

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

October 20, 2017

Docket No. VS-17-056

AIDAN MURPHY, KAREN M. MURPHY and PATRICK M. MURPHY, Petitioners

v.

DEPARTMENT OF VETERANS' SERVICES, Respondent

ORDER OF DISMISSAL

Appearance for the Petitioners:

Patrick M. Murphy
64 Bardwell St.
South Hadley, MA 01075

**Appearance for Implied Intervenor
Holyoke Dep't of Veterans' Services**

James Mahoney
Veterans' Service Officer
310 Appleton Street
Holyoke MA, 01040

Appearance for the Respondent:

Stuart W. Ivimey, Esq.
General Counsel
Dept. of Veterans' Services
600 Washington St., 7th floor
Boston, MA 02111

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

An appeal by a veteran's adult dependent, and his co-guardian mother, from the January 27, 2017 decision of the Massachusetts Department of Veterans' Services (DVS) sustaining the denial of his application for ordinary M.G.L. c. 115 veterans' benefits because he was not a veteran himself and his veteran father appeared to be financially ineligible to receive benefits under Chapter 115, is dismissed for lack of prosecution following (1) non-compliance with an order requiring confirmation that the father (who is not a co-guardian) had authority given by the co-guardians to proceed here as his adult son's authorized representative, and also requiring that the father send to DVS and Holyoke DVS whatever unpaid medical bills he had for his son, and that the petitioners state whether they wished to proceed with this appeal or, instead, proceed with a request that the DVS Secretary waive the father's financial ineligibility for Chapter 115 benefits as a matter of discretion, pursuant to 108 C.M.R. § 3.06(3); and (2) failure to respond to DVS's motion to dismiss the appeal for lack of prosecution. As a result, the DVS decision is affirmed. However, dismissal is without prejudice to (1) any request the father may file with the DVS Secretary for a waiver of his financial ineligibility for M.G.L. c. 115 benefits, (2) his son's continued receipt of any "medical only" Chapter 115 benefits he may be receiving under a prior (2015) DVS Decision, or (3) any future determination of his son's eligibility for ordinary M.G.L. c. 115 benefits on grounds not addressed by the January 27, 2017 DVS Decision, including a waiver of the father's financial ineligibility for Chapter 115 benefits, if the father files a waiver request and the DVS Commissioner issues a waiver.

Background

Aidan Murphy, currently 21 years old, is an adjudicated incapacitated person, *see* M.G.L. c. 190B, § 5-101(9), who has suffered since childhood from schizophrenia, anxiety and depression and is prone to violent outbursts. Aidan is not a veteran. He is the adult dependent of his father, Patrick Murphy, a United States Army veteran and retiree.¹

¹/ M.G.L. c. 115, § 1 defines "dependent," in pertinent part, as including the child of a veteran:

provided, that no child of a veteran who is more than eighteen years of age shall be deemed a dependent, unless such child is attending school for the purpose of completing a regulation high school course or its equivalent, *or unless he is mentally or physically unable to support himself, and his disability existed before he attained that age*

(emphasis added.)

Patrick Murphy and Aidan's mother, Karen M. Murphy, are divorced. On November 14, 2014, after Aidan turned 18, the Hampden (Massachusetts) Probate and Family Court appointed Karen M. Murphy and her brother, William H. Lunney, as his permanent guardians based upon his status as an incapacitated person,² pursuant to M.G.L. c. 190B, § 5-306, (Exh. 3.)

Patrick Murphy does not himself receive Massachusetts state veterans' benefits pursuant to M.G.L. c. 115 because he does not qualify financially for this type of public assistance. The Massachusetts Department of Veterans' Services (DVS) regulations provide that "[u]nless the [DVS] Secretary decides otherwise, a dependent shall not be eligible for benefits if the veteran is ineligible." 108 C.M.R. § 3.06(3). The "[u]nless the Secretary decides otherwise" clause of this regulation suggests that the DVS Secretary may waive a veteran's financial ineligibility as a ground for denying his or her dependent's eligibility for Chapter 115 benefits.

Despite that provision and Patrick Murphy's financial ineligibility, Aidan received Chapter 115 benefits calculated for a "Budget 3 institutional resident" (*see* 108 C.M.R. § 5.02(2)), until he turned 18 and was released from institutionalized care.³ In September 2015, the Holyoke

²/ M.G.L. c. 190B, § 5-101(9) defines "incapacitated person " as "an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance."

³/ Aidan's condition, and its history, makes it unsafe for him to live with either of his parents. He currently lives alone in an apartment whose rent was originally subsidized by the "Center for Human Development Adult Mental Health of Holyoke" (DVS Decision and Order, Jan. 27, 2017). As I understand it from my discussion with the parties at the prehearing conference, Aidan's rent, currently \$772 per month, is now paid out of the monthly Social Security income he receives and/or by his father. Aidan, his father, and his guardians, were hoping that Chapter 115 benefits would offset this rental expense.

Department of Veterans' Services either terminated or denied Aidan's M.G.L. c. 115 benefits because his income (\$771 per month SSI, and \$34 per month SSP) placed him above the limit for Budget 3 Chapter 115 benefits.⁴ Aidan's mother and co-guardian, Karen Murphy, appealed that action to DVS. In its decision dated November 12, 2015, DVS determined that although Aidan was financially ineligible to receive "ordinary" Chapter 115 benefits under "Budget 3," he was eligible to receive "Budget 5 Medical Only" benefits, per 108 C.M.R. § 5.02(2) and (13). For reasons that neither the 2015 DVS Decision nor the record explains, the DVS hearing officer did not address whether Aidan could receive any Chapter 115 benefits as a non-veteran if his veteran father did not receive them or did not qualify for them financially.

Neither Aidan nor his guardians appealed the 2015 DVS Decision. In accordance with that Decision, Aidan received "medical only" Chapter 115 benefits. He and/or one or both of his guardians filed a new application to receive ordinary Chapter 115 benefits as Patrick Murphy's

⁴/ The Massachusetts Executive Office of Health and Human Services website explains that:

SSI (Supplemental Security Income) is a federal program of the Social Security Administration that makes monthly payments to certain people who are age 65 or older, blind or disabled. Massachusetts adds more money to SSI payments for Massachusetts residents. This is called the State Supplement Program, or SSP.

<http://www.mass.gov/eohhs/consumer/basic-needs/financial/ssp.html> .

M.G.L. c. 115 veterans' benefits are a needs-based form of public assistance. *See, e.g., Slocum v. Dep't of Veterans' Services*, Docket No. VS-10-803, Decision at 2-3 (Mass. Div. of Admin. Law App., May 26, 2011). The DVS regulations require, therefore, that the needs-based "budget" of an M.G.L. c. 115 benefits applicant be "offset . . . with alternative sources of income," 108 C.M.R. § 6.01(1), which includes "alternative types of benefits available to him or her," including but not limited to "VA non-service pension, Social Security, railroad retirement, Supplemental Security Income, workmen's compensation or private pension plans." 108 C.M.R. § 6.01(3). SSI and SSP payments are counted as income, therefore, in determining whether a veteran is financially eligible to receive M.G.L. c. 115 benefits.

dependent on October 1, 2016. Holyoke DVS denied the application in a notice of action dated November 2, 2016, because Aidan was not a veteran, *citing* 108 C.M.R. § 3.02, and because unless the DVS Secretary decided otherwise, a veteran's dependent is not eligible for Chapter 115 benefits if the veteran (meaning Patrick Murphy, in Aidan's case) was ineligible to receive them, *citing* 108 C.M.R. § 3.06(3).⁵ Aidan appealed the Holyoke DVS decision to DVS which, following a hearing conducted by telephone, issued a decision and order on January 27, 2017 sustaining the denial of his Chapter 115 benefits application on the grounds that Holyoke DVS asserted. The decision noted Patrick Murphy's testimony during the hearing that his income "would likely exceed the income limitations" on Chapter 115 benefits eligibility, and the DVS hearing officer concluded that without income verification showing that Patrick Murphy was financially eligible to receive Chapter 115 benefits, Aidan was ineligible to receive them as well.

Aidan, his mother and co-guardian, and his father (who currently is not one of his co-guardians) appealed the 2017 DVS Decision to the Division of Administrative Law Appeals (DALA). For reasons not yet made clear, Mr. Lunney (who *is* Aidan's co-guardian) did not appeal. The petitioners claimed that Aidan's non-veteran status was not applicable to his benefits eligibility, and that denying him benefits based upon his veteran father's financial ineligibility was "unreasonable and [in]equitable," particularly since DVS had already found him eligible to receive "medical only" Chapter 115 benefits. They also claimed that the "discretion of the Secretary" denying Aidan benefits under 108 C.M.R. § 3.06(3) was unreasonable. This claim suggested the

⁵/ 108 C.M.R. § 3.06(3), entitled "Dependents," states that "[u]nless the [DVS] Secretary decides otherwise, a dependent shall not be eligible for benefits if the veteran is ineligible."

petitioners' belief that the 2017 DVS Decision they appealed was also a decision by the DVS Secretary to deny waiving Patrick Murphy's financial ineligibility for Chapter 115 benefits as the basis for denying Chapter 115 benefits to Aidan. However, they have submitted no request for the DVS Secretary to issue such a waiver, and the Secretary has not had occasion to issue or deny one.

I held a prehearing conference at DALA on March 16, 2017. DVS appeared by its general counsel. Holyoke DVS did not appear, but I maintained its status as an implied intervenor because it remained involved in Aidan Murphy's situation. Patrick Murphy alone appeared, but it was unclear whether he did so on his own behalf, as a concerned parent, or pursuant to authorization by Aidan and/or his co-guardians (Karen Murphy and Mr. Lunney) that he appear for the other petitioners as well.

Patrick Murphy stated that Aidan's behavior was too uncertain to make his appearance at the conference advisable. He also suggested that Karen Murphy had health-related issues that kept her from appearing at the conference, and that might make it impossible for her to proceed here or carry out her duties as Aidan's co-guardian. I explained that DALA could not determine whether that was the case, but that he was free to pursue Aidan's best interests in terms of guardianship by petitioning the Hampden Probate and Family Court to be appointed Aidan's guardian in his former wife's place. It was suggested to him that he discuss with Karen Murphy and William Lunney whether they are willing to relinquish their co-guardianship of Aidan, and that he check with the court clerk as to what papers all of them need to file for the court to act on a proposed guardianship transfer.

Meanwhile, however, Patrick Murphy needed to clarify that he had authority to proceed here as the authorized representative for all three petitioners, and not just himself. "Authority to proceed

here” meant having the right to sign papers and make decisions in this appeal that were binding upon all of the petitioners, and to receive notices, orders and decisions issued by DALA, and papers filed by DVS and Holyoke DVS, on their behalf. In view of Aidan’s guardianship, he would need authorization not only from Aidan and Karen Murphy, but also from William Lunney, Aidan’s co-guardian.

During the prehearing conference, DVS suggested a possible resolution of this matter based upon the payment of Aidan Murphy’s outstanding medical bills (meaning co-payments for medications and other bills not paid by other public assistance programs).⁶ Its General Counsel requested that Patrick Murphy send him copies of those bills to review. He confirmed that by doing so, Mr. Murphy would not commit the petitioners to settling this matter based upon payment of the outstanding medical bills, a resolution in which Mr. Murphy expressed no interest. What it would do, however, is allow DVS to decide whether to make a settlement offer to the petitioners, and, if so, to offer the petitioners something concrete to consider. If DVS decided to make a settlement offer, the petitioners would be free to accept or reject it. Based upon my conversation with the parties at the prehearing conference, it was my understanding that Mr. Murphy would send copies of any of Aidan’s medical bills he could find DVS General Counsel.

I also discussed with the parties whether there was anything to decide here if the appeal is not resolved by agreement. The facts relevant to whether Aidan Murphy was eligible to receive Chapter 115 benefits did not appear to be disputed. The petitioners appeared to want the DVS

^{6/} It is my understanding that Patrick Murphy has been making Aidan’s co-payments, although he is not legally obligated to do so.

Secretary to decide, as a matter of discretion pursuant to 108 C.M.R. § 3.06(3), whether to waive Patrick Murphy's financial ineligibility to receive Chapter 115 benefits so that Aidan Murphy's benefits application could be decided on grounds that the 2017 DVS Decision did not decide, and that were not before me.

It appeared unlikely that the Secretary would decide such a waiver request unless and until this appeal ended, either by a decision after a hearing that upheld the denial of benefits to Aidan Murphy, or by the petitioners' withdrawal of this appeal and, based upon the withdrawal, a decision dismissing this appeal with prejudice to renewing the appeal, but without prejudice to a waiver request. Either of those outcomes would make it clear that the DVS decision denying Chapter 115 benefits to Aidan Murphy was final, and that the only way for Aidan Murphy to obtain benefits would be if the DVS Secretary granted a waiver as to Patrick Murphy's financial ineligibility to receive M.G.L. c. 115 benefits.

The petitioners needed to decide, therefore, how they preferred to proceed. One option was to request that the DVS Secretary issue a waiver of Patrick Murphy's financial ineligibility for Chapter 115 benefits instead of going forward with this appeal. Another was to go forward with a hearing in this appeal regarding the denial of Aidan's request for ordinary M.G.L. c. 115 benefits, and await a decision, before Patrick Murphy requested a waiver.

On March 24, 2017, following the prehearing conference, I issued an order directing that the petitioners take the following steps before this appeal could proceed:

First, Patrick Murphy needed to clarify his authorized representative status. By April 21, 2017, he was to confirm that he had been given authority to proceed here as the petitioners'

authorized representative by the other two petitioners, Karen Murphy and Aidan Murphy, and also by William Lunney as Aidan's co-guardian. He was to do this in a letter addressed to me at DALA, with copies mailed to counsel for DVS and to Mr. Mahoney, the Holyoke veterans' service officer. Because I was mailing a copy to Karen Murphy, Aidan Murphy, and Mr. Lunney as Aidan's co-guardian, the Order stated that each of them was being given an opportunity to consent or object to Patrick Murphy serving here as the authorized representative for petitioners other than himself. Any such consent or objection had to be mailed to me at DALA, and to the other parties, by April 21, 2017.

Second, Mr. Murphy was to send whichever of Aidan Murphy's unpaid medical bills he had found to DVS General Counsel by April 21, 2017, so that DVS could decide whether to make a settlement offer based upon payment of those bills.

Third, the petitioners had to let me know, by May 26, 2017, whether they wished to proceed with this appeal or proceed, instead, with a waiver request to the DVS Secretary. If they preferred to proceed with a waiver request, the petitioners were to send to DVS General Counsel and to the Holyoke Veterans' Service Officer (also by May 26, 2017) a request that the DVS Secretary issue a waiver of Patrick Murphy's financial ineligibility for Chapter 115 benefits so that Aidan Murphy's benefits application could be decided on grounds other than those addressed by the 2017 DVS Decision appealed here. The Order stated that if the petitioners chose to proceed with a waiver request rather than proceed with this appeal, and submitted a waiver request to DVS General Counsel, I would dismiss this appeal with prejudice to its renewal, but without prejudice to a waiver request to the DVS Secretary. If the petitioners chose to proceed with this appeal instead, however,

and the parties had not reported that the appeal has been or will be resolved by agreement, I would schedule a hearing without further notice. *Order Following Prehearing Conference* (Mar. 24, 2017) at 8.

I mailed a copy of the Order separately to Aidan Murphy and Patrick Murphy, and to each of Aidan's co-guardians, Karen Murphy and William H. Lunney. None of these mailings was returned to DALA by the United States Postal Service. Receipt of the Order by each of the recipients is therefore presumed.

None of the petitioners has responded to the March 24, 2017 order, and the deadlines set by the order for filing the responses it required have passed.

On September 29, 2017, DVS moved to dismiss this appeal for lack of prosecution based upon the petitioners' failure to comply with the March 24, 2017 Order. DVS asserted, in its motion, that (1) it had not received from Patrick Murphy any confirmation of his authorization to represent Aidan or his guardians here; (2) it had also received nothing from the guardians regarding Mr. Murphy's representational authority; (3) Mr. Murphy had not forwarded any of Aidan's medical bills nor contacted the agency or its General Counsel about them; and (4) the petitioners had not advised DVS or the Holyoke Veterans' Service Officer whether they preferred to proceed with this appeal or pursue a waiver request to the DVS Commissioner instead. DVS requested, therefore, that I dismiss this appeal. However, it did not request that dismissal be with prejudice to a waiver request by Mr. Murphy to the DVS Commissioner, or to Aidan's continued receipt of "medical only" Chapter 115 benefits (if he continues to receive them), or to a re-assessment of Aidan's eligibility for ordinary Chapter 115 benefits if Patrick Murphy requested, and was granted, a financial

ineligibility waiver.

The petitioners have not filed any response to the motion to dismiss, and the time for filing a response has expired. Their failure to comply with the March 24, 2017 Order or respond to the motion to dismiss shows that they do not wish to proceed with this appeal. Accordingly, this appeal is now dismissed for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)(2). As a result of this dismissal, the January 17, 2017 DVS Decision sustaining the denial of ordinary M.G.L. c. 115 benefits to Aidan Murphy pursuant to 108 C.M.R. § 3.06(3) is affirmed. However, the dismissal is without prejudice to (1) any request that Patrick Murphy may file with the DVS Secretary for a waiver of his financial ineligibility for M.G.L. c. 115 benefits; (2) Aidan Murphy's continued receipt of any "medical only" benefits he may be receiving pursuant to the 2015 DVS Decision; or (3) any future determination of Aidan Murphy's eligibility for ordinary M.G.L. c. 115 benefits on grounds not addressed by the January 27, 2017 DVS Decision, including any waiver of Patrick Murphy's financial ineligibility for Chapter 115 benefits, if Mr. Murphy files a request to waive his financial ineligibility and the DVS Commissioner issues a waiver.⁷

SO ORDERED.

Notice of Rights of Further Review and Appeal

This is a final decision. Each of the parties is hereby notified that (1) it may seek further

⁷/ In view of the outcome here, I do not decide whether Patrick Murphy had standing to appeal the January 27, 2017 DVS Decision, or whether he was authorized to represent Aidan Murphy or Karen M. Murphy in this appeal.

review of this decision, pursuant to M.G.L. c. 115, § 2, 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 appeal seeking judicial review must be instituted within 30 days of receipt of such decision and filed with the Superior Court Department of the Trial Court.

Each of the parties is also 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)(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

Mark L. Silverstein
Administrative Magistrate

Dated: October 20, 2017