

Dept. Of Veterans Affairs

Regional Office #346

Jackson Fed. Bldg.

915 Second Ave.

Seattle, Wa. 98174-1060

In reply to: 346/28

Attention: Appeals Team

STATEMENT IN REBUTTAL OF

SUPPLEMENTAL STATEMENT OF THE CASE

Dear Sirs,

In reference to VR&E Division 28 SSOC dated May 7, 2014, I offer rebuttal and include both new and material evidence to rebut the findings of fact by the Veterans Administration. This will require a de novo reconsideration of the claim.

New And Material Evidence

Ownership of "greenhouse"

Statement from the rightful owner of what VA refers to as an existing greenhouse. I hope this clears up the erroneous finding of fact. The 4' X 8' 'coldframe" which is constructed of the same material as the "greenhouse" which is also unheated and useless in winter, also belongs to Mrs. Harrell.

The listed **Summary Of Evidence and Vocational Rehabilitation and Counseling Actions** questions the credibility of my ownership of the "greenhouse" located at 14910 125th St. KP N in Gig Harbor, WA 98329. I have consistently maintained that the greenhouse is not mine. I have consistently pointed out that the "greenhouse" does not meet the definition of a greenhouse as defined by Miriam Webster Dictionary. Being unheated, the structure does not protect

seedlings from cold weather. Only an all-weather structure designed for this would be suitable in the Northwest. The same deficit applies for the "two enclosed glass structures over existing raised planters".

Thus, there are no "greenhouses" on site. The existing one was never designed for the rigors of winter. It also was never designed to be ADA-compliant.

Gardening structure is non-ADA compliant

A picture of the entrance to the 6'X8' structure with my VA-issued wheelchair. Please note there is no room for my hands to propel the wheelchair in due to clearance limitation of twenty nine and one quarter (29 1/4") inch opening. The VR&E employees have yet to address the deficit of being unable to access the structure when my fibromyalgia requires ambulatory help. Currently, when this occurs, I am unable to access my plants. Included in my submission with my NOD and my Form 9 are additional pictures of my VA-issued walker that exhibits the same problem of accessibility. The VR&E employees insist it is adequate for my needs. Being unfamiliar with gardening and the rigors of winter temperatures may account for their decisions. I cannot afford to keep buying planting starts at Hope Depot when it is easier to do and far cheaper at home.

100% Total Disability Due to

PCT And Avoidance of Sunlight

From my recent Record Before the Agency (RBA), I attach RBA pages 1076 and 1077. This is the VA's July 18, 2008 compensation and pension examination for my service connected Porphyria Cutanea Tarda (PCT). Please note page 1077, which is page two of the C&P exam. Under remarks it states the following:

"The effect of the condition [PCT] on the claimant's usual occupation is totally disabled. The effect of the condition on the claimant's daily activity is no heavy house and yard work, must avoid the sun." (emphasis mine) The document is signed by James C. Morgan, MD.

I am service connected currently for Hepatitis and Porphyria. Both these conditions cause total disability. In essence, the sum of them constitutes two 100% ratings. Total disability is defined in 38 CFR §4.15. I reprint it here:

§ 4.15 Total disability ratings.

The ability to overcome the handicap of disability varies widely among individuals. The rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must be overcome and not from individual success in overcoming it. **However, full consideration must be given to unusual physical or mental effects in individual cases**, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability **and to the effect of combinations of disability**. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; *Provided*, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule.

This meets or exceeds the requirements for 38 USC §§3120(b), 3104(a)(1)(B) for a severe handicap. If that is still unclear, allow me to elucidate. **I cannot go out in bright sunlight to enjoy gardening due to damage the sunlight causes to my skin.** I can only do my gardening early in the morning. My near constant debilitating condition from my service-connected Hepatitis C requires I sleep longer than most due to extreme fatigue. The sum of these two deficits greatly curtails my excursions outside. In order to have any independence in everyday living out of doors, a large, heated greenhouse with a hard-surfaced floor will greatly facilitate my access to the outside. In conjunction with my love of gardening for both myself and for other Veterans, this is essential ingredient to improving my activities of daily living. All of these disabilities have been expressed in my NOD and Form 9.

The VR&E Assessment has never examined my need to be outside free from the confines of the indoors. Most take this luxury of being able to enjoy the outdoors without realizing how intrinsic it is to independence in everyday living. Being unable to go outdoors for over half the year is an impediment to the activities of everyday living. In addition, my cryoglobulinemia restricts my outdoor activities at temperatures below 40 degrees Fahrenheit. In sum, being confined to the house greatly restricts my independence in everyday living dramatically. The VR&E employees have failed to take this into consideration.

This theory of independence from the confines of the dwelling are incorporated into the VA's General Counsel Precedent 6-01 (VAOPGC PREC 6-2001). To wit:

DISCUSSION:

1. The veteran established entitlement to receive vocational rehabilitation services under chapter 31 of title 38, United States Code. Although the veteran's pursuit of a vocational goal was not found reasonably feasible, he was found eligible for and was inducted into a program of independent living (IL) services pursuant to 38 U.S.C. § 3120. In addition, VA authorized services for the veteran under chapter 21 (specially adapted housing); section 1717(a)(2) (home health services); and chapter 39 (specially adapted automobile) of the same title.
2. Essentially, VA has provided the veteran with a specially adapted home, including access ramps and other home health services improvements, and a specially adapted van for transport. The veteran's VA Vocational Rehabilitation and Employment Services (VR&E) counselor now proposes to further the veteran's ability to live independently by **authorizing the costs of enclosing and heating a deck for a studio where the veteran can gain proximity to the outdoors and pursue his painting and photography interests.** It would appear, and this opinion presumes, that such expenditure cannot now be authorized, in whole or in part, under either chapter 17 or chapter 21. Hence, the instant query is whether the proposed assistance may be independently authorized under chapter 31 as part of the veteran's program of independent living services.

Please note the phrase "**where the veteran can gain proximity to the outdoors** and pursue his painting and photography interests". Now substitute "gardening interests in a temperature and light controlled environment for "painting and photography interests".

General Counsel Precedent 6-01 was about gaining access to the outdoors as a necessary ingredient for living independently. The precedent was also a vehicle to examine which regulation to authorize it under, with Chapter 31 being only one of the available remedies. A real, heated greenhouse can thus be a vital tool in being free to access the outdoors and engage in my avocational gardening interests.

From the photographic evidence previously submitted with my Notice of Disagreement and Form 9, it is clear the structure I currently use is extremely inadequate to the task of gardening in winter. As there is no heat, it is impossible to use. As for its use in growing winter vegetables, again, no heat precludes viable use. The structure is fragile and was slightly damaged when it blew over in

a windstorm in 2011. The structure is not permanent in any respect nor was it designed to be.

This finding (in VAOPGCPREC 6-01) rebuts the “finding” that VR&E is not able to provide an additional greenhouse structure under the Independent Living Program because we do not find that this meets the criteria of an Independent living need. Quite clearly, VA’s legal personnel insisted it did for an individual in 2001 and indeed, set precedence in this important area regarding access or proximity to the outdoors as an important adjunct of independence in everyday living.

Left untried and ignored, a finding that these services would not achieve the goals of measurable or sustainable improvement as they relate to activities in everyday living is merely the subjective assessment of a person untrained in the art of gardening. A professional assessment by a licensed occupational therapist in a one-on-one setting to ascertain the benefits of access to the outdoors has not been investigated.

The VA has acknowledged that I qualify for the Independent Living Program and has partially implemented it. This shows I can be helped by the Program. The matter of degree is the sticking point. Being housebound comes with its own restrictions. It isolates me from the community and makes enjoying my avowed gardening avocation extremely challenging. I have pursued this hobby for years as the weather permitted. I firmly believe I have as much right to the independence granted other Veterans to the outdoors in a safe manner.

REASONS OR BASES FOR DECISION

Under Reasons for Decision, VA lists several paragraphs extracted from the M-28R manual for Vocational Rehabilitation and Education in Part IV, Section C, Chapter 9 which discusses guidelines for the development and administration of an Independent Living Plan. **For the record, I would like to point out the M28R Manual for these denial reasons was revised on March 31, 2014.**

The first paragraph under Reasons For Decision is:

“Independence in daily living refers to the ability of an individual, without

the service of others, or with a reduced level of service from others, to live and function within the Veteran's family and community."

From M-28R, on page 9-3 under (a)Definitions. (1)Independence in Daily Living:
Independence in daily living refers to the ability of an individual, without the service of others, or with a reduced level of service from others, to live and function within his/her family and community.

In the second paragraph, the author states:

"VR&E services may be provided in support of an avocational activity however they are limited."

From the M28R on page 9-8, under 4. Avocational Needs:

The preliminary independent living assessment investigates the impact of the individual's disability on avocational pursuits. **The delivery of services to address avocational needs is limited.** See section 9.05 for detailed information on the provision of services designed to address avocational pursuits.

In the third paragraph, the author states the following:

"The following criteria must be met before providing services designed to support the pursuit of an avocational interest:

- 1. The disability condition(s) limits or prevents participation in the avocational interest.**
- 2. The activity must have been previously performed for a significant amount**

of time, defined as over a twelve-month period.

3. A medical and/or mental health provider must provide documentation that continued support of the activity is not contraindicated.

4. An expert consultation to identify accommodations required to enable continued support of the activity must be completed by a qualified person, such as an occupational therapist.

5. The pursuit of the avocational interest must improve the individual's independence in daily living in a measurable and verifiable manner.

6. The individual must have the ability and resources to sustain the activity or pursuit after the period of rehabilitation services are completed.

In the M28R manual, on page 9-13, under b. Eligibility Criteria:

The following criteria must be met before providing services designed to support the pursuit of an avocational interest:

1. The disability condition(s) limits or prevents participation in the avocational interest.

2. The activity must have been previously performed for a significant amount of time, defined as over a twelve-month period.

3. A medical and/or mental health provider must provide documentation that continued support of the activity is not contraindicated.

4. An expert consultation to identify accommodations required to enable continued support of the activity must be completed by a qualified person, such as an occupational therapist.

5. The pursuit of the avocational interest must improve the individual's

independence in daily living in a measurable and verifiable manner.

6. The individual must have the ability and resources to sustain the activity or pursuit after the period of rehabilitation services are completed.

It is clear that the rationale for this denial is predicated wholly on M28R Revised March 31, 2014.

CASE TRANSMITTAL TO VA CENTRAL OFFICE FOR SOC

On March 1, 2013, Mr. Kris Holloway emailed me to say he had just received my case file back from the DC office and it was denied. The rationale for the denial was predicated on a completely different set of criteria than that set out in the recent SSOC. To wit, the VR&E employee made the following finding:

"The veteran currently has one large and at least two smaller greenhouses on his property. The Independent living assessments did not substantiate a need for another greenhouse for Independent Living purposes. The additional greenhouse is not considered essential to assist in the performance of his activity of daily living. He would be dependent on the [new] greenhouse in performing a critical function regarding activities of daily living. Also, the additional greenhouse would not sustain the veteran to function more independently in his family or community without the assistance of others or at a reduced level of assistance from others. The additional greenhouse would not lessen his dependence on others." (italics mine) Additionally, the VR&E author stated that ***"the veterans (sic) interest in garden is considered an avocational pursuit, therefore is denied this request (sic)."*** This is a VA finding. It is a fact of law that has been ascertained by VA personnel in the course of their regular duties. As such, the Presumption of Regularity attaches. It can only be overturned if it is proved to be based on an inaccurate factual predicate.

There is a presumption that public officers perform their official duties correctly, fairly, in good faith, and in accordance with law and governing regulations. *Marsh v. Nicholson*, 19 Vet.App. 381, 385 (2005); see also *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (applying the presumption of regularity to the competence of VA examiners). The presumption applies with equal force whether its application favors the Government or the individual seeking disability

compensation from the Government. Woods v. Gober, 14 Vet.App. 214, 218 (2000); cf. United States v. Chem. Found. Inc., 272 U.S. 1 (1926) (rejecting the Government's claim that sales of intellectual property were induced fraudulently because United States officers were presumed to be aware of the facts when the transactions were made absent clear evidence to the contrary). Whether the presumption of regularity attaches to the public actions of a public official is a question of law that the Court reviews *de novo*. Marsh, 19 Vet.App. at 386

The VR&E employee, a counseling psychologist, argues that “*additional greenhouses*” would not be authorized because the existing ones are adequate to the task. The VA now concedes in the SSOC that there is basically only one greenhouse, the ownership of which is suspect or alleged. This now contradicts the previous presumption of regularity. In the obverse, if VA insists it is still a valid finding or assessment, is that the avocational pursuit of gardening in greenhouses is indeed supported by the record but that I already have an adequate number of greenhouses to accomplish my activities of daily living. In fact, it is pointed out that any *additional* greenhouses would either be superfluous on their face or exceed my ability to utilize them. These are findings of fact that VA has determined. I do not seek to overturn them. They clearly are in my favor for a greenhouse-albeit one that is large enough to facilitate my needs- is ADA-compliant and protect me from the harmful rays of the sun.

38 CFR §19.29 REQUIREMENTS

A Statement of the Case must meet certain requirements in order to be useful in appealing a claim. 38 CFR §19.29 states:

§ 19.29 Statement of the Case.

The Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals. It must contain:

- (a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;**
- (b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and**
- (c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.**

Quite clearly, the rationale for the SOC dated 25 February 2013 is twofold. I have ample greenhouses and they are adequate for the pursuit of my avocational

activities. The second reason, although grammatically garbled, conveys the reason as being that an avocational pursuit under the ILP is not authorized and the request is denied.

In order to present my appeal, I am dependent on that document, as well as M-28, 38 USC §3120 and 38 CFR §21.160 to frame my appeal. My Form 9 is focused solely on rebutting the findings of the SOC, not the SSOC.

However, Mr. David Boyd of the Seattle Office VR&E (Division 28) informed me at the beginning of March 2014, following an IRIS query, that my claim had been sent back to Washington DC. yet again to the VR&E's Central Office to iron out some vague language addressed by my VA Form 9 Substantive Appeal.

I now have a Supplemental Statement of the Case (SS)C dated May 7th, 2014 with a completely *different* rationale predicated solely on the new, revised version of the M28R (Revised March 31, 2014).

In 1991, the Court of Veterans Appeals (COVA) decided Karnas v. Derwinski (1991) whereby a Veteran claimant was entitled to a reading of the regulations and statutes current at the time the filing of his adjudication. This panel determination stood until the US Court of Appeals for the Federal Circuit decided Bernklau v. Principi 291 F. 3d 795 2002 and Kuzma v. Principi 341 F. 3d 1327 (2003). **The Federal Circuit has made amply clear that generally, Congressional enactments and administrative rules will not be construed to have retroactive effect unless it is clear from the language of the statute or regulation that it is to be applied retroactively.** The underlying rationale for the anti-retroactivity canon is that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” This holding is incorporated by the Supreme Court in INS v. St. Cyr 533US 289.316 (2001) and in Landgraf 511 US at 270.

Having perused the Statutes, regulations and the M28R, the only thing I see changed is the M28R has been revised in the interim on March 31, 2014. I, however filed my claim for this on May 4th, 2011. I further clarified my desires for a greenhouse on August 11th, 2011. All these dates precede the rationale contained in the May 7th, 2014 which is predicated on the new, March 31, 2014 revision in the M28R. Since the M28R does not discuss retroactivity of the revision, the clear intent of the Secretary would appear to be that henceforth from

March 31, 2014 on the criteria for the Independent Living Program has new parameters with no retroactive intent.

In *Princess Cruises v. United States*, the Federal Circuit announced the three-part test for determining whether a statute or a regulation was applied in a manner that gave it a prohibited retroactive effect. The Federal Circuit held that in determining whether application of a statute or regulation creates an unlawful retroactive effect, three factors must be considered: (1) the nature and extent of the change of the law; (2) the degree of connection between the operation of the new rule and a relevant past event; and (3) familiar considerations of fair notice, reasonable reliance, and settled expectations.

Here, there has been no change in the underlying statute (38 USC §3120) nor have there been any substantial changes to 38 CFR §21.160. According to the Federal Register, there has been no change to 38 CFR §21.160 since 1990 (See 55 FR 42186, Oct. 18, 1990). Similarly, parsing the Federal Register, I see no changes to 38 USC §3120. Merely changing the M28 manual and revising it based on new criteria the VA has determined to be more in keeping with the original intent of Congress or to make it conform more closely to 38 CFR §21.160 is all well and fine but it doesn't not impart retroactivity to it unless authorized by Congress.

Therefore, the M28R Manual of Independent Living Program applications are not applicable to my claim. The controlling regulations and law are most closely enunciated in VA General Counsel Precedent 6-2001. VA General Counsel Precedent 34-1997 is also applicable as it rebuts the February 25th, 2013 Statement of the Case finding that avocational pursuits are not covered by 38 USC or 38 CFR.

I have been forthright in all my dealings with the VA VR&E office and their personnel. I have clearly and convincingly conveyed a longstanding interest in avocational gardening for myself. As my health improved after a debilitating bout of Crohn's disease left me in the Seattle VAMC for almost a year, I have begun helping other Veterans in my community. This has been accomplished by enlisting the aid of fellow relatives who own a nursery. They donate all my potting soil and containers with which to do this. I have submitted a letter stating as much. There is no mention of this in the SOC or the SSOC.

Gilbert v. Derwinski (1992) pointed out that when a finding is clearly and unmistakably erroneous and there cannot be two interpretations of the same

fact, then the decision is flawed. The whole process for the greenhouse has been flawed based on incorrect findings easily rebutted on the NOD and the VA Form 9. **Nevertheless, the denial now approaches certification and the rationale has shifted to one supported precariously by a guidance manual that was recently revised after I filed my claim.**

The law is dispositive on Statute and Regulation having a retroactive effect. I find none. I find a pattern of denial at all costs requiring not one but two trips to the Central Office in DC in belabored search of an adequate reason for denial. The latest one simply grasps at straws to deny with no basis or legal standing for retroactive application.

My medical disabilities are the predicate for the greenhouse. My desire to be able to access the outdoors without doing myself harm was the rationale for this from Day One. VA has yet to address that primary argument. The continued argument about seeking to avoid buying pesticide-free vegetables is no longer a valid reason for a denial. The "necessary and vital" requirement for this claim has been met. VA General Counsel Precedent 6-2001 clearly shows the importance of having access to the outdoors. The VR&E employee has admitted that the "greenhouse" I currently use is adequate for the task growing what I need in my normal activities of daily living. This is a finding of fact. I do, indeed, use and "need" a greenhouse in pursuit of my normal independence in accessing the outdoors. The VR&E simply disputes whether I need a "new" one or if the one presently on site, is "adequate".

In a nonadversarial, veteran friendly environment in which we inhabit, it is presumed that the right enshrined in 38 CFR §3.102, the fabled benefit of the doubt, is extended to a Veteran at the end of the weighing of evidence. Here, there has been no mention of this. A constant adversarial cacophony of "No." suffuses this process. Each rebuttal is met with new denial language and a different, new, revised manual by which to deny me. Two trips to the VR&E Central Office in Washington D.C. to formulate a plausible denial logic is not what defines the word nonadversarial.

I am defending myself pro bono. I have no service organization representing me so whoever you are sending copies of this is in violation of my rights and might endanger my personal identity information. Additionally, I am in full control of my mental faculties regardless of what the VR&E counselor may think or feels gives him a reason to doubt my abilities to operate a greenhouse.

I also wish to clarify a mistake in the SOC> I do have a website, misidentified in the SOC, as "ASKHOD". The correct address is:

www.asknod.org or

www.asknod.wordpress.com.

There you will find an unbroken record of my "avocational gardening". Here are a few selections.

<http://asknod.wordpress.com/2014/04/18/va-ilp-the-farm-report/> published on April 18th, 2014.

<http://asknod.wordpress.com/2012/11/29/cavc-court-of-appeals-for-vegetable-claims/> published November 29th, 2012.

<http://asknod.wordpress.com/2012/04/25/va-called-today/> published April 25th, 2012.

All of these blog posts and the other 43 filed under Independent Living Program in my alphabetically-listed BLOGS BY SUBJECT Table of Contents concern my pursuit of gardening.

UNDERUTILIZATION OF AVAILABLE POSITIONS AVAILABLE

Lastly, My May 7th, 2014 SSOC stated in the **REASONS FOR DECISION** section in the second paragraph:

"VR&E services may be provided in support of an avocational activity, however they are limited." I would point the VA VR&E Counselor to review the IL Program statistics of IL Rehabilitations for the eight years of 2004 to 2012. They consistently show underutilization of resources. If he does not have access to the report, he can find it here. Here is a link:

<http://asknod.wordpress.com/va-ilp-stats/>

These statistics, on VA's own spreadsheet, supplied by VA themselves, reveal that in 2012, only 2,428 Veterans were rehabilitated via help from the IL program. Congress authorizes 2,700 slots every year. Yet in the eight years from 2004 to 2012, the results show that the VR&E have been unable to fill the allotted slots even once. The best year was 2011 with 2,539 Veterans "rehabilitated"- still fully

161 souls short of its allotted potential. **The Seattle Office of VR&E, meanwhile, posted the lowest number of IL rehabs in the last eight years with only 14 successful rehabilitations.** It appears the VR&E services in Seattle available to "severely disabled" Veterans are being artificially restricted based on the statistics VA themselves publish. At this rate, they will reach zero rehabilitations by 20119 and quite possibly sooner.

Congress, not the Veterans Administration, granted its favored Sons of War-only those with the most egregious of diseases or wounds, mind you- a special dispensation in the form of the Independent Living Program. The intent, in 1984, is still the same. It has always encompassed the needs of the most severely disabled of us first. True, we must exhibit a viable need for an avocational pursuit, but the program exists to supply that very need. The entrance fee of being "only the most severely disabled" is steep. We must be "severely disabled" as opposed to having hemorrhoids or hammer toe.

Much like the fabled decision in Caluza v. Brown (1994), we need three things to prevail in a claim for ILP (prior to the revisions in the M28R dated March 31, 2014):

- 1) Severely disabled (100% or more)
- 2) Incapable of being trained for a vocation.
- 3) Exhibit a need for an avocational pursuit which passes the "necessary and vital test".

As an observation, I would like to point out that in the eight years I speak of, not one severely disabled Veteran from the great State of Wyoming (Regional Office #442) has been rehabilitated. Zero. None. There are 689 100% totally disabled Veterans in Wyoming, 43 of which are Veterans of the more recent Iraq and Afghanistan Wars. I find it almost beggars the imagination to believe not one of these loyal Americans qualifies for such a valuable program.

In Vermont (Regional Office #405), none have succeeded in this reputed "rehabilitation" in the last six years. Again, zero, zip, nada. It appears there is some uneven distribution of the Independent Living Program assets that cannot be easily explained here. The VBA has me rated as 100% plus an additional 50%, permanent and total effective March 31 1994. Nevertheless, I don't qualify for one real, functional, temperature-controlled greenhouse due to the limited number of funds available for such mundane avocational pursuits. Pray tell,

what were the limitations of the other 14 "severely disabled" Veterans in Seattle whose ILP programs provoked a shortfall in funding availability?

I certify that the above statements are true and correct to the best of my knowledge and belief.

Respectfully,

Buckwheat sends