

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

**August 30, 2024**

**Middlesex, ss.**

**Docket No. VS-21-0565**

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**LYSA M. ELWELL, Petitioner**

**v.**

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

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**DECISION - ORDER OF DISMISSAL**

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**Appearance for the Petitioner:**

Jeff Goldman, Esq.  
Morgan, Lewis & Bockius LLP  
One Federal St.  
Boston, MA 02110-1726

**Appearance for the Respondent:**

Sarah G. Vincent, Esq.  
Administrative Law Counsel  
Executive Office. of Veterans Services  
600 Washington St., 2nd floor  
Boston, MA 02111

**Administrative Magistrate:**

Mark L. Silverstein, Esq.

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*Summary of Decision*

**Veterans Benefits Appeals - Dismissal - Mootness - Massachusetts disabled veteran annuity benefits, M.G.L. c. 115, § 6B - Denial for lack of eligibility as “veteran” per prior definition, see M.G.L. c. 115, §§ 1 and 6A - Expanded definition of “veteran” for Chapter 115 benefits eligibility purposes, see HERO Act, St. 2024, c. 178, § 48 - Executive Office of Veterans Services (EOVS) determination that petitioner now meets definition of “veteran,” and withdrawal of opposition to petitioner’s Chapter 115 benefits application.**

Petitioner’s appeal challenging the denial of her application for Massachusetts disabled veteran annuity benefits pursuant to M.G.L. c. 115, § 6B is dismissed as moot, pursuant to 801 C.M.R. § 1.01(7)(g)3, following (1) the enactment of St. 2024, c. 178 (the HERO Act), § 48 expanding the definition of “veteran” for Chapter 115 benefits eligibility purposes; and (2) EOVS’s confirmation that the petitioner and/or her spouse meet this new definition, and that it withdraws any further objection to the petitioner’s Chapter 115 benefits application. EOVS is directed to calculate and begin paying the annuity benefits for which petitioner now qualifies, if it has not already done so.

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In late 2019, petitioner Lysa M. Elwell applied to the Massachusetts Department of Veterans’ services (DVS; now EOVS, the Executive Office of Veterans Services) for a disabled veteran’s annuity pursuant to M.G.L. c. 115, § 6B, a type of state veterans benefit made available by Chapter 115. Ms. Elwell claimed to have sustained a disabling injury during active duty military service—post-traumatic stress disorder (PTSD) as a result of repeated sexual assaults upon her by her commanding officer during basic training in 1983, when she was an Army National Guard member. Ms. Elwell’s disability was undisputed, as was her eligibility for federal veterans benefits. Reversing an earlier denial of federal veterans benefits to Ms. Elwell after the federal definition of “veteran” was expanded, the United States Department of Veterans Affairs’s Veterans Benefits Administration had awarded those benefits to her on November 5, 2019 for a 100 percent service-connected disability based upon her PTSD. However, DVS denied Ms. Elwell’s disabled veteran’s

annuity application because she did not meet the Massachusetts definition of “veteran” for Chapter 115 eligibility benefits purposes then in effect. Per that definition, a veteran qualifying for Chapter 115 benefits needed to have performed “active duty service” in the Armed Forces of the United States (meaning in the United States Army, Marine Corps, Navy, Air Force or Coast Guard, with no other type of Armed Forces service specified). In addition, “active duty for training purposes” (noted as “ACDUTRA” on a service member’s Form DD-214 discharge paper) did not qualify as active duty service. *See* M.G.L. c. 115, §§ 1 and 6A (Mar. 1, 2023 rev.), which applied the definition of “veteran” set forth at M.G.L. c. 4, § 7, cl. 43rd for Chapter 115 benefits eligibility purposes; *see also* DVS Regulations, 108 C.M.R. § 3.02.

Ms. Elwell timely requested a hearing before DVS on the agency’s annuity benefits denial. Following a hearing, the DVS hearing officer issued a decision on November 10, 2021 sustaining the denial of annuity benefits to Ms. Elwell based upon her ineligibility for them according to the definition of “veteran” that Chapter 115 applied at the time. The DVS hearing officer concluded that because Ms. Elwell’s active duty service was performed for training as an Army National Guard member while she was on active-duty orders from the Army National Guard (rather than on active-duty orders from the United States Army, Navy, Marine Corps, Air Force or Coast Guard), she had not performed active duty service in the Armed Forces of the United States and therefore did not qualify as a veteran for Chapter 115 benefits eligibility purposes.

Ms. Elwell timely appealed the DVS hearing officer’s decision to the Division of Administrative Law Appeals. I held a prehearing conference on January 13, 2022. Ms. Elwell’s argument at the time was that DVS should accept the U.S. Veterans Administration’s determination

of her service-connected disability, and its award to her of a service-related disability, as "conclusive" in establishing her service in the Armed Forces of the United States and, as well, her eligibility for Chapter 115 state veterans' benefits. In view of the parties' agreement that there appeared to be no genuine, material factual issue, and that the appeal could be resolved as a matter of law upon motions for summary decision, I did not schedule a hearing or conclude the prehearing conference. EOVS filed a motion for summary decision on August 7, 2023. Ms. Elwell cross-moved for summary decision on September 8, 2023. Each of the parties also filed an opposition to the other party's summary decision motion.

While those motions remained pending, the Massachusetts legislature considered a proposed amendment expanding the definition of "veteran" for Chapter 115 benefits eligibility purposes, along with various other amendments to state law governing veterans benefits, veteran training and education, veteran health care, and services and resources made available to veterans and their families by the Commonwealth. Earlier this month, the legislature passed, and the Governor signed, St. 2024, c. 178, entitled "An Act Honoring, Empowering, and Recognizing Our Service Members and Veterans" (the "HERO Act"), which became effective on August 8, 2024. The HERO Act's many provisions include a section striking the current definition of "veteran" appearing at M.G.L. c. 115, § 1 and inserting, in its place, an expanded definition of "veteran" for Chapter 115 benefits eligibility purposes. *See* St. 2024, c. 178, § 48.<sup>1</sup> Among other things, section 48 made the following

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<sup>1</sup>/ The new definition of "veteran" that M.G.L. c. 115, § 1 recites, per St. 2024, c. 178, § 48, is:

any person who (a) is a veteran as defined in clause Forty-third of section 7 of

changes to the definition of “veteran” that now governs Chapter 115 veterans benefits eligibility:

(1) The period of active service in the Armed Forces of the United States qualifying for veteran status is shortened from 180 to 90 days absent a service-connected disability or death;

(2) “Veteran” includes any person who performed active duty service for training in the National Guard or Active Reserves who either suffered a service-connected disability or died in service; and

(3) “Veteran” includes a person who is determined to be a veteran according to the United States Department of Veterans Affairs.<sup>2</sup>

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chapter 4; or (b) served on active duty in the armed forces for at least 90 days and whose last discharge or release was under conditions other than dishonorable; or (c) served on active duty, to include active duty solely for training purposes, in the armed forces, and was awarded a service-connected disability or who died in such service under conditions other than dishonorable; or (d) served in the national guard or as a reservist in any branch of the armed forces, including active duty solely for training purposes, and was awarded a service-connected disability or who died in such service under conditions other than dishonorable; or (e) is determined to be a veteran according to the U.S. Department of Veterans Affairs; provided, that in any case, the service of such person qualified under clause (a) through clause (e) was entered into or served in Massachusetts, or such person has resided in the commonwealth for 1 day, except for the purpose of determining the residential eligibility of a deceased veteran’s dependents.

<sup>2</sup>/ 38 U.S.C. § 101(2) defines “veteran” as a person who served in the active military, naval, air or space service, and who was discharged or released from such service “under conditions other than dishonorable.” This includes active duty in the Army, Navy, Air Force, Marine Corps, Coast Guard and Space Force; as a commissioned officer of the Public Health Service, the National Oceanic and Atmospheric Administration, or the Coast and Geodetic Survey; and as a cadet in the U.S. Military, Air Force, or Coast Guard Academy, or as a midshipman at the U.S. Naval Academy. It also includes “active duty for training” and “inactive duty training” in the National Guard and Reserves, during which the person concerned was disabled or died from disease or injury incurred or aggravated in the line of duty. *See* 38 U.S.C. §§ 101(21)–(24).

The HERO Act's expanded definition of "veteran" for Chapter 115 benefits eligibility purposes proves to be of immediate consequence here. On August 26, 2024, EOVS General Counsel notified Ms. Elwell's counsel and the DALA Administrative Magistrate by email that she "and/or her spouse now meet the definition of a veteran," and that EOVS intended to "withdraw any further objection" to Ms. Elwell's application for Chapter 115 benefits. EOVS counsel in this appeal confirmed the withdrawal. Not surprisingly, Ms. Elwell and her counsel were delighted by this outcome. Her counsel responded by email that "[t]his is terrific news," and asked if he "could to "do anything to help document the resolution of this appeal."

Counsel need do nothing further. With the new definition of "veteran" applied to determine Ms. Elwell's eligibility for M.G.L. c. 115, § 6B annuity benefits, and the withdrawal of EOVS's opposition to her Chapter 115 benefits application, this appeal is now moot (as are the pending summary decision motions), and may be dismissed as such without further notice. In view of what EOVS General Counsel stated in his August 26, 2024 email, and with no representation to the contrary, the Executive Office's determination that Ms. Elwell is eligible for M.G.L. c. 115, § 6B annuity benefits is deemed to have superseded both DVS's previous denial of Ms. Elwell's annuity benefit application and the DVS Decision affirming the denial that Ms. Elwell appealed here.

Accordingly, this appeal is dismissed as moot, pursuant to 801 C.M.R. § 1.01(7)(g)3. EOVS shall compute the amount of annuity benefits for which Ms. Elwell qualifies and begin their payment, if it has not already done so.

In view of this outcome, I am omitting, as unnecessary, a formal statement of the right of any

party to seek further review of the decision.<sup>3</sup> *See Gaudette v. EOVS*, Docket No. VS-19-0279, Decision-Order of Dismissal, at 5 (Mass. Div. of Admin. Law App., Aug. 22, 2023)(statement of appeal rights omitted as unnecessary based upon the parties’ agreement resolving a Chapter 115 benefits appeal). Instead, each of the parties is hereby notified that within ten days from the date on which this decision is mailed to it, it may file a motion to reconsider this decision, pursuant to 801 C.M.R. § 1.01(7)(a)(1), 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.”

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*/s/ Mark L. Silverstein*

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Mark L. Silverstein  
Administrative Magistrate

Dated: August 30, 2024

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<sup>3/</sup> Typically, a decision of a veterans benefits appeal that is not withdrawn, and/or the cover letter accompanying the decision, will advise 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; (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.