On that date, the Legal Services Center of Harvard Law School filed, as a one-time courtesy to Ms. Brimberry, documents that were partially responsive to the Order.⁴ The documents showed that Ms. Brimberry: (1) was applying, or had applied, for Social Security Disability benefits but was not yet receiving them; (2) was approved to receive SNAP (federal food purchase assistance) benefits at the rate of \$192/month, starting August 4, 2019 and thereafter on the fourth day of every month, during her "certification period" (February 4, 2019 through February 3, 2020) and needed to apply for the recertification of her SNAP benefits before February 3, 2020; (3) did not appear to be eligible for any other federal or state benefits, and would probably not qualify for WIC food benefits because although her eligibility for SNAP benefits established her financially eligible for them, she did not meet the WIC program's child dependent eligibility requirements; (4) had, for the period May 28, 2019 to June 25, 2019, only six cents left in a Massachusetts bank account, and had a negative balance in a Pennsylvania bank account; (5) had an outstanding student loan debt of \$67,646 as of August 23, 2006; (6) had \$394 in unpaid telephone charges; and (7) supplied no information regarding the \$1,000 bank loan balance she had asserted previously.

⁴ /In her August 23, 2019 cover letter accompanying its filing, Legal Services of Center of Harvard Law School counsel stated specifically that the legal clinic was not representing Ms. Brimberry here and was "solely assisting her by transmitting" the documents it mailed to DALA.

As I noted in my September 23, 2019 Order re Further Proceedings, Ms. Brimberry's documentation suggested strongly that she would qualify financially for Chapter 115 state veterans' benefits, although the information also suggested that she might receive payment from an alternative source (Social Security Disability benefits), assuming she completed her application for them or had already done so. While she had not confirmed her medical status, it appeared "worthwhile to discuss (1) what options may be available for her to receive medical benefits under Chapter 115; and (2) what options are available to her to obtain assistance in arranging and traveling to a V.A. Hospital or other provider for at least a physical examination and any necessary workup, which would likely confirm whether or not her ability to work was limited," as well as whether there were available alternative residence options for Ms. Brimberry that would be more sensible for her, in terms of being able to obtain medical care and buy groceries.

In view of this, and Ms. Brimberry's difficulty accessing a cell phone to participate in a conference call and inability to travel to DALA for a live conference, I suggested, in the September 23, 2019 Order, that I begin speaking with each party individually to assess whether I should attempt settlement facilitation. I ordered that each of the parties advise me, by October 16, 2019, whether or not it objected to proceeding in this manner.

Ms. Brimberry filed a lengthy response to the Order on October 18, 2019. She stated that she was still unable to arrange assistance from the United States Veterans' Administration with transport of any kind, whether medical or otherwise, and that she continued "to live in chronic, debilitating pain, exacerbated by sub-standard living conditions" including an upper respiratory infection worsened by having to inhale another tenant's cigarette smoke and another tenant who she described

as aggressive and confrontational. She stated that information about her debilitating condition was in her medical records, but did not wish to provide them. In her view, it was the Winchendon Veterans' Service Officer's obligation to investigate her condition before he terminated her benefits; she resented being asked about her condition repeatedly; and she resented being "manhandled into proving" her medical condition or physical limitations that prevented her from working. She also questioned the authority of DVS, or DALA, to request information about these matters, and asserted that the requests for them were demoralizing, violative of her personal privacy, and also contrary to the intent of M.G.L. c. 115 and the regulations governing the processing of Chapter 115 benefits applications. She asserted that she was entitled to Chapter 115 veterans' benefits simply because she was a veteran, and that it was for the Winchendon VSO and DVS to prove that she was not entitled to them.

It was sufficiently clear from Ms. Brimberry's October 16, 2019 response that she was not interested in the approach I had suggested to resolve her appeal and her eligibility for Chapter 115 benefits, and that she would not file any further information other than what she had provided previously. It was also clear that Ms. Brimberry had not mailed a copy of her response to DVS or to Winchendon DVS. The DALA Clerk returned this filing to her for failure to serve it on the other parties and file a statement of service, as she was required to do by the adjudicatory practice and procedure regulations governing appeals such as this one. *See* 801 C.M.R. § 1.01(5)(f) and DALA Standing Order 13-1. The Docket Clerk mailed copies of this regulation and the Standing Order to Ms. Brimberry, as well as a copy of DALA's five-page Guide for People Appearing Without a Lawyer ("Pro Se")," para. 4 of which reminds a party of her obligation to send a copy of all

submissions to the lawyer for the state agency involved in the DALA appeal and a statement that she had done so; and that not doing so might result in DALA not accepting a filing. Paragraph 5 of this Guide also states that a party must follow DALA's Rules whether represented by an attorney or not.

No further filings followed from any party until June 7, 2023, when counsel for the Executive Office of Veterans' Services (EOVS, the successor agency to DVS), filed a notice of appearance and served a copy by regular mail upon Ms. Brimberry and on Winchendon DVS. The copy mailed to Ms. Brimberry at her last known address and only address of record here (258 School Street in Winchendon) was returned to EOVS by the United States Postal Service with a machined notation on the envelope in which EOVS had mailed it. This notation stated "RETURN TO SENDER NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The envelope also had a handwritten notation on it that stated "Return to Sender No Longer @ this address," with an arrow pointing to Ms. Brimberry's Winchendon address.

On July 3, 2023, EOVS filed a motion to dismiss this appeal for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)2. The motion noted the return of EOVS's June 7, 2023 mailing to Ms. Brimberry as undeliverable and not forwardable. It stated that EOVS had not been able to reach Ms. Brimberry by telephone, as "phone numbers for Ms. Brimberry in Winchendon are either disconnected or no longer in service." It also stated that "[a] a search of commercial phonebooks produce[d] an address for Ms. Brimberry in the State of Maine" (in York, Maine according to a printout of a an online search at "PeopleSearch" that was attached to the motion to dismiss as an

exhibit).⁵ EOVS also asserted that the appeal was “old,” and that while Ms. Brimberry had the burden of proof as to her eligibility for Chapter 115 benefits and the obligation to prosecute her appeal, she had not done so since 2019. EOVS’s motion included a certificate of service showing that a copy was served upon Ms. Brimberry by regular mail addressed to the same Winchendon address to which the earlier notice of appearance was mailed.

On October 20, 2023, I issued an Order directing EOVS to supplement its motion by answering the following questions: (1) Was the copy of the motion to dismiss that EOVS mailed to Ms. Brimberry returned to that agency as undeliverable and/or not forwardable , or with a different explanation by the United States Postal Service for the mail return? (2) Did EOVS have an email address for Ms. Brimberry, or had it found one? and (3) Had EOVS confirmed whether Ms. Brimberry is no longer a Massachusetts resident, and in doing so, had it checked whether Ms. Brimberry had applied for Chapter 115 benefits to the Veterans’ Services Officer of a Massachusetts town or city other than Winchendon?

Having no email or current regular mailing address for her, I could not, and thus did not, send a copy of my October 20, 2023 Order to her. The Order noted, however, that I would send the Order to her if the responses to it showed her current email or residential address.

In its response to the Order dated October 25, 2023, EOVS stated that (1) the United States Postal Service had returned its mailing of the motion to dismiss to Ms. Brimberry as undeliverable and not forwardable; (2) as of October 25, 2023, DVS’s case management system database showed

⁵/ Ms. Brimberry did not file with DALA, or DVS, any information about an address change after she commenced this appeal.

no email address for Ms. Brimberry; and (3) the database also showed that as of October 25, 2023, Ms. Brimberry had not filed a new Chapter 115 benefits application in any Massachusetts municipality since 2019. EOVS reported no other mailing address in its records for Ms. Brimberry, whether in or outside of Massachusetts. EOVS filed, with its motion to dismiss, the affidavit of the EOVS paralegal who had searched the agency's database for this information, and copies of the envelopes returned by USPS as undeliverable and non-forwardable in which it had mailed to Ms. Brimberry a copy of its counsel's notice of appearance in June 2023, and a copy of the motion to dismiss in October 2023.

Discussion

1. Dismissal for Lack of Prosecution

Veterans' benefits appeals to DALA, such as this one, are governed procedurally by the Formal Rules of Adjudicatory Practice and Procedure, 801 C.M.R. § 1.01 *et seq.* The Rules recognize several grounds for the accelerated disposition of an adjudicatory appeal without an evidentiary hearing, among them dismissal for lack of prosecution. *See* 801 C.M.R. § 1.01(7)(g)(2) (Rule 7(g)(2)). Lack of prosecution includes the failure of a party "to respond to notices or correspondence, to comply with orders of the Presiding Officer,"⁶ or when the party "otherwise indicates an intention not to continue with the prosecution of a claim" Rule 7(g)2, first

⁶In a DALA adjudicatory appeal, "Presiding Officer" means a DALA Administrative Magistrate.

sentence. When any of these grounds are present, Rule 7(g)(2) allows the presiding officer to issue an order to show cause why a claim (or appeal) should not be dismissed for lack of prosecution, and the failure of the appealing party to “establish such cause” allows the presiding officer to dismiss the claim or appeal “with or without prejudice.” *Id.* The Presiding Officer may issue, *sua sponte*, an order requiring the party to show cause why a claim or appeal should not be dismissed for lack of prosecution, or another party may move to dismiss a claim or appeal on this ground. *Id.*

Dismissal, along with the affirmance of the appealed agency decision, may result as well if a party fails to respond to another party’s motion to dismiss for lack of prosecution. No order to show cause need issue before an unopposed motion to dismiss for lack of prosecution is granted, as Rule 7(g)(2) does not require this additional step. *See, e.g., Murphy v. Dep’t of Veterans’ Services*, Docket No. VS-17-056, Order of Dismissal (Mass. Div. of Admin. Law App., Oct. 20, 2017) (an appeal by a veteran’s adult incapacitated dependent challenging the denial of M.G.L. c. 115 benefits, based upon the veteran’s financial ineligibility for them, was dismissed for lack of prosecution based upon (1) the petitioner’s failure to comply with prior orders (failure to clarify his representational authority, as he and his representative had been ordered to do, or to clarify whether he intended to proceed or request, instead, that the DVS Commissioner issue him a waiver of financial ineligibility for veterans’ benefits); and (2) the petitioner’s failure to respond to DVS’s motion to dismiss for lack of prosecution; however, dismissal was ordered without prejudice to the dependent’s right to request a financial ineligibility waiver, to apply anew for Chapter 115 benefits if this type of waiver was issued by the Commissioner, or to apply for “medical only” benefits under Chapter 115 based upon medical need, whether a financial ineligibility waiver was required or not).

The omission of an order to show cause prior to a lack of prosecution dismissal applies not only when the motion prompts no reply from the prospective responding party, but also when the responding party defeats notice to it of the motion (or anything else) through action or inaction—in this case, moving away from the only mailing address of record, not advising DALA or the agency involved of an address change, not supplying an email address, and being unreachable by telephone.

No order to show cause is necessary here as a prerequisite to lack of prosecution dismissal. Turning next to the dismissal EOVS seeks, Ms. Brimberry's self-made (and persisting) state of unreachability for notice purposes weighs heavily in determining that a lack of prosecution dismissal should be ordered. So, too, does the lengthy history of Ms. Brimberry's inaction since she filed her October 26, 2019 response to the order directing her to file information needed to determine her financial and medical eligibility for M.G.L. c. 115 state veterans benefits. Her response to the order, which was intended to accommodate her inability to travel and her financial hardship and to accelerate a decision of her underlying benefits eligibility issue, indicated that she intended no cooperation in resolving her appeal by agreement or in adjudicating it formally.

Ms. Brimberry was entitled to decline furnishing information material, and critical, to determining her benefits eligibility, but in doing so she risked dismissal of her appeal and receiving no Chapter 115 benefits. She was not entitled to benefits while she withheld material information needed to resolve her benefits denial appeal, or to set her own rules for deciding what information to supply relative to her financial and medical benefits eligibility. *See, e.g., Britton v. Dep't of Veterans' Services*, Docket No. VS-15-203, Decision - Order of Dismissal (Mass. Div. of Admin. Law App., Apr. 11, 2018), *reconsideration denied* (Mass. Div. of Admin. Law App., Jun. 1, 2018)

(veteran's appeal challenging his placement into "refund status" for Chapter 115 benefits overpayment for failing to disclose his income from all other sources, including the tax and business records of an accounting services practice that he and/or his wife operated, was dismissed for lack of prosecution in view of his persistent failure to produce relevant financial records or comply with orders requiring this production). Moreover, her position as to producing the necessary proof of her benefits eligibility was legally untenable. While her veteran's status is undisputed, eligibility for state veterans' benefits based upon low income status or medical condition must be determined on a case-by-case basis because it is a form of needs-based public assistance intended to benefit indigent veterans, and an individual's need for it must be documented. *See McConnell v. Dep't of Veterans' Services*, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017). Financial eligibility for initially receiving, or continuing to receive, Chapter 115 benefits, and medical eligibility related to ability to work or to disability precluding earning an income, is always subject to continuing review. *See* notes 2 and 3 above.

The totality of circumstances present here suggest no further interest on Ms. Brimberry's part in pursuing her appeal, or in complying with the applicable regulations, or orders issued by the Administrative Magistrate if she had continued to pursue it.⁷ Granting EOVS's motion to dismiss

⁷/ Part of this disinterest may be on account of having been granted Social Security Disability benefits since late 2019, a form of supplemental income that would have been counted in determining whether she was financially eligible for Chapter 115 benefits. *See* above at 8; *see also* n. 2 above. If this appeal had proceeded further, Ms. Brimberry's failure to disclose her financial status, including income from alternative sources such as Social Security might have warranted drawing an adverse inference against her—that her current income made her currently financially ineligible for Chapter 115 benefits, even though her financial condition was dire as of late 2019. There is no need to draw the inference, however, in view of the appeal's dismissal.

for lack of prosecution, and affirming the appealed DVS Decision sustaining the termination of her Chapter 115 benefits, are therefore appropriate in the circumstances presented. Ms. Brimberry may reapply for Chapter 115 benefits if she maintains a Massachusetts residence (or returns to the Commonwealth, if indeed she moved out of state), but benefits eligibility would be based upon her current financial status (including current income from any other source, such as Social Security Disability payments), and her current medical status (supported by a treating physician's statement and medical records, if the local Veterans' Services Officer and/or EOVS requests them). These records would likely be needed to evaluate sufficiently, and to update, Ms. Brimberry's need for this type of needs-based public assistance, or her eligibility for medical benefits available under Chapter 115 and the DVS Regulations if Ms. Brimberry applied for them.

2. Notice of Decision via Publication, by Posting to DALA Website

I need to resolve, finally, how notice of this Decision should be given to Ms. Brimberry, who appears to have no email or currently-valid mailing address. I conclude that, in the circumstances presented, the most fair method of giving this notice to her is through publication, by posting the Decision to the DALA website.

801 C.M.R. § 1.01(4)(c) ("Rule 4(c)),, entitled "Notice of Agency Actions," states:

Notice of actions and other communications from the Presiding Officer or adjudicating Agency, or its designee, shall be delivered by email, unless otherwise agreed upon by the parties, or directed by the Presiding Officer for good cause, or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Notice of actions and other communications by mail shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail. The postmark shall be evidence of the date of mailing.

Although the Rules do not provide specifically for giving notice of a DALA decision by publishing it, the first sentence of Rule 4(c) allows the presiding officer (in the DALA adjudicatory proceeding context, an Administrative Magistrate) to direct the issuance of a decision “otherwise” (meaning other than by email or regular mail) “for good cause” or because the respondent or petitioner “lacks access to sufficient Electronic Medium.”

Ms. Brimberry never furnished DALA or EOVS with an email address during this appeal. As a practical matter, email service is provided typically via a web browser, installed on a cell phone, other wireless communication device, or desktop computer, that communicates with a wireless or copper wire-based telephone service. The most current information in the record about Ms. Brimberry’s means of communicating with the outside world—her October 18, 2019 response to prior orders directing her to file financial and medical information relevant to her qualification for Chapter 115 benefits—was that she had a cell phone with basic service that Ms. Brimberry described as unreliable, and that she was nearly \$400 in arrears on her telephone bill. This suggests strongly that if her cell phone service included email, Ms. Brimberry was close to losing it in late 2019 and, as well, her cell phone service and the ability to send or receive anything via cell phone. Her financial information at the time also suggested that she was having trouble finding money sufficient to purchase food. She appeared, therefore, unlikely to have any “email-ready” equipment other than a cell phone through which she could be reached. Most of her filings were handwritten and sent by regular mail, and although her most recent filing (dated October 16, 2019) was typed, it is unclear whether she owned, or had anything other than sporadic access to, the computer on which it appears to have been prepared. It is entirely unclear what her email situation is now, as she has filed nothing

since October 2019 with DALA, and EOVS's July 2023 motion to dismiss relates the agency's inability to contact her by telephone because her telephone had been disconnected.

The only reasonable conclusion drawn in these circumstances is that Ms. Brimberry has no email address at which she could receive notice of this Decision.

There is also no known current mailing address for Ms. Brimberry to which this Decision may be sent and at which she would be likely to receive it. While she continued to receive regular mail through late 2019 at the Winchendon address she gave in her appeal (and that she provided to Winchendon DVS, to DVS and to DALA earlier), this has not been the case since early June 2023. EOVS's motion to dismiss relates that the agency's mailings to Ms. Brimberry (its counsel's June 7, 2023 notice of appearance and the July 3, 2023 dismissal motion) were returned by the United States Postal Service with notations that these mailings were undeliverable and not forwardable. The motion also includes copies of the envelopes in which the USPS returned these mailings to EOVS. The EOVS paralegal's affidavit accompanying its motion to dismiss relates that her contemporaneous search of the agency's statewide database revealed no application by the petitioner for Chapter 115 benefits in any Massachusetts municipality (other than the one she had filed with the Winchendon VSO in 2018). As a result, EOVS (and Winchendon DVS) had, as of late October 2023, no different mailing address for the petitioner other than what she supplied in 2019 or before. My most recent Order requiring that the parties supply any known email address, or mailing address, for Ms. Brimberry other than the Winchendon address to which EOVS had recently attempted two mailings unsuccessfully, generated no such information.

In these circumstances, I find good cause, pursuant to Rule 4(c), for directing that notice of

this Decision be given to the petitioner by a viable alternative means. Here, this would be via publication, by posting the Decision to DALA's website, www.mass.gov/dala. With relatively few exceptions, DALA now regularly publishes its general jurisdiction decisions (including veterans' benefits decisions) to this website in a commonly-used format (pdf), where they may be read, and from which they may be printed or downloaded electronically, by parties to DALA appeals and the public without charge. While Ms. Brimberry may not have any telephone or internet service, access by internet to DALA's website may be had at almost every public library in the United States at which computer terminals are provided for use by library users.⁸

Disposition

For the reasons stated above:

- (1) This appeal is dismissed for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)2;
- and
- (2) the August 22, 2018 decision of the Massachusetts Department of Veterans' Services

⁸/ Rule 4(c) does not prescribe a preferable means of publishing a Decision for notice purposes, which leaves the choice of publication to the Administrative Magistrate's sound discretion. Various other forms of publishing notice familiar in civil practice appear far less feasible, or likely to provide effective notice of a DALA Decision to a person without a mailing address or cell phone and internet service, than would posting the Decision to DALA's website, which is at least accessible without charge via public computers such as those at libraries. These include publishing notice of a Decision in a newspaper of general circulation for some period of time (infeasible here because DALA has no budget for publishing notices in newspapers), and posting the Decision in a part of a lobby or hallway dedicated to posting public notices (as DALA has no such area; and, even if it did, Ms. Brimberry asserted that she was both physically and financially unable to travel to DALA at all).

sustaining the termination of Ms. Brimberry's M.G.L. c. 115 benefits is *affirmed*.

Because the petitioner supplied no email address, her telephone has been apparently disconnected, and recent mailings by EOVS to the only mailing address she supplied were returned by the United States Postal Service as undeliverable and not forwardable, notice of this Decision shall be given to the petitioner via publication, by posting it to the DALA website. Notice to EOVS and Winchendon DVS shall be by email.

SO ORDERED.

Notice of Further Review and Reconsideration Rights

This is a final decision. The parties to this appeal are hereby advised that (1) pursuant to M.G.L. c. 115, § 2, further review of the decision may be had by any party upon application made to the Governor and Council within ten days after receipt of the decision; and (2) whether or not an application for further review is made to the Governor and Council, the decision of the Division of Administrative Law Appeals, or the decision of the Governor and Council if an application for further review is made, is subject to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14; and (3) any such appeal must be instituted within 30 days of receipt of such decision and filed with the Superior Court Department of the Trial Court.

The parties are also hereby notified that within ten days from the date on which this decision is emailed to it (or, in Ms. Brimberry's case, posted to the DALA website), it may file a motion to reconsider this decision, pursuant to 801 C.M.R. § 1.01(7)(a)(l), in order to "correct a clerical or mechanical error in the decision or a significant factor that [DALA or the Administrative Magistrate]

may have overlooked in deciding the case.”

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Mark L. Silverstein

Mark L. Silverstein
Administrative Magistrate

Dated: November 28, 2023